THE DOMESTIC EFFECT OF THE EAST AFRICAN COMMUNITY'S HUMAN RIGHTS PRACTICE

BY

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Thesis submitted in partial fulfilment of the requirements for the degree

DOCTOR LEGUM (LLD)

at the

CENTRE FOR HUMAN RIGHTS

FACULTY OF LAW

UNIVERSITY OF PRETORIA

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SEPTEMBER 2017

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DECLARATION

I, the undersigned, declare that the thesis, which I hereby submit for the degree Doctor Legum (LLD) at the Centre for Human Rights, Faculty of Law, University of Pretoria, is my own work and has not previously been submitted for a degree at this or any other university.

Signed at Pretoria, on this…….day of……..2017

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VICTOR LANDO

ABSTRACT

The Treaty for the Establishment of the East African Community (EAC Treaty) outlines good governance, democracy and the promotion and protection of human rights as part of the EAC's fundamental and operational principles. The East African Court of Justice, (EACJ) has authoritatively ruled that the observance of human rights is indispensable to the achievement of the Community's integration objectives. Given that the ultimate beneficiaries of EAC's integration process are the citizens and residents of the respective Partner States, it follows that any measures taken under the EAC's framework for the promotion and protection of human rights should radiate from the sub-regional to the domestic sphere and impact the human rights practices in the Partner States for the benefit of their citizens and residents.

This thesis pursues this proposition by investigating how the measures taken by the EAC at the sub-regional level to promote and protect human rights have influenced the development, interpretation or application of law and policy, or the practices of state and non-state actors within the domestic sphere of each of the Partner States. Inclusive in this is an evaluation of the factors that affect how these measures are received and implemented within the respective national frameworks.

The overall finding of this research is that the EAC's measures for the promotion and protection of human rights have influenced development of national law and policy, as well as national state and non-state actors. However, this influence has been limited in terms of scale and spread. This is attributable to a number of factors, including poor linkages and coordination between sub-regional and national level institutions and actors, low prioritisation of human rights by the EAC Partner States as well as limited engagement with the EAC human rights framework by national level human rights workers and EAC citizens and residents. The thesis makes a number of targeted proposals on how these challenges can be surmounted in order to enhance the domestic effect of the EAC's human rights measures within the Partner States' legal and policy framework.

ACKNOWLEDGEMENTS

I wish to express my heartfelt appreciation to all those who walked with me in the course of this research. Special appreciation to the Lord God almighty for His divine care and protection, for the good health and the willpower to stay on this path; to my parents, brothers and sisters, and to my family, Emily, Hawi, Ayira and Mich for enduring all the late nights and weekends I spent holed up reading, researching and writing this thesis; to my business partner, Moses for holding the fort to enable me focus on this project; and to all my friends for cheering me on. I also wish to thank my supervisors Prof. Magnus Killander and Prof. Solomon Ebobrah for their guidance, support and instruction, which enabled this work become what it is today. I would also not forget to appreciate the Centre for Human Rights at the University of Pretoria and the Institute for Comparative Law in Africa (ICLA) as well as the USAID for the scholarship award that enabled me undertake this study. Appreciation also goes to all those who took their time to give their insights into aspects of my research–I thank you all and I am grateful for your support.

DEDICATION

For Eric

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AEC	African Economic Community
AU	African Union
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
COMESA	Common Market for Eastern and Southern Africa
CSO	Civil Society Organisation
EAC	East African Community
EACCA	East African Community Competition Authority
EACJ	East African Court of Justice
EADB	East African Development Bank
EALA	East African Legislative Assembly
EAMU	East African Monetary Union
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
IGAD	Inter-Governmental Authority on Development
ILO	International Labour Organisation
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
NPEACI	National Policy on East African Community Integration
OAU	Organisation of African Unity

REC	Regional Economic Community
SADC	Southern African Development Community
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities

CHAPTER ONE

INTRODUCTION TO THE STUDY

1. Background

The signing of the Treaty Establishing the East African Community (EAC Treaty) in November 1999 signalled one of the most significant developments in regional integration in Africa.[1] An earlier attempt at integration within the East African sub-region under the 1969 Treaty for East African Co-operation lasted only ten years, ending with the collapse of the East African Community in 1978.[2] Thus, the new EAC Treaty revived the Community against a strong backdrop of, among others, the determination to strengthen the Partner States' economic, social, cultural, political and other ties towards fast, balanced and sustainable development that would raise the living standards of the EAC peoples and accelerate the realisation of the proposed African Economic Community (AEC).[3]

In a milestone development, Burundi and Rwanda acceded to the EAC Treaty on 1 July 2007, while the Republic of South Sudan was admitted into the EAC on 2 March 2016, bringing the total membership of the EAC to six Partner States. Meanwhile, the application by the

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[1]See Treaty for the Establishment of the East African Community. Signed in Arusha, Tanzania, on 30 November 1999, entry into force on 7 July 2000.

[2]Paragraph 4 of the Preamble to the EAC Treaty attributes the collapse of the first East African Community established under the defunct 1967 Treaty for East African Cooperation to among others, lack of strong political will, lack of strong participation of the private sector and civil society in the co-operation activities and the continued disproportionate sharing of benefits of the Community among Partner Stated due to the differences in their levels of development and lack of adequate policies to address this situation. Additional factors attributed to its demise included poor leadership, which manifested itself in greed, intolerance, vengefulness, lack of foresight and the absence of honest analyses of problems. See K Apuuli 'Assessment of Institutional Development in the East African Community (EAC) 2001-2009' in R Ajulu (eds) *A Region in Transition; Towards a New Integration Agenda in East Africa* (2010) 99.

[3]See Preamble to the EAC Treaty. The EAC is one of the eight African Regional Economic Communities (RECs) formally recognized by the African Union (AU) at the seventh ordinary session of the AU's Assembly of Heads of State and Government in Banjul, the Gambia, in July 2006. The eight regional communities are: the Arab Maghreb Union (AMU); the Community of Sahel-Saharan States (CEN-SAD); the Common Market for Eastern and Southern Africa (COMESA); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).

Republic of Somalia is currently under consideration by the relevant organs of the Community.[4]

The EAC's objectives as set out in its constitutive Treaty include 'widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs for their mutual benefit,'[5] through the creation of a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation.[6] The achievement of these objectives is guided by its organs and institutions,[7] which include the Summit of Heads of State and Government (the Summit),[8] the Council of Ministers (the Council),[9] the Coordination Committees,[10] the

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[4]The Republic of South Sudan was admitted into the EAC at the 17th Ordinary Summit of the EAC Heads of State. It signed the Accession Treaty to the EAC on 15 April 2016. The verification process for Somalia's application to join the EAC is still ongoing. See 'Joint Communique of the 17th Ordinary Summit of the EAC Heads of State.' Available at <http://www.eac.int/news-and-media/statements/20160302/joint-communique-17th-ordinary-summit-east-african-community-heads-state (accessed on 13 July 2016).

[5] See article 5(2) of the EAC Treaty.

[6]In the theory of economic integration, a customs union is characterised by the elimination of tariffs between participating states, and a common external tariff for goods exported from the Union. The EAC Customs Union Protocol was adopted by the Summit on 2 March 2004 and entered into force on 1 January 2005. A common market adds the free movement of factors of production to the customs union. In this regard, the EAC Common Market Protocol was adopted on 20 November 2009 and entered into force on 1 July 2010. The Protocol was envisaged to make possible the free movement of goods and services and factors of production (capital and labour) across the borders of the Partner States. The East African Monetary Union Protocol was adopted and signed by the Partner States on 30th November 2013. It entered into force on 1 July 2014.

[7]The EAC Treaty makes a distinction between organs and institutions of the Community. The organs are created under article 9(1) of the Treaty and include the Summit of Heads of State and Government, the Council of Ministers, the East African Legislative Assembly, the East African Court of Justice and the office of the Secretary General. Institutions of the Community are created by the Summit pursuant to powers vested under article 9(2) of the Treaty. Examples of EAC institutions include specialized bodies such as the East African Development Bank, the Lake Victoria Fisheries Organisation and the Inter-University Council of East Africa. From a reading of the Treaty, it appears that the organs are permanent bodies, entrenched in the Treaty and correspond to the three arms of government in a constitutional democracy. The institutions on the other hand, are bodies created to serve specific purposes, and may be dispensed with or modified depending on whether their purposes have been achieved.

[8]The Summit is the highest organ of the Community made up of the Heads of State of the EAC Partner States. See articles 10, 11 and 12 of the EAC Treaty.

[9]The Council is the policy-making organ comprising ministers mandated by their countries to be in charge of EAC affairs and Attorney Generals of the EAC Partner States. Other functions include implementing the decisions and directives of the Summit as may be addressed to it and considering measures that should be taken by Partner States in order to promote the attainment of the objectives of the Community. See generally articles 13, 14, 15 and 16 of the EAC Treaty.

Sectoral Committees,[11] the East African Court of Justice (EACJ),[12] the East African Legislative Assembly (EALA),[13] the Secretariat[14] and 'such other organs as may be established by the Summit'.[15] A detailed exposition of the structure and functioning of these organs will be undertaken in chapter two of this study.

2. Problem Statement and Research Questions

The EAC is founded on the ideals of good governance, democracy and respect for human rights in line with internationally recognised human rights standards as well as the African Charter on Human and Peoples' Rights (ACHPR).[16] These human rights commitments can only be of tangible value to the citizens and residents of the Partner States if they translate into enhanced respect for and promotion of human rights at the domestic realm. For this to happen, the EAC must take deliberate measures at the sub-regional level, to promote and protect human rights, and these measures should radiate from the sub-regional to the domestic sphere and either reinforce the Partner States existing human rights frameworks, or spur new changes in law, policy or the works of state and non-state actors for the benefit of their citizens and residents. This national impact is significant as it contributes towards reinforcing the EAC as a supranational body with the capacity to influence national law,

[10]The Co-ordination Committee works closely with the Council and consists of Permanent Secretaries in the various Partner States responsible for EAC affairs, and is responsible for among other things, the submission of relevant reports and recommendations to the Council on the implementation of the Treaty; implementation of the decisions of the Council as the Council may direct and the receipt and consideration reports of the Sectoral Committees. See articles 17, 18 and 19 of the EAC Treaty.

[11]Sectoral Committees are created by the Council from among its members to monitor and review the implementation of specific programme sectors within the Community.

[12]The EACJ is established under article 9 of the EAC Treaty and serves as Community's judicial arm whose core function is to ensure the adherence to law in the interpretation and application of the Treaty.

[13]Established under article 9 of the EAC Treaty, the East African Legislative Assembly (EALA) is the Community's legislative organ, vested with the legislative, representative and oversight mandate designed to mirror the legislature in a constitutional democracy.

[14]The Secretariat is the executive organ responsible for administrative and operational functions. See generally Chapter 10 of the EAC Treaty.

[15]See generally article 9 of the EAC Treaty.

[16]See generally the Preamble as well as articles 6 and 7 of the EAC Treaty.

policy and practice even as the Partner States gear up to form a political federation as envisaged in the EAC Treaty.[17]

This then leads to the core research question in this thesis-what measures has the EAC taken at the sub-regional level to promote and protect human rights, and how have these impacted on the respective national human rights frameworks within the Partner States?

In answering this question, the research will seek to achieve three key objectives. The first objective of this study is to understand the theoretical and legal basis for the inclusion of human rights into the mandates of Regional Economic Communities (RECs) as well as lay out the EAC's legal and institutional framework through which it implements its human rights mandate.

The second objective of the study is to investigate the interaction between the EAC's legal system as outlined under its constitutive treaty and the national legal orders of the EAC Partner States. An understanding of this interplay between the sub-regional and the municipal legal systems provides a useful foundation for analysing how the human rights measures employed at the sub-regional realm have been or are likely to be incorporated within the Partner States' respective national legal frameworks.

Flowing from the foregoing, the third objective is to determine whether, and how the measures that the EAC has adopted to promote and protect human rights at the sub-regional level, have impacted on the development, interpretation or application of law and policy, or on the practices of state and non-state actors within the domestic sphere in the Partner States.

These objectives are pursued through a review and an investigation of the EAC legal and human rights framework, the experiences of other RECs where applicable, as well as an infusion of a theoretic approach. It is anticipated that the analysis and the findings of the study will not only contribute to legal scholarship, but also provide a platform for making recommendations towards a more effective and efficient trickle down mechanism for the

[17]See for instance paragraph 15 of the Preamble, articles 5, 11 and 123(1), (3) and (6) of the EAC Treaty.

human rights gains that are made at the EAC level, and thus enhance the realization of human rights in all the EAC Partner States.

3. Theoretical Framework

This thesis is premised on the proposition that legal systems of sub-regional bodies such as the EAC exert influence on the legal systems of the respective converging states. This influence may be evidenced through among others, national implementation of normative standards that are developed at the sub-regional level or state compliance with decisions of sub-regional courts, resulting in legal or policy change within the domestic legal framework of the converging states. Influence may also be evidenced by the use of these sub-regional normative standards by non-state actors such as individuals or civil society organisations in litigating before national and sub-regional courts. Furthermore, non-binding standards developed under the sub-regional legal regime may also impact the national legal frameworks through use by litigants as persuasive evidence in national courts, reference points for the development of national legislative or policy instruments, or points of advocacy by Non-Governmental Organisations (NGOs) and other national actors.

In evaluating the impact of the EAC's human rights measures on the Partner States' national human rights framework, this thesis considers it useful to reflect on the dominant paradigms that seek to explain state level compliance with international norms and the effectiveness of international institutions. Extrapolations will then be made from these paradigms in order to identify a suitable theoretic foundation on which to ground this research. Borrowed from the international relations discipline, the realist, neo liberalist, liberalist and constructivist theories provide a suitable launching pad for understanding the behaviour of states in complying with their international obligations, which include sub-regional arrangements such as obligations that arise in the context of RECs such as the EAC.

To begin with, the realist theory views the creation, behaviour and effectiveness of international institution through the lens of the (asymmetrical) power relationships between converging states.[18] Realists ascribe compliance with and effectiveness of

[18]See H Morgenthau 'Positivism, Functionalism, and International Law' (1940) 34 *American Journal of International Law* 260.

international law to coercion by a dominant hegemon. In their view, dominant states can coerce or compel other states to comply with international law through force or the threat of force.[19]

Neo-liberalists on the other hand base compliance with international law on interest or preference by co-operating states. In their view, states are inherently egotistic entities, which will seek to constantly maximise their selfish interests. Therefore, international institutions and international law are tools that help self-centred states realise their common interests. Nonetheless, neo-liberalists still recognise the value that power dynamics hold. As such, this theory is synthesised based on power dynamics as well as the interest of converging states.[20]

The liberalist theory departs from the state-centric propositions of the realist and neo-liberalist perspectives, and attributes cooperation and compliance by states with international law and international institutions to a 'level of convergence of national preferences which is shaped by the demands of domestic groups represented by the state.'[21] The theory argues that domestic entities such as courts, parliaments and civil society organizations may lead a state to comply with its international obligations by applying pressure and influence on the states actions.[22]

Lastly, constructivists peg the effectiveness and impact of international institutions to the role of ideas, knowledge and norms. In their view, international institutions contribute to the shaping of interests held by states through constructing and disseminating norms, ideas and knowledge.[23]An offshoot of the constructivist theory, 'strategic social constructivism' or

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[19]See E Neumayer 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49 *Journal of Conflict Resolution* 926.

[20]See I L Claude *Swords into Ploughshares; The Problems and Progress of International Organisations* (1984) 435-436.

[21]See A Moravcsik 'Explaining International Human Rights Regimes: Liberal Theory' (1995) 1 *European Journal of International Relations 157, 158*.

[22]As above.

[23]See P Haas 'Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control' (1989) 43 *International Organisation* 377. See also OC Okafor *The African Human Rights System, Activist Forces and International Institutions* (2007) 24-26.

'quasi constructivism' builds on the constructivism theory by introducing an element of 'rational strategizing'. Whereas it emphasises the role of norms, it accords equal weight to rational strategizing by relevant actors including non-state and sub-state actors, thus reflecting both the rational and normative aspects of actor behaviour.[24]

This research leans heavily towards the constructivist (including the strategic constructivist) theory as well as the liberalist theory. This is based on the proposition that an evaluation of impact within the EAC context will of necessity consider factors such as the influence of norm development and dissemination by various actors within the EAC framework and the extent to which these norms interact with national interests of the Partner States, which are shaped by the demands of domestic actors.[25]

4. Significance of Study

The EAC has, within its treaty framework, set its sights on progressive integration into the deepest form of integration-a political federation.[26] It is submitted that the deeper the process of integration, the greater the need to safeguard the promotion and protection of human rights. This is borne from the fact that integration involves the exercise of public power that affects in one way or another, the rights and freedoms of citizens in the participating states.[27] Therefore, this study becomes significant and timely as it delves into whether the EAC integration process has provided added value to the human rights framework within the respective Partner States national spheres. It achieves this through

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[24]See M Finnemore and K Sikkink 'International Norm Dynamics and Political Change' (1998) 52 *International Organisation* 887.

[25]For the purposes of this research, the realist and neo-liberalist theories would be unsuitable in view of the lack of a marked power differential among individual or coalitions of EAC Partner States that would form the necessary pre-condition for the operation of these theories.

[26]The EAC's founding Treaty is clear that the one of the Community objectives is to establish among the Partner States 'a Customs Union, a Common Market, and subsequently a Monetary Union and ultimately a Political Federation.' See article 5(2) of the EAC Treaty. Notably, there is already a Common Market Protocol in force that seeks to eliminate internal barriers to trade and enhance the economic competitiveness of the EAC as a regional economic block. Going one step further, the EAC Partner States adopted the Protocol on the East African Monetary Union on 30 November 2013. It entered into force on 1 July 2014.

[27]See A L Garin 'Human Rights and Regional Integration in Mercosur: a Bipolar Relationship.' Presentation at the VIII[th] World Congress on Constitutional Law, Mexico 6-10 Dec 2010. Available at <> (accessed on 23 February 2016).

identifying good practice that should be reinforced, shortcomings and challenges that need to be comprehensively addressed as well as new opportunities and frontiers in the protection of human rights within the sub-region. This study would thus be useful in coming up with appropriate insights that will not only contribute to scholarly works, but also be of practical relevance to policy makers and implementers at both the domestic level and within the EAC and other similarly situated RECs. Whereas it is acknowledged that there have been a number of scholarly works undertaken under the thematic area of incorporating human rights in regional integration processes, none has so far delved into the domestic impact of the EAC's human rights practice, hence this study is poised to be one of the leading research works in this field.

5. Definition of Terms

For the most part of this research, the terminology used will bear their ordinary meaning as understood under general international law. However, for purposes of clarity of terms used in the context of this research, it is deemed necessary to provide a general working definition of certain key terms as used in this thesis.

5.1 Human Rights Practice

The EAC Treaty provides the foundation for all the measures for the protection and promotion of human rights under the auspices of the EAC. It creates the necessary Community organs responsible for the formulation and implementation of policies and laws and the adjudication of any disputes that may arise in relation to the interpretation of the Treaty. The human rights aspirations of the EAC cannot be realised without a concrete and formalised framework for their implementation. Thus, for the purposes of this research, the term 'human rights practice' will be taken to mean the formal measures taken by the EAC through its organs and institutions, for the realisation of the Community's human rights commitments as outlined in the EAC Treaty.

5.2 Impact

Given that the core of this thesis is to understand the impact of the EAC's human rights practice on the domestic legal frameworks of the partner states, it is imperative to have a clear understanding of how the impact referred to is measured and evaluated. For purposes

of clarity, the reference in the title to this thesis to 'domestic effect' is construed to mean the same as 'impact'.

In one of the leading studies on the impact of UN human rights treaties on the domestic level, Heyns and Viljoen define impact as 'any influence the treaties may have had in ensuring realization of the norms they espouse in individual countries.' They measure impact by among others reference to legislation, national constitutions, court judgments, policy formulation and implementation of concluding observations.[28] Writing on the extent of state compliance with the recommendations of the African Commission on Human and Peoples' Rights (African Commission), Viljoen and Louw distinguish between 'direct impact' and 'indirect impact' of human rights treaties and law.[29] They define 'direct impact' as immediately demonstrable results expressed for instance by implementation of a finding of a treaty monitoring body. 'Indirect impact' in their view is defined as incremental and occurring over time.[30] A study on the impact of the African Charter on Human and Peoples' Rights (ACHPR) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) on selected African states defines impact as both state compliance with the ACHPR and the Maputo Protocol and 'more indirect forms of influence'.[31] The study identifies elements of these 'indirect forms of influence' to include awareness and use by civil society, lawyers and national human rights institutions, inclusion in law school curricula as well as reference to the Protocol in academic writings. Krommendijk's study on domestic impact of state reporting under the UN treaty bodies defines impact as the use and discussions of the reporting process and concluding observations at the domestic level by parliament, courts, national human rights institutions,

[28]C H Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002) 6.

[29]F Viljoen & L Louw ' State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *American Journal of International Law* 1.

[30]As above.

[31]Centre for Human Rights *Impact of the African Charter and the Women's Protocol in Selected African States* (2012) 7.

ombudsman institutions, non-governmental organisations and the media.[32] A recent study on the national impact of the international human rights monitoring mechanisms in Kenya assesses impact 'through the influence of the monitoring mechanisms' decisions, concluding observations and recommendations on national courts, executive action and policy making, law making, activities of non-state actors…'[33]

But perhaps the most influential scholarly work on this thesis insofar as the understanding of impact is concerned is Okafor's study on the domestic impact of the African human rights system in Nigeria and South Africa. He adopts and advocates for a broader view that evaluates impact beyond the traditional notions of state compliance with the decisions of monitoring regimes.[34] In his view, impact may be incremental in nature through influencing the thinking processes and actions of key domestic actors including national courts, national executive, policy making and legislative processes and civil society activists. What emerges from the studies referred to above is that whereas compliance is narrow in scope and is mostly state centric as evidenced by Viljoen and Louw,[35] impact brings other actors into the equation such as NGOs, individual litigants or other non-state actors, as espoused by Krommendijk and Okafor.[36]

This thesis takes cognizance of the foregoing works and settles on an understanding of impact that goes beyond the conceptions of impact as being limited to state compliance. Thus, impact, for the purposes of this study not only includes compliance, but also refers to the influence of the EAC's human rights measures on domestic law and policies as well as the actions of domestic actors leading to changes in human rights practices in the EAC Partner States.

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[32]J Krommendijk *The domestic impact and effectiveness of the process of state reporting under UN human rights treaties in the Netherlands, New Zealand and Finland: paper pushing or policy promoting?* (2014) 368-375.

[33]F Kabata 'Impact of International Human Rights Monitoring Mechanisms in Kenya' unpublished LLD thesis, University of Pretoria, 2015.

[34]See Okafor (n 23 above) 3-5 and 91-93.

[35]Viljoen and Louw (n 29 above).

[36]See Krommendijk (n 32 above) and Okafor (n 23 above).

5.3 Binding and Soft Law Measures

Binding measures in the context of this thesis refer to measures employed by the EAC which impose a legal obligation on the person to whom they are addressed. These include provisions of the EAC Treaty, its Protocols and Annexes, Acts of the Community, Regulations, Directives and Decisions of the Council as well as the decisions of the East African Court of Justice (EACJ).

The phrase 'soft law measures' on the other hand, generally refers to standards of conduct, which although not legally binding, still have some legal significance and effect.[37] Within the EAC framework, these soft law standards include resolutions and declarations made by the EALA, Bills passed by the EALA but pending assent by the heads of state and policies and strategies by EAC organs such as the Secretariat and the Council.

5.4 Supranational/Intergovernmental International Organisation

Various authors have classified international organisations on the basis of among others, function, membership or the degree of influence of the organisation over the national frameworks of their constituent member states.[38]

In general, intergovernmental organisations are classified as such on the basis of two key characteristics. Firstly, the decision making power is vested in the various representatives of the constituent members and not on the organisation itself. Secondly, the decisions of intergovernmental organisations cannot bind governments against their will. In essence, the organisation does not rise above its members.[39]

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[37]See U Morth, 'Soft Law and New Modes of EU Governance-A Democratic Problem?'(2005). Available at <http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/6/Papers_Soft%20Mode/Moerth.pdf>(accessed on 26 August 2014). An in-depth discussion of soft law is undertaken in chapter 5 of this thesis.

[38]For instance, H.G Schermers and N M Blokker *International Institutional Law* (2003) 58-63, W Mattli 'The Vertical and Horizontal Dimensions of Regional Integration: A Concluding Note' In F Laursen (ed) *Comparative Regional Integration, Theoretical Perspectives* (2003) 273 and J Klabbers *An Introduction to International Institutional Law* (2009) 24-25.

[39]See Klabbers (n 38 above) and Mattli (n 38 above).

Supranational organisations on the other hand are distinct in that their decisions bind the member states irrespective of whether they agree with these decisions or not.[40] Secondly, the products of their decisions are superior to conflicting national law and are directly effective within the member states' national legal frameworks.[41] Furthermore, the supranational organisation must have the power to enforce compliance with its decisions as well as have some financial autonomy. Lastly, unilateral withdrawal of a member state should not be possible.[42] To be completely supranational, an organisation must fulfil all the above criteria. No pure supranational organisation exists in the current international legal framework. Most organisations that lay claim to the supranational tag have some elements of intergovernmentalism and vice versa.[43]

For the purposes of this research, and as will be explained in the sections that follow, the EAC as structured under its treaty, bears strong characteristics of a supranational organisation and is classified as such notwithstanding that it bears elements of an intergovernmental organisation.[44]For instance, the EAC bears elements of an intergovernmental institution, as its decisions cannot bind Partner States against their will in view of its consensus-based decision making framework.[45] Moreover, it does not have the capacity to singlehandedly enforce compliance with its decisions, but rather defers to the respective Partner States to facilitate compliance through their national legal institutions.[46] On the other hand, it exhibits supranationalist characteristics since the decisions of its organs such as the Summit, the Council and the Court of Justice as well as duly enacted Acts of the Community are not only binding on the Partner States, but are also vested with legal

[40]Schermers and Blokker (n 38 above) 58-63.

[41]As above.

[42]See Klabbers (n 38 above) as well as Schermers and Blokker (n 38 above).

[43]As above.

[44]Notably, the EAC in its website refers to the EAC as an intergovernmental organisation. See <http://www.eac.int/about/overview> (accessed on 15 March 2016).

[45]See article 12(3) on decisions of the Summit and article 15(4) on decision making by the Council of Ministers.

[46]See for instance article 38(3) of the EAC Treaty on the enforcement of the decisions of the EACJ. See also A Possi 'The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community,' unpublished LLD thesis, University of Pretoria (2014) 179.

precedence over similar national law.[47]In this thesis, reference to the EAC as a supranational international organisation is not used to denote the purest form of supranationalism, but rather to indicate that the EAC is an international organisation in which the supranational elements prevail over possible references to an intergovernmental organisation.

6. Literature Survey

There is a rich repository of literature on regional integration in Africa and strong emerging research on the nexus between human rights and integration at the regional or sub-regional level, to which this study seeks to contribute and strengthen.

Noting that integration is invariably a give and take process in which states surrender part of their sovereignty in order to birth the sub-regional institution charged with the task of achieving specific common objectives set out in the founding treaty, there have been attempts at navigating the constitutional concerns that arise in the context of the interplay between national law and Community legal systems. Addressing this issue, Van der Mei observes that one of the inherent challenges in regional integration in the EAC is the reality that EAC Partner States have not fully appreciated the notion of limited sovereignty, which is crucial to successful integration.[48] Similarly, Wauna[49] points to the possibilities of legal and constitutional hurdles to the acceptance of EAC legislation and policy directions given the gaps and inconsistencies in the constitutional and domestic legal frameworks within the Partner States for the smooth reception and operation of EAC legislation. Nwauche,[50] while writing from the perspective of the Economic Community of West African States (ECOWAS), sheds some light on this constitutional challenge of regional integration, particularly on how

[47]See generally, articles 8(2) and (4) of the EAC Treaty. Also, the EAC cannot claim to be purely supranational as is not completely financially autonomous as it depends on Partner States' contributions. See article 132(4) of the EAC Treaty, which provides that 'The budget of the Community shall be funded by equal contributions by the Partner States and receipts from regional and international donations and any other sources as may be determined by the Council.'

[48]See A P van der Mei 'The East African Community: The Bumpy Road to Supranationalism, Some Reflections on the Judgments of the Court of Justice of the East African Community in Anyang' Nyong'o and others and East African Law Society and others.' Available at <http://ssrn.com/abstract=1392709> (accessed on 22 June 2012).

[49]See O Wauna 'Legitimacy of the East African Community' (2009) 53 *Journal of African Law* 194.

[50]E S Nwauche 'Enforcing ECOWAS Law in West African National Courts' (2011) 55 *Journal of African Law* 181.

to manage the limitation of national judicial sovereignty of member states to ensure that Community law is recognized as superior to national law and is accordingly applied and interpreted by national courts at the instance of community citizens. To this end he argues that one of the requirements for enhanced integration is for the ECOWAS member states to give direct effect and direct applicability to Community law within their respective national legal frameworks. These constitutional challenges to integration are discussed with reference to the EAC in Chapter three of this thesis in the context of the interplay between Community law and the national laws of Partner States.

Successful integration demands some measure of acceptance by and the participation of the citizens and residents of the converging states in order to confer legitimacy to the sub-regional body. Addressing this legitimacy question, Kasaija,[51] though writing from a political integration perspective, notes that the overall integration process in EAC has been more 'leader led' without a heavy investment in the opinions of the peoples of the EAC Partner States. He observes that the people at the grassroots in East Africa are not effectively involved in the integration process, including discussions on the sub-regional mechanisms on human rights. This view is supported by Wauna, who asserts that EAC's legitimacy is questionable from the way in which it was formed to the way in which it currently operates.[52] In his view, its systems and organs are not transparent, are not accountable and, lack opportunities for outside criticism and public participation. He thus calls on the Partner States to embrace public participation and ownership of the EAC integration process. In the context of this study, the acceptance of the EAC as a supranational organisation is a fundamental component in the national impact of its human rights measures.

With reference to the EAC's human rights mechanisms, a number of scholars have made forays into thematic aspect of human rights in the sub-regions. Thus, for instance, Deng while writing on the broad theme of human rights in EAC integration, focuses primarily on the EAC framework on the protection of the rights of migrants including refugees, asylum

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[51]See generally P A Kasaija.'Regional Integration: A Political Federation of the East African Countries?' (2004*) 7 African Journal of International Affairs 21-34.*

[52]Wauna (n 49 above).

seekers and Internally Displaced Persons. He explores the treaty and policy framework and in particular the question of the right to free movement and residence within the proposed East African Federation.[53] He highlights the need to vest the EACJ with human rights jurisdiction with particular emphasis on its potential in protecting the rights of migrants.

Ochanda[54] examines the human rights and corruption challenges and their possible effects on the intended deepening integration of the EAC. He notes that the Treaty is silent on matters of enforcement of human rights and anti-corruption and recommends the formation of the East African Human Rights and Anti-Corruption Commission (EAHRACC). He also highlights a possible challenge to integration being the grey areas that each country brings with it to this integration process hence the need for concerted efforts at harmonizing laws and practice within the EAC.

The works of Gathii and Possi focus on the human rights jurisdiction of the EACJ as a sub-regional court that has repurposed its mandate from a court that was designed to handle matters of economic integration into one that boldly takes on human rights cases. Their works highlight the challenges experienced by the Court, as well as the opportunities available in reaffirming its human rights jurisdiction.[55] In addition, Gathii has explored the workings of the Court from an environmental law perspective, arguing that it is now poised to adjudicate matters relating to environmental protection and sustainable development.[56]

Whereas the foregoing works have undoubtedly contributed towards a greater understanding of the EAC human rights context, and form an important backdrop for this study, there is still a dearth of literature that focuses exclusively on the EAC and in particular

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[53]See B K Deng 'Sub-regional Legal Instruments on International Migrants Rights and their Implementation Mechanisms-The case of the East African Community' (2010) 39 (4) *Africa Insight* 149.

[54]See R M Ochanda 'Human Rights within the Context of Deepening Integration of the East African Community (EAC)' Available at < http://ssrn.com/abstract=2027710> (accessed on 22 June 2012).

[55]See Possi (n 46 above) 63. See also J T Gathii, 'Variation in the Use of Sub-regional Integration Courts Between Business and Human Rights Actors: The Case of the East African Court of Justice' (2016) 79:37 *Law and Contemporary Problems* 37.

[56]See J T Gathii 'Saving the Serengeti: Africa's New International Judicial Environmentalism,' (2016) 16 (2)*Chicago Journal of International Law* 386. Available at: <http://chicagounbound.uchicago.edu/cjil/vol16/iss2/3> (accessed on 10 May 2017).

on the extent to which its integration process has impacted on the promotion and protection of human rights within the domestic realm among the Partner States. Therefore, this thesis takes cognizance of these various works and builds another layer of scholarship that focuses on national impact of EAC's human rights measures.

7. Research Methodology

The study is based on desktop and library research, as well as qualitative data drawn from selected interviews with key informants. The primary sources consulted include treaties, case law, EAC legal instruments such as Acts of the Community, the EAC Treaty and its Protocols, and decisions of the EACJ. In addition, reference was made to official EAC policy documents, as well as municipal laws and policies within the Partner States. Further sources relied upon include books, journal articles, newspaper articles, conference papers, working papers and relevant internet sources.

Interviews were conducted at various levels of the EAC such as the East African Court of Justice, the East African Legislative Assembly, the EAC Council of Ministers and the EAC Secretariat, for a better understanding and analysis of the actual human rights practices of the EAC. Similarly, interviews were conducted with selected national offices within the EAC Partner States such as the respective National Human Rights Institutions, ministries responsible for East African Affairs and the ministries of Justice in order to gain an understanding of how the national state actors have interacted with the EAC's legal instruments and in particular those that seek to promote and protect human rights. For a more diverse information base, the study also consulted national civil society and other organisations within the EAC Partner States that have worked on the promotion of human rights at both national and sub-regional levels.

Given that the EAC's human rights framework is fairly young, and taking cognizance of the limited scholarship on the EAC's legal and human rights framework, this study also employed a limited comparative analysis based on the experiences of other regional integration initiatives such as the European Union (EU), ECOWAS and SADC, where applicable.

Lastly, this study recognises that the EAC operates in a somewhat crowded environment in terms of human rights obligations. Partner States have human rights obligations arising from

their national constitutional demands as well as commitments under the AU and the UN framework. As such, it may be at times difficult to attribute certain human rights outcomes exclusively to the EAC's human rights measures. As such, the study shall, where appropriate, acknowledge the contributions of other actors and other processes in the human rights outcomes identified for analysis.

8. Chapter Breakdown

This thesis is broken down into six chapters structured as follows:

Chapter one provides a general introduction and background to the study and essentially provides the foundation from which other chapters will be built. It gives a brief overview of the EAC as a sub-regional supranational institution and proceeds to set out the main research questions, the significance of the study, the limitations identified and the methodology that will be adopted in seeking to answer the research questions.

Chapter two discusses the emergent views on the inclusion of human rights into the mandates of African RECs and then delves into the structure and functioning of EAC's organs.

Building on this, **chapter three** provides a link between the sub-regional and the domestic human rights frameworks by analysing the sources of law within the EAC legal system and how these have interacted with the respective Partner States' national legal systems. The discussion in this chapter will delve on the theoretical and constitutional underpinnings on the reception of international as well as Community law, and determine the status and character of EAC law within the Partner States' domestic legal framework in light of the provisions of article 8 of the EAC Treaty which give primacy and direct effect to Community laws and institutions. The discussion in this chapter will form the basis for **chapter four** which identifies and analyses the national impact of the EAC's binding human rights measures on the promotion and protection of rights within the Partner States. Accordingly, this chapter will analyse the domestic impact of among others, the EAC Treaty and any protocols adopted pursuant to its provisions, relevant judgments of the EACJ with a bearing on human rights, and the Acts of the Community duly passed by the EALA.

Chapter five of this study focuses on the domestic impact of EAC's soft law human rights measures. These include policy documents such as the EAC Plan of Action on Human Rights, EAC Development Strategy, the EAC Strategic Plan on Gender, Youth, Children, Persons with Disabilities, Social Protection and Community Development, as well as the EALA's oversight mechanisms such as its resolutions, the reports of its Committees and Community Bills pending assent by the heads of state. The overarching objective in Chapters four and five is to determine whether these human rights measures adopted at the sub-regional level have radiated into and have influenced the development, application and interpretation of law and policy at the domestic sphere towards the enhanced realisation of human rights.

Chapter six brings together the findings in chapter four and five and analyses these in the context of the constructivist (including the strategic constructivist) as well as the liberalist theoretical frameworks in order to gain an understanding, from a theoretic perspective on what factors have influenced the behaviour of the EAC Partner States in giving effect to the human rights provisions contained in the EAC Treaty. It then closes the thesis with a summary of conclusions drawn and recommendations. It is anticipated that these will not only contribute to scholarly discourse on the subject matter, but will also practically contribute towards a more efficient and effective mechanism for the promotion of human rights within the sub-region and more importantly, within the domestic sphere.

9. Limitation and Temporal Scope

There are a number of limitations to this study. The first was the difficulty gaining access to important primary documents of the concerned institutions, and especially government run institutions, which restrict access to official government documentation which they at times consider confidential. Although efforts have been made to locate and collect necessary primary documents, inevitably, in some cases, reliance has been placed on secondary material found on the websites of the relevant institutions and organisations as well as interviews with responsible individuals. Nonetheless, efforts were made throughout the study to ensure that the information utilised in this research was well updated.

Another limitation encountered was the dearth of case law from Rwanda and Burundi. This is attributed to their civil law legal tradition, which does not rely on case law and the doctrine of *stare decisis*, as well as lack of a well-developed law-reporting infrastructure.

This was further compounded by the fact that available cases are reported in Kinyarwanda and Kirundi respectively. Nonetheless, efforts were made to find English translations of the cases from these two Partner States where appropriate.

In terms of temporal scope, the study focused on the EAC's human rights framework since its formation in 1999 to the year 2016.[57]It is observed that the community is currently in a state of rapid transformation with a number of ongoing initiatives on good governance, human rights and other aspects of integration. Accordingly, every attempt has been made to ensure that all the information presented reflects the most current state of affairs within the EAC's integration process.

Finally, it is acknowledged that it is somewhat difficult to establish the precise causal links between measures adopted under the EAC framework and domestic human rights responses, given that changes in domestic law, policy and practice relating to the promotion and protection of human rights may be spurred by other contributing efforts such as provisions of national law, pressure from civil society, international pressure or monitoring mechanisms under the UN and AU framework. Nonetheless, the domestic influence of the EAC's human rights measures may be measurable with some confidence by supplementing documentary analysis with qualitative interviews from key informants.

[57]In this regard therefore, the thesis does not consider the Republic of South Sudan, which only joined the EAC in March 2016. See EAC Heads of State Communique (n 4 above).

CHAPTER TWO

UNDERSTANDING THE EAST AFRICAN COMMUNITY'S INSTITUTIONAL FRAMEWORK

1. Introduction

A key part of evaluating the impact of the EAC's human rights measures on the Partner States' national frameworks is understanding why the EAC has repurposed itself from an institution designed to primarily address matters of economic integration, into one that has taken on human rights as part of its areas of competence. It is also imperative, as part of this endeavour, to understand its institutional architecture that is responsible for delivering its integration objectives. In this regard, the first part of this chapter delves into scholarly attempts at understanding the reasons behind the inclusion of human rights into the mandate and functioning of African RECs in general. The second part will then provide a descriptive layout of the structure and functioning of the EAC's organs.[1] This provides a foundation for the discussions on the national impact of the Community's binding and soft law measures for the promotion and protection of human rights in the chapters that follow.

2. RECs and Human Rights in Africa

2.1 Integrating Human Rights in African RECs

Most of the early post-independent African RECs were fashioned primarily as vehicles for the achievement of economic development. There were no express inclusions or allusions to principles of human rights, governance, democracy or rule of law in their constitutive instruments.[2]For instance, no references to human rights were found in the constitutive treaties of early African RECs such as the Economic Community of Central African States

[1]The EAC Treaty makes a distinction between organs and institutions. The organs are created under article 9(1) of the treaty. Institutions of the Community are created by the Summit pursuant to powers vested under article 9(2) of the Treaty. Examples of EAC institutions include specialized bodies such as the East African Development Bank, the Lake Victoria Fisheries Organisation and the Inter-University Council of East Africa.

[2]Within the auspices of the Organisation of African Unity (OAU), its founding Charter leaned heavily on reaffirming the sovereignty of newly independent African states and facilitating independence for the ones that were still under colonialism. The closest reference to human rights appeared in article 2(1) (e) of the OAU Charter, in which the African states sought to 'promote international cooperation having regard to the Charter of the United Nations and the Universal Declaration of Human Rights'. See Charter of the Organisation of African Unity, adopted on 25 May 1963. The OAU Charter was repealed by the Constitutive Act of the African Union, adopted on 11 July 2000 and entered into force on 26 May 2001.

(ECCAS)[3] or the Economic Community of West African States (ECOWAS).[4] An examination of the 1969 Treaty for East African Cooperation also reveals that it was no exception. The aims of the Community as stipulated under article 2 of the repealed treaty were limited to strengthening the industrial, commercial and other relations for the achievement of accelerated economic development. Thus, whereas these newly created post-colonial RECs demonstrated an acute awareness that pooling their resources and abilities would be a useful tool in their fight against underdevelopment, they did not find it useful to employ human rights language in their founding treaties and legal instruments. However, this is not to say that African states completely ignored human rights in their national and regional governance processes. On the contrary, it is during this early post-independence period that the African states negotiated and adopted the Charter of the Organisation of African Unity (OAU) with commitments to adhere to the Universal Declaration on Human Rights (UDHR) and the principles and purposes of the United Nations Charter, which include the respect for, and the protection of human rights.[5] Indeed, key integration processes such as the reduction of trade barriers as well as enhancing movement of goods, services and people

[3]Also referred to in French as Communauté Économique et Monétaire de l'Afrique Centrale, (CEMAC), it is an organisation established by among others, Cameroon, Central African Republic, Chad, Equatorial Guinea, Gabon, the Democratic Republic of Congo and the Republic of Congo. CEMAC was established by the Brazzaville Treaty of 1964, which entered into force in 1966 after ratification by the then five Member States-Cameroon, the Central African Republic, Chad, Gabon and the Republic of Congo. The treaty does not contain specific reference to human rights as an objective or guiding principle for the integration process. Article 4 sets out the aim of the Community to promote and strengthen harmonious cooperation and balanced and self-sustained development in all fields of economic and social activity. In article 3, the principles governing the Community include sovereignty, equality and independence of all States, good neighbourliness, non-interference in their internal affairs, non-use of force to settle disputes and the respect of the rule of law in their mutual relations.

[4]Under the 1975 ECOWAS Treaty, article 2(1) provided that the aims of the Community were to promote cooperation and development in all fields of economic activity particularly in the fields of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions and in social and cultural matters for the purpose of raising the standard of living of its peoples, of increasing and maintaining economic stability, of fostering closer relations among its members and of contributing to the progress and development of the African continent. See 1975 Treaty for the Economic Community of West African States, entry into force 28 May 1975.

[5]See para 9 of the Preamble to the OAU Charter as well as article 2(1) (e) in which the contracting states declare adherence to the UDHR as well as the UN Charter. The OAU Charter was adopted in Addis Ababa, Ethiopia on 25 May 1963 and was repealed by the adoption of the Constitutive Act of the African Union in 2000. See the African Union website on < http://au.int/en/history/oau-and-au> (accessed on 20 October 2016).

across national frontiers were significant drivers of the realisation of economic and social rights. Furthermore, given that these early RECs were formed and operated under the overarching provisions of the OAU and the UN Charter, it is submitted that they could not altogether ignore the human rights references contained therein. It is arguable therefore, that any cooperation entered into by the converging states in these post-colonial RECs had a human rights colour, derived from these wider regional and international instruments that African states had subscribed to, notwithstanding that these were not expressed in the letter of the treaties that were negotiated at the time.

With the increased emphasis on democratic governance and the strengthening of the human rights discourse both globally and regionally, both old and emergent RECs in Africa have refined their focus to pursue development through the prism of human rights.[6] In this respect, they have either included in, or revised their founding instruments to include the recognition, promotion and protection of human rights as an objective or fundamental norm for achieving their goals, with references to the African Charter on Human and Peoples' Rights (ACHPR) as the normative standard.[7] Notable examples in this regard are the revised ECOWAS Treaty,[8] the Treaty of the Southern African Development Community

[6]Indeed, the OAU Charter referred to above pales in comparison to the Constitutive Act of the African Union (AU) when it comes to the inclusion of human rights guarantees. The Constitutive Act of the AU makes clear and deliberate human rights inferences right from the Preamble to article 3(e) and (h) that outline the objectives of the AU, to article 4(m) on the AU's fundamental principles.

[7]The African Charter on Human and Peoples' Rights, adopted on 27 June 1981 and entered into force on 21 October 1986. See also article 6(d) and 7(2) of the EAC Treaty of 1999, article 4(g) of ECOWAS treaty, article 6(e) of COMESA treaty of 1993, article 4(c) of the SADC treaty and article 6(A)(e) of the Agreement establishing the Intergovernmental Authority on Development (IGAD) of 1996.

[8]Article 4(g) of the revised ECOWAS Treaty provides that one of the Community's fundamental principles is the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. In addition, ECOWAS has under its framework adopted a number of protocols that are designed with the promotion and protection of human rights in mind. These include the Protocol on Democracy and Good Governance, Protocol Relating to Free Movement of Persons, Residence and Establishment, and the Declaration on the Fight against Trafficking in Persons. Moreover, the revised ECOWAS treaty incorporates by reference, the provisions of the ACHPR, and proceeds to grant express human rights jurisdiction to the ECOWAS Community Court of Justice (ECCJ).

(SADC Treaty),[9] the Treaty for the Common Market for Eastern and Southern Africa (COMESA Treaty),[10] as well as the EAC Treaty.

Various perspectives have been put forward in an attempt to explain the integration of human rights into the mandate of RECs in Africa. Ruppel for instance, notes that RECs embraced the promotion and protection of human rights in response to obligations arising under the Treaty for the Establishment of the African Economic Community (AEC Treaty), in which contracting parties declare their adherence to among others, the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.[11] In testing Ruppel's assertion, an examination of the constitutive treaties of the EAC, ECOWAS, COMESA, IGAD as well as SADC reveals that they have incorporated, almost verbatim, the language used in article 3(g)

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[9]The Treaty of the Southern African Development Community (SADC) outlines human rights, democracy and the rule of law as one of its principal objectives, in addition to investing in institutions and mechanisms for the promotion of good governance and human rights. It however does not make reference to the African Charter as a normative standard. The Treaty establishing the SADC was adopted on 17 August 1992 and entered into force on 30 September 1993. SADC replaced SADCC (Southern African Development Coordination Conference) that was established in 1980 in Lusaka, Zambia. SADC member states include Angola, Botswana, The Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Article 4 of the Treaty includes human rights, democracy and the rule of law as one of the principles of the Community. SADC has also adopted human rights related instruments such as the SADC Protocol Against Corruption, the Charter of Fundamental Social Rights in SADC, the Protocol on Gender and Development and the SADC Declaration on HIV/AIDS, all of which may be applied towards the increased promotion and protection of human rights within the region.

[10]The Treaty for the Common Market for Eastern and Southern Africa (COMESA Treaty) articulates in article 6(e) that the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights is one of its fundamental principles.

[11]See O Ruppel 'Regional economic communities and human rights in East and Southern Africa' in Anton Bösl & Joseph Diescho (eds) (2009*) Human Rights Law in Africa: Legal perspectives on their protection and Promotion* 319–350. The African Economic Community Treaty (AEC and also known as the Abuja Treaty) was adopted by the African Union (AU) in 1991 and came into force on 12 May 1994. The AEC treaty is an attempt to establish an economic community in Africa through different stages culminating in the establishment of an executive political organ of the African Economic Community. Article 6 of the EAC treaty highlights the modalities for establishing the community by providing a road map of thirty four34 years for its establishment. This is to be done through a gradual process by coordination, harmonization and progressive integration of the activities of existing and future regional economic communities (RECs) in Africa, which are regarded as the building blocks of the AEC. The stated goals of the AEC include the creation of free trade areas, customs unions, a single market, a central bank, and a common currency thus establishing an economic and monetary union by 2028. The implementation of the Abuja Treaty is a process that is envisaged to be completed in 6 stages over 34 years. See <http://www.cislacnigeria.net/2013/02/the-treaty-establishing-the-african-economic-community/> (accessed on 8 October 2015).

of the AEC Treaty as one of their fundamental principles. Furthermore, the converging states have in these treaties also made express references to the AEC Treaty as being one of the key instruments that have informed their integration processes.[12]Thus, the inclusion of provisions of the AEC Treaty in REC constitutive instruments validates Ruppel's proposition.

Another perspective put forward by Kaime holds that human rights obligations that states have undertaken under international human rights treaties and the ACHPR require them to reflect similar standards of protection of human rights in subsequent commitments such as those under REC treaties. [13]Writing from a similar standpoint, Ebobrah notes that with the almost universal adoption of the ACHPR by AU member states, human rights has become a common thread in inter-state discourse on the continent, and has of necessity, been incorporated into the workings of RECs.[14] In the same vein, Ruppel attributes the inclusion of human rights into the mandate of RECs to the influence by contracting states, which have in their own right, individually ratified various human rights treaties at the international and regional levels. Thus 'the obligations and commitments resulting from such human-rights-related legal instruments are also reflected in the conceptualisation of RECs.'[15] The argument advanced by these scholars is based on the presumption that states would replicate their human rights commitments made at the international and regional level into their sub-regional arrangements.

Other views put forward to explain the inclusion of human rights into the mandates of RECs broaches the subject from a socio-economic perspective. The core of this school of thought is that one of the objects of integration is to enhance the standard of living of the citizens in

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[12]See for instance, the Preamble to the SADC Treaty and the EAC Treaty in which the AEC Treaty is referred to as one of the instruments that inspire the creation of the particular RECs. The provisions of the AEC Treaty have also been incorporated into the AU Constitutive Act. However, the AU Constitutive Act prevails over any provisions of the AEC Treaty that may be inconsistent therewith. See for instance the Preamble as well as article 3 and article 33 of the AU Constitutive Act.

[13]T Kaime 'SADC and Human Rights: Fitting Human Rights into the Trade Matrix.' (2004) 13(1) *African Security Review*, 109-117.

[14]See S Ebobrah 'Human Rights Realisation in the African Sub-Regional Institutions' in M Ssenyonjo (ed), *The African Regional Human Rights System-30 Years after the African Charter on Human and Peoples' Rights* 283-300.

[15]See Ruppel (n 11 above).

the participating states. The end result of this would be improvements in the enjoyment of socio-economic rights, even if not clearly stipulated or stated as an objective. Nwauche observes in this regard that human rights form part of the integration process from the outset-even if this is not explicitly declared or acknowledged. He attributes this to the fact that integration aims at satisfying at least the socio-economic rights of the people of the region in question.[16] In the same vein, Ebobrah argues that there is a measure of convergence between human rights and the socio economic objectives of integration, particularly in the context of the improvement of the welfare of the people in participating countries.[17] Viljoen notes that 'although human rights and the rule of law do not feature as prime goals of RECs, these aspects form part of the way in which the goals have to be attained in principled way.'[18]Nwogu contributes to this discourse from a right to development perspective and observes that regional integration is an instrument for realizing the right to development as outlined in article 22 of the ACHPR.[19]Accordingly, the peoples' right to development imposes a corresponding duty on states, individually or collectively, to ensure its realization. She therefore posits that state efforts at economic development through regional economic integration regimes can be deemed to be the collective effort of states to ensure the fulfilment of the right to development as set out in the ACHPR.[20]

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[16]See E S Nwauche 'Regional Economic Communities and Human Rights in West Africa and the African Arabic Countries in Anton Bösl & Joseph Diescho (eds) (2009*) Human Rights Law in Africa: Legal perspectives on their Protection and Promotion 319-347.*

[17]See Ebobrah (n 14 above).

[18]See F Viljoen, *International Human Rights Law in Africa*, (2007) 498. He further links aspects of integration such as free movement with the need to ensure the protection of human rights, and also touches on the realization of the right to development as one of the outcomes of integration.

[19]N Nwogu 'Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS' (2007) 6 (3) *Journal of Human Rights* 345.

[20]However significant this inference may be, it remains to be proven to what extent the decision by states to form RECS was informed by these provisions of the African Charter. For instance, the Preamble to the EAC Treaty, where one would expect to find references to article 22(2) instead outlines the common historical, socio, economic and cultural ties enjoyed by the Partner States and proceeds to make reference to the AEC Treaty as one of the instruments from which it draws inspiration. It appears that no inspiration was drawn from (at least in the Preamble) the African Charter, and in particular the provisions on the right to development as being a core consideration in the creation of the EAC.

Arguing from a peace and security angle, Baimu[21] observes that, peace and stability are essential ingredients for socio-economic development. In his view, peace and security can only thrive where human rights are respected, promoted and protected. Therefore, RECs need to integrate human rights in order to create peace and stability in the region, thus contributing to enhanced socio-economic development.[22]

Taking cognizance of the various scholarly views put forward, and in contributing to this conversation, it is submitted that converging states would also include human rights guarantees in the constitutive instruments of RECs arising out of their 'selfish' national interest to secure their citizens' rights across national frontiers. This stems from the realisation that elements of integration such as free movement of labour, people and the right of establishment across national frontiers require their citizens to move outside their national territories and thus states would expect certain minimum human rights guarantees for their citizens whenever they enter other member states' territories. [23]

The various propositions discussed above may be analysed from the constructivist and liberalist approach. For instance, arguments by Ruppel and Kaime on the replication of international and regional human rights commitments to the sub-regional sphere lends credence to the assertion by the constructivist view on the influence of norms on state behaviour. Thus the construction and dissemination of human rights norms at the international sphere has influenced states to replicate these human rights commitments at

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[21]E Baimu 'The African Union: Hope for Better Protection of Human Rights in Africa?' (2001) 1 *African Human Rights Law Journal* 299.

[22]Ruppel also notes in this regard that the observance of human rights coupled with good governance instils investor confidence and thus creates an appropriate investment climate that is essential to furthering economic development. These positions taken by Ruppel and Baimu on the peace and security considerations *vis-à-vis human* rights in the context of integration must however be understood from the context that the protection of human rights is not the sole contributor to, but is one of the factors that contributes to effective regional integration. Thus, for instance, although there are linkages between good governance, human rights and investor confidence other factors such as sound monetary policies, infrastructure, and human resources would also play a part in enhancing economic growth.

[23]This may be explained through a facet of the liberalist theory of integration, which holds that integration is attributed to 'member states' preferences, which are in turn shaped by domestic actors. As such, the inclusion of human rights guarantees in any integration framework could be informed by the demands of the national actors to secure the rights of their citizens when they traverse national frontiers. See E Bomberg *The European Union; How does it work?* (2008) 16.

the sub-regional sphere. On the other hand, the right to development argument put forward by Nwogu may be viewed from a liberalist perspective. As such, human rights are included into the mandates of RECs due to the domestic demands of the rights holders, together with the convergence of the respective national interests of the various states to ensure that the human rights of their citizens are protected across national frontiers.

2.2 Human Rights in the EAC Treaty

The foregoing attempts at explaining the foray of human rights into regional integration demonstrates the consensus that human rights norms have gained currency in international governance and inter-state relations. It further reinforces the symbiotic relationship between human rights and regional integration-that the respect for human rights is a key ingredient for successful integration, and that regional integration processes provide the opportunities for enhanced protection of human rights among the converging states.[24]

The framers of the 1999 EAC treaty made a deliberate effort to hinge the EAC on principles of good governance, democracy and human rights. The clearest of these is found in articles 6(d) and 7(2), in which the EAC Partner States agree to a set of fundamental and operational principles including good governance, democracy and the rule of law, 'gender equality as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples Rights'[25] Indeed these two provisions form the substratum upon which the EAC's foray into the human rights realm is founded.

Furthermore, article 7(1)(a) of the EAC Treaty stipulates people-centred and market-driven co-operation as one of the EAC's operational principles. The concept of 'people-centeredness' would include notions of good governance, democracy, and transparency,

[24]See A L Garin 'Human Rights and Regional Integration in Mercosur: a Bipolar Relationship.' Presentation at the VIII[th] World Congress on Constitutional Law, Mexico 6-10 Dec 2010. Available at <> (accessed on 23 February 2016). See also S E Mvungi 'Constitutional Questions in the Regional Integration Process: The Case of the Southern African Development Community with References to the European Union.' Unpublished LLD Dissertation, University of Hamburg, 1994, 49, where he argues that no meaningful integration measures can be implemented in a region torn in ethnic, ideological or national wars.

[25]See Article 6(d) of the EAC Treaty.

which are key drivers for the promotion and protection of human rights. Reflecting on this principle, the EACJ in the case of *East African Law Society and 4 others v The Attorney General of the Republic of Kenya and 3 Others*, held that the amendments by the Partner States of several articles of the EAC Treaty without holding national consultations with their citizens was inconsistent with their commitments under article 7(1)(a) of the EAC Treaty and thus read in the requirement for public participation into the treaty amendment process set out in article 150 of the EAC Treaty. The import of this is that any subsequent amendments to the EAC Treaty must be undertaken with due regard to the need for consultations with and the participation of the citizens of the EAC Partner States.[26] When this principle is extrapolated beyond just treaty amendment, it means that the participation of the citizens and residents of the EAC is critical in all aspects of implementation of the EAC Treaty.

In addition, article 3(3)(b) of the EAC Treaty stipulates that adherence to universally acceptable principles of good governance, democracy, the rule of law and the observance of human rights and social justice are among the prerequisites for a non-member to be accepted to the Community or to be associated with or participate in any of its activities. [27] Moreover, articles 146 and 147 respectively, which provide for the suspension and expulsion of a Partner State from the Community, stipulate that a state may be suspended for failure to observe the fundamental principles of the treaty, of which the promotion and protection of human rights is a component. Besides, a state may be expelled if it is determined that it is guilty of gross and persistent violation of among others, the fundamental principles of the Treaty. Thus, at least in theory, the persistent failure by a Partner State to respect and protect human rights may constitute grounds for suspension or

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[26] *East African Law Society and 4 Others v Attorney General of Kenya and 3 Others, EACJ* Reference No. 3 of 2007.

[27] The Republic of Southern Sudan was admitted into the EAC notwithstanding the human rights violations that continue to occur in the context of the conflicts between the different factions since its independence. There is need for a framework where an in depth human rights analysis is conducted for an applicant state to join the EAC. The Republic of South Sudan was admitted into the EAC at the 17th Ordinary Summit of the EAC Heads of State. It signed the Accession Treaty to the EAC on 15 April 2016. The verification process for Somalia's application to join the EAC is still ongoing. See the joint Communique of the 17th Ordinary Summit of the EAC Heads of State. Available at <http://www.eac.int/news-and-media/statements/20160302/joint-communique-17th-ordinary-summit-east-african-community-heads-state> (accessed on 13 July 2016).

expulsion from the Community. The grave consequences that are attached to the violation of the fundamental principles of the Community points to the significance that was accorded to these principles by the drafters of the Treaty as well as the Partner States in ratifying or acceding to the EAC Treaty.

Also, the EAC treaty is replete with other provisions, which may be deployed to enhance the protection and promotion of human rights within the Community notwithstanding the lack of express mention of human rights therein. To begin with, article 5(1) of the EAC Treaty sets out the Community's objectives to include 'widening and deepening co-operation among the Partner States in political, economic, social and cultural fields…for their mutual benefit.' Towards the attainment of these objectives, the Partner States undertake to ensure 'accelerated, harmonious and balanced development and sustained expansion of economic activities'[28] Development is not only an economic imperative but is also a stand-alone human right. Nwogu's proposition that state efforts at economic development through regional economic integration regimes can be deemed to be the collective effort of states to ensure the fulfilment of the right to development as set out in article 22(2) of the ACHPR comes into play in this scenario.[29]Thus, the EAC's development objective, when viewed through the human rights optic, is in essence a commitment to the achievement of human rights outcomes stipulated in the ACHPR.

Furthermore, articles 5(1) and 5(3) (f) outline the promotion of peace and security as one of the objectives of the EAC. Peace and security and human rights are mutually reinforcing- where there is an absence of peace and security, human rights violations are likely to be prevalent. This falls into step with Baimu's observation that peace and stability, being essential ingredients for socio-economic development, can only thrive where human rights are respected, promoted and protected.[30] To this end, article 123 of the EAC Treaty outlines the development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms as one of the objectives of the common foreign

[28]See article 5(2) of the EAC Treaty.

[29]See Nwogu (n 19 above).

[30]See Baimu (n 21 above).

and security policies to be developed by the EAC. The Partner States further undertake under article 124 of the EAC Treaty, to strengthen cooperation for maintaining regional peace and security. Taken together, these two provisions translate into a commitment to ensure the protection of human rights through the prism of peace and security. [31]

The EAC Partner States also make treaty commitments towards gender mainstreaming and the enhancement of the role of women in cultural, social, political, economic and technical development.[32] It cannot be gainsaid that matters of gender equality and gender equity are inherently human rights matters since they are inextricably interlinked with the enjoyment of human dignity, which sits at the core of all human rights.[33]

In article 120, the EAC Partner States undertake to develop and adopt a common approach to address the specific needs of vulnerable populations such as children, the elderly and persons with disabilities through rehabilitation and provision of among others, foster homes, health care, education and training. This again contributes towards the enhanced realisation of the rights of sections of the population that have hitherto been marginalised and rendered vulnerable.[34]

Furthermore, the Partner States agree under chapter 17 of the EAC Treaty to adopt measures to achieve free movement of persons, the right to work in any Partner State, the right to establishment and residence. Such measures must, as a matter of course, come hand in hand with inherent human rights guarantees for those they apply to.[35]Nwauche reaffirms this argument and notes that 'If the people of a region have a regional right of residence instead of a national right of residence, their freedom of movement, assembly

[31]See Ruppel (n 11 above).

[32]See article 5 of the EAC Treaty.

[33]See for instance the Preamble to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Adopted in July 2003, entry into force in November 2005.

[34]See for instance the soft law instruments developed under the EAC Framework discussed in Chapter 5 of this thesis.

[35] See article 107 of the EAC Treaty and generally Chapter 17. Also refer to the discussion in Chapter 4 of this thesis on the human rights nuances of the provisions of the EAC Common Market Protocol on free movement of persons, the right to work and the right to establishment.

and association are enhanced.'[36]Other human rights references may be gleaned from provisions relating to food security,[37]the right to live in a clean and healthy environment through sustainable exploitation of natural resources and measures for environmental protection and management.[38]

Lastly, article 8(1)(c) prohibits Partner States from taking any measures likely to 'jeopardise' the implementation of the provisions of the EAC treaty-including its provisions on the realisation of human rights as outlined in article 6(d) and 7(2) above. This reaffirms the principle of *pacta sunt servanda* embodied in article 26 of the Vienna Convention on the Law of Treaties and requires Partner States to implement their treaty obligations in good faith.[39]

One clear observation that can be made in relation to these treaty provisions is that whereas the promotion of human rights is not explicitly outlined as one of the objectives of integration within the EAC Treaty framework under article 5, the inclusion of human rights as fundamental and operational principles of the Community means that it should be infused into every aspect of the integration process.[40]These fundamental and operational principles form the bedrock upon which the objectives of integration are built. Without adherence to these principles, it would be impossible to achieve the objectives spelt out in the EAC Treaty. In this regard, the EACJ observed in the case of *Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda (Mohochi Case)* that:

> ...these principles are foundational, core and indispensable to the success of the integration agenda, and were intended to be strictly observed. Partner States are not to merely aspire to achieve their observance; they are to observe them as a matter of Treaty obligation...these are rules that must be

[36]See Nwauche (n 16 above) 319.

[37]Chapter 18 of the EAC Treaty.

[38]Chapter 19 of the EAC Treaty. Indeed, it is pursuant to this that the Partner States concluded the Protocol on Environment and Natural Resources, 2005.

[39]Vienna Convention on the Law of Treaties. Adopted on 23 May 1969, entry into force on 27 January 1980.

[40] See also article 121 of the EAC Treaty on matters relating to gender equality.

> followed or adhered to by the Partner States in order that the objectives of the Community are achieved. [41]

The Court has similarly held in the case of *Plaxeda Rugumba v Secretary General of the EAC & Attorney General of Rwanda* that the insertion of human rights principles in the EAC Treaty was not meant to be a cosmetic exercise, but rather denotes a serious commitment by the Partner States to the promotion and protection of human rights in line with the Treaty imperatives.[42]The authoritative pronouncement by the EACJ on these provisions points to the significance that must be attached to them by all parties engaged in the implementation of the treaty. Thus, all Community organs and institutions, and all the Partner States, are required to give effect to the human rights principles enshrined in the EAC Treaty as a matter of legal obligation. However, caution must be taken to avoid treating the EAC Treaty as a human rights convention. It neither sets out specific rights nor creates a specific monitoring mechanism, as is the case with ordinary human rights treaties. Rather, it is a treaty that sets the framework for cooperation and integration among the Partner States in diverse agreed areas, but with human rights as a fundamental consideration. In the *Mohochi case*, the EACJ observed in relation to the EAC Treaty that:

> … the Treaty is neither a Human Rights Convention nor a Human Rights Treaty as understood in international law. It is rather a Treaty to govern the widening and deepening of, inter alia, the political, economic, social, cultural, research, technology, defence, security, legal and judicial cooperation between the Partner States…we are not aware of a chapter, article or provision in the Treaty, Protocols and Annexes which designates any provisions therein as *"the human rights provisions"* [43]

The implementation of the human rights commitments outlined above, as well as the national impact of the measures devised by the EAC to give effect to them, are discussed in the chapters that follow.

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[41]*Samuel Mukira Mohochi v Attorney General of the Republic of Uganda,* EACJ Reference No. 5 of 2011. First Instance Division.

[42]See *Plaxeda Rugumba v Secretary General of the EAC & Attorney General of Rwanda*, EACJ Reference No. 8 of 2010, EACJ First Instance Division, para 37.

[43]See *Mohochi* case (n 41 above) para 28 and 29.

3. EAC's Institutional Architecture

The EAC's integration process, including implementation of its commitments to the promotion and protection of human rights as stipulated in the previous section, is driven by the Community organs and institutions set out in chapter three of the EAC Treaty**.** For the purpose of this study, focus will be on the following Community organs: the Summit of Heads of State and Government (the Summit), the EAC Council of Ministers (the Council), the EAC Secretariat, the East African Legislative Assembly (EALA) and the East African Court of Justice (EACJ).

3.1 EAC Summit of Heads of State and Government (the Summit)

This is the highest political organ of the Community consisting of the heads of state or government of the Partner States and is responsible for 'giving directions and impetus for achieving the objectives of the Community'.[44] It works closely with the Council, which is the policy making organ, to drive the Community's integration agenda. Other functions include considering reports submitted to it by the Council, reviewing the state of peace, security and good governance in the Community, and the progress achieved towards the establishment of a political federation.[45] The Summit also has powers to make law through the adoption of thematic protocols to the EAC Treaty.[46]

The Chairperson of the Summit is elected for a period of one year from among the Heads of State based on the principle of rotation and consensus as outlined in the Rules of Procedure for the Summit of Heads of State or Government of the EAC (EAC Summit Rules).[47] The Summit conducts its business through meetings held at least once every year but may hold extraordinary meetings upon request by any Partner State or the Chairperson of the

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[44]Articles 10(1) and 11 (1) of the EAC Treaty.

[45]Articles 11(2) and (3) of the EAC Treaty.

[46]According to article 11(6) of the Treaty, 'an Act of the Community may provide for the delegation of any powers, including legislative powers, conferred on the Summit by this treaty or by any Act of the Community, to the Council or to the Secretary General'.

[47]See Rules of Procedure for the Summit of Heads of State or Government of the East African Community.(EAC Summit Rules) Adopted in June 2001 pursuant to the provision of article 12(5) of the EAC Treaty. Copy on file with the author.

Summit.[48] The EAC Secretary General is responsible for the drafting of a provisional agenda for each Summit session, which normally includes consideration of Council Reports and recommendations as well as any pending matters from previous sessions.[49] At the conclusion of each session, the Secretary General compiles and distributes all decisions taken by the Summit.[50]Decisions that require national implementation are then implemented by the Partner States in line with how they have ordered their governments. Those that require implementation by the organs of the Community are taken up by the Secretary General for implementation in line with the EAC's internal systems. In terms of monitoring compliance and implementation of Summit decisions, the EAC has set in place the East African Monitoring System (EAMS), a web-based reporting system in which all Summit and Council decisions are posted together with the status of implementation.[51] Moreover, the status of implementation of decisions remains a standing agenda item in every Summit meeting, meaning that heads of state are able to call each other to account for lapses in national implementation and compliance.[52]

3.2 EAC Council of Ministers

The EAC Council of Ministers (the Council) is subordinate to the Summit and functions as the Community's policy organ.[53] Comprising of ministers responsible for regional cooperation, the Attorney Generals, and such other ministers as may be determined by the Partner States,[54]the Council has a broad gamut of functions which include to promote, monitor and keep under constant review the implementation of the programmes of the Community and

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[48]See article 12 of the EAC Treaty and Rule 4 of the EAC Summit Rules.

[49]A format of the Provisional Agenda for the Summit sessions is outlined in Rule 7 of the EAC Summit Rules.

[50]See Rule 14(5) of the EAC Summit Rules.

[51]See Summit Decision EAC/SHS 15/ Decision 04, contained in Report of the Meeting of the 15th Summit of Heads of State, 30 November 2013. However, the EAMS is not available for public access. It is restricted to members of the EAC Secretariat and Partner States' and designated staff from the Partner States 'Ministries relating to EAC matters.

[52]As above.

[53]See article 14(1) of the EAC Treaty.

[54] Ministers may be accompanied to Council Meetings by officials and advisors. The Council may also invite observers to its meetings. See article 13 of the EAC Treaty as well as Rule 3 of the Rules of Procedure for the Council of Ministers of the East African Community.

to ensure the proper functioning and development of the Community in accordance with the EAC Treaty'.[55]

The Council is also empowered to initiate and submit Bills to the EALA, 'make regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the Treaty provisions.'[56] It is further vested with powers to give directions to the Partner States and to all other organs and institutions of the Community other than the Summit, the EACJ and EALA.[57] The Council executes its functions primarily through two ordinary sessions annually, one of which is held in the days preceding the sessions of the Summit, to prepare for the presentation of its reports to the Summit.[58]These sessions are moderated by the Bureau, consisting of the chairperson and a rapporteur, elected from among the Partner States for a period of one year based on the principles of consensus and rotation.[59]

At the conclusion of each session, the Secretary General compiles and distributes all Council decisions to the members. The Council endeavours to take decisions by consensus as outlined in article 15(4) of the Treaty as read with article 2 of the Protocol on Decision Making by the Council of the EAC (Protocol on Decision Making).[60] However, it may in certain cases also take decisions by simple majority. [61]

Under article 2(3) and (4) of the Protocol on Decision Making, all decisions of the Council must be in writing and are binding on each Partner State. Furthermore, all regulations and

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[55]See generally article 14 of the EAC Treaty.

[56]Article 14(3) (b) (c) and (d) of the EAC Treaty.

[57]See article 14(c) and (d) respectively of the EAC Treaty. It is also empowered to request for advisory opinions from the EACJ in accordance with the provisions of the Treaty.

[58]Extraordinary meetings may be convened at the request of a Partner State or the Chairperson of the Council. See article 15 of the EAC Treaty.

[59]See Rule 5 of the Rules of Procedure for the EAC Council of Ministers.

[60]Protocol on Decision Making by the Council of the EAC. Adopted in Arusha on 21 April 2001 (copy on file with the author). See also Rule 13 of the Rules of Procedure for the Council of Ministers of the East African Community.

[61]See article 2(2) of the Protocol on Decision Making (n 60 above).

directives made or given by the Council must be published in the Gazette and come into force upon publication or as otherwise provided.[62]

The Council may create Sectoral Committees from among its members, to monitor and keep under constant review the implementation of the programmes of the Community with respect to specific sectors. Each Sectoral Committee is responsible for the preparation of a comprehensive implementation programme and the setting out of priorities with respect to its sector; monitoring and reviewing the implementation of the programmes of the Community with respect to its sector; and may submit reports and recommendations to the Co-ordination Committee concerning the implementation of the provisions of the Treaty that affect its sector. [63]

Feeding into the Council is the Coordination Committee consisting of permanent secretaries in the various Partner States responsible for EAC affairs. The Co-ordination Committee is responsible for submission of relevant reports and recommendations to the Council on the implementation of the Treaty; implementation of the decisions of the Council as the Council may direct; the receipt and consideration reports of the Sectoral Committees and to co-ordinate their activities.[64]The involvement of permanent secretaries through these coordination committees allows for the representation of national civil servants in the EAC integration process, and provides a significant link between the sub-regional integration framework and the respective national legal and policy frameworks. This linkage is crucial in

[62]In the same vein, article 16 of the EAC Treaty stipulates that all 'regulations, directives and decisions of the Council taken or given in pursuance of the Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly.

[63]Currently, there are 19 Sectoral Committees, covering agriculture and food security; capital markets development; EAC statistics; education, culture and sports; energy; environment and natural resources; facilitation of movement of persons, immigration, labour, employment and refugees; finance and administration; fiscal affairs; gender and community development; inter-parliamentary committee for East Africa; interstate defense; interstate security; Lake Victoria development programme; legal and judicial affairs; monetary affairs; trade, industry and investment; tourism and wildlife conservation; and transport, communications and meteorology. For additional information see articles 20, 21 and 22 of the EAC Treaty and more information at <http://www.eac.int/index.php/organs/sectoral-committees-.html> (accessed on 21 June 2012).

[64] See articles 17, 18 and 19 of the EAC Treaty. For additional information on the Coordination Committee see <http://www.eac.int/index.php/organs/co-ordinating-committee-.html> (accessed on 22 June 2012).

terms of the reception and implementation of sub-regional policies and laws as the respective national bureaucracies would have played a role in their development from their formative stages, and would have had the occasion to interrogate their respective national frameworks with respect to the proposed sub-regional standards.

Council decisions that require national implementation are channelled through to the relevant national ministries in charge of EAC affairs. These would then liaise with the specific line ministries at the national level depending on the specific area in which action is required. With regard to monitoring and follow up on implementation and compliance, the EAMS provides valuable information on the status of implementation of Council decisions. Moreover, the first agenda item in every Council meeting is a report on the status of implementation of Council decisions by each Partner States. In addition, the Council reports to the Summit every six months on how Partner States have implemented its decisions. This constant review by Partner States ensures that decisions once made, are followed up to their logical conclusion. Furthermore, those Partner States that would have difficulties in implementing certain decisions are given an opportunity to outline the difficulties encountered and steps to be taken to comply.[65]

As the Community's main policy organ, the Council provides a crucial linkage between the Summit and the bureaucracies within the respective Partner States that are charged with policy development and implementation in all areas of integration including the promotion and protection of human rights.[66] As will be shown in the course of this study, the Council continues to discharge this obligation primarily through its role in the adoption of Protocols to the Treaty, the development of policies and action plans, as well as its powers to issue decisions and directives.[67]

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[65]See Summit Directive EAC/SHS 15/ Directive 04, contained in Report of the Meeting of the 15th Summit of Heads of State, 30 November 2013. See also interview with Mrs. Isabelle Waffubwa, EAC Directorate of Political Federation, Nairobi, Kenya, 17 July 2015. (Notes on file with the author).

[66]Being an organ of the Community, the Council is required to give effect to human rights as the guiding and operational principles of the EAC as stipulated in articles 6 and 7 of the Treaty.

[67]See for instance sections 3.1 and 3.2 of Chapter 3 of this thesis.

3.3 East African Legislative Assembly

Established under Article 9 of the EAC Treaty, the East African Legislative Assembly (EALA) functions as the Community's legislative organ.[68] It has a total of 52 members, consisting of 45 members elected by the national assembly of each Partner State; seven ex-officio members consisting of the regional cooperation ministers from each Partner State and the Community's Secretary General and the Counsel to the Community.[69] The election of non-ex-officio Members of the Assembly is not by universal suffrage. Rather, they are elected by the respective national assemblies of the Partner States taking into account among others, the relative parliamentary strengths of various political parties, gender and special interest groups in accordance with procedures to be determined by their national assemblies.[70] Elected members of the Assembly serve for a term of five years and are eligible for re-election for a further five-year term.

The EALA is structured to mirror the legislature in a constitutional democracy in terms of functions and mandate. As such, it is vested with the legislative and oversight mandate in addition to being an organ that represents the citizens and residents of EAC Partner States. Its functions include debating and passing Community legislation under the EAC Treaty, liaison with the Partner States' legislatures on matters relating to the Community, the

[68]The EALA was inaugurated by the Summit on 29 November 2001, during which the First Assembly, comprising of 27 elected Members and 5 ex-officio Members, were sworn in.

[69]See generally article 48 of the EAC Treaty. Under article 48 (1) (b) (ii), the Assistant Minister, or Deputy Minister, or Minister of State responsible for Community affairs from each Partner State is also an ex-officio Member of the Assembly; provided that such Assistant, or Deputy Minister, or Minister of State may only participate in the meetings of the Assembly when the substantive Minister is, for any reason, unable to participate. Notably, with the entry of the Republic of South Sudan into the EAC, the EALA will expand beyond the 52 members to incorporate the new members. It is important to note that article 50 of the EAC Treaty bars Members of National Parliaments of the Partner States from being elected as members of the EALA.

[70]See article 50 of the EAC Treaty. See also the EACJ decision in *Prof. Peter Anyang' Nyong'o and 10 others v the Attorney General of the Republic of Kenya and 5 Others* (Anyang' Nyongó case) EACJ Reference No. 1 of 2006 and EACJ Appeal No. 1 of 2009 and *Democratic Party and Mukasa Mbidde v The Secretary General of the East African Community and the Attorney General of the Republic of Uganda,* EACJ Reference No. 6 of 2011, First Instance Division.

debate and approval of the EAC budget as well as the consideration of the Community's annual reports and audits.[71]

Community legislation is enacted via Bills passed by the Assembly and assented to by the Heads of State. The legislative process may be triggered in different ways, but principally through private members' Bills,[72]those from the Coordination Committees forwarded through the EAC Secretariat,[73]Bills initiated and submitted to the EALA from the Council,[74] or Bills from relevant Parliamentary Committees.[75]

A Bill must be published as such in the Community Gazette after which it goes through a minimum of three readings before being passed by the Assembly.[76]The first reading is where the Bill is formally introduced to the House, and is marked by a simple act where the Speaker reads out its short title. The Bill is then committed to the relevant committee of the House for scrutiny. The Committee is required to present its report within seven days of committal of the Bill or it may, with the leave of the House, seek for an extension for a further seven days. The committee may propose amendments or new clauses to the Bill.[77]

The Committee presents its report on the merits of the Bill, after which the Bill is tabled for debate by the entire House. Any amendments may be proposed and approved at this stage. This is the second reading.[78] Once a Bill has passed through parliamentary debate and has been approved by the House, it is read a third time and a vote is taken on whether or not to

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[71]See article 49 of the EAC Treaty. For additional information see <http://www.eala.org/oldsite041111/component/content/article/26-overview/13-welcome-to-the-east-african-legislative-assembly.html> (accessed on 22 June 2012).

[72]Article 59 of the Treaty accords any member of the Assembly the right to propose any motion or introduce any bill in the Assembly.

[73]See article 71 of the EAC Treaty.

[74]See article 14(3) of the EAC Treaty.

[75]See Rule 79(1) of the EALA Rules of Procedure.

[76]See Part XII of the EALA Rules of Procedure (Rule 60-71) on Legislative Procedures.

[77]See Rule 66 and 67 of the EALA Rules of Procedure.

[78]See Rule 68 of the EALA Rules of Procedure.

pass it as a Bill of the Assembly.[79] Thereafter, the assent procedure under article 63 of the EAC Treaty kicks in.

If a Bill receives assent by all the heads of State, it is referred to as an Act of the Community, and must be published in the Community Gazette before it gains the force of law.[80] Legislation passed by the EALA enjoys legal precedence within the domestic legal framework of the Partner States as stipulated under article 8(4) of the EAC Treaty.[81]If the Heads of State fail to assent to a Bill within three months of passage by the Assembly, they are required to refer it to the Assembly with reasons for withholding assent and a recommendation for reconsideration by the Assembly. The Assembly may elect to reconsider the Bill and resubmit it to the Heads of State for assent. If a Head of State withholds assent to a re-submitted Bill, the Bill lapses.

The EALA has so far passed a number of Bills in an effort to enhance the Community's legal framework for the promotion and protection of human rights. These include the EAC Human and Peoples' Rights Bill, the EAC HIV and AIDS Prevention and Management Bill,[82] the EAC Persons with Disabilities Bill [83]as well as the EAC Gender Equality and Development Bill.[84]A

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[79]See Rule 70 of the EALA Rules of Procedure.

[80]See article 62 of the EAC Treaty.

[81]The EALA has been fairly prolific in terms of enactment of Community legislation. To date it has passed in excess of 58 Bills. Whereas a large part of these are Appropriation Bills relating to annual EAC budget approvals, the rest touch on diverse thematic areas of integration. See generally the East African Legislative Assembly website at < http://www.eala.org/home.html> (accessed on 18 June 2014).

[82]EAC Human and Peoples' Rights Bill. Passed by the EALA in 2012. It has not yet entered into force as it is still pending assent by the heads of state. See 'EALA Passes Bill on Human Rights' EAC Press Release available online at <http://www.eac.int/index.php?option=com_content&view=article&id=988:eala-passes-bill-on-human-rights&catid=146:press-releases&Itemid=194>(accessed on 5 January 2016). See also the EAC HIV and AIDS Prevention and Management Bill, passed by the EALA in April 2012. The Bill is also not yet in force as it has not received assent by the Heads of State for Rwanda and Tanzania.

[83]See 'EALA passes Bill on PWDs, wants dignified, humane treatment for all' EAC Press release available online at<http://www.eac.int/news-and-media/press-releases/20160601/eala-passes-bill-pwds-wants-dignified-humane-treatment-all > (accessed on 10 October 2016).

[84]See 'EALA Passes Key Gender Bill on International Women's Day' EAC Press Release available at <http://www.eac.int/news-and-media/press-releases/20170308/eala-passes-key-gender-bill-international-womens-day> (accessed on 10 May 2017). See also 'EAC Retirement Benefits for Specified Heads of Organs Bill, 2016' EAC Press Release available online at < http://www.eac.int/news-and-media/press-releases/20160204/eac-retirement-benefits-specified-heads-organs-bill-2016 > (accessed on 10 October 2016).

detailed exposition of the Bills passed by the EALA will be undertaken in Chapter 4 and 5 of this thesis.

Aside from its legislative function, the EALA plays a fundamental role in Community governance through its oversight competence. This is exercised in among other ways, via its budgetary oversight function,[85]its powers to receive petitions from any resident of the EAC on matters touching on integration,[86]the Committee system[87]as well as the power of the EALA to pass resolutions and make recommendations to the Council on thematic matters of integration.[88] The human rights nuances of the EALA's oversight competence are discussed in this thesis in the context of its powers to receive and consider petitions, as well as its competence to pass resolutions and make recommendations. These are examined in further detail in chapter 5.

3.4 East African Court of Justice

Established under article 9 of the EAC Treaty, the East African Court of Justice (EACJ) is the Community's judicial arm whose core function is to ensure the adherence to law in the interpretation and application of the Treaty.[89]The Court's jurisdiction covers both contentious and non-contentious matters relating to the interpretation and application of the Treaty. It is also empowered to determine disputes between the EAC and its employees with regard to their terms and conditions of employment, and arbitrate disputes pursuant to an arbitration clause contained in a contract agreement conferring such jurisdiction to

[85]See article 49(2)(b) of the EAC Treaty.

[86]Rule 85 of the EALA Rules of Procedure empowers the Assembly to receive and consider petitions from any citizen of the Partner States, and any natural or legal person residing or having its registered office in a Partner State, on any matter within the Community's fields of activity and which affects them directly.

[87]See article 49(2)(b) of the EAC Treaty. See also article 78 of the EALA Rules of Procedure.

[88]See article 49(2)(d) of the EAC Treaty.

[89]The EACJ is different in composition and jurisdiction from the defunct East African Court of Appeal which was a court of appeal from decisions of the national courts on both civil and criminal matters except constitutional matters and the offence of treason for Tanzania. See H R Nsekela 'Overview of the East African Court of Justice': A paper for presentation during the sensitisation workshop on the role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1–2 November, 2011. Available at <http://www.eacj.org/docs/Overview-of-the-EACJ.pdf> (accessed on 12 February 2012).

the Court.[90] The EACJ may be seized of a matter through references by natural and juristic persons resident within the Community, EAC Partner States and the EAC Secretary-General.[91]The EAC Council may also seek advisory opinion from the Court under article 14 of the Treaty.

The EACJ delivers its mandate through a first instance and an appellate division. The President is the head of the appellate division as well as the administrative head of the Court.[92] The Principal Judge heads the first instance division.[93] The Registrar is in charge of the administration of the business of the Court.[94] The EACJ currently comprises ten judges, five from each division, serving on an *ad hoc* basis for a single seven-year non-renewable term.[95] Judges of the Court are appointed by the Summit upon recommendation by the Partner States (usually the Head of State) from persons who fulfil the conditions required for holding high judicial office in their respective countries.[96] Although the practice by some Partner States has been to second judges from their national judiciaries to the EACJ, others have elected not to nominate their judges to the Court and have instead nominated senior jurists, scholars and legal practitioners. As currently constituted, the EACJ's appellate division comprises five judges, out of which the President and Vice President are not serving judges in their national judiciaries. Similarly, in the first instance division, only two out of the five judges hold judicial positions in their respective Partner States.[97]

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[90]Detailed provisions on the mandate and functions of the Court are outlined in articles 23-47 of the EAC Treaty. See also <http://www.eacj.org/establishment.php> (accessed on 21 June 2016).

[91]See articles 28-32 of the EAC Treaty.

[92]Under article 24 of the EAC Treaty, the Summit shall designate two of the Judges of the Appellate Division as the President and the Vice President respectively.

[93]See article 23(3) of the EAC Treaty.

[94]See article 45(5) of the Treaty.

[95]For details on the current judges of the EACJ refer to <http://eacj.org/?page_id=1135> (accessed on 18 June 2016).

[96]See article 23 of the EAC Treaty.

[97]See judicial profiles of the EACJ Judges posted online at <http://eacj.org/?page_id=1135> (accessed on 8 May 2016).

Unlike its predecessor under the defunct 1969 Treaty for East African Cooperation, the EACJ is not an appellate court from the domestic jurisdictions. Rather, it is an International Court that resolves disputes submitted to it in accordance with the EAC Treaty. However, it does, notwithstanding its international character, play a complementary function with the national courts, which the EAC Treaty also vests with limited jurisdiction to interpret and apply the Treaty.[98] A clear instance of this is found in article 34 of the EAC Treaty which provides for preliminary rulings-a referral mechanism by the domestic courts of a Partner State to the EACJ, where a question is raised concerning the interpretation or application of the provisions of the Treaty or the validity of the regulations, directives, decisions or actions of the Community, and the court or tribunal considers that a ruling on the question is necessary to enable it give a judgment. In these circumstances, the national court is solely entitled to determine 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. In this endeavour, the court must appreciate that not all questions concerning the interpretation of the Treaty or Community law in question must be referred to the EACJ for preliminary rulings. This device is only reserved for those questions that are necessary for the national court to give its judgment. As such, the Treaty vests in the national courts a wide discretion to establish whether a decision on a question of Community law is necessary to enable it to give its judgment. By implication therefore, a national court may take a decision on a point of Community law, which in its opinion, does not warrant the request for a preliminary ruling. Ruhangisa writes in this regard and defers to the decision of the European Court of Justice in *CILFIT and Lanificio di Gardo v Ministry of Health*, in which it was observed 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

[98]The wording of article 33 of the Treaty recognizes, albeit obliquely, that national courts as well have jurisdiction to determine disputes concerning the application of EAC law.

> 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. [99]

He therefore concludes that the above persuasive finding of the ECJ is relevant and applicable to the EACJ and to the national courts.[100] Thus, the Treaty creates a system where national courts have limited jurisdiction to determine disputes relating to the application of Community law but at the same time recognizing that this is subject to the supremacy of the EACJ in the interpretation of all law made within the EAC framework.[101] To date, the device of preliminary rulings has not taken root within the overall EAC legal practice. Two attempts have so far been made by the High Courts of Kenya and Uganda respectively, with only the reference by Uganda having been heard and determined. The first attempt was made in 2011 by the High Court of Kenya in the case of *Saida Rosemary (on behalf of Christopher Magondu a.k.a Idris Magondu) and Hassan Elijuma Agade (on behalf of Hussein Hassan Agade v The Commissioner of Police, The Commandant Anti-Terrorism Police Unit and The Attorney General of Kenya.*[102]However, when the reference came up for hearing, the EACJ stayed the matter in view of the fact that the judge who made the request for preliminary ruling had been removed from office and that it would therefore await further directions from the Kenyan High Court. No further directions have been given on the matter to date. The second reference was made in 2014 by the Ugandan High Court in the case of *Attorney General of the Republic of Uganda v Tom Kyahurwenda,* where the EACJ was required to determine among others, whether national courts have jurisdiction to interpret the EAC

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[99]ECJ Case 283/81, para 22.

[100]See J E Ruhangisa 'The East African Court of Justice: Ten Years of Operation (Achievements and Challenges)' A Paper for Presentation During the Sensitisation Workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1–2 November, 2011. Available at <http://eacj.huriweb.org/wp-content/uploads/2013/09/EACJ-Ten-Years-of-Operation.pdf> (accessed on 7 June 2015).

[101]See the case of *East African Law Society and 4 Others v Attorney General of Kenya and 3 Others* (n 26 above) where the Court observed that by the provisions under articles 23, 33(2) and 34, the Treaty established the principle of overall supremacy of the Court over the interpretation and application of the Treaty, to ensure harmony and certainty.

[102]High Court Miscellaneous Criminal Applications No. 418 & 419 of 2010 which gave rise to the reference to the EACJ vide *Case Stated No. 1 of 2011, Saida Rosemary (on behalf of Christopher Magondu a.k.a Idris Magondu) and Hassan Elijuma Agade (on behalf of Hussein Hassan Agade v The Commissioner of Police, The Commandant Anti-Terrorism Police Unit and The Attorney General of Kenya.*

Treaty. In disposing of the reference, the EACJ held that national courts and tribunals have jurisdiction to hear and determine matters involving the violation of the Treaty within the context of articles 33 and 34, and further that articles 6, 7 and 8 of the Treaty are justiciable before Partner States' national courts and tribunals. With regard to the status of EACJ decisions, the Court reaffirmed the provisions of article 33(2) of the EAC Treaty by holding that decisions of the Court in the interpretation of the Treaty take precedence over decisions of the national courts and tribunals on similar matters.[103]

The EACJ is not clothed with express jurisdiction to hear and determine human rights complaints.[104] Indeed, the EAC Treaty explicitly stipulates in article 27(2) that the EACJ shall have human rights competence 'as will be determined by the Council at a suitable subsequent date' upon the conclusion of a protocol to operationalise the extended jurisdiction. To date, no such protocol has been enacted. Nonetheless, the EACJ has consistently asserted that it will not relinquish its mandate of interpreting and ensuring appropriate application of the Treaty merely because the matter referred to it has elements of human rights violations.[105]

The landmark case in this regard was *James Katabazi and 21 others v the Secretary General of the EAC and Another*, where the Court held that although it did not yet have jurisdiction to deal with human rights issues, it had jurisdiction to interpret the treaty even if the matters complained of included human rights violations.[106]Accordingly, the Court proceeded to 'interpret' and 'apply' articles 6(d), 7(2) and 8(1)(c) of the Treaty then made a

[103]*Attorney General of the Republic of Uganda v Tom Kyahurwenda,* Case Stated No.1 of 2014 arising from Miscellaneous Application No. 558 of 2012 in Civil Suit No. 298 of 2012 of the High Court of Uganda at Kampala-Civil Division.

[104]This contrasts with the ECOWAS Court, which has express human rights jurisdiction under the revised ECOWAS Treaty. In the case of the SADC Tribunal, the SADC Treaty does not expressly circumscribe human rights jurisdiction in the manner done under the EAC Treaty framework, hence it is arguable that its human rights jurisdiction is derived from its overall mandate to interpret the SADC Treaty, which has several references to human rights.

[105]*James Katabazi and 21 others v the Secretary General of the EAC and Another*. EACJ Reference No. 1 of 2007.

[106]As above.

finding that the facts of the case disclosed a violation of the principle of the rule of law and consequently a contravention of the EAC Treaty.

This position, referred to in this study as the 'Katabazi doctrine', continues to be reaffirmed in subsequent decisions of the Court such as in *Independent Medical Legal Unit v the Attorney-General of the Republic of Kenya and 4 Others*[107] and in the Court's first instance and Appeal Chamber in *Attorney General of the Republic of Rwanda v Plaxeda Rugumba*.[108] Thus, whereas it is not a human rights court *per se*, the EACJ has, through a mix of judicial activism, creative interpretation and well-argued submissions by counsel, handed down decisions which, although not based on express human rights provisions, have nonetheless had the effect of safeguarding and promoting rights within the Community. In this way, the EACJ has repurposed its mandate from a court initially established to interpret disputes in the context of economic integration, into one which now boldly adjudicates human rights claims.[109]

As the Community's judicial arm, the EACJ relies on national legal systems to implement its decisions, and in particular those that do not touch on EAC Organs or Institutions. Article 44 of the EAC Treaty as read with Rule 74 of the EACJ Rules of Procedure provide that Judgments that impose a pecuniary obligation on a person are executed as per the rules of civil procedure of the Partner State concerned, thus enforcing the EACJ's judgments in the

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[107] *Independent Medical Legal Unit v the Attorney-General of the Republic of Kenya and 4 Other*s, EACJ Reference No. 3 of 2010, First Instance Division. The Court held that it has jurisdiction to hear and determine a petition against the Republic of Kenya relating to allegations that it failed to take measures to prevent, investigate or punish those responsible for executions, acts of torture, cruelty, inhuman and degrading treatment of over 3,000 Kenyans resident in Mount Elgon District which were carried out by the respondent between 2006 and 2008 in violation of several international human rights conventions, the Constitution of Kenya as well as the Treaty Establishing the East African Community.

[108] *Attorney General of Rwanda v Plaxeda Rugumba,* EACJ Appeal No. 1 of 2012. See also (n 42 above). In essence, the Court has had to claim its human rights jurisdiction thus putting it on a 'collision course' with the EAC's political organs as well as the Partner States. Indeed, in references filed at the EACJ where violations of rights have been alleged, the Respondent Partner States have consistently raised preliminary objections based on their views that the Court lacks jurisdiction over human rights matters.

[109] See JT Gathii 'Saving the Serengeti: Africa's new international judicial environmentalism' (2015) 16 *Chicago Journal of International Law* 386, 391. He also argues that the EACJ has since expanded its jurisdictional horizons to now adjudicate matters of environmental protection and sustainable development.

same manner as domestic judgments. In this way, article 44 of the Treaty has essentially modified Partner States' civil procedure rules, thereby introducing a new source of judgments that may be amenable to execution through national courts. The civil procedure rules regarding execution within the EAC Partner States are fairly similar, and would typically involve the extraction of a decree and then execution of the decree through among others, direct payment to the decree holder, payment into court, attachment and sale of property among others.[110] Those that do not impose pecuniary obligations are implemented under the broad framework of article 38(3), which requires the Council or the Partner States to take measures to expeditiously implement the Court's decisions thus hinging compliance on Partner States' political goodwill. The EACJ has observed that Partner States have largely complied with its decisions.[111] This positions the EACJ's decisions as one of the mechanisms that would significantly impact on Partner States' national legal frameworks on integration matters including the promotion and protection of human rights. Chapter 4 of this study analyses the national impact of the Court's decisions on the national legal and human rights frameworks of the EAC Partner States.

In spite of its successes in protecting human rights, a series of challenges have continued to hamstring the discharge of its mandate, particularly with regard to its obligation to promote and protect human rights within the Community.

Almost two decades after its inauguration, the EACJ still lacks express jurisdiction to hear and determine human rights claims. A protocol adopted under article 27(2) of the EAC Treaty excluded human rights jurisdiction from the EACJ based on the argument that Partner States have already acceded to the African Charter and thus any human rights concerns should be ventilated through the African Court.[112]Furthermore, Partner States

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[110]See Civil Procedure Act Chapter 21, Laws of Kenya, Civil Procedure Act Chapter 71, Laws of Uganda and Civil Procedure Code Chapter 33 Laws of Tanzania as well as Law No.21/2012 of 14/ 6/2012 Relating to the Civil, Commercial, Labour and Administrative Procedure, Rwanda.

[111]See A Possi 'The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community,' Unpublished LLD Thesis, University of Pretoria (2014) 179 as well as Ruhangisa (n 100 above).

[112]See Report of the 13th Meeting of the Sectoral Council on Legal and Judicial Affairs Ref EAC/ SCLJA/13/2012 and Report of the 16th Meeting of the Sectoral Council on Legal and Judicial Affairs Ref: EACJ/ SCLJA/16/2014.

have argued that they have sufficient national constitutional safeguards for the protection of human rights.[113]This means that litigants who would wish to approach the EACJ on matters touching on human rights would still have to frame them in terms of violations of article 6 and 7 of the EAC Treaty. It appears that the EACJ has taken a cue from this and decided to deal with complaints of a human rights nature without referring to the possibility of an enabling protocol. A case in point is the case of *Burundian* Journalists *Union v The Attorney General of the Republic of Burundi* in which the court steered clear of article 27(2) and instead approached the case from the perspective of its overall mandate to interpret the treaty provisions under article 27(1).[114]Moreover, the court in this decision expresses an impressive degree of confidence and boldness, seemingly claiming for itself human rights jurisdiction without deference to the Community's political organs.[115]It remains to be seen whether the Court will proceed with this course of action in future human rights claims or whether it will defer to the erstwhile position of making reference to an envisaged protocol under article 27(2) of the Treaty.

Whereas there is no mandatory treaty obligation on the Partner States to vest the EACJ with human rights jurisdiction, it is submitted that the EACJ would have more impact on national human rights practices if it was able to issue binding decisions to reinforce the Community's human rights commitments as stipulated in its founding Treaty. Moreover, as earlier observed, the progressive integration of the EAC into a political federation requires a

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[113]See Question to the Council: EALA/PQ/OA/3/34/2013 (By Hon. Dora Byamukama). Report of the 4th Meeting of the 2nd Session of the East African Legislative Assembly, Kampala, Uganda, 19 January- 31 January 2014. At the 15th Ordinary Summit of the EAC Heads of State, the Summit endorsed recommendations by the Council to expand the Court's jurisdiction to cover trade and investment matters, as well as matters associated with the East African Monetary Union. See para 16 of the Communiqué of the 15th Ordinary Summit of the EAC Heads of State, 30 November 2013. Available at <http://www.mineacom.gov.rw/index.php?id=71&L=0&tx_ttnews%5Btt_news%5D=704&cHash=f7b7cfda0b9af8fe66fca40ebf327453> (accessed on 10 May 2017).

[114]*Burundian* Journalists *Union v The Attorney General of the Republic of Burundi,* EACJ Reference No. 5 of 2013, First Instance Division. Applicants contended that the Burundi Press Law No.1/11 of 4 June, 2013 as enacted, unjustifiably restricted the freedom of the press and the right to freedom of expression which form a cornerstone of democracy, rule of law, accountability, transparency, and good governance. As such these restrictions contravened Burundi's obligations under articles 6(d), 7(2) of the Treaty.

[115]It is observed that the Court in this case did not make reference to the envisaged Protocol under article 27(2) of the EAC Treaty, seemingly aware that the just enacted Protocol did not contain any provision that enhanced its jurisdiction to include human rights.

corresponding robust framework for the promotion and protection of human rights, which would include an EACJ with express human rights jurisdiction.

While it is observed that the EACJ has taken a lead in claiming its limited human rights competence through creative judicial law-making coupled with innovative legal arguments by counsel, it is submitted that full human rights jurisdiction for the EACJ can only be achieved through a coordinated and sustained campaign, involving among others, EAC bar associations, NGOs, EAC Secretariat as well as the EACJ judges. Thus, the prevailing situation is not only a challenge, but an opportunity that has been availed for all the relevant actors and stakeholders to develop and execute a sub-regional strategy similar to what was experienced in the ECOWAS context that saw the sub-regional court clothed with express human rights jurisdiction.[116]

Furthermore, the Court's effectiveness and efficiency continues to be hampered by the fact that it is still operating on an *ad hoc* basis, notwithstanding its increasing caseload.[117] None of the sitting judges are on full time engagement at the EACJ. They still hold offices either in private sector, academia or in their respective national governments as judicial officers or public servants. They are therefore constrained to juggle between their private endeavours or national commitments and their judicial duties at the EACJ. A practical challenge posed by this situation is the possibility of a high court judge, who also functions as a judge at the EACJ, arriving at a decision which binds the Supreme Court in his national jurisdiction, by virtue of article 33(2) of the EAC Treaty which provides that decisions of the EACJ prevail over those of national courts on matters relating to the interpretation and application of the Treaty.[118] This creates an untidy legal situation, which may affect the reception, application and implementation of decisions of the EACJ at the national level. This may precipitate

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[116]See generally KJ Alter, LR Helfer and J McAllister 'A new International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 108 *American Journal of International Law* 737.

[117]See Ruhangisa (n 100 above). See also the EACJ Strategic Plan 2010-2015. Available at <http://eacj.org/2014/docs/EDITED%20FINAL%20COPY%20.pdf > (accessed on 20 October 2016).

[118]Another possibility is having a national judge in a Partner State refer a matter to the EACJ for a preliminary ruling under article 34 of the EAC Treaty, only to find themselves either directly or indirectly participating in the framing of that ruling at the EACJ.

unnecessary litigation in national jurisdictions challenging the validity of such decisions in the national legal framework in view of national constitutional provisions on the hierarchy of national courts.

It is submitted that the most sustainable option would be to have a permanent court, with judicial officers who do not have corresponding duties especially within their national judiciaries. This would enhance its stature as a Court both in the eyes of litigants and national governments thus making it a preferred forum for the resolution of claims which may arise in the integration process. Such enhanced stature also means there would be increased compliance with and reference to its decisions within the national legal frameworks of the Partner States.

Just like its sub-regional counterparts under the ECOWAS and SADC frameworks, the EACJ has experienced, the threat of political interference and backlash from the Community's political organs as a result of some of its decisions that may be unpopular with national executives of the Partner States.[119] A clear instance of this political backlash was illustrated in the circumstances surrounding the decision of the Court in an interlocutory application in the case of *Prof. Peter Anyang' Nyong'o and 10 others v the Attorney General of the Republic of Kenya and 5 Others*[120](*Anyang' Nyong'o* case) in which the EACJ issued an injunction barring the swearing in of Kenya's nominees to the EALA until the court had decided the case on its merits. The applicants, drawn from the country's opposition party, rejected the candidates chosen by Kenya to sit in the East African Legislative Assembly (EALA) claiming that among others, the rules under which the candidates were appointed did not provide for an election as required under article 50 of the EAC Treaty. The ruling embarrassed the Kenyan government triggering an overt campaign to intimidate and weaken the court, culminating in a series of rushed amendments to the EAC Treaty that

[119]KJ Alter, JT Gathii and LR Helfer 'Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 (2) *European Journal of International Law* 293.

[120]*Anyang' Nyong'o Case* (n 70 above).

substantially altered the EACJ's structure and jurisdiction.[121]Consequently the court was split into a First Instance and an Appellate Division, new grounds for removal of judges were introduced which allowed suspension on allegations of misconduct in the countries of origin, and a 60-day time limit set for instituting references before the court challenging violations to the Treaty. Furthermore, the Court's jurisdiction was limited with the inclusion of a provision to the effect that it had no power to review cases for which "jurisdiction [is] conferred by the Treaty on organs of Partner States"[122]

Although these political manoeuvres were fiercely resisted by the EAC Bar Association, the EACJ and several NGOs, the EAC's political organs had already passed a message to the EACJ-that they were willing to take unspecified action against the court in the event of such unpalatable decisions. Nonetheless, the EACJ has remained fairly independent and has not refrained from taking decisions based on a fear of possible actions by Partner States.[123]

A further challenge experienced by the EACJ has been the restrictive interpretation of the EACJ's jurisdiction by Partner States, who often raise the sovereignty argument in most cases filed against them at the Court. Thus for instance, in the *Samuel Mohochi Case,* the Ugandan government sought to rely on the doctrine of national sovereignty to justify a breach of a treaty provision.[124]And, in *Independent Medical Legal Unit vs the Attorney-General of the Republic of Kenya and 4 Other*s, the Kenyan government claimed that the EACJ did not have jurisdiction to hear and determine a reference before it on the basis that it contained reference to human rights, notwithstanding that this was a case which involved allegations of breach of treaty provisions.[125]Other cases brought against the EAC Partner States at the EACJ have similarly been met with arguments revolving around national sovereignty or lack of jurisdiction. The legal implications of these arguments by the EAC

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[121]For a detailed account and analysis of the backlash arising from the EACJ's decision in the Anyang' Nyong'o Case, see J Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy' (2014) 24 *Duke Journal of Comparative & International Law* 249.

[122]See EAC Treaty, articles 26(1), 26(2), 27(1), and 30(2).

[123]See Gathii (n 121 above).

[124]See *Mohochi* case (n 41 above).

[125]See *IMLU* Case (n 107 above).

Partner States is to attempt to bar the Court from inquiring into matters taking place within national jurisdictions, thereby seeking to limit the domestic reach of the EAC Treaty. [126]

In spite of these challenges, the Court has proved itself as a vibrant and influential organ with regard to the promotion and protection of human rights within the sub-region. An analysis of the domestic impact of its key decisions will be undertaken in Chapter 4 of this study.

3.5 EAC Secretariat

The EAC Secretariat is the Community's executive organ consisting of the Secretary-General, the deputy Secretary General, the counsel to the Community and other staff of the Community.[127] The Secretary General is appointed by the Summit upon nomination by a head of state based on the principle of rotation.[128]

Being the implementing arm of the Community, It has a wide array of functions which include the mobilisation and management of funds for the implementation of the Community's projects; strategic planning and management of Community programmes, the custody of Community property; the co-ordination and harmonisation of the policies and strategies relating to the development of the Community and the general promotion and dissemination of information on the Community to the stakeholders, the general public and the international community. It is also responsible for initiating, receiving and submitting recommendations to the Council and forwarding Bills to the Assembly through the Coordination Committee.[129] Furthermore, it is required to initiate studies on and research matters affecting the Community and ensure the implementation of Summit and Council

[126]This is also evidenced by the hurried amendments to the EAC Treaty attributed to the Kenyan government in the wake of the EACJ decision in the *Anyang' Nyong'o Case* (n 70 above).

[127]See article 66 of the EAC Treaty.

[128]See article 67 of the EAC Treaty. In essence, the office holders will come from the Partner States on a rotational basis.

[129]The Co-ordination Committee consists of the Permanent Secretaries responsible for EAC affairs in each Partner State and such other Permanent Secretaries as each Partner State may determine. See article 17 of the EAC Treaty.

decisions, as well as organizing and keeping records of all meetings of Community organs and institutions other than the Court and the Assembly. [130]

The Secretariat has investigatory powers under article 71(1) (d), which is a powerful tool with the potential of having far reaching positive effects on the promotion and protection of human rights in the sub-region. The outcomes of these investigative missions by the Secretariat may culminate in recommendations or directives issues to the Partner State concerned requiring it to take measures to remedy the causes of any breaches of their legal obligations under the Treaty, including breaches related to their human rights obligations. In the case of *East African Law Society v Attorney General of the Republic of Burundi and the Secretary General of the EAC,*[131]the applicant claimed among others, that the Secretary General had failed in his duty to monitor the observance by the Republic of Burundi, of the EAC Treaty obligations pursuant to the provisions of article 71(1)(d) of the EAC Treaty. In responding to these allegations, the Secretary General clarified that he had formed a Task Force pursuant to his powers under article 77(1) (d) of the EAC Treaty, to investigate alleged breaches of the EAC Treaty and the causes of growing litigation at the EACJ emanating from Burundi, especially within the context of articles 6 and 7 of the EAC Treaty. The Secretary General further informed the Court that he did not receive positive cooperation from the government of Burundi with reference to the conduct of a possible fact finding/ investigative visit to Burundi by the Task Force. In its final decision, the Court ordered the Government of Burundi to among others, take measures to allow the Secretary General to conduct its investigative mission as earlier requested.

This decision by the EACJ offered a valuable insight on the utility and the potential that this device holds in Community governance. It was however not yet clear as at the writing of this thesis, whether the Secretary General finalised their investigative visits as per the court order, or whether the Secretariat has taken a more robust stance in deploying this device.

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[130]See generally Chapter 10 of the EAC Treaty. For additional information on the Secretariat see also <http://www.eac.int/index.php/organs/secretariat.html> (accessed on 21 June 2012).

[131]EACJ Reference No. 1 of 2014, First Instance Division.

In addition to the foregoing, the Secretariat has taken several notable measures towards infusing human rights standards within the Community. Most of these have been in the realm of providing support to the Summit and the Council in the area of development and implementation of law and policy as well as in commissioning relevant studies in the area of governance and human rights. For instance, the Secretariat by virtue of its positioning and its Treaty functions, plays a key role in the development of Protocols to the EAC Treaty. In this regard, the Secretariat lays claim to making a contribution towards the human rights provisions in the Common Market Protocol discussed in detail in chapter 3 and 4 of this study.[132]

The Secretariat also plays a key function in providing support to the Council in relation to its policy development mandate. As such, policy documents on human rights such as the EAC Policy on Disability, the EAC Gender Policy as well as the EAC Plan of Action on Human and Peoples Rights owe their existence to the efforts by the Secretariat.[133]

Additionally, it has pursuant to decisions of the Council, institutionalised and implemented annual meetings of oversight bodies such as the EAC National Human Rights Commissions, Anti-Corruption Commissions, Electoral Management Bodies and national Chief Justices which provide a platform for standard setting, harmonisation of standards and experience sharing across the Partner States.[134] These oversight institutions play a key role in their respective national systems by contributing towards the enhancement of the rule of law, governance and the realisation of human rights.

Being the Community's executive organ, the Secretariat functions as the face of the EAC and in this regard interfaces with the Partner States' national frameworks across a broad spectrum of sectors through its programmes and projects that are relevant to the integration process. Of relevance to the promotion and protection of human rights are its

[132]See article 71(1) (a) of the EAC Treaty.

[133]See for instance the Preamble to the EAC Strategy on Gender, Children and Persons with Disability which acknowledges the input of the Secretariat in its formulation.

[134]See Business Daily 'EAC Now Proposes Common Platform for fighting Corruption.' Available at <http://www.businessdailyafrica.com/-/539552/614074/-/view/printVersion/-/hv6ro3/-/index.html> (accessed on 20 August 2016).

programmes in gender, community development and civil society, peace and security, as well as political affairs, in which it interfaces with national state and non-state actors across the Partner States.[135] Furthermore, it has established a forum for consultations between EAC organs and institutions and private sector, civil society organisation and other interest groups as required under article 127 of the Treaty, which provides an avenue for feedback and dialogue between the EAC and its stakeholders.[136] These dialogue sessions on thematic areas of integration contribute to national impact of EAC's legal and policy framework by enhancing awareness by national actors, thereby spurring them to take action at their national levels based on the sub-regional framework. All these diverse forums are fertile ground for the infusion of human rights principles into the work of the Secretariat as a whole. Nonetheless, there appears to be no central coordinating body within the Secretariat for purposes of human rights mainstreaming. This gives rise to the need for a distinct office within the Secretariat that is responsible for identifying key human rights facets of the functions of the various Community Organs and Institutions, and facilitating linkages between them and respective national level actors. It is therefore submitted that the Council should consider creating an East African Human Rights Commission as posited by Ochanda,[137]or work with the Secretariat towards the appointment of a substantive office within the Secretariat for purposes of coordinating human rights measures much in the same way as the Secretariat has in place a gender office.

4. Conclusion

This chapter set out to understand and discuss the emergent views on the inclusion of human rights into the mandates of African RECs and also explore the structure and functioning of EAC's organs. It has emerged that human rights considerations did not form

[135]See the EAC Sectors as administratively divided. Available at < http://www.eac.int/sectors> (accessed on 1 August 2016).

[136]For instance the EAC Secretariat has institutionalised the annual EAC Secretary General's Forum for Private Sector and Civil Society, which includes participation from broad based stakeholders from across the five Partner States. See EAC Press Release on <http://www.eac.int/news-and-media/press-releases/20160307/4th-annual-eac-secretary-generals-forum-private-sector-civil-society-and-other-interest-groups-held>. (accessed on 1 August 2016).

[137]See R M Ochanda, P K Wakinya and W O Odipo 'Human Rights within the Context of Deepening Integration of the East African Community (EAC)' (2013) 4(2) *Postmodern Openings Journal 47.*

part of the constitutive instruments of early post-colonial African RECs, However, with the democratic wave that swept through most of Africa in the early 1990s, new and existing RECs either specifically included human rights provisions in their constitutive instruments or revised their founding instruments to give effect to the promotion and protection of human rights. In this regard, the RECs shifted from being purely developmental institutions with economic objectives to institutions that approached development from a human rights optic. Thus, EAC Partner States expressly included human rights as fundamental and operational principles of the Community under article 6 and 7 of the EAC Treaty. Various reasons have been set out by different scholars in trying to understand the inclusion of human rights into the mandates of organisations previously purely focused on economic development. These include the need to comply with provisions of the AEC Treaty, replication of global and regional human rights commitments to the sub-regional level and the need to promote the right to development under article 22 of the ACHPR. From a theoretical perspective, the constructivist view would attribute the inclusion of human rights into REC constitutive instruments to the influence of norms that have been developed and applied at the international and regional level. Thus, converging states that are members of the international and regional groupings, would wish to replicate the same human rights ideals at the sub-regional front. From a liberalist view, this may be attributed to the convergence of the national interests of the various states tapered by the demands of internal actors within the respective states to ensure that the human rights of their citizens are protected across national frontiers. Regardless of the theoretical standpoint taken, what emerges is that human rights have not only taken root within African RECs, but are slowly gaining traction as a key consideration in their structure and functioning.

Turning to the EAC's institutional framework, the EAC Treaty has set in place Community organs and institutions which are designed to spearhead the achievement of the integration objectives. The Summit, Council, Assembly and the Court of Justice are in principle intended to mirror and dovetail with the classic three arms of government in a constitutional democracy. In terms of linkages with national systems, the Secretariat is in principle the executive organ that provides the linkages between national and the EAC systems. However, extra layers of linkages are also present in the Council as well as the Summit of Heads of

State and government. All these Community organs have a treaty obligation to give effect to the provision of articles 6 and 7 of the EAC Treaty in their various activities at implementing the integration process.

CHAPTER THREE

THE INTERPLAY BETWEEN COMMUNITY LAW AND NATIONAL LAW WITHIN THE EAC PARTNER STATES

1. Introduction

The EAC's integration process envisions the deepest form of regional integration-the creation of a political federation. This process is guided and midwifed by a complex normative framework that works in concert with the Partner States' respective national legal systems to deliver on the objectives of integration. For the EAC's integration process to be meaningful, it is imperative that Partner States are able to appreciate and navigate the legal minefield that comes with the interplay between their national legal frameworks and the seeming 'invasion' of Community laws, organs and institutions into the national space.[1] Accordingly, the goal of this chapter is to understand and critically examine the interplay between the laws developed under the EAC Treaty framework, commonly referred to as Community law, and the respective national legal regimes of the Partner States. This is significant for this study as it lays a foundation for understanding how the EAC's binding and soft law measures for the promotion and protection of human rights have influenced law, policy and practice within the Partner States' national human rights frameworks.

In this endeavour, the first part of the chapter considers how the EAC Partner States have traditionally interacted with norms of international law, and in particular with regards to the reception and application of treaties.[2] This is in view of the fact that the EAC is created by a treaty, which is a legal instrument at international law, and an understanding of the reception and legal status accorded to treaties and other sources of international law by the Partner States would aid in understanding their 'psychology' when it comes to working with laws from sources other than from their domestic legislative organs, which in this case

[1]See for instance, article 8(4) of the EAC Treaty which stipulates that Community Organs and institutions shall have precedence over similar national ones in matters relating to the implementation of the EAC Treaty.

[2]It is worth noting that the EAC Partner States are drawn from a mixture of civil law tradition with a mostly monist inclination (Burundi and Rwanda) and states with a common law legal tradition with a largely dualist inclination (Uganda and Tanzania) when it comes to the status, character and applicability of international law within the domestic legal framework. Kenya, which was hitherto dualist, transformed into a monist state by virtue of articles 2(4) and 2(5) of its 2010 Constitution.

includes EAC's legal norms. Building on this, the second part of this chapter discusses the legal norms and standards developed by the EAC within the context of the doctrine of legal primacy and direct effect of Community law, and the experiences of the EAC Partner States in this regard. The insights gained from the analysis in this chapter will then be infused in the impact analyses in chapter 4 and 5 of the thesis.

2. Character and Status of International Law in the Domestic Legal Systems of EAC Partner States: Revisiting the Monist and Dualist Debate

For centuries, states have developed and used international law to govern their relationships in diverse fields. This branch of law is derived from international custom, treaties, as well as general principles of law and writings of publicists.[3] With increased interaction between states in specialised areas such as human rights, trade and finance, treaties in particular, are gaining currency as the most preferred international instrument for regulating international relations.[4] Given that treaties are concluded on the basis of mutual interest and sovereign equality, state parties are obliged to ensure that treaties which have been duly ratified are accorded the force of law in their national legal systems.[5]

In this regard, the 'monist' and 'dualist' theoretic frameworks have been developed to refer to the two dominant perspectives on the relationship between international law and domestic law, and more particularly, on how states give effect to ratified treaties within their domestic legal frameworks.[6] This approach has its root in the two dominant legal

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[3] See article 38 of the ICJ Statute, which generally outlines the sources of law applicable by the International Court of Justice, which has become accepted as an exposition of the sources of international law.

[4] See generally J Dugard, International Law: *A South African Perspective* (2005) 406.

[5] Article 26 of the 1969 Vienna Convention on the Law of Treaties provides for the principle of *pacta sunt servanda*, where states undertake to perform their treaty obligations in good faith. Furthermore, under article 27, a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform its treaty obligations. See also the International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966, entry into force on 23 March 1976. In article 2 thereof, the contracting states make an undertaking to take the necessary steps to ensure the implementation of the obligations therein.

[6] The same terms, Monist and Dualist, may also be used to describe types of domestic legal systems. In this sense, reference to a state as monist for instance, does not allude to the general relationship between domestic and international law; rather, it points to the status of international law in the domestic legal system of that state. See D Sloss 'Treaty Enforcement in Domestic Courts: A Comparative Analysis' in D Sloss (eds) *The Role of Domestic Courts in Treaty Enforcement, A comparative Study* (2000) 1.

traditions in the world, that is, the civil law and common law legal tradition. The civil law system traces its origin to the reformulations carried out by Emperor Justin on Roman legal traditions and edicts.[7] The common law system on the other hand, traces its roots to English legal traditions and customs.

Derived from the civil law system, the monist theory holds that international and municipal law, far from being essentially different, must be regarded as manifestations of a single conception of law. Accordingly, in a monist legal system, treaty provisions automatically become operative within the national legal framework through the operation of some constitutional provisions, yet maintain their international character.[8] As such, upon ratification and publication, international treaties become part of domestic law. Furthermore, in the constitutions of some monist states, international law enjoys normative precedence over municipal law in cases of conflict with treaty norms.[9]

Dualists on the other hand, perceive international law and municipal law as completely different systems of law, with the result that international law may be applied by domestic courts only if 'adopted' by their courts, or in the case of treaties, if they are translated into national law by legislation, through a process known as incorporation or transformation.[10]

Based on a strict interpretation and application of the monist and dualist frameworks, one would be inclined to conclude, at least in theory, that whereas civil law (monist) countries would be more open to the application of international instruments and principles at the domestic level, common law (dualist) countries would be more resistant due to the two-tier system of ratification and domestication. However, this is not always the case in practice.

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[7]J Dainow 'The Civil Law and the Common Law: Some Points of Comparison' (1967) 15 *American Journal of Comparative Law* 419,435.

[8]See generally MCR Craven 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights' (1993) 40 Netherlands *International Law Review* 367.

[9]See generally M Killander & H Adjolohoun 'International Law and Domestic Human Rights Litigation in Africa: An introduction' in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 5.

[10]Whereas in cases of incorporation, the treaty provisions become part of domestic law as they stand by being appended in the text of the act or in its accompanying schedule, in cases of transformation, the treaty provisions are translated into terms of domestic law. This may be done by amending or supplementing existing legislation without any specific reference to the relevant treaty provision. For a discussion on Monism and Dualism please refer to Dugard (n 4 above) 28.

This is because some states considered to be monist, have inbuilt into their ratification processes, an elaborate role for their national legislatures, akin to what is essentially the transformation process in a dualist state. Thus for instance, Rwanda has included provisions within its constitution, which require participation of the national legislature in the treaty ratification process, and the conduct of a national referendum in instances where the proposed treaty affects aspects of national security, sovereignty or relates to its territorial integrity.[11]And in Kenya, whereas the Constitution in article 2(5) stipulates that international treaties duly ratified form part of national law, the Kenyan parliament in 2012 enacted the Treaty Making and Ratification Act, which puts the national parliament at the centre of the treaty ratification process. Under this Act, parliament is required to debate and approve a proposed treaty prior to its ratification, through a complex process that mirrors the passing of national legislation.[12]Thus, the reception and national legal effect of treaties may not be an altogether straightforward endeavour in some monist states as one would imagine.

And, whereas one may expect dualist states to be more resistant to the penetration of international law into their national legal frameworks, especially in instances of undomesticated treaties, the courts in a number of dualist African states have been seen to exercise measured judicial activism, and in particular, with reference to international human rights treaties ratified but not domesticated within their national legal systems, which has seen international law gain traction within their domestic legal sphere. It is nonetheless instructive to observe that these courts have treated undomesticated international instruments, not as a source of substantive law in themselves, but as interpretative tools and guides where the constitution or legislation is ambiguous, unclear or capable of several meanings.[13]A gain for international law within national legal systems of dualist states is that, when superior courts in a common law system use international instruments to interpret

[11]Article 167 of the Constitution of Rwanda.

[12]Act No. 45 of 2012, Laws of Kenya.

[13]For instance, the Supreme Court of Zimbabwe observed in the case of *Mildered Mapingure v the State* (Supreme Court Civil Appeal No. SC 406/12 of 2014) that whereas international instruments cannot override or modify domestic law unless they are transformed as rules of domestic law, it was proper and instructive to have regard to them as *'embodying norms of great persuasive value in the interpretation and application of domestic statutes and common law.'*(emphasis added).

national law, the resulting judicial decision becomes binding precedent and is thus applicable in subsequent cases through the doctrine of *stare decisis.* As such, provisions of international treaties may find their way into decisions of superior courts of record and become binding law. This demonstrates that dualist states, through their judiciaries may, in some instances, be more receptive to international law, a fact that is otherwise expected from a strict interpretation of the monist-dualist divide.

Within the EAC Partner States, the Kenyan High Court in the case of *Re: Estate of Lerionka Ole Ntutu (deceased)*[14] relied on the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the African Charter on Human and Peoples' Rights (ACHPR) to interpret and apply the non-discrimination provisions of the Constitution of Kenya.[15] The court held that a customary law provision that disinherited the deceased's daughters was inapplicable as it would be discriminatory on the grounds of sex, which was prohibited under the then section 82 of the Constitution and international treaties that Kenya had ratified. Thus whereas the court did not cite them as sources of substantive rights, it nonetheless relied on their provisions to fortify and interpret the constitutional provisions on non-discrimination.[16] In this way, the strict application of the dualist doctrine has been slowly eroded over time by the acknowledgement of the utility of international instruments in the resolution of legal controversies within the domestic realm.[17]

For purposes of clarity, this thesis does not seek to undertake an in depth analysis of the monist and dualist doctrines, but rather employs these theories in order to enrich the investigation of how the EAC Partner States have received and engaged with international law, given that EAC law, which as will be discussed in the sections that follow, bears certain characteristics of international law.

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[14]*Re Estate of Lerionka Ole Ntutu (Deceased) [2008] eKLR.*

[15]This was in reference to the former Constitution of Kenya, which was repealed on 27 August 2010 with the promulgation of a new Constitution under which Kenya became a monist state.

[16]This position has also been held in Botswana in the case of *Mmusi & others v Ramantele & another* (2012 2 BLR 590 HC), in Lesotho in the case of *Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea & Others* ([2014] LSCA 22) and the Ugandan case of *Mifumi (U) Ltd & 12 Others v the Attorney General*, (Constitutional Appeal No. 02 of 2014) [2015] UGSC 13).

[17]Thus, this research is situated within this context, where strict delineation between monist and dualist doctrines has been modified over time through state practice.

2.1 International Law in EAC Dualist States

The legal systems of the EAC Partner States are derived from the two main legal traditions- civil law and common law, and would accordingly be generally classified as either being monist or dualist. However, as already observed in the previous section, the strict monist or dualist dichotomy has been modified over time to accommodate national realities. As will be shown in the sections that follow, Tanzania and Uganda have shed their strict dualistic label by allowing the direct application of principles of international law within their domestic sphere, albeit within limited circumstances. Kenya has through its 2010 Constitution shifted from a previously dualist regime to join the Republic of Rwanda to form what this thesis refers to as 'hybrid' monist states.[18] Burundi however continues to remain largely monist.

2.1.1 Tanzania

The Constitution of the United Republic of Tanzania does not refer to international law as a direct substantive source of law. The closest reference is article 9(f) which obliges the state and all its agencies to direct their policies and programmes towards ensuring 'that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration on Human Rights' (UDHR), thus incorporating 'the spirit of the UDHR into the Constitution'.[19] In outlining the sources of the applicable law within the United Republic of Tanzania, the Judicature and Application of Laws Act does not mention international law as a substantive source of law in the same way as it mentions legislation, common law, doctrines of equity and customary law.[20] Notably, article 63 of the Constitution vests the national assembly with power to 'enact legislation where implementation of an international treaty requires

[18]Although there is in general no need for specific domestication of treaty provisions for them to acquire the force of law, there are instances in which domestic legislation is required in order to transpose treaty provisions into national law.

[19]Murungu argues in this regard that since the UDHR forms part of customary international law, it is thus incorporated into Tanzanian law not as a treaty (which it clearly is not) but as customary international law. See C B Murungu 'The Place of International Law in Human Rights Litigation in Tanzania' in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 57. However, it is important to note that Tanzania has a Bill of Rights, which incorporates most of the UDHR Rights. Thus the UDHR would be relevant in relation to rights that are not included in the Bill of Rights, for instance ECOSOC rights.

[20]See Judicature and Application of Laws Act Chapter 385 Laws of Tanzania.

legislation'.[21] This then presupposes that Tanzania recognises treaties as a source of law but only to the extent that it is transformed into national legislation via an Act of parliament. Therefore, a conclusion is reached that Tanzania is dualist by inclination and that international treaties have no domestic legal effect unless they are appropriately domesticated.[22] However, this does not mean that ratified but undomesticated treaties do not have any value within the national legal system. On the contrary, the courts in Tanzania have repeatedly relied on provisions of undomesticated international human rights treaties as well as other international human rights instruments as interpretative guides and persuasive authorities. Thus, in the case of *Paschal Makombanya Rufutu v The Director of Public Prosecutions,* the High Court observed that:

> If there is any ambiguity or uncertainty in our law, then courts can look at the international instruments as an aid to clear up the ambiguity and uncertainty, seeking always to bring it into harmony with the international conventions.[23]

Furthermore, in *DPP v Daudi Pete*, the High Court reaffirmed the significance of international treaties in interpreting constitutional provisions when it held that while interpreting the Bill of Rights, the courts must have due regard to the African Charter on Human and Peoples' Rights.[24]

Also, in the case of *Ephraim v Pastory*, the High Court set aside a customary law provision that denied women the right to own land, on the ground that this was discriminatory on the basis of sex. In arriving at this conclusion, the court relied on the fact that the rule against discrimination on the basis of sex was not only in the Bill of rights, but was also incorporated in CEDAW, International Covenant on Civil and Political Rights (ICCPR) and the ACHPR, all of which Tanzania had ratified. The Court observed:

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[21]See specifically article 63(3) (d) and (e) of the Constitution of Tanzania.

[22]See Murungu (n 19 above) 60.

[23]*Paschal Makombanya Rufutu v The Director of Public Prosecutions*, Miscellaneous Civil Cause No. 3 of 1990 (unreported) 10-11 reproduced in HK Bisimba and CM Peter (eds) *Justice and Rule of Law in Tanzania: Selected Judgments and writings of Justice James Mwalusanya* (2005) 356-378.

[24]*Director of Public Prosecutions v Daudi Pete* (1993) TLR 22, 34-35. Also look at *John Byombalirwa v Regional Commissioner, Kagera and Regional Police Commander, Bukoba* where the High Court of Tanzania relied on article 17(2) of the Universal Declaration on Human Rights, which protects the right to property, to order the return of goods seized by the police to the applicant, who had been cleared by the courts.

> The principles enunciated in the above-named documents are a standard below which any civilised nation will be ashamed to fall. It is clear from what I have discussed that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.[25]

Furthermore, in *Legal and Human Rights Centre and 2 Others v Attorney General,*[26] the petitioners challenged the constitutionality of sections of the National Elections Act which legalized the offering by a candidate in election campaigns of 'anything done in good faith as an act of hospitality to the candidate's electorate or voters'.[27] The petitioners contended that these provisions not only encouraged voter bribery, but were also discriminatory since they provided an undue advantage to wealthy candidates over low income candidates. They also claimed that the provisions infringed on the right to political participation.

In finding for the petitioners, the High Court observed *inter alia* that:

> Tanzania is a party to various International Human Rights Instruments. The Universal Declaration of Human Rights (UDHR), which is the core of International Human Rights law, is incorporated in Article 9(f) of our Constitution. Article 7 of the UDHR provides for equality before the Law and bars discrimination. Article 21 of UDHR provides for the right to participate in the government of one's country directly or freely chosen representative.[28]

In this case, the High Court was quick to rely on the UDHR by virtue of its incorporation into the Constitution by reference. It however also acknowledged the role played by other international human rights instruments that Tanzania had ratified in the overall legal and governance architecture.

Lastly, in *Christopher Mtikila v Attorney Gene*ral,[29] the petitioner challenged the constitutionality of amendments to articles 21(1), 39 (1) (c) and article 67(1)(b) of the Tanzanian Constitution introduced by Act No. 34 of 1994, which in effect locked out private

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[25] *Ephraim v Pastory* (2001) AHRLR 236 (TzHC 1990).

[26] *Legal and Human Rights Centre and 2 Others v Attorney General.* High Court Miscellaneous Civil Cause No. 77 of 2005.

[27] See sections 119(2) and (3) of the National Elections Act, Tanzania.

[28] See para 38 of the decision.

[29] *Mtikila v Attorney Gene*ral. High Court Miscellaneous Civil Cause No 10 of 2005.

candidates from contesting for political office on the ground that they unlawfully restricted the rights of Tanzanian citizens to participate in political governance. In finding for the petitioner, the High Court observed that these amendments were unreasonable, and declared them unconstitutional and inconsistent with the international covenants to which Tanzania is party. The court in this case also cited and adopted the *dicta* of the High Court in the *Daudi Pete* case that international conventions must be taken into account in interpreting not only the constitution, but also other national laws.[30]

From the cases highlighted above, it is reasonably concluded that the courts in Tanzania rely on ratified but undomesticated international instruments, not as a distinct source of law, but as a source of persuasive authority to interpret provisions of national law, and in particular, in instances where there is a *lacuna* or ambiguity. Furthermore, this reliance on international instruments runs deeper than just for mere cosmetic effect. The *dicta* of the High Court in *Paschal Makombanya Rufutu v The Director of Public Prosecutions* is instructive in this regard, where the Court observed that the endeavour is to always interpret national law to bring it in conformity with international law.[31]This has been implemented in Tanzania especially in the interpretation and application of human rights provisions of the constitution. Notably, the courts have on several instances relied on the UDHR to interpret national law, borne from its unique positioning where the rights stipulated therein have been incorporated into the Constitution of Tanzania. It reasonably follows therefore that the UDHR, though not a treaty, still forms a useful tool in terms of interpreting constitutionally protected rights.

Tanzania is currently in the process of reviewing its 1977 Constitution, albeit with a few hiccups and bottlenecks. Nonetheless, it is anticipated that the resultant document will be more receptive to international law, given the evolution that has been evident in other hitherto dualist jurisdictions. It is observed that different versions of the draft constitution have included international law as part of the sources of law to be referred to by the courts

[30]See *Daudi Pete* case (n 24 above).

[31](n 23 above).

in the determination of human rights disputes under the Bill of Rights.[32] As such, one can conclude that Tanzania may rework its constitution in a manner that recognises and gives effect to international law, even if it decides to retain its dualist inclination.

On the question of customary international law, the Tanzanian legal framework has no statutory or constitutional provisions that specifically address its placement within the domestic legal architecture. Accordingly, Tanzania's common law tradition would mean that customary international law forms part of national law but only insofar as these are not inconsistent with the Constitution or national legislation.[33]

2.1.2 Uganda

Article 2(5) of the Constitution of Uganda declares that the Constitution is supreme and binds all authorities and persons in Uganda. It further provides that any law or custom that is inconsistent with it is null and void to the extent of the inconsistency.[34] The Constitution makes no mention of international law as a source of law applicable by the courts of Uganda. It however refers to international law in the Directive Principles of State Policy, which provide in principle 28 that the foreign policy of Uganda 'shall be based on the principles of…respect for international law and treaty obligations.'[35] This seems to create a positive obligation on the executive to conduct the nation's foreign affairs in a manner that gives effect to international law. It is however noted that this provision is not in itself a basis for the application of international law in Uganda, but is rather a framework that may be used to hold the government accountable for its international law obligations.

Furthermore, international law is not mentioned or recognized as a source of law under the Judicature Act, which sets out the sources and hierarchy of laws to include, the Constitution,

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[32]See article 62(1) of Proposed Draft Constitution of the United Republic of Tanzania 2014. Available at < http://www.constitutionnet.org/files/the_proposed_constitution_of_tanzania_sept_2014.pdf > (accessed on 20 November 2015); See also article 52(1) of the 2013 proposed Draft Constitution available at http://www.constitutionnet.org/files/tanzania_draft_constitution_2013-english.pdf> (accessed on 20 November 2015).

[33]See Murungu (n 23 above).

[34]Article 2(2) of the Constitution of Uganda.

[35]Objective XXVIII (b) of the National Objectives and Directive Principles of State Policy in the Constitution of Uganda.

Legislation (Acts of Parliament), common law, doctrines of equity and customary law.[36] Thus, in line with Uganda's common law heritage, a treaty must be domesticated as an Act of Parliament for it to have binding legal effect within the national legal system. This was affirmed by the Constitutional Court in *Paul K Ssemwogerere and Others v Attorney General*, where it held that undomesticated international human rights conventions do not form part of Ugandan law.[37]Nonetheless, the courts in Uganda have made reference to ratified but undomesticated international instruments as an aid to constitutional interpretation, being employed as external, albeit persuasive law.

For instance in *Tinyefuza v Attorney General*, the High Court observed in relation to international instruments that:

> …where the words of the Constitution or other law are ambiguous or unclear or are capable of several meanings…we may have to use aids in construction that reflect an objective search for the correct construction. These may include international instruments to which this country has acceded and thus elected to be judged in the community of nations. [38]

Similarly in *Victor Juliet Mukasa & Yvonne Oyo v the attorney General,* the presiding judge made reference to article 1 of the UDHR and article 3 of CEDAW in finding that the applicants' rights to privacy and to freedom from torture, inhuman and degrading treatment under articles 27 and 24 of the Constitution of Uganda had been violated.[39] Furthermore, in *Onyango-Obbo & Another v Attorney General*, the High Court relied on the international and regional human rights instruments ratified by Uganda (including the ACHPR) to interpret article 29(1)(a) of the Constitution and held that section 50 of the Penal Code which made publication of false news a criminal offence was in contravention of the right to freedom of expression.[40]

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[36]See Section 14(2) of the Judicature Act, Chapter 13, Laws of Uganda.

[37]*Paul Ssemwogerere & Others v Attorney General*, Constitutional Court, Petition No 5 of 2002.

[38]*Tinyefuza v Attorney General,* Constitutional Petition 1 of 1996 (unreported).

[39]*Victor Juliet Mukasa & Yvonne Oyo v The Attorney General,* High Court Miscellaneous Cause 247 of 2006; 2008 AHRLR 248.

[40] *Onyango-Obbo &Another v Attorney General*, Constitutional Appeal No. 2/2000 (SC) (unreported).

In *Col (Rtd) Dr Kiiza Besigye v Yoweri Museveni Kaguta and the Electoral Commission*, the Supreme Court took the view that article 1(4) of the Constitution of Uganda, which provides for citizen participation in governance through regular free and fair elections incorporated the principles protected in articles 21 of the UDHR and article 25 of the ICCPR.[41] As such, an interpretation of the right to participation had to be made with reference to those international instruments.

Furthermore, the Supreme Court in the case of *Attorney General v Susan Kigula & 417 Others,* made extensive reference to international law in their interpretation of the relationship between constitutional provisions on the death penalty and on the right to life and freedom from torture, cruel, inhuman and degrading treatment and punishment.[42] Thus, it referred to the UDHR, the ICCPR as well as the ACHPR to find that these whereas these instruments contained provisions that provided for the right to life and freedom from torture, they did not in themselves, abolish the death penalty altogether.

What emerges from the discussion above is that the position in Uganda mirrors the case in Tanzania, where ratified and domesticated treaties have legal effect within the national legal framework as national legislation. Ratified but undomesticated treaties are only limited to serving as guides to interpretation in a persuasive capacity.

Whereas there has been considerable engagement by the courts and litigants on the domestic application of international law, this debate has mostly centred on international treaties and conventions, with little or no discussion on the place of international custom within the domestic legal architecture. Kabumba observes that this may be partly due to the fact that 'while the Constitution variously mentions international conventions, it appears to be silent regarding customary international law.'[43] The closest reference to customary

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[41]*Col (Rtd) Dr Kiiza Besigye v Yoweri Museveni Kaguta and the Electoral Commission.* Election Petition 1 of 2001, Supreme Court (unreported).

[42]*Attorney General v Susan Kigula & 417 Others*. Constitutional Appeal No. 3 of 2006, ILDC 1260; [2009] UGSC 6.

[43]See B Kabumba 'The Application of International Law in the Ugandan Judicial System: A Critical Enquiry' in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 83. However, for the purposes of this study, it is important to observe that RECs are mostly run on the basis of Treaty law for

international law in the Constitution of Uganda is principle 28(i)(b) of the National Objectives and Directive Principles of State Policy, which requires the state to base its foreign policy on respect for international law as well as treaty obligations. Presumably, the reference to international law in addition to treaty obligations implies that customary international law is included in that broad reference distinctly from treaties. For now, there remains a gap with reference to the place of international custom that has not been incorporated as common law by virtue of Section 14(2) of the Judicature Act or duly codified as part of national legislation or treaties. [44]

2.2 International Law in EAC Monist States

2.2.1 Burundi

Burundi comes from a civil law background which is associated with the monist approach to international law. Thus, international instruments once ratified, have the force of law within the domestic realm upon publication in the official government gazette.[45] Therefore, treaties that have not been ratified do not form part of national law. Article 289 of the Constitution of Burundi vests the president with the power to sign and ratify treaties. However, peace treaties and commercial treaties, those relating to international organizations, treaties involving the finances of the State, those that modify national legislative provisions and those relating to personal status may only be ratified through a process which includes parliamentary debate and approval, akin to the domestication process in dualist states.[46] Once ratified these treaties have the force of law within the republic, subject however, to reciprocal application by the counterpart state for bilateral treaties or the achievement of certain conditions that may be set as a condition precedent in the treaty document for multilateral treaties.[47]

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purposes of clarity and certainty and international custom would only come into play in terms of resolving ambiguities in the wording of the treaty.

[44]Judicature Act, Chapter 13, Laws of Uganda.

[45]See Dugard (n 4 above) 406-408.

[46]Article 290 of the Constitution of Burundi.

[47]Article 292 of the Constitution of Burundi.

There is no indication in the Constitution of the legal value that may be ascribed to these treaties within the domestic legal environment, that is, whether they are superior or inferior to statutes in the national legal framework. However, given that article 296 of the Constitution provides that ratification of a treaty may be withheld pending an amendment of the Constitution upon a ruling of the Constitutional Court, it may be reasonably inferred that treaty provisions, given their capacity to trigger a constitutional amendment, would supersede the provisions of ordinary Acts of Parliament.[48] Moreover, Burundi's orientation as a monist state from a civil law tradition would mean that it would give precedence to international treaties over ordinary legislation in its hierarchy of laws.

An interesting provision with reference to international human rights treaties is article 19 of the Constitution, which specifically incorporates the rights and duties guaranteed by a number of international human rights instruments as part of the Constitutional framework, and stipulates that these are 'an integral part of the Constitution of the Republic of Burundi'.[49] Two arguments may be made in this regard-the first, that article 19 of the Constitution essentially incorporates these international instruments as part of the Constitution and grants them constitutional status. This would mean that these instruments have each been individually elevated and recognised as making part of the constitution. The second argument would be that it is only the 'rights and duties proclaimed and guaranteed' by these instruments that are incorporated and not the treaties themselves. That is, the framers of the Constitution did not find the need to reproduce the provisions of these instruments in the body of the Constitution and therefore elected to make reference to the identified instruments. Thus, the 'constitutionalisation' is in the 'content' or the 'rights and duties declared by the treaties and not the treaties as stand-alone legal instruments.

[48]This is the current position at law. See Interview with Hon. Justice Audace Ngiye, Judge at the EACJ and Deputy Director of the Burundi National Service for Legislation, 10 March 2016, EAC Headquarters, Arusha, Tanzania.(Notes on file with the author).

[49]International human rights instruments mentioned under article 19 include the UDHR, the ACHPR, CEDAW as well as the United Nations Convention on the Rights of the Child (UNCRC).

2.2.2 Rwanda

Previously, the position in Rwanda was somewhat similar to Burundi insofar as the national applicability of international law was concerned. However, a revision of the Constitution of Rwanda in December 2015 introduced fundamental changes in the domestic reception and application of international law, thus converting it into a 'hybrid monist' state.[50]

Under the previous constitutional regime, article 190 of the Constitution assigned normative primacy to international treaties that had been conclusively adopted. Upon publication in the official government gazette, they entered into force and were superior to national legislation. Thus in the 2013 case of *Mwubahamana* v *Banque Rwandaise de Developpement* the plaintiff sought to rely on among others ILO Convention no 158 on termination of employment and article 23 of the UDHR on the right to employment in a bid to challenge her employer's decision to prematurely terminate her employment. The Court in that case observed that whereas provisions of duly ratified treaties are binding and would be applied in Rwanda, the ILO Convention was only of persuasive value since Rwanda had not ratified the Treaty. The court then proceeded to dispose of the case without reference to the ILO Convention as a substantive source of law.[51]

Presently, article 95 of the revised Constitution lays out a hierarchy of laws in descending order with the Constitution as supreme law followed by organic law, then duly ratified international treaties, ordinary laws and finally orders and decrees.[52] Article 167 vests the President with the power to negotiate and sign international treaties and agreements and advise Parliament thereafter. However, treaties dealing with among others commerce, accession to international organisations, as well as those which commit state finances, or

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[50]See the Constitution of Rwanda, revised through a referendum on 18 December 2015, Promulgated on 24 December 2015.

[51]Rwanda High Court, RSOCA 0194/13/HC-KIG, also cited as RLR-2014-06-13, available on Rwanda Law reports available at <www.judiciary.gov.rw> (accessed on 30 October 2015).

[52]Organic law, in the Rwanda legal system refers to special type of laws designated as such by the Constitution to regulate key matters of governance. Under article 91 of the Constitution, organic law requires a higher majority to pass or repeal (3/5 majority) as opposed to ordinary law, which can be passed or repealed by a simple majority. Areas designated by the Constitution to be regulated by organic law include elections and functioning of Parliament (article 100), state finances (article 162) as well as the benefits payable to the President (article 113).

require modification of national legislation can only be ratified after Parliamentary approval. Furthermore, treaties and agreements that pertain to the alteration of national territory can only be ratified after conducting a referendum.

Article 168 then proceeds to stipulate that once published in the official government gazette, treaties that have been duly ratified or approved have the force of law as national legislation in accordance with the hierarchy of laws provided for under article 95 of the Constitution. This means that duly ratified and published treaties are inferior to organic law, but are superior to ordinary legislation.

In terms of national application, the Courts in Rwanda have given legal effect to duly ratified treaties in accordance with the constitutional demands. Thus, in *Re: Ingabire,* the petitioner filed a reference to the Supreme Court of Rwanda claiming that her prosecution for the crime of minimization of genocide and genocide ideology under articles 2-9 of Law No.18/2008 of 23/07/2008 punishing the crime of genocide ideology and article 4 of Law No 33 bis/2003 of 06/09/2003 punishing the crime of genocide, crimes against humanity and war crimes, should declared void because the said provisions were in her view inconsistent with articles 20, 33, and 34 of the Constitution of the Republic of Rwanda, as they unlawfully infringed on among others her freedom of conscience and expression. [53]

In denying her application, the Supreme Court relied on among others, the ICCPR,[54] and held that:

> ..the freedom of opinion does not allow every person to say whatever pleases them, especially that even international law and the Constitution of Rwanda allow some limitations as provided under 34 of that Constitution and article 19 of International Covenant on Civil and Political Rights in its point 3 b, that the freedom to express one's opinion can be limited by the laws of each country when it is necessary to safeguard the security and sovereignty of the State, public order or good morals. [55]

[53] *Re Ingabire* (Petition for the Repeal of Legal Provisions Inconsistent with the Constitution) [2015] 4RLR.

[54] Rwanda ratified the ICCPR by decree-law No. 08/75 of 12/02/1975. It entered into force on 23/03/1976.

[55] See para 27 of the judgment.

Furthermore, in *Re Murorunkwere*,[56] the petitioner successfully moved the Supreme Court to declare article 354 of the Penal Code of Rwanda[57] inconsistent with the preamble and article 16 of the Constitution for the reason that it was discriminatory on the basis of sex, as it provided different penalties for men and women for the crime of adultery. In its decision, the Court invoked among others, articles 2 and 15 of CEDAW in which states undertake to adopt appropriate measures to eliminate discrimination against women. The Court then observed that '...the fact that men and women have the same rights, penalizing a man in a different way than a woman, contradicts the provision of the convention.'[58]

A reading of the two judgments reveals that the court did not merely use the ratified treaties as aids to interpretation as was the case in the common law jurisdictions of Uganda and Tanzania, but went a step further to these international treaties as a source of binding law. This then provides evidence of the nature and status of international law, and in particular, international treaties, as a binding source of law in Rwanda's national legal regime.

2.2.3 Kenya

Kenya has had a long but eventful engagement with international law, moving from a wholly dualist to a hybrid monist state.[59] Prior to the adoption of its current Constitution in August 2010, it was settled law that the provisions of a treaty ratified by Kenya did not become part of the municipal law of Kenya save in so far as they were made such by appropriate domestic legislation. Therefore, if the provisions of any treaty, having been made part of the municipal law of Kenya, were in conflict with the Constitution, then to the extent of such conflict, such provisions were held to be void.

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[56]RE/inconst/Pen.0001/08/CS.

[57]Decree Law No.21/77 of 18/08/1977.

[58]See para 26 of the judgment.

[59]The term 'hybrid' monist state is used in the context of this thesis to refer to states in which treaty ratification is a complex process that includes parliamentary input and debate akin to the passing of national legislation, as opposed to a simple ratification act by the Executive as is the case in some jurisdictions.

The landmark case for this position was the old case of *Okunda v Republic*[60] before the then East African Court of Appeal, where the Court observed that international law, not being one of the sources of law listed in the Judicature Act,[61] was not an independent source of law and thus had no legal effect in Kenya unless domesticated via statute or a constitutional amendment. Subsequently, the High Court in the case of *Pattni & Another v Republic* established that international norms, much as they could be of persuasive value, were not binding in Kenya save for where they were incorporated into the Constitution or other written laws.[62] International custom was nonetheless part of national law under the common law tradition.

This position held sway until the promulgation of the 2010 Constitution. However, in this intervening period, between the *Okunda* decision and the enactment of the 2010 Constitution, undomesticated international instruments, though without municipal legal force, were used by the courts as persuasive authority and interpretative guides. For instance, in the landmark Court of Appeal decision of *Mary Rono v Jane Rono & William Rono*, the Court relied on article 1 of CEDAW and article 18 of ACHPR in a decision to justify awarding daughters of a polygamous man (married under customary law) who had died intestate, equal shares in his property, contrary to the customary law position that female children could not inherit their deceased parents' estate.[63]The Court thus recognized that norms of international law, encapsulated in both international custom and treaty law could be applied by court as interpretative guides provided that they were not at variance with existing law. Waki JA observed in the above case that

> …the central issue relating to discrimination which this appeal raises, cannot be fully addressed by reference to domestic legislation alone. The relevant international laws which Kenya has ratified will also inform my decision.[64]

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[60]*See Okunda v Republic* (1970) EA 453.

[61]Section 3(1) of the Judicature Act, Chapter 8 Laws of Kenya.

[62]*Pattni & another v Republic* [2001] eKLR. In addition to the cases discussed here see also *Lemeiguran and others v* Attorney *General of Kenya*, First instance Miscellaneous Civil Application No 305 of 2004 [2006] eKLR.

[63]*Mary Rono v Jane Rono & William Rono,* Civil Appeal No. 66 of 2002, [2005] eKLR.

[64] (n 63 above) para 24.

Upon the adoption of the 2010 Constitution, Kenya was transformed into a 'hybrid' monist state. Articles 2(5) and (6) of the Constitution provide that the general rules of international law shall form part of the law of Kenya, and that any treaty ratified by Kenya shall form part of the law of Kenya under the Constitution. Furthermore, section 7 of the 6th Schedule of the Constitution of Kenya (Transitional Provisions) requires all existing law in force to be construed with the necessary 'alternations, adaptations, qualifications and exceptions' to ensure compliance with the Constitution. As such, one facet of this is that all existing law must be construed having due regard to the influence and the status of international law within the national legal regime, given the provisions of article 2(5) and (6).

In spite of this express constitutional inclusion of international law into Kenya's legal framework, it observed that the Judicature Act amended as recently as 2012, does not contain any express provisions relating to the position of international law within the national hierarchy of laws.[65] Indeed, whereas section 3 thereof outlines the Constitution as the supreme law, followed by legislation, common law, doctrines of equity and African customary law, it has remained untouched in the recent amendments in terms of speaking to the place of international law.[66] As a result, there is still no explicit legislative articulation of the placement of international law, including treaty law, within Kenya's legal framework,

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[65] Judicature Act Chapter 8, Laws of Kenya.

[66] The Judicature Act provides in section 3:

3.(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with -

(a) the Constitution;

(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August,1897, and the procedure and practice observed in courts of justice in England at that date; but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

and in particular, whether they are superior to or inferior to legislation. This is unlike the position in Rwanda, where its Constitution clearly stipulates that ratified treaties have the status of legislation.[67]

Ambani observes in this regard that the implication of articles 2(5) and 2(6) is that the Constitution has in effect amended the Judicature Act.[68] In his estimation, international law, in this new hierarchy, should either be at par with Acts of Parliament 'or even higher.'[69] He calls for a clear expression of the status of international law in the hierarchy of norms applicable in Kenya. Notably, this issue has confronted the courts on several occasions without any conclusive clarity in sight. One of the first cases to deal with this controversy was *Re: Zipporah Wambui Mathara,*[70] where the applicant, claimed that their committal to civil jail pursuant to section 40 of the Kenyan Civil Procedure Act that provides for the arrest and detention of judgment-debtors, was in violation of article 11 of the ICCPR which was part of the laws of Kenya by virtue of article 2(5) of the Constitution. [71]

The High Court agreed with the applicant and acknowledged that the provisions of article 11 of the ICCPR were part of the laws of Kenya under the Constitution. It then proceeded to state that an order for committal to civil jail 'goes against the International Covenant on Civil and Political Rights that guarantee parties basic freedoms of movement and of pursuing economic social and cultural development.'[72] However, the Court did not make any declarations as to the (un)constitutionality of section 40 of the Civil Procedure Act.

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[67]See the discussion on Rwanda in 2.2.2 above.

[68]See section 7 of the 6th Schedule of the Constitution of Kenya (Transitional Provisions) which provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.

[69]See J O Ambani 'Navigating Past the 'Dualist Doctrine': the Case for Progressive Jurisprudence on the Application of International Human Rights norms in Kenya' in M Killander (eds) *International Law and Domestic Human Rights Litigation in Africa* (2010) 32.

[70]*Re: Zipporah Wambui Mathara* [2010] eKLR.

[71]This covenant was ratified by Kenya on 1 May 1972, and has now become part of the laws of Kenya by virtue of Article 2(6) of the Constitution.

[72]See para 10 of the judgment.

Following closely was the decision in *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa,* where the High Court was required to decide whether a warrant of arrest issued pursuant to section 40 of the Civil Procedure Act for the non-payment of a debt violated the applicant's fundamental rights and freedoms including article 11 of the ICCPR.[73] In its judgment, the court acknowledged the paucity of precedent on the matter and singled out the case of *Zipporah Wambui* as the only available Kenyan case law at the time. When it came to locating the ICCPR within the hierarchy of laws, the court was of the view that the highest rank it could possibly enjoy was that of an Act of Parliament. The court observed as follows:

> Since, however, Section 40 is at variance with the provisions of an International Convention which is part of the law of Kenya, it follows that we now have two conflicting laws, none of which is superior to the other … In my view, where a section of the law takes away a right which is conferred by another section, the former section should itself be taken away.[74]

However, the court yet again shied away from making any declaration on whether section 40 of the Civil Procedure Act was unconstitutional, and instead, granted stay of the warrant of arrest that had been issued against the applicant.

A further attempt by the High Court to pronounce itself on the status of international law was in the subsequent case of *Beatrice Wanjiru and another v Hon. Attorney General,* where the petitioners' contention was that the imprisonment of debtors violates fundamental rights and freedoms protected in the Bill of Rights including the right to liberty and movement as set out in the ICCPR, which was applicable in Kenya by virtue of articles 2(5) and 2(6) of the Constitution.[75] In an attempt at resolving the question of the relationship between domestic and international law, the Court's view was:

> The nature and extent of application of treaties must be determined on the basis of the subject matter and whether there is domestic legislation dealing with the specific issue at hand bearing in mind that legislative authority, which is derived from the people of Kenya, is conferred by Parliament under Article 94.[76]

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[73] *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa* [2010] eKLR.

[74] As above, para 13.

[75] *Beatrice Wanjiru and another v Hon. Attorney General* [2012] eKLR.

[76] See para 23 of the decision.

What the court was saying was that ratification is largely an executive act that does not involve the exercise of the people's sovereignty through their elected representatives. Treaties are for this reason subordinate to legislation based on the provisions of article 94 which vests supreme legislative authority on Parliament.

Parliament subsequently passed the Treaty Making and Ratification Act 2012, which provides for parliamentary debate and approval of treaties as part of the ratification process.[77] As such, any treaties ratified through this process would meet the requirements of article 94 and would in my view, be clearly at par with legislation. What is still left unanswered is the question of treaties ratified prior to the 2010 Constitution as well as those ratified between the promulgation of the Constitution and the enactment of the 2012 Act. An untidy legal situation would arise where such treaties, in light of the decision in *Beatrice Wanjiru v AG*, are viewed as inferior to legislation whereas those ratified pursuant to the provisions of the Treaty Making and Ratification Act are accorded the same status as Acts of Parliament. The debate is still ongoing and it is anticipated that the courts will act with finality to put this controversy to rest.

Notwithstanding the foregoing, the courts and litigants in constitutional petitions have exhibited increased reference to international human rights instruments.[78] However, there has not been a single case that has been solely founded on a provision in an international treaty or on general principles of international law. In tandem with the previous practice, most petitioners hinge their cases primarily on the Bill of Rights of the Constitution and use the provisions of international instruments to fortify their arguments.

With reference to the status of international custom within Kenya's legal framework, an inference can be made that article 2(5) of the Constitution refers to international custom when it stipulates that 'general rules of international law' shall form part of the law of

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[77]Act No. 45 of 2012, Laws of Kenya.

[78]Thus for instance, in *Satrose Ayuma & Others v Registered Trustees of the Kenya Railway Staff Retirement Benefits Scheme and Others Nairobi Petition No. 65 of 2010 [2013] eKLR, the High Court relied on the* UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007) to lay out basic minimums for the conduct of evictions of unauthorised settlers/ squatters in private / public land in the absence of domestic legislation on the same.

Kenya. Furthermore, Kenya's common law heritage would mean that customary international law would form part of national law via the common law route as stipulated in the Judicature Act. Nonetheless, there has so far not been any articulation of where these general rules would fall in the hierarchy of laws. An examination of the Judicature Act read against article 2(5) of the Constitution leads to a conclusion that International custom, being largely unwritten law, would fall in the same category as common law and rules of equity, which would be subordinate to Acts of Parliament.

2.3 Reflections on the Legal Status of International Law within EAC Partner States

The main objective of this section was to understand the 'psychology' of the EAC Partner States in terms of the reception and the status of international law, and in particular international treaties. Given that the EAC constitutive instrument is a treaty, an understanding of the EAC Partner States' national legal framework for the domestic reception and application of treaties is essential in order to gauge how they have so far engaged with or are likely to engage with the EAC Treaty and the other aspects of Community law. The picture that emerges from the preceding discussion is that the EAC Partner States accord legal force to treaties which have been conclusively incorporated into the national legal framework as per their respective constitutional requirements. In the dualist states of Uganda and Tanzania, Treaties duly ratified and domesticated have the status of national legislation. Ratified but undomesticated treaties are only of persuasive legal value. The situation is slightly different in the monist states, whereby in Burundi, duly ratified treaties are superior to national legislation; in Kenya, treaties are largely of the status of national legislation whereas in Rwanda, treaties that have been duly ratified are superior to ordinary legislation but inferior to organic law. Informed by the findings so far, the next section identifies the sources of law within the EAC framework and examines how EAC Partner States have given effect to these sources of law within their respective national legal frameworks.

3. Sources of EAC Law and their Interplay with National Law

In determining the meaning of the term 'source of law', international legal discourse differentiates between 'formal' and 'material' sources of international law. Brownlie writes in this regard that formal sources are 'legal procedures and methods for the creation of

rules of general application', while a material source 'provides evidence of the rules'.[79] Ebobrah, while writing within the ECOWAS context, argues that the formal source of law refers to 'the source of validity' of an international organisation. In his view this would be the collective sovereignty exercised by the Heads of State and governments of the member states.[80] He refers to material sources on the other hand as 'tangible sources from which the matter of rules can be derived'.[81] For the purposes of this research, the term 'source of law' would be used to refer largely to the material sources of law as described above, and which are found in diverse legal instruments within the EAC legal framework.

Given the different applicable legal instruments within the EAC's legal system, it would be useful for the purposes of this study, to identify and categorise them based on their respective legal strengths. Writing on the ECOWAS legal framework, Ebobrah adopts Ajulo's categorisation of sources of ECOWAS law into two main categories-primary and secondary sources.[82]Under this classification, the ECOWAS treaties, protocols and conventions, treaties with third states as well as legislation from the ECOWAS parliament are grouped as primary sources of law. Subordinate legislation of ECOWAS Community organs, international custom, general principles of law, judicial decisions and what he refers to as 'ECOWAS internal law' are classified as secondary sources. [83]

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[79]I Brownlie *Principles of Public International Law* (2003) 1.

[80]Whereas this would present legitimacy problems especially for laws passed without the input of the duly democratically elected representatives, it is observed that such laws made by heads of state or government are normally subject to national processes before they become applicable nationally, thereby curing the democratic deficit argument. See ST Ebobrah 'Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of the Economic Communities of West African States,' LLD thesis, University of Pretoria (2009) 103.

[81] As above.

[82]See SB Ajulu 'Sources of Law in ECOWAS' (2001) 45 *Journal of Africa Law* 73, 77.

[83]See Ebobrah (n 80 above). Furthermore, Article 19(1) of the ECOWAS Protocol on the Community Court of Justice vests the court with jurisdiction to determine disputes in accordance with the Treaty, the Court's Rules of Procedure and by reference to the body of laws contained in Article 38 of the Statute of the ICJ. The ECOWAS Community Court of Justice had an opportunity to interpret this provision in *Keita v Mali*, where it observed that the sources of applicable law in the ECOWAS context are 'the Revised Treaty, the Protocols, Conventions and subsidiary legal instruments adopted by the highest authorities of ECOWAS' See *Keita v Mali* ECOWAS Community Court of Justice. Judgment No. ECW/CCJ/APP/03/07 para 27.

Within the EAC framework, a recent study by Possi classifies sources of EAC law on human rights into three categories: primary sources, secondary sources and supplementary sources.[84] In his view, primary sources refer to the EAC Treaty, and its Protocols and instruments referred to therein. Secondary sources include Community Acts, 'international agreements between the EAC and other organisations as well as subsidiary legislation, rules, directives and decisions of the organs of the Community'.[85] Supplementary sources comprise of 'international law instruments, the decisions of international courts and national courts, laws of the member states, customary international law and general principles of law.'

This research takes cognizance of the various formulations by Ebobrah and Ajulo in the ECOWAS context and also builds on Possi's formulation of the sources of law applicable within the EAC. Thus, this thesis adopts a classification of EAC law into primary, secondary and supplementary sources. Primary sources form the first tier and include the EAC Treaty, and its Protocols and annexes, Community Acts enacted by the EALA and duly assented to by the Heads of State as well as decisions of the EACJ in the course of applying and interpreting the EAC Treaty. These are classified as primary sources for the reason that they are authoritative statements on the law of the Community and form the bedrock of the EAC legal system.

Secondary sources form the second tier of Community law. These arise from and derive their validity from the primary sources, and include, regulations, directives and decisions of the Summit and the Council, as well as subsidiary legislation enacted by the EALA. The primary and secondary sources form the core of the EAC's law that guides how the integration process is implemented both at the sub-regional and the national level.

Supplementary sources refer to the persuasive sources of law in the EAC legal framework. They comprise international law instruments, customary international law and general principles of law, the decisions of international courts and decisions of national courts of the

[84]A Possi 'The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community,' LLD thesis, University of Pretoria (2014) 63.

[85]As above.

Partner States as well as the domestic laws of Partner States. Inclusive in this category are non-binding standards and principles, which nonetheless have significant legal relevance within the Community's integration process, commonly referred to in international legal discourse as 'soft law'. These include for instance the non-binding resolutions of the EAC organs, policy documents generated by the Secretariat and the Council as well as provisions of Bills passed by the EALA but not yet assented to by the Heads of State.

The three sources of Community law outlined above are not mutually exclusive, but function in a complementary fashion within the EAC's legal system for the achievement of the integration objectives.[86] They are discussed in more detail below.

3.1 Primary Sources

3.1.1 The EAC Treaty and its Protocols

The EAC Treaty is the primary legal instrument that creates the EAC as an international institution, establishes its organs and institutions, and assigns them specific functions and powers. Article 1 of the EAC Treaty defines the term 'treaty' to include the EAC Treaty together with its protocols and annexes.[87] The Treaty requires Partner States to conclude protocols not only in key identified thematic areas, but also in areas that they may consider necessary for the deepening of the integration process.[88] Examples of protocols currently in force include the East African Community Customs Union Protocol,[89] the Protocol on the Establishment of the East African Common Market (the EAC Common Market Protocol) and

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[86]Thus for instance, international instruments may be employed by the EACJ to resolve ambiguities or inconsistencies within the EAC Treaty in cases that are filed before it. Furthermore, national law of a Partner State may provide guidance to the EAC Council when formulating regional laws or policies on a similar subject matter.

[87]See article 151(4) of the EAC Treaty.

[88]Specifically, the EAC Treaty outlines a number of protocols to be concluded as follows: Protocol on decision making (article 4), Protocol on extended jurisdiction of the EACJ (article 27(2)), Protocol on a Customs Union (article 75), Protocol on a Common Market (Article 76), Protocol on Standardisation, Quality Assurance, Metrology and Testing (article 81), Protocol on Free Movement of Persons Labour Services and Right of Establishment and Residence (article 104) and a Protocol on Combating Illicit Drug Trafficking (article 124). In addition to these mandatory protocols, article 151 of the Treaty confers discretion on the EAC Partner States to conclude such other protocols as may be necessary to facilitate the integration process.

[89] The EAC Customs Union Protocol was adopted by the Summit on 2 March 2004 and entered into force on 1 January 2005.

the Protocol on the Establishment of the East African Monetary Union.[90] Being part and parcel of the EAC Treaty, these protocols and annexes bear the same legal quality as would be ascribed to the parent treaty, both within the EAC legal framework and in the domestic legal framework of the Partner States. A useful point to note is that the EAC Treaty and its protocols enjoy normative precedence over national law as stipulated under article 8 of the EAC Treaty.[91]

3.1.2 Acts of the Community

Community legislation is enacted by the EALA, which debates and passes Bills that gain legal effect upon assent by the Heads of State.[92] The EAC legislative process is triggered principally through Bills from private members, from the Coordination Committees forwarded through the EAC Secretariat, Bills initiated and submitted to the EALA from the Council,[93] or those that emanate from relevant parliamentary Committees.[94] An analysis of the EALA's legislative history reveals that it concentrated in particular, during its first decade of existence, on legislation aimed at institution building. [95] This period saw the enactment of among others the East African Community Interpretation Act,[96] the East African Legislative

[90]Protocol on the Establishment of the East African Community Common Market. Adopted on 20 November 2009. It entered into force on 1 July 2010. See also the East African Community Monetary Union Protocol, which was adopted and signed by the Partner States on 30th November 2013. It entered into force on 1 July 2014.

[91]Each protocol once negotiated, concluded and signed by the Partner States as contracting parties, enters into force upon the ratification and deposit of instruments of ratification with the Secretary General. See generally articles 151, 152 and 153 of the EAC Treaty. Full details on all the EAC protocols to date are available at <http://www.eac.int/index.php?option=com_docman&Itemid=226> (accessed on 6 May 2014).

[92]See articles 62 and 63 of the EAC Treaty together with part XII of the EALA Rules of Procedure, which lay out a detailed mechanism for the enactment of Community legislation.

[93]See article 14(3) b of the EAC Treaty.

[94]See Rule 79(1) of the EALA Rules of Procedure. See also section 3.3 of chapter 2 of this thesis for an in-depth analysis of the EALA's legislative processes.

[95]This refers to legislation aimed at creating specific institutions and making the necessary provisions as required by the Treaty and as necessary to entrench the integration process.

[96]Assented on 9 October 2003 and with a commencement date of 31 January 2004, this is an Act that provides for the construction and interpretation of the enactments of the Community.

Assembly Powers and Privileges Act and the Acts of the Community Act.[97] The rest of the legislation has been largely the annual Appropriations Acts, which detail the Community's budgets over the years.[98] Subsequently, a number of thematic legislation was passed such as the EAC Standardisation, Quality Assurance, Metrology and Testing Act, the EAC Trade Negotiations Act, the EAC Competition Act and the EAC Customs Management Act.[99]

With reference to human rights, the EALA has passed the East African Community HIV & AIDS Prevention and Management Bill, 2010[100] and the East African Community Human and Peoples Rights Bill, 2011,[101] both of which were still undergoing the assent process as at the writing of this thesis. In June 2016, the EALA passed the EAC Persons with Disabilities Bill, which seeks to safeguard, promote and protect the rights of persons with disabilities within the Community.[102] The EAC Gender Equality and Development Bill was also passed on 8 March 2017.[103] Although not yet in force, it is anticipated that all these instruments, which have the promotion and protection of human rights as a fundamental outcome, will, once in

[97]The Acts of the Community Act makes provision for the form and commencement of EAC Acts and for the procedure following the passing of Bills by the EALA. Assented on 9 October 2003 and commenced on 31 January 2004.

[98]The only other substantive legislation enacted during this period was the EAC Competition Act, which is a technical competition legislation with little room for human rights analysis.

[99]Details of the EAC Acts available at www.eala.org (accessed on 6 May 2016). Also available on <http://kenyalaw.org/kl/index.php?id=4206>(accessed on 9 May 2016).

[100]One of the core objects of this Bill is to promote a rights based approach to dealing with all matters relating to HIV and AIDS.

[101]The main object of the Bill is to establish a fully-fledged EAC human and people's rights regime and give effect to the EAC Treaty for the creation of mechanisms for the recognition, promotion and protection of human and people's rights in accordance with the African Charter on Human and Peoples Rights.

[102]See 'EALA passes Bill on PWDs, wants dignified, humane treatment for all' EAC Press release available online at<http://www.eac.int/news-and-media/press-releases/20160601/eala-passes-bill-pwds-wants-dignified-humane-treatment-all > (accessed on 10 October 2016).

[103]See 'EALA Passes Key Gender Bill on International Women's Day' EAC Press Release available at <http://www.eac.int/news-and-media/press-releases/20170308/eala-passes-key-gender-bill-international-womens-day> (accessed on 10 May 2017). See also 'EAC Retirement Benefits for Specified Heads of Organs Bill, 2016' EAC Press Release available online at < http://www.eac.int/news-and-media/press-releases/20160204/eac-retirement-benefits-specified-heads-organs-bill-2016 > (accessed on 10 October 2016).

force, form a formidable basis for enhanced human rights protection within the Community.[104]

3.1.3 Decisions of the EACJ

Article 23 of the EAC Treaty vests judicial authority on the EACJ to hear and determine, among others, references filed on the basis of alleged breaches of the EAC Treaty. The EACJ has compulsory jurisdiction over all parties to a dispute submitted to it in accordance with the Treaty provisions-unlike classic international tribunals, parties do not have to consent to the EACJ's jurisdiction with respect to each dispute brought before it for resolution. [105]Moreover, the rules of access to the EACJ are more flexible, allowing natural and artificial persons, as well as states to have audience before the Court. Its decisions are binding on all parties to disputes before it, including the Partner States.[106]

Just like any other international tribunal, the doctrine of *stare decisis* does not apply to the EACJ. Its decisions are only binding as between the parties to the dispute and only with respect to the specific dispute before it. Nonetheless, given the need for consistency and predictability in the court's jurisprudence, the EACJ, just like other international courts, has tended to follow its previous decisions in deciding similar matters that come before it.[107]

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[104]Interview with Generose Minani, EAC Directorate of Social Sectors, 8 March 2016, EAC Headquarters, Arusha, Tanzania. (Notes on file with author).

[105]See J T Gathii 'Saving the Serengeti: Africa's New International Judicial Environmentalism,' (2016) 16 Chicago Journal of International Law: No. 2, Article 3. Available at: <http://chicagounbound.uchicago.edu/cjil/vol16/iss2/3> (accessed on 10 May 2017).

[106]A similar situation obtains within the ECOWAS legal framework where the judgments of the Court of Justice are binding on the member states, the institutions of the Community and on individuals and corporate bodies. See article 15(4) of the revised ECOWAS Treaty. Also, the decisions of the SADC Tribunal were 'binding and final' prior to its restructuring following its decisions in the Campbell Case. As an Organ of the EAC, its decisions supersede those of national courts by virtue of article 8(4) of the EAC Treaty. So far, the national courts of the EAC Partner States have not had an opportunity to make a determination on whether they consider EACJ decisions binding on their superior courts of record. See interview with Hon. Justice Dr.Faustin Ntezilyayo at EACJ Headquarters, Arusha, Tanzania, 10 March 2016. (Notes on file with the author).

[107]A good example is the decision in *James Katabazi and 21 others v the Secretary General of the EAC and Another* (the *Katabazi* case), EACJ Reference No. 1 of 2007, where the court laid out the principle that it would not hesitate to hear and determine cases brought before it merely on the ground that they included allegations of human rights violations. The tendency for the EACJ to gravitate towards its previous decisions may also be attributed to the fact that most of its judges are drawn from a common law background which heavily relies on the doctrine of *stare decisis*.

The EACJ does not have its own enforcement mechanisms and therefore depends on the Partner States or the Council to facilitate implementation. As such, judgments that impose a pecuniary obligation on a person are executed as per the rules of civil procedure of the Partner State concerned. In this way, the EACJ's judgments are enforced as decisions of national High Courts. Once judgment has been delivered, the successful party applies for an Execution Order under Rule 74 of the EACJ Rules of Procedure. The Registrar appends a copy of the judgment to the Execution Order and transmits these to the High Court of the Partner State in which execution is to be implemented. [108]Thereafter, execution follows the normal rules of Civil Procedure applicable.

The EAC Treaty and the Rules of Procedure are unclear with regard to judgments that do not entail pecuniary obligations and in particular those directed to Partner States or their governments. In these circumstances, it seems that deference is to article 38(3) of the EAC Treaty, which requires the Council or the Partner States to take measures to expeditiously implement court decisions. The implementation of such decisions, and in particular, those directed to the Partner States or the EAC as an institution, would largely depend on political goodwill as there are no clear sanctions for non-implementation. Nonetheless, given that the Council is required to present annual reports to the Summit on the status of implementation of various aspects of integration including on the activities of the EACJ, there would be a measure of political pressure on the non-compliant Partner State, at both Council and Summit levels, arising from these reports, that would contribute towards spurring compliance and implementation of the judgments in question. Moreover the principle of *pacta sunt servanda* also comes into play to fortify the EAC Treaty provisions on compliance with these decisions.[109]

[108]See Possi (n 84 above) 179.

[109]As above, 181.The EAC Partner States have nonetheless exhibited compliance with these types of EACJ decisions for instance in the *Anyang' Nyongo* and *Katabazi* cases.

3.2 Secondary Sources

3.2.1 Decisions and Directives of the Summit

Being the highest political and decision making organ of the Community, formal decisions of the Summit have a binding legal effect within the EAC. Article 11(8) of the Treaty which provides that the rules and orders of the Summit once published in the official community gazette, come into force on the date of publication-the element of coming into force thereby validating the premise that these decisions have binding legal effect and are therefore a source of law. Moreover, the inherent nature of the Summit as the highest political organ of the EAC, together with the functions assigned to it by the Treaty such as appointment of Judges of the EACJ, the adoption of Protocols to the Treaty and the admission of new members to the Community, all require the taking of legally binding decisions.[110] However, it is important to note that these decisions of the Summit and the Council must be taken within the confines of the EAC Treaty and existing Community law.

An examination of the records of Summit meetings discloses that it acts through either 'directives' or 'decisions'. To date, the Summit has not enacted any 'regulations'. Neither the Treaty nor the Rules of Procedure for the Summit provide a definite technical meaning for the terms 'directive', 'regulation' or 'decision'.[111] Upon a review of the records of its official meetings, it emerges that the Summit acts by directive when it issues authoritative instructions to other Community organs or Partner States to undertake a specific function. For instance at the 15th Ordinary Summit of the Heads of State, the Summit directed the Council to submit a report on the verification exercise on the application of the Republic of South Sudan to join the EAC.[112] It also issued a directive to Partner States to conclude the ratification process of the East African Monetary Union Protocol.

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[110]Compared to the EAC Treaty, the constitutive instruments of the SADC and the ECOWAS contain clearer provisions, which stipulate that the decisions of their highest political organs are binding on the Community Organs and on the respective member states. See article 9(4) of the ECOWAS Treaty and article 10 of the SADC Treaty respectively.

[111]See recorded interview with Stephen Agaba, Office of the Counsel to the Community, 10 April 2016(on file with author).

[112]See Final report of the 15th Summit of the EAC Heads of State. EAC/SHS 15/ Directive 07.

With reference to decisions, the records reveal that the Summit employs them when it wishes to act with finality or a given matter. Thus for instance the Summit acted by a decision at the 15th Ordinary Summit of the Heads of State to sign and approve the Protocol on the Establishment of the East African Monetary Union (EAMU).[113]From the foregoing, it becomes clear that Summit decisions appear to have more legal weight than its directives within the EAC's legal framework.

3.2.2 Regulations, Directives, Decisions, Recommendations and Opinions of the Council

As the Community organ responsible for policy formulation and implementation, the Council is in essence the vehicle through which the Summit implements its treaty mandate of leading the integration process. Article 14(3)(d) of the Treaty empowers the Council to 'make regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of this Treaty'. Article 16 of the Treaty then provides that 'the regulations, directives and decisions of the Council taken or given in ...shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly…'[114] Just as has been noted in the preceding section with reference to the Summit, the Treaty offers no guidance on the technical meanings to be ascribed to the terms 'regulation', 'directive', 'decision'[115] 'recommendation' or 'opinion' of the Council.[116] Information from the EAC Secretariat confirms that there is no objective framework or official policy guidance on when to employ for instance, a directive instead of a decision or a regulation.[117] As such, the choice of when to use any of these instruments is predicated on a combination of factors, including the

[113]See EAC/ SHS 15/ Decision 08.

[114]Furthermore, article 2(4) of the Protocol on Decision Making by the Council of the EAC provides that decisions of the Council shall be binding on each Partner State.

[115]The Protocol on Decision Making by the Council of the EAC defines a decision in its definition section in the following terms: 'decision means a decision of the Council and includes a decision to make recommendation to the Summit'.

[116]Given that article 16 omits 'recommendations' and 'opinions' from the list of the other binding elements, it is safe to conclude that recommendations and opinions of the Council are non-binding and belong to the category of norms referred to as 'soft law'.

[117]See interview with EAC Office of Counsel to the Community (n 111 above).

language used by the Treaty provision concerned,[118] the overall legal effect of the particular instrument based on prevailing practice at international law or reference to the plain English meaning of the term 'directive', 'decision' or 'regulation'.[119] Therefore, the Council will move by a directive in a given situation if that is the type of instrument stipulated by the Treaty or the Protocol for that particular circumstance. Thus, for instance, article 38(4) of the Common Market Protocol provides that the Council shall make *regulations* (emphasis added) for the coordination of transport with respect to among others, rail, road, air and pipeline transport.[120] As such, the Council, will in line with the demands of the Protocol, adopt the use of *regulations* as stipulated. Similarly, with respect to directives, articles 41 and 43 of the Common Market Protocol require the Council to issue *directives* (emphasis added) with regard to cooperation in statistics and in cooperation in the administration, management and enforcement of intellectual property rights. In this regard, the Council will adopt the language of the Protocol and issue directives.

In instances where there is no clear stipulation either in the Treaty or Protocol on the type of instrument to be employed, the choice of the most appropriate instrument may also be determined on the basis of its overall legal effect.

Regulations are designed to ensure the uniform application of EAC law in all the Partner States. They are of general application and are binding in terms of articles 14 and 16 of the EAC Treaty. In terms of hierarchy of norms, these regulations are subordinate to national legislation and would occupy the place of subsidiary legislation. In this regard, the Council has for instance issued the EAC Customs Management Regulations pursuant to the provisions of the EAC Customs Management Act of 2004.[121] These Regulations have been adopted by the EAC Partner States national customs authorities alongside the EAC Customs

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[118]Specific provisions of the Treaty or relevant Protocols may call for either a directive, decision or a regulation.

[119]See interview with EAC Office of Counsel to the Community (n 111 above).

[120]Also, article 10(4) empowers the Council to also adopt *regulations* (emphasis added) with reference to social security benefits of workers in host Partner States in the context of facilitating the right to work across national borders.

[121]Enacted by the EALA as an Act of the Community to make provision for the management and administration of Customs and for related matters. Assented on 31 December 2004 and commenced on 1 January 2005.

Management Act as the operative legislative framework governing customs within their respective national legal frameworks. [122]

The Council adopts directives in the same manner as the Summit does-as an authoritative instruction to other EAC organs and institutions and to the Partner States as well.[123] In terms of legal effect, the prevailing view is that directives are binding, but only in terms of the result to be attained.[124] That is, they defer to the national authorities the choice of form and methods of implementation. However, there is another view within the EAC that Council directives are of general application and are binding on Partner States with no choice on mode of implementation-in essence that directives function in the same manner as regulations.[125] Given that regulations already exist for matters that demand uniform application across the Partner States, the most reasonable position would be to reserve directives for those that require the converging states to identify the most appropriate means of achieving the desired outcome.

With no technical meaning of 'decisions', provided in the EAC Treaty framework, a reading of Council decisions taken over time leads to the conclusion that Council decisions are more of an administrative tool for the conduct of its mundane matters such as receiving sectoral reports, adopting the contents of draft protocols and legislation and receiving reports from other EAC Organs such as the EALA and the EACJ.[126] However, in terms of matters that require further action on the part of Partner States, the Council would move by directives.[127]

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[122]An examination of the legal and policy frameworks of the EAC Partner States shows that the Act is the reference point in all customs related matters in all the jurisdictions. See for instance Kenya Revenue Authority on <http://www.kra.go.ke/index.php/about-kra/customer-service-directory/customs-services>:Tanzania Revenue Authority on <http://www.tra.go.tz/index.php/laws> as well as the Ugandan Revenue Authority on <https://www.ura.go.ug/index.jsp> (all accessed on 1 August 2016).

[123]For instance, the EAC Council of Ministers vide EAC/CM/ Directive 12 at its 32nd Meeting in August 2015 directed the Republic of Tanzania to deposit the instrument of ratification of the EAC Sanitary and Phyto-Sanitary Protocol with the Secretary General on 30 August 2015.

[124]See interview with EAC Office of Counsel to the Community (n 111 above).

[125]As above.

[126]Thus for instance the Council at the 31st Meeting in April 2015 'Took note of the Report of the East African Legislative Assembly' vide EAC/CM 31/ Decision 36.

[127]For instance the Council moved by directive when it required Partner States to remit their outstanding contributions. See EAC/CM31/ Directive 15.

Lastly, recommendations and opinions, as their names suggest, are not binding on those to whom they are addressed. They are nonetheless significant in providing guidance on the content and interpretation of Community law.[128]

The foregoing discussion reveals a deficit within the EAC framework with respect to the description of the means available for the Council and the Summit to implement their respective mandates. In this regard, lessons may be drawn from ECOWAS, which has a neater option of dealing with binding norms that emanate from non-legislative organs of the Community. Under the ECOWAS model, the Authority, which is the equivalent of the EAC Summit, largely acts by 'decisions'; the Council of Ministers acts via 'regulations' and the Court of Justice delivers 'judgments'. The Community parliament is only limited to making 'recommendations.' In this sense, one is able to determine with relative ease, the status and type of instrument rendered by the particular Community organ. This provides more clarity and is in my view a more practicable option as opposed to the prevailing situation within the EAC where there is no definite technical meaning attached to the various terms used to denote normative standards set out by the Council and the Summit.

3.3 Supplementary Sources

As observed in the preceding section, supplementary sources refer to the persuasive sources of law in the EAC legal framework, comprising international law, decisions of national courts of the Partner States, domestic laws of Partner States as well as 'soft law'. For the purposes of this study, focus will be on soft law as a supplementary source of EAC law. This does not however imply that the other supplementary sources are not of significance. The reason soft law is given prominence in this section is primarily in order to lay a foundation for the discussion on the national impact of the soft law standards developed within the EAC legal framework in chapter five of the study.

[128]See Bomberg *The European Union; How does it work?* (2008) 16. See also 'Sources of European Union Law'. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l14534 >. Also refer to <http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf > (both accessed on 20 November 2015).

3.3.1 Soft Law

The term 'soft law' is commonly used to refer normative standards which 'have no legally binding force but which nevertheless may have practical effects.'[129]Whereas the EAC Treaty does not make any express references to soft law, it is nonetheless replete with provisions and allusions to soft law that when taken in totality, lend credence to the argument that soft law plays a fundamental role in the EAC integration process, including in the promotion and protection of human rights.

For instance, under article 5(1) of the Treaty, the EAC sets out its objectives as 'to develop policies and programmes aimed at widening and deepening co-operation among the Partner States…for their mutual benefit.' It is submitted that these 'policies and programmes' referred to in article 5 are not in the nature of positive law that attract sanctions for breach, but are rather, voluntary obligations undertaken by the respective Partner States, which do not attract judicial sanctions for non-compliance.[130] Thus, the EAC recognises that it may not be possible to legislate on all matters relevant to integration and therefore leaves room for the development of non-binding standards that would facilitate the integration process.

In article 6(d) the EAC undertakes to adhere to certain fundamental principles such as good governance, accountability, transparency, social justice, and gender equality. Article 7(2) sets out the Community's operational principles, which include adherence to the principles of good governance, democracy, social justice and maintenance of universally accepted standards of human rights. Furthermore, in article 5(3)), the EAC undertakes to 'ensure gender mainstreaming and the promotion of the role of women in cultural, social, political, economic and technological development.' It is recognized that concepts such as good governance, accountability, transparency, social justice and gender mainstreaming are not the sole preserve of positive law. Indeed, to a large extent these concepts derive from and are implemented through a variety of measures, which lean heavily towards soft law.

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[129]F Snyder 'Soft Law and Institutional Practice in the European Community' European University Institute Working Paper LAW, No. 93/5 (Florence, 1993) 18. For a more in depth discussion of soft law please refer to Chapter 5 of this study.

[130]Indeed, policies, by their very nature, imply that these are non- binding guidelines that would enable Partner States and the Community to achieve their integration imperatives in a systematic and coherent manner.

Another notable example in this regard is the mandate vested in Community organs such as the Council, the EALA and the Secretariat to make recommendations and give opinions in accordance with the provisions of the Treaty.[131] These recommendations and opinions, though not legally binding, may assist in the interpretation of binding norms, or may eventually crystallize into positive law. Other soft law norms emanating from Community organs include policy documents such as the EAC Development Strategy, the EAC Plan of Action on the Promotion and Protection of Human Rights and the EAC Strategic Plan on Gender, Youth, Children, Persons with Disabilities, Social Protection and Community Development.[132] Furthermore, resolutions adopted by the East African Legislative Assembly in the exercise of its oversight role, as well as Bills passed by the EALA pending assent by the Heads of State and government are yet another source of soft law within the EAC legal framework.

In terms of legal standing within the Partner States' national legal architecture, soft law norms are *ipso facto* non-binding-they do not invite any formal sanctions for breach or non-compliance. Nonetheless, non-compliance may attract 'unpleasant' consequences such as political pressure or reputational risk. A detailed exposition of the EAC's soft law framework and its national impact is undertaken in chapter five of this study.

4. Interplay Between Community Law and Partner States' National Law

4.1 EAC Law as *Sui Generis* Law

Having identified the various sources of EAC law, it is imperative to understand how these various laws interact with the Partner States' national legal frameworks. From the outset, it must be understood that EAC law is a *sui generis* type of law – it is neither municipal law nor international law, but rather bears elements of both. For instance, it bears elements of international law in the sense that the EAC's constitutive instrument as well as any protocols passed thereunder are treaties between sovereign states which are interpreted and applied in accordance with international law principles including the provisions of the Vienna

[131]See article 14 of the EAC Treaty.

[132]See generally Chapter 5 of this thesis on the soft law dimensions of the EAC's human rights measures for an in depth discussion of these instruments.

Convention on the Law of Treaties. However, on the other hand, the EAC Treaty and its protocols, as well as legislation passed by the EALA are incorporated into the Partner States' legal systems by the operation of national law, making them directly applicable within the Partner States national frameworks. In this sense, EAC law becomes part of the national laws of the Partner States.[133] When viewed from these two perspectives, it becomes apparent that EAC law does not fit neatly into the description of international or municipal law. This is not the sole preserve of EAC law, but is a unique feature of most RECs. Commenting on the nature and status of Community law, the European Court of Justice (ECJ) in the case of *Costa v Enel* observed as follows:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which ...became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights ... and have thus created a body of law which binds both their nationals and themselves.[134]

It is submitted that this explanation of the nature and status of Community law by the ECJ is in principle, also applicable to the EAC, for the reason that it bears similar characteristics to the EU model. The EAC Partner States have created a community with a distinct legal personality, with its own political institution with the capacity to make laws that are applicable to their citizens. However, this is not to say that the EAC is an exact replica or a mirror image of the EU. Although it is largely modelled on the EU, its integration process is designed with the sub regional realities of the Partner States in mind. Furthermore, it aspires to eventually evolve into a political federation, which is one step beyond the current EU framework.[135]

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[133]See article 8(4) of the EAC Treaty.

[134]*Costa v ENEL* (1964) ECR, 585.

[135]See for instance, the Preamble to the EAC Treaty which outlines the historical ties between the Partner States in diverse areas of economic and political governance and thereafter identifies the Partner States' shared vision for the establishment of a sub-regional body that responds to the common challenges experienced by their citizens.

Inasmuch as EAC law is neither municipal nor international law, it is not designed to replace or compete with national law, but to work alongside the national legal framework for the achievement of the integration objectives set out in the EAC Treaty. A cogent example in this regard is in the judicial field, where the two systems mesh through the preliminary ruling procedure in article 34 of the EAC Treaty, which mandates national courts to refer matters to the EACJ for a preliminary ruling in instances where an interpretation of Community law is required.[136] Another level of complementarity is with respect to the judgments of the EACJ, which are enforced through the national courts of the Partner States, given that the EAC does not have its own enforcement framework.[137]

Borchardt, while writing about the correlation between the EU legal order and those of its Members, notes that the EU legal system does not operate in isolation-the fact that EU laws are applicable to the same people, who are concomitantly citizens of a Member State and of the EU, negates a rigid delineation of these two legal orders.[138] As such, the EU legal order is not a 'foreign' system and the Member States and the EU institutions have created indissoluble links between themselves so as to achieve their mutual goals.[139] It is submitted that the same proposition is equally applicable to the linkages between the EAC legal order and Partner States' national legal regimes.

Before delving into more detail on the EAC legal framework *vis-à-vis* the Partner States' domestic law, it is vital to explore two concepts that influence how Community law interacts with the national legal systems of the converging states; the doctrine of precedence of Community law and direct effect of Community law.

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[136]A similar procedure has been adopted and incorporated in Article 267 of the Treaty on the Functioning of the European Union, whereby national courts may, or sometimes are required to refer questions on the interpretation and validity of Union law to the ECJ.

[137]See article 44 of the EAC Treaty.

[138]See D T Borchardt *The ABC of European Union Law (*2010*).*

[139]A cogent example in this regard is in the judicial field, where the two systems mesh through the preliminary ruling procedure in Article 267 of the Treaty on the Functioning of the European Union, whereby national courts may, or sometimes are required to refer questions on the interpretation and validity of Union law to the ECJ. It is notable that this procedure has been adopted and incorporated in article 34 of the EAC Treaty.

4.2 Precedence and Direct Effect of Community Law

In its interaction with the national legal frameworks of the converging states, it becomes necessary for Community law to have uniform legal effect across all participating jurisdictions. This is important as it not only facilitates and enhances national legitimacy and acceptance of Community law but it also enables the Community to develop harmonised standards and norms that are a key ingredient for the various steps of integration from customs union to a political federation. In this regard, the concept of legal precedence of Community law over national law comes into play.

4.2.1 Precedence of Community Law

The concept of primacy (or precedence) of Community law can be traced to the EU, and in particular, to the decisions ECJ in the two landmark cases of *Costa v ENEL* [140] and *Van Gend & Loos.*[141] In its decision in *Costa v ENEL*, the ECJ established the principle that Union law, which was enacted in accordance with the powers laid down in the Treaties, has primacy over any conflicting law of the Member States.

The Court observed thus:

> It follows from all these observations that the law stemming from the treaty, and independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the community itself being called into question.[142]

The legal consequence of this rule of precedence was that, in the event of a conflict of laws between the national and Union law, any national law which is inconsistent with Union law ceases to apply and furthermore, no new national legislation may be enacted unless it is compatible with Union law.

Within the EAC legal framework, this rule of precedence is set out in article 8(4) of the EAC Treaty, which provides that 'Community organs, institutions and laws shall take precedence

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[140](n 134 above).

[141]*Van Gend en Loos* (1963) ECR.

[142]See (n 134 above) 593.

over similar national ones on matters pertaining to the implementation of this Treaty.' Article 8(5) then proceeds to require the Partner States 'to make the necessary legal instruments to confer precedence of community organs, institutions and laws over similar national ones.'[143]

Three distinct components of this formulation emerge. Firstly, legal precedence is vested in Community laws. This is similar to the legal precedence enjoyed by EU law over national law as formulated in the *Costa v Enel* case. Whereas this legal precedence is conferred over Community laws, the Treaty is silent on whether this extends to national constitutions. In this regard, the EAC policy organs have interpreted provisions of article 8 on precedence of Community law to exclude national constitutions. [144] In terms of national engagement with the concept of precedence, the Ugandan High Court blazed the trail in *Uganda v Gurindwa Paul Tumusiime and 5 Others* where it held that the legal precedence accorded to Community law does not extend to the Constitution.[145] Whereas there have been no similar interpretations by the national courts of the other Partner States, it is submitted that this position provides a glimpse into the likely scenario across the other Partner States given that the EAC's policy organs, which work closely with national executives, has also pronounced itself on the issue. As such, national constitutions enjoy legal primacy within the national legal framework, while Community law would, where applicable, come second in terms of legal hierarchy. A practical example in this regard is the EAC Customs Management Act of 2004, which has been accorded legal precedence over the respective Partner States' national legislation on matters pertaining to the regulation of customs for goods emanating from or destined for the EAC market.[146]

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[143]Notably, the constitutive treaties of ECOWAS and SADC do not have corresponding precedence clauses comparable to article 8(4) of the EAC Treaty. Under both regimes, member states are bound to give legal effect to Community laws within their respective domestic legal frameworks in the same manner as article 8(2) of the EAC Treaty. However, the treaties do not grant Community law express legal precedence and primacy over national law.

[144]See interview with EAC Office of Counsel to the Community (n 111 above). See also interview with Hon. Justice Isaac Lenaola, Judge of the Supreme Court of Kenya and Principle Judge of the East African Court of Justice, dated 16 December 2014, Nairobi, Kenya. (Notes on file with the author).

[145]Case reference No. HCT-00-AC-SC-0070 OF of 2012. Uganda High Court at Kololo.

[146]EAC Customs Management Act (n 121 above).

Secondly, precedence is vested on Community organs and institutions over similar national ones on matters relating to the implementation of the EAC Treaty. There is however no clear elaboration, within the EAC legal or policy framework, of what is meant by the terms 'similar national institutions' in relation to this rule on precedence. Nonetheless, given that the EAC's policy organs have interpreted legal precedence of Community law to exclude provisions of national constitutions, it follows that the institutional precedence excludes national constitutional bodies and institutions exercising their constitutional functions within the national jurisdictions. As such, the institutional precedence of the EACJ, for example, is restricted to the extent that it cannot take decisions that would otherwise be taken by national judiciaries. Therefore, in assigning institutional precedence, it is submitted that an inference of 'similarity' may be drawn based on the functions of each of these Community organs and institutions *vis a vis* those of the national institutions being examined. One would then go a step further to determine whether, and to what extent, the functions of these national institutions relate to the implementation of the EAC Treaty. Thus, in terms of institutional precedence of non-constitutional bodies, the EAC Civil Aviation Safety and Security Agency (CASSOA), being the Community institution charged with sub-regional oversight on civil aviation, has precedence over the Partner States' national civil aviation bodies with respect to the development and implementation of civil aviation guidelines and standards within the community.[147] Similarly, the East African Community Competition Authority (EACCA) has institutional precedence over Partner States' national competition authorities with respect to matters of competition law within the EAC. [148]

Nonetheless, the question of precedence for some of the specialised Community institutions *vis-à-vis* national institutions is not as straightforward as one would imagine. A function that may be the preserve of one organ or institution of the EAC may be spread over

[147]CASSOA was established pursuant to the Protocol for the Establishment of the CASSOA signed on 18 April 2007. For more details on its structure and functioning see <http://dcareug.com/cassoa/> (accessed on 20 September 2016).

[148]The EACCA was created pursuant to the EAC Competition Act adopted by the EALA is September 2006 and assented to by the heads of state in November the same year as the sub-regional legislative framework for the promotion of fair trade and consumer welfare.

a number of ministries, departments and agencies within the domestic framework of a partner state. Given that the respective Partner States have organised their national governments differently, the institutional precedence would have to be considered on a case by case basis and upon careful evaluation of all relevant facets and facts.

The third component that can be gleaned from article 8(4) is that this precedence is limited to matters relating to the implementation of the Treaty. The EAC Treaty is very extensive, covering a diverse gamut of integration activities that may all be placed under the umbrella of 'matters relating to treaty implementation'. As at the writing of this thesis, the EAC policy organs have not yet developed a concrete interpretation of this phrase. However, it is noted that the Treaty dedicates fourteen chapters to sixteen different areas of cooperation and integration.[149] In view of this, one can safely conclude that the phrase 'matters relating to treaty implementation' was intended to apply only to these sixteen areas of cooperation set out in the Treaty as well as any other areas as may be determined by the Partner States under article 131 of the EAC Treaty.

Therefore it is concluded that the precedence of Community law within the EAC legal framework, is only with respect to non-constitutional matters, touching on areas of integration outlined within the relevant provisions of the Treaty. The precedence of Community organs over national ones is limited to those organs that do not perform constitutional functions as outlined in national constitutions-with institutional precedence determined on a case by case basis based on the relative similarity of functions between Community organs and national organs. At all times however, it must be considered that the rule on precedence is not intended to foment competition between national law and Community law, but rather to provide a framework to ensure that Community law has uniform penetration and application across the Partner States.

4.2.2 Direct Effect of Community Law

The concept of precedence of Community law goes hand in hand with the doctrine of direct effect of Community law. First articulated by the ECJ in the landmark case of *Van Gend &*

[149]See generally chapter 11 to 25 of the EAC Treaty (articles 74 to 129).

Loos, the essence of this doctrine is that Community law may confer rights on individuals, which the courts are bound to recognise and enforce.[150] That is, Community law may be directly invoked and applied in the national courts of the member states. Thus, Community law forms part and parcel of the national legal framework and hence can be relied on by litigants and courts within the national legal framework. The Court in the above case held that a citizen could enforce a right granted by European Community legislation against the state. In laying down the doctrine, the Court observed that:

> the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.[151]

Whereas the Court affirmed that citizens could affirm rights conferred under Community law against the state, the original formulation of the doctrine of direct effect did not address the question of whether rights could also be enforceable against another citizen. Subsequently, the ECJ in its decision in the case of *Defrenne v SABENA* developed the concept of horizontal direct effect (where rights are enforceable against individuals, including companies) in addition to vertical direct effect (where the citizens enforce rights against the state).[152]

An examination of the EU legal framework reveals that there is no express articulation of the doctrine of direct effect under the EU Treaties. Nonetheless article 258 of the Treaty on the Functioning of the European Union (TFEU) alludes to this when referring to Regulations by stating that these 'shall be binding in its entirety and *directly applicable* (emphasis added) in Member States'.

In contrast with the EU legal architecture, the EAC Treaty explicitly lays the foundation for direct effect of Community law in article 8(2) by requiring Partner States to enact and implement national legislation conferring the force of law upon community legislation, regulations and directives. This in essence means that once these national legislation is

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[150] See (n 141 above).

[151] As above.

[152] *Defrenne v SABENA* Case 2/74 (1974) ECR 631.

passed, Community law would have the force of national law within the respective national jurisdictions, and one would be able to found a legal claim in a national court based on Community law.

In reinforcing the primacy and direct effect of Community law over domestic law of Partner States, the EACJ made the following observations in *Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda* with regard to the application of the EAC Treaty and the Common Market Protocol within Uganda's legal system.[153]

> Like in any other Partner State, once the Treaty and, subsequently, the Protocol, were given force of law within Uganda, they became **directly enforceable** (emphasis added) within the country and took precedence over national law that was in conflict with them. Existing legal provisions became qualified and started to be applicable only to the extent that they were consistent with the Treaty and the Protocol. These included provisions in Uganda's Citizenship and Immigration Control Act.

A number of instances have arisen within the EAC Partner States where Community law has been directly invoked and applied in national courts. In Kenya, for instance, a case of direct effect of the EAC Treaty arose in a cross border incident following the Kampala bombings of 11 July 2010. Two Kenyan citizens, Christopher Idris Magondu and Hussein Hassan Agade, were allegedly arrested from their homes in Nairobi, Kenya, on the night of 23 July 2010, renditioned to Uganda, and arraigned in Court in Kampala. They were then committed to stand trial before the High Court of Uganda for the offences of murder, attempted murder and terrorism. Their families and legal representatives in Kenya filed applications before the High Court of Kenya at Nairobi for the writs of *habeas corpus* seeking their release from custody or their production before the Court on among other grounds, that a formal extradition process was not followed.[154] During the hearing of the *habeas corpus* applications before the High Court of Kenya at Nairobi, the Government of Kenya invoked article 124 of the EAC Treaty as the legal basis and justification for the transfer of the

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[153]*Samuel Mukira Mohochi v The Attorney General of The Republic of Uganda* EACJ Reference No. 5 of 2011. The decision has contributed to the reviews of Uganda's Citizenship and Immigration Act. See Report of the 21st Meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning held on 27-31 October 2014 in Kigali, Annex IV, p 5. See also Report of the 22nd meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning, 22-26 June 2015, EAC Headquarters Arusha, Tanzania. REF: EAC/SCMEACP/22/2015.

[154]High Court Miscellaneous Criminal Applications Nos. 418 & 419 of 2010.

subjects from Kenya to Uganda without recourse to extradition proceedings. The subjects on the other hand relied on article 6(d), 7(2) and 124(5) of the EAC Treaty for their position that the Treaty does not authorize circumvention of extradition proceedings by Partner States, even in cases of suspected terrorism. Reliance on these provisions of the Treaty by the opposing parties within the national courts triggered a referral to the EACJ for a preliminary ruling on the meaning, purpose, spirit, application and interplay of the cited provisions of the Treaty. However, the reference was not heard to conclusion as the EACJ stayed the matter in view of the fact that the judge who had made the reference had been removed from office and that it would therefore await further directions from the Kenyan High Court. No further directions have been given on the matter to date. It appears that the matter has been overtaken by events and will most likely not proceed for hearing. Nonetheless, the direct effect of the EAC Treaty was not only showcased by reference to its provisions by the opposing parties in a national court, but also by the action of the Kenyan High Court acknowledging the jurisdiction of the EACJ and referring the matter for a preliminary hearing in accordance with article 34 of the EAC Treaty.[155]

Another instance that demonstrates national application of Community law is the Ugandan case of *Uganda v Gurindwa Paul Tumusiime and 5 Others,*[156] where the applicants sought a Constitutional reference for an interpretation of among others:

a) Whether section 253 of the East African Community Customs Management Act (EACCMA) which provides that it has precedence over similar national law was inconsistent with the provisions of article 2(1) of the Constitution of Uganda which restates the principle of supremacy of the Constitution over any other law in Uganda and;

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[155]This reference was done vide *Case Stated No. 1 of 2011 Saida Rosemary (on behalf of Christopher Magondu a.k.a Idris Magondu) and Hassan Elijuma Agade (on behalf of Hussein Hassan Agade Versus The Commissioner of Police, The Commandant Anti-Terrorism Police Unit and The Attorney General of Kenya.* See also the reference from the High Court of Uganda to the EACJ in *Attorney General of the Republic of Uganda v Tom Kyahurwenda* Case Stated No.1 of 2014 arising from Miscellaneous Application No. 558 of 2012 in Civil Suit No. 298 of 2012 of the High Court of Uganda at Kampala- Civil Division.

[156]See (n 145 above).

b) Whether section 203(a) of the EACCMA, which places the burden of proof on a taxpayer in respect of tax offences under the Act, was a violation of the presumption of innocence as stipulated in article 28(3) of the Constitution of Uganda and hence inconsistent therewith.

In dealing with the first issue, the Court acknowledged the precedence of the provisions of the Act, but then observed that this precedence was with respect to similar national laws. In this instance, legal precedence would be applied to national laws on customs and tax matters and not the Constitution. Nonetheless, the Court still reaffirmed the supremacy of the Constitution over all other laws, including the EACCMA. On the second issue, the High Court held that the shifting of the burden of proof was in accordance with the rules of evidence and was not unconstitutional. Thus, this case demonstrates that the Ugandan High Court recognised the direct effect of the EACCMA, which had been incorporated as part of the Laws of Uganda pursuant to the provisions of article 8 the EAC Treaty.

4.3 Weaving the Strands Between Community and National Law within the EAC Partner States

Having identified the 'psychology' of the EAC Partner States in dealing with sources of law from an external source, noting the different legal status accorded to treaties in the national legal frameworks of the Partner States and taking cognizance of the concepts of precedence and direct effect of Community law that have been discussed above, this section delves into an analysis of the interaction between EAC law and the respective national legal systems of the Partner States. An understanding of the general reception and treatment accorded to EAC law is useful in drawing conclusions on the national reception of human rights measures developed under the EAC legal framework.

4.3.1 Burundi

Being the only traditionally monist state in the EAC, Burundi acceded to the EAC Treaty in June 2007. As set out in the preceding section, upon ratification, the EAC Treaty automatically became part of its legal system and acquired supra-legislative status. Although there was no requirement to enact specific legislation translating the EAC Treaty into

national law, the ratification process was supervised by parliament, which passed a legal instrument approving the ratification.[157] Therefore, for Burundi, the EAC Treaty is *a priori* superior to ordinary legislation. However, Acts of the Community, not being treaties, are accorded the status of ordinary legislation. However, they have precedence over national law only in matters of implementation of the EAC Treaty by virtue of the provisions of article 8(4) of the EAC Treaty.

Given that Burundi is a civil law jurisdiction, decisions of the EACJ would not bind national courts in terms of the *stare decisis* doctrine. Nonetheless, EACJ decisions on matters of interpretation of the EAC Treaty and the laws of the Community would be binding law, and in particular, if specifically addressed to Burundi. These would then be enforced as decisions of national courts.[158]

As discussed in the foregoing sections, decisions of the Summit and Council are binding on all Partner States by virtue of articles 11(8) and 14(3) (d) respectively of the EAC Treaty. There is however no specific articulation of their status in the national hierarchy of laws. This is again compounded by the fact that the EAC Treaty does not make a clear distinction between decisions, directives and regulations as distinct decision-making instruments that may be deployed by the Summit or Council in the course of Community governance. Nonetheless, there is consensus that these instruments, employed by the Summit and Council, though binding, are largely subordinate to national legislation in Partner States' national legal regimes.[159]

4.3.2 Rwanda

Rwanda revised its Constitution in 2015 into a hybrid monist system. It acceded to the EAC Treaty in 2007 under its previous Constitution, which assigned normative primacy over

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[157]The ratification process was done vide law no. 1/08 of 30 June 2007.See the History of Burundi's integration into the EAC. Available online (in French) at <http://www.eac.bi/index.php?option=com_content&view=article&id=68&Itemid=41> (accessed on 9 May 2016).

[158]See for instance article 38(3) of the EAC Treaty on the enforcement of the decisions of the EACJ. See also Possi (n 84 above) 179.

[159]See generally sections 3.2.1 and 3.2.2 of this thesis for a discussion on decisions of the Summit and the Council.

national legislation to international treaties duly ratified and published in the official government gazette.[160] As such, upon accession, the EAC Treaty entered into force and its provisions were incorporated as part of national law bearing supra-legislative status. Under the current revised framework, the EAC Treaty is recognized as part of national law by virtue of articles 95 and 168 of the revised Constitution.[161]Therefore, the EAC Treaty is superior to ordinary legislation but inferior to organic law. However, given that the provisions of article 8(4) of the EAC Treaty have been incorporated as part of national law, it means that the Treaty is elevated above national legislation (including organic law) on matters related to its implementation.

With regard to Acts of the Community, these have the status of ordinary legislation within Rwanda's legal framework, but with a proviso that they are superior in status to legislation when it comes to matters of regional integration. In *Autoxpress SARL v Rwanda Revenue Authority,* the Supreme Court of Rwanda held that the Appellant had been unlawfully penalized for making a false tax declaration whereas he had not admitted the offence. [162] Section 219 of the EAC Customs Management Act provides inter *alia that* the Commissioner of Taxes does not have powers to impose penalties where the accused does not admit the offence.[163] As such, the Supreme Court found that RRA was thus in contravention of the EAC Customs Management Act, thereby giving effect to Community legislation which has been incorporated as part of national law.

Being a civil law jurisdiction, the doctrine of *stare decisis* is not applicable and case law is not largely used in its judicial system. As such, its national courts are not inclined to make reference to EACJ decisions as binding authority in the course of ordinary litigation, save for the EACJ's decisions on a preliminary ruling under article 34 of the EAC Treaty. Nonetheless,

[160]See article 190 of the revised Constitution of Rwanda.

[161]See interview with Hon. Justice Dr.Faustin Ntezilyayo (n 106 above)

[162]RCOMA0084/11/CS.

[163] EAC Customs Management Act (n 121 above)

decisions of the EACJ on matters directed at Rwanda would still be binding in the same way as the case in Burundi outlined above.[164]

4.3.3 Kenya

Prior to 2010, Kenya's constitutional framework required all treaties to be domesticated via national legislation for them to have national legal effect.[165] Accordingly, Kenya gave effect to the EAC Treaty vide the Treaty for the Establishment of the East African Community Act (EAC Act).[166] The Act seeks to give 'effect to certain provisions of the Treaty for the Establishment of the East African Community and for connected purposes.'[167] At first instance, the inclusion of the term 'certain provisions' in the preamble to the Act may lead one to conclude that this means that the Act only intended to give partial effect to the Treaty. It is however unclear from the provisions of the Act what these *certain* (emphasis added) provisions of the Treaty are. In the absence of any cogent proof of giving partial effect to the treaty, an inference is drawn that the use of the term 'certain provisions,' though inelegant, was not borne out of bad faith. Indeed, a reading of the Tanzanian Treaty for the Establishment of the East African Community Act of 2002 reveals the use of similar language, the only difference being that the Tanzanian Act talks of 'certain provisions specified in the treaty'. Thus, one may elect to give the drafters the benefit of doubt, and conclude that their use of the term 'certain provisions' was with reference to article 8(2) of the EAC Treaty, which requires Partner States to within twelve months of signature of the Treaty, enact domestic legislation conferring legal personality upon the Community, and vesting upon the legislation, regulations and directives of the Community and its institutions, the force of law within their territory.

As observed previously in this chapter, the Constitution of Kenya 2010 transformed Kenya into a monist state with the enactment of article 2(6), which provides that any treaty or

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[164]See interview with Hon. Justice Dr.Faustin Ntezilyayo (n 106 above).

[165]See the discussion on Kenya's interaction with treaties in section 2.2.3 of this chapter. Also see *Okunda v Republic* (n 60) above.

[166]The Treaty for the Establishment of the East African Community Act No. 2 of 2000. Assented on 11 July 2000 and entered into force on 29 December 2004.

[167]See Preamble to the Treaty for the Establishment of the East African Community Act.

convention ratified by Kenya shall form part of the law of Kenya under the Constitution.[168] On reading the provisions of the EAC Act through the prism of the Constitution, and in particular, the provisions of section 7 of the 6th Schedule, it becomes evident that the entire EAC Treaty has been granted the force of law within the domestic legal framework. It has been incorporated as part of national law and is not only directly applicable pursuant to the EAC Act, but also as a treaty under the provisions of article 2(5) and (6) of the Constitution.

With regard to Acts of the Community, these are superior to national legislation but only within the parameters set by article 8(4) of the EAC Treaty are. In all other respects, they have the status of ordinary national Acts of Parliament. The EAC Customs Management Act (EACCMA) is a notable example for showcasing the national application of Community legislation.[169] In *PZ Cussons East Africa Limited v Kenya Revenue Authority*, the High Court of Kenya ruled that a tax assessment against the petitioner made pursuant to, among others, section 146 of the EACCMA without following due process was unconstitutional and in breach of the right to fair administrative action protected under article 47 of the Constitution of Kenya.[170] In essence, the High Court while recognising the binding legal value of the EACCMA as part of national law, declared that the Revenue Authority had not exercised its powers under the Act in a just and fair manner.

As a common law jurisdiction, the doctrine of *stare decisis* is applicable in Kenya, contrary to the position in Burundi and Rwanda outlined above. The issue of the precedential nature of decisions of the EACJ therefore becomes of fundamental importance when considering interplay between national and Community law.

To start with, decisions of the EACJ would be binding upon national courts on matters of interpretation of the EAC Treaty. Therefore, for instance, decisions in the context of a preliminary ruling submitted to the EACJ would be binding, particularly on the issue for

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[168]Furthermore, Section 7 of the 6th Schedule of the Constitution of Kenya (Transitional Provisions) provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.

[169]EAC Customs Management Act (n 121 above).

[170]*PZ Cussons East Africa Limited v Kenya Revenue Authority* [2013] e KLR.

which the ruling was sought. Decisions rendered by the EACJ in the ordinary course of litigation, directed at Kenya, would also be binding in the same manner as decisions of the Kenyan High Court. However, general EAC case law is not binding precedent in the course of ordinary litigation before national courts. Their influence would therefore only be limited as persuasive authority.

4.3.4 Tanzania

As earlier observed in this study, Tanzania, being a dualist state, does not grant treaties the force of law unless they are domesticated through the adoption of enabling legislation. All domesticated treaties acquire the status of legislation within the domestic legal architecture. With reference to the EAC Treaty, Tanzania enacted the Treaty for the Establishment of the East African Community Act in 2002 to give domestic effect to the EAC Treaty.[171] Thus, the EAC Treaty has the force of law in line with Tanzania's legal and constitutional framework. The same situation obtains in Tanzania as in Kenya with reference to Acts of the Community as well as decisions of the EACJ. Community Acts are accorded the status of ordinary legislation whereas decisions of the EACJ are binding insofar as they are specifically directed to Tanzania. However, EACJ decisions that have no direct correlation with Tanzania would be persuasive in terms of precedential value.

4.3.5 Uganda

It has been determined in the preceding sections that Uganda's constitutional framework requires treaties to be domesticated for them to have binding legal effect within the national legal framework. Uganda domesticated the EAC Treaty vide the East African Community Act of 2002 (EAC Act).[172] Its stated purpose is to give the force of law in Uganda to the treaty and to provide for other connected or incidental matters. Section 3 provides:

> (I) The Treaty as set out in the Schedule to this Act shall have the force of law in Uganda.

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[171]Treaty for the Establishment of the East African Community Act, Chapter 411 Laws of Tanzania. The Act is somewhat similar to the Kenyan Act and contains the EAC Treaty as schedule thereto. The Preamble outlines the purpose of the Act as to give effect to 'certain provisions specified' in the Treaty which although not expressly specified, would in effect be article 8(2) of the EAC Treaty, which require enactment of enabling legislation within twelve months of signature of the Treaty.

[172]East African Community Act No. 13 of 2002. It entered into force in 2005 vide the East African Community Act (Commencement) Instrument, 2005.

> (2) Without prejudice to the general effect of subsection I) of this section, all rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaty and all remedies and procedures from time to lime provided for by or under the Treaty shall be recognized and available in the law and be enforced and allowed in Uganda.

In terms of positioning within the domestic legal hierarchy, the EAC treaty, being a duly ratified and domesticated treaty, has the status of legislation. However, its provisions have legal precedence over national legislation in matters relating to integration by virtue of the domestication of the provisions of article 8 of the Treaty.[173] The same would apply to the EAC Protocols, which are treaties in their own right and are therefore domesticated by ratification under the Ratification of Treaties Act.[174]

Community legislation has the status of ordinary national legislation, but with precedence over national legislation only in matters of integration. This was reaffirmed by the Ugandan High Court in *Uganda v Gurindwa Paul Tumusiime and 5 Others* where it held that the EAC Customs Management Act had precedence over similar national law on customs management.[175]

With reference to decisions of the EACJ, Uganda follows its common law counterparts, Kenya and Tanzania in terms of the national status of decisions of the Community court. Therefore, EACJ decisions directed to Uganda are binding. However, general EACJ case law is only applicable as persuasive precedent within national courts in Uganda. In this regard, the Ugandan High Court has blazed the trail in terms of reliance on EACJ decisions in resolving cases that are litigated before it. A notable instance in this regard was the reliance on the *Anyang' Nyong'o*[176] decision by the Ugandan Constitutional Court in *Jacob Oulanyah v Attorney General,*[177] in which the Petitioner successfully argued that the 2006 electoral rules of the National Assembly of Uganda were inconsistent with the Constitution of Uganda and

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[173]See also Interview Questionnaire by Ms.Patricia Musingura, Director of Research, Uganda Human Rights Commission. 5 May 2015 (on file with the author).

[174]Ratification of Treaties Act, Chapter 204, Laws of Uganda.

[175]See (n 145 above).

[176]*Prof. Peter Anyang' Nyongo and 10 others v The Attorney General of Kenya and 2 others.* EACJ Reference No. 1 of 2006 and EACJ Appeal No. 1 of 2009.

[177]*Jacob Oulanyah v Attorney General* Constitutional Petition No 28 of 2006.

the EAC Treaty, to the extent that independent candidates were denied the right to be elected to the EALA. This was the first time a national court relied on a decision of the EACJ in its judgment, thus signifying the legal value attached to EACJ's decisions by the national courts. The *Anyang' Nyong'o* case has been cited in subsequent cases before the Uganda High Court, notably in *Akidi Margaret v Adong Lilly and the Electoral Commission*[178] as well as in *Toolit Simon Akesha v Oulanyah Jacob L'Okori and Electoral Commission.*[179] Whereas this research did not document cases where EACJ decisions have been cited in national courts of the other Partner States, it is anticipated that the trend set by Uganda would influence litigants and courts alike, in the other jurisdictions to follow suit.

4.4 Reflections on the Interplay between National and Community Law

The common thread that runs in the domestic jurisdictions of all the EAC Partner States is that the EAC Treaty been incorporated as part of their national law, in line with the demands of article 8(2) of the Treaty. As such, it is the argument of this thesis that with the EAC Treaty being part of national law, all the other sources of EAC law have also been absorbed as part of Partner States' national law. This argument is made on the basis that Community law such as Acts of the Community, decisions of the EACJ as well as the Regulations, Decisions and Directives of the Summit and the Council are all made pursuant to, and derive their legal validity from the EAC Treaty. Therefore, it follows that if the EAC Treaty is part of national law, then all the laws that derive therefrom are *ipso facto* absorbed as part of national law.

4.4.1 EAC Treaty and its Protocols

Kenya, Tanzania and Uganda have each passed national Acts of Parliament giving effect to the EAC Treaty. As such, the EAC Treaty, having been duly ratified and incorporated has the status of national legislation in their respective legal systems. However, given that the precedence provisions in article 8(4) of the EAC Treaty have also been legislated as part of national law, it is submitted that the Partner States have accorded the EAC Treaty a 'supra-

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[178] *Akidi Margaret v Adong Lilly and the Electoral Commission.* Election Petition No. 0004 of 2011 (unreported).

[179] *Toolit Simon Akesha v Oulanyah Jacob L'Okori and Electoral Commission.* High Court Election Petition No. 001 of 2011 (unreported).

legislative' status *vis-à-vis o*ther ordinary legislation when it comes to matters relating to its implementation.

For Burundi, its national constitutional framework stipulates that treaties, once ratified and duly published, are superior to national legislation. In this instance therefore, the EAC Treaty has a direct supra legislative status *vis-à-vis* national law.

With reference to Rwanda, duly ratified and published treaties are caught somewhat between the constitution and legislation, being superior to ordinary legislation, but inferior to organic law. However, given the unique status of the EAC Treaty, it is the argument of this thesis that its provisions in article 8(4) would elevate it to a status beyond organic law.

In exploring judicial reactions to, and interpretations of the EAC Treaty *vis-à-vis* national law, the decision by the EACJ in the *Samuel Mohochi* case, is instructive. The Court in this case observed that the EAC Treaty and Protocols were not only directly enforceable upon ratification, but took precedence over conflicting national law, and in effect qualified the existing provisions of national law, including the Uganda Citizenship and Immigration Act.[180] Whereas it is observed that the EACJ would be expected to reaffirm the status of the EAC Treaty and Community law in general, it is also important, for purposes of a wholesome discussion, to consider how national courts have reacted in instances where conflicts arise between national law and Community law. The decision of the Uganda High Court in *Uganda v Gurindwa Paul Tumusiime and 5 Others* offers useful insights in this regard. The Court in this case addressed claims of inconsistencies between the Ugandan Constitution and the East African Community Customs Management Act, and held that the fair trial guarantees of the Constitution of Uganda were not negated by provisions in the EACCMA shifting the burden of proof to the accused person. Thus, the court acknowledged the legal weight and effect of EAC law and proceeded to interpret the provision of the national constitution in light of the Act.[181] In another instance, the action by the Kenyan High Court in making a reference to the EACJ for a preliminary ruling in *Saida Rosemary and Hassan Elijuma Agade v The Commandant Anti-Terrorism Police Unit and The Attorney General of*

[180]Mohochi Case (n 153 above).

[181]See (n 145 above).

Kenya[182] demonstrated that a national court was willing to make a deference to the EACJ thus clearly acknowledging that the EAC Treaty had legal effect within Kenyan territory, and could be relied on by courts as well as litigants in pursuing their claims in national courts.

4.4.2 Acts of the Community

With reference to Community legislation, the EAC Customs Management Act and the EAC Competition Act are instructive for purposes of demonstrating the reception and interaction between the various national jurisdictions and Community Acts. The EAC Customs Management Act was passed as 'An act of the Community to make provision for the management and administration of customs and for connected purposes'. [183] It was enacted pursuant to article 39 of the Protocol on the Establishment of the EAC Customs Union. Section 1(2) of the Act clearly stipulates that it is applicable to the Partner States, while section 253 provides that its provisions take precedence over Partner States national legislation with respect to any matter to which its provisions relate. The EAC Partner States' national customs authorities have adopted this Act and the Regulations passed thereunder as the operative legislative framework governing customs within their respective jurisdictions. [184] In this way, Community legislation has been seamlessly adopted as part of national law and is functional in the same manner as legislation.[185] In addition, there has been considerable litigation within the Partner States with regard to the implementation of its provisions. Thus for instance, in *Uganda v Gurindwa Paul Tumusiime and 5 Others* the Uganda High Court dismissed a claim of inconsistency between the EACCMA and the Constitution of Uganda.[186] In *PZ Cussons East Africa Limited v Kenya Revenue Authority*, the

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[182]See (n 154 above).

[183]EAC Customs Management Act(n 121 above).

[184]See for instance the Kenya Revenue Authority has developed a booklet for its staff on how to implement the Customs Management Act. See <http://www.revenue.go.ke/index.php/customs-downloads> (accessed on 8 May 2016) See also a similar action by the Tanzania Revenue Authority available at <http://www.tra.go.tz/tax%20laws/Customs%20Regulations.pdf> (accessed on 8 May 2016).

[185]An examination of the legal and policy frameworks of the EAC Partner States shows that the Act is the reference point in all customs related matters in all the jurisdictions. See for instance Kenya Revenue Authority on <http://www.kra.go.ke/index.php/about-kra/customer-service-directory/customs-services>: Tanzania Revenue Authority on< http://www.tra.go.tz/index.php/laws> as well as the Ugandan Revenue Authority on <https://www.ura.go.ug/index.jsp> (all accessed on 1 August 2016.).

[186](n 145 above).

High Court of Kenya ruled that a tax assessment against the petitioner made pursuant to, among others, section 146 of the EACCMA without following due process was unconstitutional and in breach of the right to fair administrative action protected under article 47 of the Constitution of Kenya.[187]And, in *Autoxpress SARL v. Rwanda Revenue Authority,* the Supreme Court of Rwanda upheld the provisions of section 219 of the EACCMA and declared that the appellant had been unlawfully penalized for making a false tax declaration whereas he had not admitted the offence. [188]

Notwithstanding the positive reception and application of the EACCMA, one must be alive to the fact that implementation of community legislation may be hampered by differing national priorities within and among the Partner States. The experience of the EAC Partner States in implementing the EAC Competition Act is worth highlighting in this regard. The Act was adopted by the EALA in September 2006 and received assent by the Heads of State in November the same year as the sub-regional legislative framework for the promotion of fair trade and consumer welfare. It envisaged the establishment of national competition legislation within the EAC Partner States as well as the establishment of a sub-regional competition regulatory body-the East African Community Competition Authority (EACCA). However, implementation of the Act has come up against several challenges both among and within Partner States legal and policy frameworks. Apart from Uganda, all EAC member States have enacted national competition legislation, although with varying degrees of implementation at the national level. It is only Kenya and Tanzania that have fully functioning national competition regimes. Uganda, Rwanda and Burundi are still in the process of setting up their respective national frameworks. Thus, a strong national competition regime, that would feed into the sub-regional framework still lacks for these Partner States.[189]

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[187](n 170 above).

[188](n 162 above).

[189]See S C Dube and A Paelo 'Prospects for the East African Community Competition Authority' CCRED Quarterly Review June 2016. Available at <http://www.competition.org.za/review/2016/6/7/prospects-for-the-east-african-community-competition-authority> (accessed on 4 August 2016).

With reference to the EACCA, the EAC Council of Ministers adopted the East African Community Competition (Amendment) Bill in 2015, which provided for the establishment of the EACCA with jurisdiction over the five Partner States, to include Burundi and Rwanda which acceded to the EAC Treaty after the coming into force of the Act. It was to be set up by July 2015, after confirmation of the Partner States' nominees for the posts of commissioners. However, Burundi, Rwanda and Uganda (each without fully established competition laws and institutions) could not submit nominees for the posts of commissioners to the regional competition authority partly because there were no commissioners in their own jurisdictions.[190] Being the centre point of the EAC's competition regime, the establishment of the EACCA as a fully functional body is indispensable to the success of the EAC's competition regime under the Act.

Thus, the EAC's competition regime as envisaged has failed to take off as planned. Whereas the EACCMA was received and implemented smoothly, the EAC Competition Act has suffered one setback after another, thus negating the initial objects for which it was passed. This has been attributed to among others, inconsistencies among national competition regimes within the EAC Partner States,[191] lack of political goodwill to prioritise the competition law, lack of public awareness and engagement on the competition framework as well as the existence of the COMESA Competition Commission which has overtaken the EAC's Competition regime in terms of its structure and functioning.[192]

4.4.3 Decisions of the EACJ

Being the Community's judicial arm, the EAC's decisions on various aspects of integration play a fundamental role in ensuring that there is clarity and predictability of law in the interpretation and application of not only the Treaty, but Community law in general. A review of the EAC Partner States' interaction with the EACJ decisions reveals that they are

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[190]See East African Business Council Briefing Paper. August 2010. Available at <http://www.eabc.info/uploads/Briefing_Paper._EAC_Competitions_Policy.pdf> (Accessed on 1 August 2016).

[191]Dee Dube and Paelo (n 189 above).

[192]A Mutabingwa 'Should EAC regulate competition?' (2010), East African Community Secretariat. Available at <http://www.eac.int/news/index.php?option=com_docman&task=doc_view&gid=153&Itemid=78 > (accessed on 2 August 2016).

recognised as a binding source of law, within the national legal framework of a Partner State in instances where these decisions are specifically directed to it for implementation. In all other instances, they serve as persuasive authority in national courts. In terms of legal precedence pursuant to article 8(4) of the Treaty, whereas decisions of EACJ would supersede decisions of national courts on matters related to the interpretation of the EAC Treaty, the practice is that national courts and the EAC have endeavoured to avoid situations which may result in conflicting decisions. This has been achieved through among others, taking advantage of the preliminary ruling procedure outlined in article 34 of the EAC Treaty as well as reference to EACJ decisions as persuasive authority in settling legal controversies that are litigated before them.

4.4.4 Decisions and Directives of the Summit and the Council

Decisions and directives of the Summit are normally reached by consensus[193] and are mostly deliberated upon as recommendations from the Council. In terms of reception into the national legal framework, these decisions are compiled by the Secretary General and distributed to the members of the Summit, who then initiate the implementation processes through their respective line ministries within the national framework.[194] With regard to legal value, it remains unclear to what extent Summit decisions would be binding law on the Partner States. As already discussed elsewhere in this section, there is no stipulation of the status of regulations, directives or decisions of community organs within the hierarchy of national laws. Thus, it remains to be seen whether one may found and action before a national court solely on the basis of for instance, a decision or a directive of the Summit. The most likely scenario that would emerge would be that these decisions and directives are relied on in addition to provisions of the EAC Treaty and its protocols or an Act of the Community. In terms of legal hierarchy, they would therefore rank below legislation enacted by national parliaments. Within the context of directives and decisions to Partner States, a reading of the Summit's meeting records leads to the conclusion that these are binding only

[193]This is in line with the provisions of article 12(3) of the Treaty as read with Rule 13 of the Rules of Procedure of the Summit.

[194]See Rule 14 of the Rules of Procedure of the EAC Summit.

in terms of the result to be attained. As such they leave it to the respective national authorities to identify the most suitable means of achieving the desired outcome. A notable example in this regard would be the directive issued by the Summit to the Partner States to commence issuance of the East African e-Passport from 1 January 2017 and to undertake awareness creation programmes on the new international East African e-passport.[195] Whereas the directive is binding in terms of outcome, it would require the Partner States to activate their respective national legal and institutional frameworks for the attainment of this result. In terms of human rights therefore, any directive or decision of the summit would only be binding in terms of result and only so while occupying a legal quality inferior to legislation.

4.4.5 Soft Law

The EAC organs have over time developed a number of soft law norms, which have been employed in diverse contexts including as advocacy tools, as standards for evaluating existing national legislation or as guides for developing new laws. This may be showcased by the EAC HIV and AIDS Prevention and Management Bill, which was passed by the Assembly in 2012 but is pending assent by the Heads of State. Whereas it is not a binding legal instrument, it nonetheless reflects consensus across a diverse spectrum of actors within the EAC, including the EALA, on the preferred sub-regional standards for the promotion and protection of the rights of those infected and affected by HIV and AIDS.[196] Thus for instance, the Bill has been used by national and regional organisations as a regional yardstick for the assessment of national legislation and for the development of a regional response.[197] In terms of influence on national legislative processes, specific and constant reference was made to the EAC HIV and AIDS Prevention and management Bill 2012 as a best practice and a bench mark during the consideration by the Ugandan Parliament of the now HIV / AIDS

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[195]See Joint Communique of the EAC Summit at its 17th Ordinary Session in Arusha, March 2016.

[196]This proposition is informed by the multi stakeholder process that was undertaken by the EALA and the Civil Society across the Community.

[197]See Implementation of the EAC Realigned HIV and AIDS Strategic Plan (2012-2014): 8th Semi-Annual Narrative Report (1 July 2013 to 31 December 2013). Available at <http://www.eac.int/health/index.php?option=com_docman&task=doc_download&gid=90&Itemid=173 (accessed on 2 December 2015).

Prevention Control Act of 2014.[198]Furthermore, Civil Society Organisations in their interaction with the proposed national HIV and AIDS legislation also made reference to the Bill as the preferred normative standard in the enactment of national legislation on HIV and AIDS, and called for a rejection of sections of the proposed HIV / AIDS Prevention Control Act of 2014 which they felt were at odds with the Bill.[199]

5. Conclusion

This Chapter sought to understand the interplay between the EAC's legal framework and the national legal frameworks of the EAC Partner States in order to lay a foundation for the analysis of the impact of Community law on national systems for the promotion and protection of human rights. It has emerged that the EAC Partner States have each established a comprehensive legal architecture within their national jurisdictions that recognises and gives effect to Community law thereby breathing life into article 8(2) of the EAC Treaty. The practice within the EAC Partner States shows that Community law does not function in competition against, but in collaboration with national law. Cogent examples in this regard include the EAC Customs Management Act and its Regulations, as well as the preliminary ruling procedure under article 34 of the EAC Treaty. However, a full appreciation of the inroads Community law has made into their respective national frameworks is yet to be fully realised nationally. It appears that Partner States have readily given effect to Community law within their domestic legal frameworks, and accorded them legal precedence save for those touching on their national Constitutional provisions. This is also informed by the Council's interpretation of the precedence provisions in article 8 of the Treaty to exclude national constitutions. Whereas the Partner States have made laudable efforts towards giving effect to the EAC Treaty and Community law, more ground remains to be covered. Thus, for instance, the sovereignty argument raised by the Republic of Uganda in the *Samuel Mohochi* case, more than a decade after the coming into force of the Treaty,

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[198]See Parliament of the Republic of Uganda, Hansard Reports for the Month of May 2014. Available at <http://hansard.parliament.go.ug/cmis/browser/Sites/website-documents/documentLibrary/Hansards/Hansards_2014/May2014> (accessed on 10 May 2017), See also Interview with P Musingura (n 173 above).

[199]See D Asiimwe 'Uganda's HIV law at odds with EAC Act' The East African Newspaper, 6 September 2014. Available online at <http://www.theeastafrican.co.ke/news/Uganda-s-HIV-law-at-odds-with-EAC-Act/-/2558/2443578/-/c3d8yz/-/index.html> (accessed 3 January 2016).

raises concerns as to Partner States' understanding of the full ramifications of integration especially with regard to its impact on the national legal systems. [200]

[200] See *Mohochi* case (n 153 above).

CHAPTER FOUR

THE DOMESTIC IMPACT OF EAC'S BINDING MEASURES ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

1. Introduction

The central question for consideration in this chapter is whether the EAC's binding measures for the promotion and protection of human rights have had a trickle-down effect into the Partner States' respective national human rights architecture.[1] Chapter one of this study laid out the framework for the impact analysis to be undertaken in this thesis, which is informed by among others, the works of Heyns, Viljoen, Krommendijk and Okafor, who have conducted domestic impact analyses of human rights instruments at different levels.[2] In this study, impact is understood as the influence of the EAC's binding and soft law human rights measures on domestic laws and policies as well as the actions of domestic actors leading to changes in human rights practices in the Partner States. Accordingly, the impact analysis that will be employed in the course of this chapter will be based on the following structural and process indicators:

- Changes in national law, policy and state practice attributable to the binding measure under consideration;
- Use of the binding measure by national courts as binding or persuasive authority; and
- Use of the binding measure by non-state actors such as non-governmental organisations and individuals.

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[1]These measures were defined in chapter 1 to include human rights commitments in the EAC treaty and its Protocols, regulations, directives and decisions of the Council with human rights nuances, Acts of the Community by the East African Legislative Assembly (EALA) and judicial decisions with human rights implications by the East African Court of Justice (EACJ).

[2]See section 1.5 in Chapter 1 of this study, and more particularly F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *American Journal of International Law* 1; J Krommendijk *The Domestic Impact and Effectiveness of the process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper Pushing or Policy Promoting?* (2014) 368-375; OC Okafor *The African Human Rights System, Activist Forces and International Institutions* (2007) 3-5 and 91-93 as well as CH Heyns & F Viljoen *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002) 6.

In this endeavour the first part of this chapter will discuss the national impact of the EAC Treaty as the foremost binding measure for the promotion and protection of human rights. The second part will examine the Protocols to the EAC Treaty and their domestic impact on human rights protection. Part three will shift to Community legislation enacted by the EALA, whereas part four will delve into the national impact of the decisions of the EACJ with a bearing on human rights. The following section will then consider the national impact of the decisions and directives of the Summit and the Council. The last part will be the conclusion to the chapter, bringing together all the findings of the study based on the analysis employed.

2. The EAC Treaty

The EAC Treaty, being the Community's constitutive instrument, creates the EAC organs and institutions, outlines their functions, and vests them with the necessary powers to enable them deliver on their respective mandates. Whereas it contains several references to good governance, democracy, the rule of law and gender equality, and further identifies the promotion and protection of human rights as one of the Community's fundamental and operational principles, it must be understood that the EAC Treaty is not a human rights treaty as understood in international law.[3] It is an international treaty that constitutes the EAC as an international organisation, with the promotion and protection of human rights as one of the fundamental principles, which must be adhered to in the integration process. The EACJ in the *Mohochi* case clarified that these fundamental and operational principles should be infused into all aspects of integration-that without adherence to these principles, it would be impossible to achieve the objectives of integration as envisaged in the Treaty.[4] It further observed that they are not merely aspirational in nature, but are core and indispensable to the success of the integration agenda.[5] The Court has also gone further to reiterate that the inclusion of human rights as a guiding and operational principle in the Treaty was not merely a cosmetic exercise, but denotes a serious commitment by the

[3]*Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda* EACJ, Reference No. 5 of 2011. para 28 and 29, First Instance Division.

[4]See also article 121 of the EAC Treaty on matters relating to gender equality.

[5]*Mohochi* case (n 3 above).

Partner States to the promotion and protection of human rights in line with the Treaty imperatives.[6] These principles, in addition to the other Treaty provisions already discussed in the previous sections provide the overarching legal framework for the promotion and protection of human rights within the community. This section therefore explores question whether the EAC Treaty has influenced the development, interpretation and application of national laws and policies, or the actions of state and non-state actors in the promotion and protection of human rights.

2.1 Influence on Partner States' Laws and Policies

2.1.1 Influence on National Laws

The EAC Treaty requires Partner States to make specific legislative changes within their national legal frameworks for the achievement of the Community's integration milestones. These legislative changes range from review of existing legislation,[7] harmonisation of Partner States' national laws,[8] passing of new legislation to repealing certain national legislation.[9] In terms of legislative changes that are of significance to the promotion and protection of human rights, the most notable are national legislation to be passed under article 8(2) and 8(5) of the EAC Treaty giving domestic legal effect to the EAC Treaty and conferring precedence on Community laws. Another significant national legislative requirement is article 121(b) of the EAC Treaty that requires Partner States to repeal national legislation that is discriminatory to women. With reference to the former, a review of Partner States' legal respective frameworks in the previous chapter revealed that they have all complied with this requirement- that is, they have all passed the necessary national

[6]See *Plaxeda Rugumba v Secretary General of the EAC & Attorney General of Rwanda*, EACJ Reference No 8 of 2010, EACJ First Instance Division, para 37.

[7]For instance article 93(q) of the EAC Treaty where Partner States undertake to review their national maritime legislation in order to comply with existing international maritime conventions.

[8]See article 104(3) (e) of the EAC Treaty where the Partner States are required to harmonise their legislation on labour practices.

[9]See for instance article 121(b) of the EAC Treaty, which requires Partner States to abolish / repeal national legislation that is discriminatory to women.

legislation and legal instruments giving effect to the EAC Treaty.[10] The import of this to the Partner States' national human rights frameworks is two-fold. On the one hand, the Partner States as duty bearers have a national legal obligation to adhere to the human rights obligations outlined in the EAC Treaty in addition to any other human rights obligations arising from national constitutions or duly ratified treaties. Secondly, the residents and citizens of these Partner States are free to take advantage of the available mechanisms at the EAC to reinforce their human rights, notably through filing references to the EACJ or filing petitions to the EALA. These engagements by Partner States citizens and residents with the EAC mechanisms are made possible through domestic law giving legal effect to the EAC Treaty within the respective Partner States national jurisdictions.

With reference to the Treaty requirement for Partner States to repeal national legislation that is discriminatory to women, it is important to note that the EAC Partner States are all party to various international as well as regional instruments that emphasise gender equality and equity. Part of their obligations under these instruments include the repeal of discriminatory laws. Moreover, their respective national constitutions have clear Bills of Rights, which legislate non-discrimination on the basis of sex. A key outcome of this would therefore be the unconstitutionality of any national laws that are discriminatory against women on the basis of their sex. From the foregoing, it is apparent that the EAC Treaty provisions on repeal of gender discriminatory legislation must be seen and analysed against the backdrop of a plethora of instruments, both national, regional and international, with similar outcomes. In this context, it becomes a challenge to attribute any national measures taken to repeal discriminatory legislation to the influence of article 121(b) of the EAC Treaty. In other words, in the absence of clear evidence to that effect, measures taken to repeal legislation that is discriminatory against women are a result of obligations arising under a number of legal instruments, and not the sole preserve of the EAC Treaty. Thus for instance

[10]Uganda domesticated the EAC Treaty vide the East African Community Act No. 13 of 2002. It entered into force in 2005 vide the East African Community Act (Commencement) Instrument, 2005. Kenya domesticated the Treaty by the The Treaty for the Establishment of the East African Community Ac No. 2 of 2000, Date of assent: 11 July, 2000; Date of commencement: 29 December 2004; Tanzania passed the Treaty for the Establishment of the East African Community Act, Chapter 411, Laws of Tanzania, whereas Burundi gave effect to the EAC Treaty vide law no. 1/08 of 30 June 2007.

in *Re Murorunkwere*,[11] the petitioner successfully moved the Supreme Court of Rwanda to declare article 354 of the Penal Code [12]invalid for being inconsistent with article 16 of the Constitution for the reason that it was discriminatory on the basis of sex, as it provided different penalties for men and women for the crime of adultery. In its decision, the Court invoked among others, articles 2 and 15 of CEDAW in which states undertake to adopt appropriate measures to eliminate discrimination against women.[13] Notably, neither the Court, nor the litigants, made any findings or submissions based on Rwanda's obligations under the EAC Treaty to repeal laws that are discriminatory to women. The proceedings centred on provisions of the Constitution as well as CEDAW. In this instance, the repeal of article 354 would be more attributable to CEDAW as opposed to the EAC Treaty.

A review of EAC Council and Summit reports does not reveal any concerted efforts by these organs to follow up with Partner States on the implementation of article 121(b). Also, a review of Partner States' national legal and policy frameworks does not reveal any reference to article 121(b) of the EAC Treaty. In addition the EAC Partner States' National Human Rights Institutions have not demonstrated any concerted action to engage with their respective governments on the basis of this Treaty provision.[14] It is therefore inferred, based on the available information and documentation, that the EAC Treaty provision that calls for the repeal of discriminatory laws has not had any observable national impact in its own right, on Partner States' national legal frameworks. However, this should not be seen as evidence of non-commitment by the EAC organs or the Partner States to addressing gender parity. On the contrary, as will be seen in Chapter 5 of this thesis, and has already

[11]RS/ Inconst/ Pen.0001/08/CS

[12]Decree Law No 21/77 of 18/08/1977

[13]See para 26 of the judgment.

[14]See Kenya National Commission on Human Rights Annual Reports for the years 2007 to 2015. Available online at< http://www.knchr.org/Publications/AnnualReports.aspx> (accessed on 28 November 2016), Commission on Human Rights and Good Governance (CHRAGG) Strategic Plan for 2011-2015 available online at < http://chragg.go.tz/index.php/publications/strategic-plan> (accessed on 28 November 2016), Uganda Human Rights Commission Annual Reports from 2010 to 2015 available online at < http://www.uhrc.ug/reports> (accessed on 28 November 2016), Rwanda National Commission for Human Rights Annual Reports for the years 2010-2015 available online at < http://www.cndp.org.rw/index.php?id=269> (accessed on 28 November 2016). No reports were available for the Burundi's Independent National Commission for Human Rights.

mentioned, there are mechanisms in place at the national levels designed to promote gender equality and equity.[15] The main inference from the findings on the national impact of article 121(b) is that there needs to be enhanced linkages between the mechanisms taken at the national, regional and international levels as well as those taken within the EAC framework.

2.1.2 Influence on National Policies

The EAC Treaty does not impose a direct obligation on Partner States to adopt a policy framework on EAC integration. Nonetheless, the Republics of Kenya, Rwanda and Uganda have all adopted national regional integration policy frameworks to guide their respective national interests within the overall EAC integration process.[16] Inclusive in these policy documents are references to the promotion and protection of human rights. Thus for instance, the Ugandan National Policy on East African Community Integration (NPEACI) was developed 'to respond to the need to have a detailed articulation of the country's EAC integration policy in a single document…'[17] It contains specific objectives on human rights which are to ensure the enjoyment of human rights and fundamental freedoms by Ugandan citizens and those of Partner States in Uganda. Specific strategies to be employed in achieving this objective include strengthening national measures to guarantee human rights, enhancing public participation in governance, promotion of gender equality and strengthening political pluralism.[18] Furthermore, human rights commitments are also found in its governance objectives, which include strengthening respect for human rights, access to justice, equal opportunities and gender equality.[19]

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[15]See 'Situation Analysis of the EAC Partner States on Implementation of Gender Equality Commitments' Study commissioned by EASSI January 2016. Available at:<http://www.eassi.org/eassi/files/mydocs/Situation%20Analysis%20-%20Gender%20Equality%20Commitments-1.pdf > (accessed on 10 May 2017).

[16]Burundi and Tanzania are yet to develop their respective national regional integration strategies.

[17]See National Policy on East African Community Integration (NPEACI). Adopted in March 2015. Available online at <http://www.meaca.go.ug/index.php/publications/send/3-policies/6-the-national-policy-on-east-african-community-integration-march-2015.html> (accessed on 3 August 2016).

[18]As above, 234.

[19]As above, preface and executive summary on xxvii.

On its part, Kenya adopted its Regional Integration Policy in April 2015 whose overall objective is 'to enhance Kenya's ability to maximize the utilization of the socio-economic and political opportunities presented by the RECs, and to further integrate into the global economy.'[20] Whereas it is not designed specifically for the EAC, it uses the EAC integration process as a model for all its regional commitments under other frameworks such as COMESA and IGAD. Human rights guarantees in the Kenyan policy are contained in its guiding principles that reiterate the founding principles of EAC and COMESA. These include '…peaceful co-existence; good governance; inter-dependence and good neighbourliness; …commitments to the principles of liberty, fundamental freedoms and rule of law; recognition, promotion and protection of fundamental human rights…'[21] Additional references are found under the thematic area on Peace, Security and Sustainability of livelihoods where the Partner State undertakes to among others 'enforce regional protocols that promote democracy and good governance with regard to rule of law, human rights and elimination of corruption.'

Rwanda's National Policy and Strategy on EAC Integration seeks to ' make the management of the east African Community (EAC) integration process more effective and efficient and to ensure that the EAC integration contributes to Rwanda's aim of becoming a middle-income country by 2020.'[22] It makes references to human rights under the governance thematic cluster in which the government undertakes to pursue high standards of good governance and promote democracy, human rights and anticorruption.

Whereas Tanzania and Burundi have not yet set in place their respective national regional integration policies, the development of regional integration policies by the other Partner

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[20]See Regional Integration Policy for Kenya, available at <http://www.meac.go.ke/index.php/downloads1/finish/4-policy-documents/1288-regional-intergration-policy-rev-15-04/0> (accessed on 4 August 2016).

[21](As above) Guiding Principles 8.

[22]It also seeks to enable Rwanda react adequately to EAC policy initiatives, decisions and other actions, as well as position Rwanda to be pro-active on critical issues, including remedial and mitigating action in order to safeguard its interests. See Preface to Rwanda's National Policy and Strategy on EAC Integration. Adopted in February 2012. Available online on <http://www.mineac.gov.rw/fileadmin/templates/Documents/NATIONAL_POLICY/The_National_Policy_and_Strategy_on_EAC_Integration.pdf> (accessed on 4 August 2016).

States in which they make explicit reference to the protection of human rights as one of the key integration outcomes provides evidence of their commitment to pursue integration through a human rights perspective as stipulated under articles 6(d) and 7(2) of the EAC Treaty. Moreover, it leads to the conclusion that the human rights principles outlined in the EAC Treaty have influenced Partner States to reflect the same standards in their national policy documents on regional integration.

2.2 Influence on National Level Actors

In addition to precipitating law and policy change at the national level, the EAC Treaty has also exerted considerable influence on both state and non-state actors within the Partner States' national frameworks. These include national judiciaries, litigants as well as civil society organisations.

2.2.1 Use of the EAC Treaty by National Courts

The EAC Treaty has been cited alongside national law in a number of cases within national jurisdictions, the import of which is that it is considered as a source of substantive law by both litigants and national courts. Uganda has blazed the trail in this regard with multiple cases, especially in election petitions, in which the EAC Treaty is cited as a binding source of law. For instance, the Ugandan High Court in *Jacob Oulanyah v Attorney General*[23] relied on article 50 of the EAC Treaty alongside the provisions of the Constitution of Uganda when it made a finding that the 2006 electoral rules of the National Assembly of Uganda for the election of members of the EALA were inconsistent with the Constitution of Uganda because they locked out independent candidates from being elected to the EALA.[24] In this case, the Treaty provisions were employed by the national court to safeguard the right to representation and political participation.

[23] *Jacob Oulanyah v Attorney General,* Constitutional Petition No 28 of 2006.

[24] An important element of this case is that it was the first time that a municipal court made reference to a decision by the EACJ, the case of *Prof. Peter Anyang' Nyongo and 10 others v The Attorney General of Kenya and 2 others.* EACJ Reference No. 1 of 2006 and EACJ Appeal No. 1 of 2009 (Anyang' *Nyong'o* case).

In *Kamurali Jeremiah Birungi and 2 Others v Attorney General of Uganda and the Secretary General of the EAC,*[25] The petitioners alleged that the election by the Ugandan Parliament, of members to the EALA, was illegal and in contravention of articles 1 and 50 of the EAC Treaty and national law for the reason that there were no special groups representatives in the final election list. In addition, they claimed that unlike independent candidates, political party candidates were not vetted by Parliament, an act that was discriminatory and contrary to article 21 of the Constitution and the rules governing the elections. Further still, they claimed that the elected members were not gazetted as required by the law. Whereas the matter was defeated by a preliminary objection, as it was time barred, the High Court made a number of observations, which in effect reinforced the stature of the EAC Treaty and EAC law in general within the national legal framework. On the applicability of the EAC Treaty to this case, the Court observed:

> Uganda is part of the East African Community (EAC) and a signatory to the Treaty. The treaty was domesticated in Uganda through the enactment of the East African Community Act 13 of 2002. Uganda is therefore bound by the provisions of the Treaty …

It is noted that in this case the petitioners relied on the EAC Treaty as one of the primary sources of law alongside the Constitution of Uganda and Uganda's Election legislation.

Furthermore, in *Akidi Margaret v Adong Lilly and the Electoral Commission*,[26] the Ugandan High Court observed that it was incumbent upon Uganda as a Partner State to see that the provisions of the Treaty are implemented just like national, law since the Treaty had been duly ratified and domesticated. [27]

And in the Kenyan case of *Saida Rosemary and Another v The Commissioner of Police and 2 others,*[28] the applicants invoked the provisions of articles 6(d) and 7(2) in a *habeas corpus*

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[25]*Kamurali Jeremiah Birungi and 2 Others v Attorney General of Uganda and the Secretary General of the EAC.* National Assembly Election Petition No. 2 of 2012 (unreported).

[26]*Akidi Margaret v Adong Lilly and the Electoral Commission*, Election Petition No. 0004 of 2011 (unreported).

[27]See paras 26-28 of the decision.

[28]*Saida Rosemary (on behalf of Christopher Magondu a.k.a Idris Magondu) and Hassan Elijuma Agade (on behalf of Hussein Hassan Agade Versus, the Commandant Anti-Terrorism Police Unit and the Attorney General*

application against the Kenyan government for alleged rendition of terrorism suspects to Uganda in violation of the extradition requirements. The government on the other hand made reference to article 124 of the Treaty citing necessary cooperation in cross border crime. Given that the issues raised required a comprehensive interpretation of the EAC Treaty, the High Court then relied on article 34 of the Treaty and made a preliminary reference to the EACJ to determine the import of these two conflicting articles in the circumstances.

Also, in *Centre for Rights Education and Awareness & 2 Others v The Speaker of the National Assembly & 2 Others*, the Kenyan National Gender and Equality Commission (NGEC) relied on article 121(e) of the EAC Treaty in its *amicus curiae* brief to the High Court in a case urging the Court to compel the National Assembly to pass the relevant enabling legislation to give effect to article 27(6) of the Constitution of Kenya which provides for enhanced gender parity in the National Assembly and Senate.[29]

Whereas there has not been robust litigation in the other EAC Partner States on the EAC Treaty, the experiences of Kenya and Uganda provide a glimpse on how the EAC Treaty has influenced the legal landscape within their respective national legal frameworks, and provides a basis for concluding that the domestic courts in the other Partner States would most likely reach similar findings when confronted with issues emanating from the EAC Treaty in national courts.

Reliance on the EAC Treaty provisions to resolve legal controversies within national jurisdictions thus showcases the national impact and influence of the Treaty not only on national judiciaries, but also on national level litigants including the representatives of the executive arms of government in litigation before national courts. It further highlights the potential that exists in employing EAC law to help in the resolution of legal disputes at national level. It is anticipated that the trend set by Uganda and Kenya in this regard would be replicated in all the other Partner States to not only enhance the use of the Treaty as a

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of Kenya High Court of Kenya in High Court Miscellaneous Criminal Applications Nos. 418 & 419 of 2010 to the EACJ vide *Case Stated No. 1 of 2011.*

[29]High Court Constitutional Petition No. 371 of 2016. The author was the counsel retained by the NGEC to pursue the *amicus curiae* brief on its behalf.

source of law within national jurisdictions, but also to develop a sub-regional jurisprudence on all facets of Community law.

2.2.2 Citizen Engagement with EAC Organs and Institutions

The creation of EAC organs and institutions under the EAC Treaty has availed an opportunity for the citizens and residents of EAC Partner States to engage with them on matters relevant to integration, including the promotion and protection of human rights. This engagement with Community organs has also shaped the respective national conversations on human rights within the Partner States. A notable example is the creation of the EACJ as the Community's judicial arm. Its establishment has opened up another layer for EAC residents to ventilate their claims on matters of good governance and human rights at the sub-regional level. The availability of another layer of accountability, beyond the national jurisdictions, has spurred citizens and residents of EAC Partner States to seek solutions beyond their national borders. A remarkable example lies in the cases that were filed in the wake of the alleged renditions of individuals from Kenya and Tanzania to Uganda on suspicion of having participated in perpetrating acts of terrorism in Uganda in 2010. Two Kenyan citizens, Christopher Idris Magondu and Hussein Hassan Agade, were allegedly arrested from their homes in Nairobi, Kenya, on the night of 23 July 2010, and arraigned in Court in Kampala Uganda to stand trial for the offences of murder, attempted murder and terrorism. This was done without a formal extradition process. Their next of kin in Kenya filed applications before the High Court of Kenya at Nairobi for the writs of *habeas corpus* seeking their release from custody or their production before the Court.[30] The two Kenyans, together with other suspects charged for the same offence then filed suit at the EACJ where they maintained that their arrest, transfer to and detention in Uganda infringed the EAC Treaty and that their impending trial in Uganda was in violation of their fundamental rights, both under the Kenyan and Ugandan Constitutions and under International law.[31] They further filed a constitutional Petition before the Ugandan High Court claiming that their

[30] (n 28 above).

[31] *Omar Awadh & 6 others v The Attorney General of the Republic of Uganda*. EACJ Reference No. 4 of 2011,First Instance Division. The Application was struck out for having been filed outside the time limit prescribed under article 30(2) of the EAC Treaty.

arrest and arraignment before the Ugandan courts was unlawful and a violation of the Constitution of Uganda. The filing of the reference before the EACJ in addition to the cases that had already been instituted at the domestic level demonstrates that the litigants were aware of the existence of a possibility of relief at the EACJ. In this way, the existence of the EACJ, established by and under the EAC Treaty, provided an avenue for non-state actor engagement in an attempt to seek redress beyond their national jurisdictions in order to safeguard their right to a fair trial. The same can be said of all the other human rights related cases that have been filed at the EACJ by diverse litigants drawn from the EAC Partner States.

Another EAC Organ that has been made available for engagement with both state and non-state actors is the EALA. Rule 85 of the its Rules of Procedure empowers it to receive and consider petitions from any citizen of the Partner States, and any natural or legal person residing or having its registered office in a Partner State, on any matter within the Community's fields of activity and which affects them directly. This mechanism has been employed by non-state actors within the EAC Partner States to influence the human rights discourse within their national frameworks. A notable instance was with regard to the petition to the EALA filed by the Pan African Lawyers Union and other civil society organisations urging it to conduct an inquiry into the human rights situation in Burundi following the political crisis that unfolded in Burundi in early 2015. The presentation of this petition contributed towards spurring action on the part of the Council and the Summit to engage with the government of Burundi to address the humanitarian and human rights crisis.[32] Other Petitions that have been filed with the EALA include one on the protection of persons with albinism within the EAC as well as a Petition calling for the EAC to conclusively address the situation in northern Uganda to end the LRA conflict.[33] In this instance, the creation of the EALA through the EAC Treaty has availed an opportunity for national level

[32]See Petition by EAC Civil Society Organisations to EALA. Available at < http://www.eala.org/uploads/Petition_by_Civil_Society_to_EALA.pdf > (accessed on 10 May 2016). Refer to Chapter 5 of this thesis (4.2.2) for a detailed discussion on the outcomes of the Petition.

[33]A review of the available information at the EALA reveals that eleven petitions have been filed with the EALA since 2010, with three being related to the promotion and protection of human rights See information from the EALA website available online at < http://www.eala.org/documents/category/petitions> (accessed on 10 October 2016).

actors to influence the human rights discourse within their national jurisdictions by employing opportunities available at the sub-regional level.

From the foregoing analysis, one is able to draw clear lines between the EAC Treaty and certain changes in national law, policy as well as the practice of state and non-state actors in the promotion and protection of human rights. Thus, for instance, some Partner States have adopted national policies to respond to the EAC integration framework with human rights nuances; national courts and litigants before them have relied on the EAC Treaty to resolve legal controversies, and citizens and residents of EAC Partner States have taken advantage of the relevant EAC organs such as the EACJ and the EALA, to ventilate their human rights concerns. The overall effect is an increased awareness, at the national level, of the existence of another layer of human rights protection at the EAC level. Whereas these changes may not be monumental, it is submitted that their collective incremental effect over time, provides demonstrable evidence of national impact of the EAC Treaty on national human rights frameworks within the Partner States.

3. Protocols Adopted under the EAC Treaty Framework- (EAC Common Market Protocol)

The term 'protocol' under international law denotes an international agreement that amends or supplements an existing treaty or international agreement.[34] Article 1 of the EAC Treaty defines a protocol as 'any agreement that supplements, amends or qualifies the Treaty'. As earlier observed, the EAC Treaty not only requires Partner States to conclude protocols in key thematic areas as a matter of legal obligation, but also empowers them to conclude such protocols as they may consider necessary for the deepening of the integration process.[35] To date, Partner States have concluded protocols in diverse thematic

[34]J Dugard, *International Law: A South African Perspective* (2005).

[35]Specifically, the EAC Treaty outlines a number of protocols to be concluded as follows: Protocol on decision making (Article 4), Protocol on extended jurisdiction of the EACJ (Article 27(2)), Protocol on a Customs Union (Article 75), Protocol on a Common Market (Article 76), Protocol on Standardisation, Quality Assurance, Metrology and Testing (Article 81), Protocol on Free Movement of Persons Labour Services and Right of Establishment and Residence (Article 104), Protocol on Combating Illicit Drug Trafficking (Article 124)and such other Protocols as may be necessary in each area of cooperation(Article 151). Full details on all the EAC protocols to date are available online at <http://www.eac.int/index.php?option=com_docman&Itemid=226> (accessed on 6 May 2014). Each protocol once negotiated, concluded and signed by the Partner States as contracting parties, enters into force upon the ratification and deposit of instruments of ratification with the Secretary General. See generally articles 151, 152 and 153 of the EAC Treaty.

areas such as the creation and regulation of the EAC Customs Union, EAC Common Market and the EAC Monetary Union, as well as standardisation, quality assurance, metrology and testing, and on decision making by the Summit and the Council.[36] For the purposes of this study, discussion will be limited to the provisions of the Protocol on the Establishment of the East African Common Market (the Common Market Protocol).[37] The choice of the Common Market Protocol is based on its centrality as one of the main integration instruments, together with the human rights commitments creatively infused within its provisions. It therefore emerges as the most suited among the Protocols adopted within the EAC legal framework, to be subjected to a human rights impact analysis. The discussion in this section will accordingly identify the main human rights nuances within the Protocol and analyse the extent to which these have permeated into the Partner States' domestic legal architecture, taking into account the indicators identified at the beginning of the chapter.

Concluded on 20 November 2009, the Common Market Protocol marked a critical step in meeting the overall objective of the EAC: to deepen and widen cooperation among Partner States.[38] The Protocol effectively moved the EAC a notch higher in terms of regional integration-from a Customs Union under the Customs Union Protocol, into a Common Market. Just like its parent instrument-the EAC Treaty, the Common Market Protocol is not a human rights treaty, and may, at first blush, seem to be an instrument designed purely for the achievement of the EAC's economic and developmental goals.[39]However, closer examination reveals the inclusion of human rights commitments in its provisions, which then make it come alive as an integral instrument for the promotion and protection of human rights within the Community.

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[36]See Protocols concluded by the East African Community. Available online at <http://www.eac.int/index.php?option=com_docman&Itemid=226> (accessed on 18 June 2014). It is crucial at this juncture to point out that these protocols, concluded within the scope of the EAC Treaty should take legal precedence within the Partner States' domestic legal framework as articulated in article 8(4) as discussed in Chapter 3 of this study.

[37]Protocol on the Establishment of the East African Community Common Market. Adopted on 20 November 2009, and entered into force on 1 July 2010.

[38]As above.

[39]The EACJ has in its case law clarified that the EAC Treaty is not a human rights treaty in the classical sense. It however is a constitutive treaty of the EAC, which includes human rights commitments. See for instance *Mohochi* case (n 3 above).

The Protocol's human rights foundation is primarily based on article 3 in which the EAC Partner States reiterate their commitment to the fundamental and operational principles of the Community as enshrined in articles 6 and 7 of the EAC Treaty. These principles include adherence to good governance as well as the promotion and protection of human and peoples' rights as provided for under the African Charter on Human and Peoples' Rights.[40]As such, any laws, policies or conduct by any of the Partner States that are based on the Protocol must be formulated and interpreted through the prism of article 3, with human rights as an integral consideration.[41] It would appear from the nature of the Common Market Protocol, being an instrument for the deepening of economic integration, that the EAC Partner States introduced these provisions on human rights guarantees to act as a shield against possible violations of human rights, especially their citizens, in the context of free movement across national frontiers. Additional human rights references may be deciphered from provisions within the Protocol, which give effect to the free movement of persons across national frontiers, the guarantee of the right of establishment, the right to work, the protection of refugees and non-discrimination on the basis of nationality. When these are viewed in the context of article 3 of the Protocol, it is submitted that there is a strong inference of the guarantee of a broad spectrum of rights including the right to property, freedom of movement, the right to work, the right to social security and the right to family, all of which are provided for under international and regional human rights instruments, and in particular, the ACHPR, which is a reference point for the Community in terms of normative human rights standards.[42] Being an integral part of the EAC Treaty, it follows that Protocol forms part of the national law of the Partner States upon ratification or

[40]It is worth noting that the EAC Treaty clearly states in article 151 that all Protocols concluded within the EAC framework are part of, and form an integral part of the Treaty. Accordingly, all the human rights commitments made by the EAC Partner States in the EAC Treaty apply to any measures undertaken by the Partner States in implementing the Common Market. Key among these human rights undertakings are the provisions of article 6 and 7 of the Treaty which set out the fundamental and operational principles of the Community.

[41]It has been variously argued by different scholars that this is an incorporation of the African Charter into the EAC. However, the various EAC organs are yet to provide an authoritative interpretation as to whether this provision gives the African Charter the force of law within the Community.

[42]See for instance the protections accorded by the African Charter on Human and Peoples' Rights to the right to property (article 14); work (article 15); freedom of movement (article 12) and the right to development (article 22) all of which are intertwined within the objects of the Common Market Protocol.

accession.[43] For the purposes of showcasing the Protocol's influence on the national human rights discourse within the EAC Partner States, this thesis, has selected the Protocol's provisions on non-discrimination, freedom of movement and the right of residence, the protection of refugees, protection of workers' rights and the protection of cross border investments. These are discussed below.

3.1 Non-Discrimination, Freedom of Movement and the Right of Residence

The EAC Partner States in article 3(2) undertake to observe the principle of non-discrimination of nationals of other Partner States on grounds of nationality. Nonetheless, discrimination on other grounds may also be read-into this article, especially considering the human rights commitments made in the Protocol and in the EAC Treaty.

Freedom of movement of citizens of EAC Partner States is guaranteed under article 7 of the Protocol and the East African Community Common Market (Free Movement of Persons) Regulations, which were passed to give effect to this article.[44] This freedom to move across national frontiers entails the provision of adequate protection for a national of a Partner State when within the territory of a corresponding Partner State and the rights of entry, stay and exit without undue restriction and without discrimination on the basis of nationality. However, limitations on these rights may be imposed only on the basis of public policy, public security and public health, and any such limitations are to be communicated in advance to the reciprocal Partner State.[45]

Closely related to the freedom of movement is the right of residence enshrined in article 14 of the Protocol. This right also extends to the spouse and dependent children of an individual who is duly admitted into the territory of a Partner State.[46] This then comes along with the need to protect the family as 'the natural unit and basis of society' under article 18

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[43]See 151(4) of the EAC Treaty on the status of Protocols and Annexes to the Treaty.

[44]Also referred to as Annex 1 to the Protocol.

[45]See generally the EAC Common Market (Free Movement of Persons) Regulations, which provide a detailed framework for the facilitation of the right to movement and residence.

[46]However, the right to residence does not extend to Permanent Residence, which is still to be governed by the national laws of the Partner States concerned.

of the ACHPR and the protection of the whole gamut of the rights of the child as outlined under both domestic and international law.

3.1.1 Influence on National Laws and Policies

In compliance with their obligations under the Protocol, the EAC Partner States have taken both legislative and administrative measures aimed at facilitating free movement of citizens across national frontiers and the guarantee of residence within their respective territories.

In this regard, the Republic of Burundi, has enacted legislation and taken administrative measures allowing it to grant automatic admission and residence permits for up to six months' stay for EAC citizens.[47]

On its part, Kenya enacted the Citizenship and Immigration Act 2011, the Citizenship and Immigration Regulations 2012 as well as the Foreign Nationals Management Service Act 2011, all of which have provisions according citizens of EAC Partner States a privileged status compared to those from other states. Thus for instance, rule 30 of the Citizenship and Immigration Regulations enacted pursuant to the Citizenship and Immigration Act exempts students from EAC Partner States from paying for student permits.[48] Administratively, immigration officials are required to automatically issue six months visitors pass to citizens of EAC Partner States.

Rwanda has also enacted a new immigration legislation, which incorporates the free movement of persons in compliance with the provisions of the Protocol.[49] Moreover, it has by Ministerial Order, made a provision that citizens from Partner States may enter and leave Rwanda without restriction for a period of six months, renewable upon application.[50] The Republics of Tanzania and Uganda have embarked on a review of their immigration

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[47]See Report of the 21st Meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning held on 27-31 October 2014 in Kigali. Annex IV, p 5. See also Report of the 23rd Meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning. Arusha, Tanzania held from 8-10 February 2016: REF: EAC/SCMEACP/23/2016.

[48]Act No. 31 of 2011.

[49]Rwanda Immigration Law No. 04/2011 of 21 March 2011.

[50]Ministerial Order No 02/01 of 13 May 2011.

legislation to ensure compliance with the Protocol.[51] They have in the meantime put in place administrative measures that provide for free entry and six-month automatic residence permits for citizens from EAC Partner States. In addition to the foregoing, the EAC Partner States have developed an EAC international passport, launched in March 2016 envisaged to eventually replace the respective national passports.[52]The implication of this passport would be that citizens of EAC Partner States would be able to move seamlessly across the sub-region with minimal disruptions.

The success story of the enhanced ease of movement across national frontiers, coupled up with the development of a sub-regional passport is one of the more tangible integration milestones, which the residents and citizens of the EAC Partner States are able to observe and experience. This study observes that there has been considerable political goodwill by the Heads of States and their respective governments towards the achievement of this outcome. This is demonstrable from records of Council and Summit meetings in which the development of a sub-regional passport was accorded priority status and Partner States were required to take both legislative and administrative steps towards this process.[53] Being an REC, the EAC's primary instinct is to gravitate towards mechanisms that would hasten the achievement of its economic objectives. It therefore follows that measures touching on the economic side of integration are given more priority than those touching on social protection or even human rights. A review of meeting records of the Council as well as the Summit which midwifed the process of enhancing free movement of persons as well as other factors of production reveals that the decision making processes did not have human rights outcomes as a primary consideration. The decisions were not taken as human rights decisions *per se*. Nonetheless, the outcome of these deliberations and decisions is the

[51]The Tanzanian Immigration Act of 1995 is under review. It has also amended the Immigration Regulations of 1997 to reflect the provisions of EAC CMP related to free movement of persons, free movement of workers and rights of establishment and residence; Uganda is also reviewing its Citizenship and Immigration Act accordingly. See Report of the 22nd meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning, 22-26 June 2015, EAC Headquarters Arusha, Tanzania. REF: EAC/SCMEACP/22/2015.

[52]See J Karuhanga 'East Africa: New EAC e-Passport to be used from January 2017' Available online on <http://allafrica.com/stories/201603030157.html> (accessed on 9 May 2016). See also Report of the 23rd Meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning, (n 47 above).

[53]See for instance Report of the 22nd meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning, (n 51 above).

promotion of the freedom of movement, the rights of residence as well as non-discrimination.

3.1.2 Influence on National Actors

In addition to the law and policy changes attributed to the Protocol, non-state actors within the Partner States have taken advantage of the Protocol's provisions to seek to vindicate their rights in instances of violation. Two cases filed at the EACJ are instructive. In *Mbugua Mureithi v The Attorney General of the Republic of Uganda and Another, t*he applicant, a Kenyan citizen, alleged that he was arrested upon his arrival at Kampala on 15 September, 2010, detained incommunicado and interrogated by Ugandan government agents and deported to Kenya on 18 September, 2010 without having been given reasons for his arrest, detention, interrogation and deportation.[54] He contended that these acts were a violation of among others, articles 7(2) of the Common Market Protocol in which Partner States undertake to ensure free entry into and exit from their territories by citizens of other Partner States without restrictions.[55] Although the reference was dismissed for being filed out of time and did not proceed to be heard on its merits, the fact that a litigant in a Partner State made use of the Protocol in founding a reference before the EACJ demonstrates the influence of the Protocol on national level actors, who have appreciated its legal value in reinforcing and promoting human rights claims before the EACJ.

Similarly, in *Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda*[56] the petitioner relied on articles 7 and 54 of the Protocol to convince the court to make a finding in his favour, that his denial of entry into Uganda without being accorded due process of law was illegal, unlawful and a breach of Uganda's obligations under article 7 of the Common

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[54] *Mbugua Mureithi v The Attorney General of the Republic of Uganda and the Attorney General of the Republic of Kenya* EACJ Reference No 11 of 2011, First Instance Division.

[55] The reference was also based on articles 6(d), 7(2) and 104(1) of the Treaty as well as articles 2, 5, 6, 7, 8, 9, 10, 11 and 12 of the African Charter on Human and Peoples' Rights and Principles 16, 17, 18 and 21 of the UN Basic Principles on the Role of Lawyers.

[56] *Mohochi* case (n 3 above).

Market Protocol.[57] Thus, the filing of these cases showcases the impact of the Protocol in spurring national level actors to approach the EACJ for a vindication of their rights.

A notable observation however is that whereas these cases demonstrate the awareness and influence of the Treaty and the Protocol on national level actors, it is apparent that this is limited to individuals and civil society organisations that are well able to afford legal counsel at the EACJ. Thus, the majority of the citizens and residents of the EAC Partner States are left out of the conversation on the utility of the Protocol in the promotion and protection of their rights. Furthermore, there has not been much litigation on the EAC Common Market Protocol at the EACJ. A review of the EACJ caseload reveals that it has only heard and determined 4 cases touching on the Protocol, with the rest mainly focusing on the EAC Treaty.[58]

3.2 Protection of Refugees

The United Nations High Commissioner for Refugees (UNHCR) puts the number of refugees in the East African countries at over 1.5 Million, with about half being citizens of East African states living as refugees in the territory of another EAC Partner State.[59] In light of this, the need to ensure their protection cannot be gainsaid. Securing legal protection of refugees is a fundamental human rights commitment made by the EAC Partner States in article 7(8) of the Common Market Protocol, which incorporates the provisions of international refugee law by providing that movement of refugees within the community shall be governed by relevant international instruments.[60] As such, the provisions of the United Nations Convention Relating to the Status of Refugees (UN Refugee Convention) and the Protocol

[57]See para 83 and 84 of the judgment.

[58]Analysis is derived from cases posted on the EACJ website as at 30 November 2016. See < http://eacj.org/?page_id=2414> (accessed on 30 November 2016).

[59]See official UNHCR statistics available at < http://data.unhcr.org/horn-of-africa/regional.php>; <http://data.unhcr.org/burundi/regional.php> as well as <http://data.unhcr.org/SouthSudan/regional.php> all (accessed on 20 October 2016).

[60]This is a positive move given the previous experiences of the EAC Partner States with the refugee crises of the mid 1990s The Great Lakes refugee crisis was precipitated principally by the 1994 genocide which led to mass exodus of over two million Rwandese refugees to neighbouring countries. This was then followed by other refugee outflows from DRC and Burundi. For current information on the Great Lakes refugee situation see < http://www.unhcr.org/pages/49e45c576.html> (accessed on 13 April 2015).

thereto[61] and the OAU Convention on the Specific Aspects of Refugee Problems in Africa [62](OAU Refugee Convention), come into play to safeguard refugees within the Community from unnecessary restrictions and most notably the protection against *refoulement*.[63]

3.2.1 Influence on National Laws, Policies and Actors

A review of Partner States' respective legal frameworks reveals that this commitment at the sub-regional level has failed to gain much traction in terms of spurring novel changes in domestic law, policy and practice. This may be attributable in part to the fact that all the EAC Partner States are already party to the UN and the OAU Refugee Conventions respectively, and have implemented these conventions by enacting national laws that govern the status of refugees within their respective territories.[64] With these national laws giving effect to the regional and international standards in place, and with the Common Market Protocol not introducing novel standards in refugee protection, it appears that the Protocol is limited to reinforcing the already existing legal provisions. A review of Partner States national legislation and policies on refugee protection does not disclose any influence or deference to the Protocol.[65] Nonetheless, at the EAC level, the EAC Immigration Chiefs are developing a regional Refugee Management Policy and Action Plan to harmonise their respective national policies with respect to the challenges posed by the refugee situation in the region.[66] A crucial factor to consider in this regard will be on the status to be accorded

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[61]United Nations Convention Relating to the Status of Refugees. United Nations General Assembly Resolution 429 (V) of 14 December 1950.

[62]Adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session. It entered into force 20 June 1974.

[63]The principle of *non-refoulement* is enshrined in article 33 of the UN Convention on the Status of Refugees as well as article 11 of the OAU Convention and prohibits the forcible return of refugees to their countries of nationality if their lives and safety would be prejudiced by such forcible return.

[64]See for instance Loi No. 1/32 of 13 November 2008 on Asylum and Protection of Refugees of Burundi, the Refugees Act of 2006, Kenya; Law No 13 ter of 21 May 2014 on Refugee Protection, Rwanda, Refugee Act of 1998, Tanzania as well as Refugees Act of 2006, Uganda.

[65]See also Interview with UNHCR Officers at the regional hub for Eastern Africa, Nairobi, 12 September 2016, as well as interview with officers from the Department of Refugee Affairs, Nairobi, Kenya, 15 September 2016. (Notes on file with author).

[66]See interview with Generose Minani EAC Directorate of Social Sectors on 8 March 2016. (Notes on file with author). See also the EAC website available at < http://www.eac.int/sectors/immigration-and-labour> (accessed on 10 May 2016).

to citizens of EAC Partner States who seek refugee status in another Partner State-will they be accorded preferential treatment by virtue of their nationality *vis-à-vis* refugees from outside the EAC? It is anticipated that this policy framework will serve to enable Partner States develop a framework that takes into account these and other peculiarities of protecting refugees within the EAC, taking into consideration the envisaged merger into a political federation. From the foregoing, this research concludes that the Common Market Protocol has had minimal influence on national laws and policies the protection of refugees.[67]

3.3 Protection of Workers' Rights

One of the other key aims of the Common Market is the facilitation of free movement of labour across the Community. This entails the need to ensure that the rights of workers who move across national frontiers are safeguarded. In this regard, the protection of workers' rights to fair labour practices, social security, residence and family are essential. Article 10 of the Protocol guarantees free movement of workers without discrimination on the basis of their nationality. Furthermore, they are guaranteed the right to be accompanied by their spouses and children. Under article 12, Partner States undertake to review and harmonize their social security laws and policies to provide for social security for self-employed persons who are citizens of other Partner States. These provisions thus correspond to article 15 of the ACHPR, which safeguards and protects the rights of all persons to work under equitable and satisfactory conditions and to enjoy equal pay for equal work.[68]

3.3.1 Influence on National Laws, Policies and Actors

As observed in the preceding section, EAC Partner States have enacted legal and administrative provisions according citizens of corresponding Partner States the right of

[67]It is submitted that one of the factors contributing to the slow response on the protection of refugees is the strong presence of the United Nations High Commissioner for Refugees (UNHCR) in most of the Partner States and its robust role in providing international protection and assistance to refugees within the sub-region. This has in a sense encouraged national governments in the EAC Partner States to give less national priority to matters of refugee protection as opposed to other integration due to the perception that UNHCR will always be there to take care of refugees.

[68]Article 15 of the ACHPR states: 'Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.'

movement and residence within the region within certain limits set by law. However, to enhance rights of workers across the region, a number of additional steps have been outlined within the protocol and which are being complied with progressively by the EAC Partner States.

As at the writing of this thesis, Burundi had initiated a review of its Labour Code, and in particular, Ministerial Ordinance No. 660/08/92, which requires all foreigners working in Burundi to pay 3 per cent of their annual revenue in Tax. The review is envisaged to include preferential tax regime for citizens and residents of EAC Partner States.[69] Uganda has conceded the existence of a number of laws with a discriminatory effect on Partner States' citizens in relation to employment, but which are currently under review to realign them with the Protocol. These include the Uganda Citizenship and Immigration Control Act, the Employment Act and the Uganda Citizenship and Immigration Control Regulations. [70]

Partner States continue to issue resident permits and dependant passes to citizens of corresponding Partner States. However, the harmonization of work permits, procedures, forms and fees is still pending. Thus, whereas Rwanda and Kenya have waived work permit fees for all Partner States, Uganda has waived work permit fees for Kenya and Rwanda on a reciprocal basis. Burundi through a Ministerial Ordinance waived Resident Permit fees for citizens of other EAC Partner States but still charges work permit fees.[71] Tanzania has retained work permit fees in its new legislation, the Non-Citizens (Employment Regulations) Act No 1 of 2015 which Introduced issuance of work permits classes, procedures and fees to non-citizens seeking employment in Tanzania and empowers the Minister responsible for

[69]Information released as at May 2016 is that Burundi still charges work Permit fees at a rate of 3% of the total annual earnings through the Ministry of Labour and that there were on-going consultations at national level to review the work permit fees. See Report of the 23rd Meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning (n 47 above).

[70]Report of the 21st meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning,(n 47 above); See also Report of the 23rd Meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning (n 47 above). There is a regular follow up of each aspect of integration by the Sectoral Council Responsible for EAC Affairs and Planning undertaken in each Council Session where updated on implementation are given.

[71]Ministerial Ordinance No 2L5/540/75()/12G3 of 2 October 2015.

Labour and Employment to give special considerations in regard to work permits application to the citizens of EAC Partner States.[72]

With reference to commitments on harmonization of social security laws as well as protection of social security for workers who may be employed in a Partner State that is not their country of nationality, the study determined that the EAC has yet to come up with a framework for the implementation of this requirement. As such, this right is not yet realised. This is partly attributable to weak social security systems within the Partner States themselves-as such, there is need to strengthen their national capacities before venturing towards a sub-regional social security framework.[73]

3.4 Protection of Cross Border Investments

Most regional economic communities, including the EAC, put a high premium on creating an ideal environment for cross border investments.[74] To this end, the Protocol is replete with provisions tailored at ensuring that the EAC is an ideal investment destination both for external investors and 'domestic' investors living within the EAC. One of the key provisions in this regard is article 29 of the Protocol, which guarantees protection of cross border investments within the EAC. It further provides that expropriation of any property may only be done for a public purpose, in a non-discriminatory manner and in full compliance with the law, with the guarantee of payment of reasonable and effective compensation. Moreover, article 13 of the Protocol discussed in the preceding sections, comes into play to guarantee the right of establishment for nationals and firms from EAC Partner States.

Whereas a plain reading of article 29 of the Protocol does not reveal the creation of human rights obligations, it is submitted that when read alongside article 3 of the Protocol, the

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[72]See Report of the 22nd meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning, (n 51 above); See also Report of the 23rd Meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning.(n 47 above).

[73]See interview with Generose Minani (n 66 above).

[74] For instance, the EAC's organisational mission is to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, enhanced *trade and investment* (emphasis added).

protection of cross border investments translates to the protection of the right to property secured under article 14 of the ACHPR.

3.4.1 Influence on National Laws, Policies and Actors

EAC Partner States have put in place national legislative and administrative measures to protect cross border investments. Whereas these measures are not solely attributable to the Common Market Protocol, its provisions have spurred Partner States to re-evaluate their national frameworks for the protection of cross border investments within the context of the provisions of article 29 of the Protocol.

In this regard, Burundi has for instance enacted Mining Law no 1/21 of 15 October 2013 as well as the Land Law 1/13 of 9 August 2011. The Mining Code replaces the old 1976 Code and introduces tax incentives for investors in the mining sector as well as protections from unlawful expropriation. It has also concluded bilateral agreements on cross border investments with other Partner States. Rwanda protects cross border investments under the provisions of its Company Act, Insolvency Law as well as the Rwanda Investment Code.[75] Thus for instance, Law No. 14/2010 of 07/05/2010 amending the Companies Act (Law No. 07/2009 of 27/04/2009) provides in article 12 that companies originating from EAC Partner States are considered on the same level as Rwandan companies by the Law. Therefore companies incorporated in other EAC Partner States, would enjoy similar benefits under Rwanda's national law, as those incorporated in Rwanda.[76]

Kenya's constitutional framework protects investments for both Kenyans and non-citizens. Article 40 protects the right to property and further restricts parliament from passing any legislation that would arbitrarily deny any person of their property of any description. Kenya is also reviewing its Investment Act to waive the minimum investment capital requirement to accommodate investors from the EAC Partner States, who are considered as foreign investors under the current legal framework and are thus required to demonstrate the

[75] See Rwanda Company Act-Law No 07/2009 and Investment Code No. 26/2005 of 17/ 12/2005.

[76] See the decision of the Supreme Court of Rwanda *in Ndigela v ATA* (RCOMA 0054/10/CS also cited as V.1-[2014] RLR) where it was held that ATA, a Tanzanian company, was exempted from furnishing security for costs in a suit filed against it in a Rwandan court, as it was not to be treated as a foreign company, based on article 12 of the Companies Act.

ability to invest a minimum of one hundred thousand United States Dollars in order to be granted an investor's licence.[77] This provision locks out or discourages a number of potential investors from the EAC Partner States who may not be able to raise such funds upfront, but who would nonetheless be interested in investing into the Kenyan economy. Tanzania's legal framework on investment protection consists of the Tanzania Investment Policy and the Investment Act as well as the Zanzibar Investment Promotion Authority Policy and Act respectively, all developed and enacted prior to the Protocol. A review of their provisions does not reveal any inconsistency with the general tenor of the Common Market Protocol provisions on the protection of cross border investment.[78] Uganda has set in place the Investment Code Act of 2011, which is a legislative framework for the ease of investments by both nationals and foreigners.[79] Within the EAC framework, the EAC Secretariat is currently working on a Community legislative and policy framework on investment protection that will augment Partner States' measures to secure the protection of cross border investments in the Community.[80]

An examination of the nature of legislation and administrative measures referred to by the Partner States above discloses that they are not couched in terms of the need to promote and protect rights. Moreover, the legislative measures are not directly attributable to the EAC Common Market Protocol. Indeed, some were passed prior to its negotiation and entry into force. Nonetheless, when read alongside the Protocol, they have the effect of protecting the right to property for the benefit of the various investors within the EAC and thus give effect to the protection of cross border investment.

With reference to the influence of article 29 of the Protocol on national level actors, the case of *Alcon International Limited v Standard Chartered Bank of Uganda and 2 others* is

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[77]See section 4 of the Investment Promotion Act Chapter 485 B, Laws of Kenya. See also Report of the 22nd Meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning (n 64 above).

[78]See Tanzania Investment Policy and Act of 1996 and 1997 respectively.

[79]Uganda Investment Code Act, Chapter 92 of the Laws of Uganda.

[80]See Report of the 22nd Meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning (n 51 above).

instructive.[81] The core of the applicant's claim was that the Republic of Uganda had failed to protect its cross-border investment contrary to the letter and spirit of the EAC Treaty and the Common Market Protocol in violation of the express provisions of articles 5, 27, 127(2) (d) and 151 of the EAC Treaty as read with articles 29 and 54(2) (b) of the Protocol. The claimant alleged that the Respondents failed to honour the obligation to pay a decretal sum owed to them in accordance with a Bank Guarantee. Although the case was dismissed by the first instance division for being time barred and for want of jurisdiction, it nonetheless demonstrated the influence of the Common Market Protocol on national actors in that they are willing to take advantage of its provisions to ventilate their claims before the EACJ.

In Rwanda, the Supreme Court in *Ndigela v ATA* held that ATA, a Tanzanian company, was exempted from furnishing security for costs in a suit filed against it in a Rwandan court, as it was not to be treated as a foreign company.[82]This was based on article 12 of the Companies Act, which provides that companies incorporated in EAC Partner States are accorded the same legal protections and standards as indigenous Rwandan companies. Whereas the decision was not based on a human rights consideration, it had the overall effect of enhancing access to justice for the Tanzanian company, and by extension, to its directors and employees.

In view of the discussion in this section, this thesis concludes that whereas the EAC Common Market Protocol is not a human rights instrument, its provisions have spurred legislative and policy reform at national level, that have had a positive effect on the promotion and protection of human rights within the Community. The examples outlined in the foregoing sections demonstrate that this reform in law and policy has enabled the citizens of EAC Partner States to enjoy enhanced freedom of movement across frontiers, the right of residence and establishment, the right to work as well as the protection of their right to property among others.

Admittedly, some provisions of the Protocol have gained traction and have been implemented considerably faster across the Partner States. Thus, for instance, provisions on

[81]EACJ Reference No. 6 of 2010.

[82]RCOMA 0054/10/CS also cited as V.1- [2014] RLR.

free movement, cross border investment and the protection of workers' rights have received more regional as well as national recognition and implementation as opposed to provisions on the protection of the rights of refugees. It may be concluded that this uneven traction is attributable to the EAC's DNA as a REC, meaning that it lays priority on areas that are essential for the achievement of the economic imperatives of integration.

This section has also revealed that in some instances, the Protocol does not introduce fresh normative standards, but only functions to reinforce existing national legislative and policy framework. A notable example in this regard is with reference to the Partner States' commitments on refugee protection, where the normative standards referred to by the Protocol had already been adopted by all Partner States. In this regard therefore, the Protocol's impact on national laws, policy as well as actors is negligible in view of other instruments that play a larger role in refugee protection such as the UN and the OAU (AU) Refugee Conventions.

With reference to the Protocol's influence on national level non-state actors, the picture that emerges is that a number of citizens and NGOs within the Partner States have relied on the Protocol to seek legal redress at the EACJ for violations of their rights under the EAC Treaty and the Protocol. However, the study did not encounter any decision by a national court predicated on the human rights nuances of the Common Market Protocol.

4. Acts of the Community

An examination of the EALA's legislative history reveals that it concentrated in particular, during its first decade of existence, on legislation aimed at institution building. [83] This period saw the enactment of among others, the East African Community Interpretation Act,[84] the East African Legislative Assembly Powers and Privileges Act and the Acts of the Community

[83]This refers to legislation aimed at creating specific institutions and making the necessary provisions as required by the Treaty and as necessary to entrench the integration process.

[84]Received assent on 9 October 2003 and with a commencement date of 31 January 2004, this is an Act that provides for the construction and interpretation of the enactments of the Community.

Act.[85] The rest of the legislation passed was largely in the form of the annual Appropriations Acts, which detailed the Community's budgets over the years.[86] Subsequently, a number of thematic laws were passed such as the EAC Standardisation, Quality Assurance, Metrology and Testing Act, the EAC Trade Negotiations Act, the EAC Competition Act and the EAC Customs Management Act.[87] Notably, these are legislation covering specific technical areas relevant to the economic imperatives of integration, which would not be amenable to a detailed human rights exposition.

The EALA in its second decade of existence broke new ground in April 2012, when it passed the East African Community HIV and AIDS Prevention and Management Bill, 2010,[88] and the East African Community Human and Peoples Rights Bill, 2011, thus laying a legislative foundation for the promotion and protection of human rights within the sub-region. Thereafter, the EALA passed the EAC Persons with Disabilities Bill in June 2016, which seeks to safeguard, promote and protect the rights of persons with disabilities within the Community.[89] The EAC Counter Trafficking in Persons Bill was passed on 18 October 2016 while the EAC Gender Equality and Development Bill was passed on 8 March 2017.[90] The EAC Prohibition of FGM Bill has also been introduced at the EALA and is undergoing various

[85]The Acts of the Community Act makes provision for the form and commencement of EAC Acts and for the procedure following the passing of Bills by the EALA. Received assent on 9 October 2003 and commenced on 31 January 2004.

[86]The only other substantive legislation enacted during this period was the EAC Competition Act, which is a technical competition legislation with little room for human rights analysis.

[87] Details of the EAC Acts available at <http://kenyalaw.org/kl/index.php?id=4206>(accessed on 9 May 2016). Also see summary of key legislation passed by the EALA available on the EALA website <http://www.eala.org/component/docman/cat_view/45-key-documents/43-acts-of-assembly.html> (accessed on 16 April 2015).

[88]One of the core objects of this Bill is to promote a rights based approach to dealing with all matters relating to HIV and AIDS.

[89]See 'EALA passes Bill on PWDs, wants dignified, humane treatment for all' EAC Press release available online at<http://www.eac.int/news-and-media/press-releases/20160601/eala-passes-bill-pwds-wants-dignified-humane-treatment-all > (accessed on 10 October 2016).

[90]See 'Assembly Enacts Anti-Trafficking in Persons Bill' EAC Press Release available at <http://www.eala.org/media/view/assembly-enacts-anti-trafficking-in-persons-bill> (accessed on 10 May 2017); See also 'EALA Passes Key Gender Bill on International Women's Day' EAC Press Release available at <http://www.eac.int/news-and-media/press-releases/20170308/eala-passes-key-gender-bill-international-womens-day> (accessed on 10 May 2017).

legislative processes as at the time of the writing of this thesis.[91] As things currently stand, none of the human rights related Bills passed by the EALA have received full assent by the EAC Heads of State and therefore cannot be referred to as Acts of the Community. Accordingly, they do not have the force of law. Thus, the provisions of article 8(4) on precedence and direct effect cannot be applied to them. They are for now relegated to the status of soft law. It is nonetheless anticipated that these Bills, which have the promotion and protection of human rights as a key outcome, will form a formidable basis for enhanced human rights protection within the Community upon gaining full force of law.[92]

With reference to the impact of Community legislation on national human rights law, policy and actors, this study concludes that there is currently no Community legislation that may be subjected to a human rights impact analysis as envisaged in this study, to determine whether it has influenced the human rights discourse within the Partner States' national frameworks. The two instruments, the East African Community HIV and AIDS Prevention and Management Bill and the East African Community Human and Peoples Rights Bill, which would have functioned as a catalogue of rights for the Community, and which would form ideal candidates for the purposes of this study, are still pending assent by the Heads of State. Therefore, any national impact that one may record with reference to these EAC Bills would only be with reference to their status as soft law instruments and not as Community legislation. A detailed analysis of the national impact of the Community's soft law measures is undertaken in Chapter five of this study.

5. Decisions of the EACJ

Since its inauguration in 2001, the EACJ has, through its adjudicative, interpretative and advisory jurisdiction, played a critical role as the plumb line for all policy, legislation and administrative action taken by the Partner States in relation to the implementation of their Treaty obligations. Furthermore, as will be shown in the cases analysed in this section, the EACJ as the custodian of the EAC Treaty has through its bold and innovative decisions,

[91]For the EAC Prohibition of FGM Bill see EALA website on <http://www.eala.org/documents/view/the-eac-counter-trafficking-in-persons-bill2016 > (accessed on 20 October 2016).

[92]See interview with Generose Minani (n 66 above).

distinguished itself as a champion for the promotion and protection of human rights notwithstanding the lack of express human rights jurisdiction.

Whereas the Court's innovation and courage is laudable in developing Community jurisprudence, it is of more tangible value to the EAC citizens and residents if it translates to identifiable gains in the promotion and protection of human rights at the national level. In view of this, an examination of the impact of its decisions within the Partner States' domestic realm is crucial in order to determine whether these have translated into strengthened human rights protection. For the purposes of this study, the following cases will be analysed:

a) *Prof Peter Anyang' Nyongo and 10 others v The Attorney General of Kenya and 2 others.*

b) *Democratic Party and Mukasa Mbidde v The Secretary General of the East African Community and the Attorney General of the Republic of Uganda.*

c) *James Katabazi and 21 Others v The Secretary General of the East African Community and the Attorney General of Uganda.*

d) *Plaxeda Rugumba v The Attorney General of the Republic of Rwanda (first Instance and Appeal Decisions).*

e) *Samuel Mohochi v The Attorney General of the Republic of Uganda.*

f) *Burundian Journalists Union v The Attorney General of the Republic of Burundi.*

g) *East African Law Society v The Attorney General of Burundi and the Secretary General of the East African Community.*

h) *Democratic Party v The Secretary General of the East African Community and 4 Others*

These cases have been selected having taken cognizance of among others, the human rights issues that were raised in the arguments before the court and the Court's decisions based on the arguments presented before it. Another useful consideration in selecting them is their contribution to the human rights discourse and jurisprudence both at the EAC level and within the respective Partner States national legal framework.

5.1 Anyang' Nyong'o Case

Prof. Peter Anyang' Nyong'o and 10 others v the Attorney General of the Republic of Kenya and 5 Others[93] (*Anyang' Nyong'o* case)

5.1.1 Arguments and Findings

This was one of the first substantive cases filed at the EACJ and on which basis the Court seized the occasion to among others address questions of its jurisdiction as well as the interaction between Community law and national law. The core of this reference was article 50 of the EAC Treaty, which provides that the National Assembly of each Partner State shall *elect* (emphasis added) nine members of the EALA in accordance with such procedures as it may determine. It also stipulates that the elected members shall, as much as feasible, be representative of specified groups, and sets out the qualifications for election.

Pursuant to this provision, the Kenya National Assembly enacted the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001 (the Election Rules 2001). The first nine members of the EALA from Kenya, whose term expired on 29 November 2006, were elected under those rules. A dispute arose at the conclusion of the election of Kenya's representatives to the second Assembly in 2006, leading to the reference by the applicants to the EACJ claiming that the process of nomination and election adopted by the National Assembly of Kenya was contrary to article 50 of the EAC Treaty in so far as no 'election' was held nor debate allowed in Parliament on the matter.

Furthermore, they contended that the Election Rules 2001 did not allow direct election of nominations to the EALA by citizens or residents of Kenya, or their elected representatives and was therefore null and void for being contrary to the letter and spirit of the Treaty.

The respondents on the other hand argued that only the High Court of Kenya had the jurisdiction to determine questions of legality of elections conducted within Kenya, and that an assumption of jurisdiction and the rendering of a decision thereon by the EACJ would be an usurpation of the national court's functions. Furthermore, the government of Kenya

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[93] *Prof. Peter Anyang' Nyongo and 10 others v The Attorney General of Kenya and 2 others* (n 24 above).

contended that only the Attorney General of Kenya could file a suit in the public interest, hence the applicants had no *locus standi* before the court.

In its decision, the Court held that the Election Rules 2001 adopted by the Kenyan National Assembly did not provide for a voting procedure for choosing or selecting the representatives to the EALA and were thus inconsistent with article 50 of the EAC Treaty.

The reasoning of the Court was grounded on the fact that the rules failed to provide for actual parliamentary debate and approval of party nominees to the EALA and thus did not amount to an 'election' as contemplated by the Treaty. Thus, Kenya had violated the provisions of article 50 of the EAC Treaty by holding a 'fictitious election in lieu of a real election.'[94] The rules merely turned the national assembly into a rubber-stamping entity, approving the names of nominees submitted to it without any inquiry into their suitability for the position.[95]

The Court also declared that it had supremacy over national courts of the Partner States in matters relating to the interpretation of the EAC Treaty. On the question of *locus standi,* the EACJ held that article 30 of the EAC treaty provided sufficient *locus* to the applicants to found a cause of action, and that there was no requirement of exhaustion of local remedies by applicants prior to instituting references before it.[96]

As discussed in Chapter 2 of this thesis, the EACJ's decision in an interlocutory application in the course of the case, in which it issued an injunction barring the swearing in of Kenya's nominees to the EALA until the court had decided the case on its merits, precipitated

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[94]See para 43 of the decision.

[95]This was not only one of the cases in which the Court clearly showed its capacity to 'bite' but was also the first case before the EACJ in which the primacy of Community law over domestic legal provisions in accordance with Article 8 of the EAC Treaty was tested and upheld by the Court. Notably, the EACJ in its decision made reference to EU case law which established the primacy of EU law over domestic law-*Flaminio Costa v ENEL*, Case 6/64 ECR 585 and *Van Gend en Loos v Nederlandse Administratie der Belastingen*, ECJ Case 26/62 ECR 1. Although the conflicting legal provisions in this instance was not a piece of domestic legislation, the EACJ in the *Mohochi* case declared section 52 of the Uganda Immigration Act inconsistent with articles 6 and 7 of the EAC Treaty and article 7 of the EAC Common Market Protocol.

[96]See generally para 17-20 of the decision.

unprecedented political backlash from the Community's political organs. [97] In a campaign spearheaded by the Kenyan government, the EAC Summit and Council pushed through a raft of amendments to the EAC Treaty, which substantially altered the EACJ's structure and jurisdiction. [98]Consequently the court was split into a First Instance and an Appellate Division; new grounds for removal of judges were introduced which allowed suspension on allegations of misconduct in the countries of origin, and, a 60-day time limit set for instituting references before the court challenging violations to the Treaty. Furthermore, the Court's jurisdiction was limited with the inclusion of a provision to the effect that it had no power to review cases for which "jurisdiction is conferred by the Treaty on organs of Partner States"[99]

5.1.2 Influence on National Laws, Policies and Actors

The immediate effect of the decision was that the Kenyan representatives to the EALA could not validly take office, and the EALA could not conduct its business as it was not fully constituted as required by the EAC Treaty. Consequently, the Kenyan Parliament on 23 May 2007, passed fresh nomination Rules in the form of the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2007. These Rules set out an elaborate procedure for election of Kenya's EALA representatives taking into consideration the concerns raised by the EACJ in its judgment in the *Anyang' Nyong'o* case. Under these rules, parliament must debate and approve the nominees for the position of EALA members.

With reference to the human rights outcomes of the decision of the EACJ in this case, an immediate result was legal reform in the nature of development of a more representative and a more democratic framework for the election of members of the EALA from Kenya in

[97]KJ Alter, JT Gathii and LR Helfer 'Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 (2) *European Journal of International Law* 293.

[98]For a detailed account and analysis of the backlash arising from the EACJ's decision in the Anyang' Nyong'o Case, see J Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy' (2014) 24 *Duke Journal of Comparative & International Law* 249.

[99]See the EAC Treaty, articles 26(1), 26(2), 27(1), and 30(2).

compliance with the EAC Treaty requirements, hence giving effect to the right to political participation and effective representation in the regional parliament.

Also, the Court's holding that *locus standi* and exhaustion of domestic remedies are not preconditions to instituting cases before it, and further that individuals can file references to the EACJ claiming one of the Partner States had acted in contravention of the Treaty, opened a door for subsequent litigation by individuals claiming violations of human rights.[100]

Another result was that the EACJ's decision in this case had a spill over effect, resounding beyond Kenya's borders and influencing the filing of similar cases at the EACJ challenging elections to the EALA by litigants in Uganda and Tanzania respectively. Two cases; *Democratic Party and Mukasa Mbidde v The Secretary General of the East African Community and the Attorney General of the Republic of Uganda* as well as *Mtikila v Attorney General of Tanzania and Others* were instituted in the wake of this decision and in the case of Uganda, resulted to change in domestic law and policy relating to the appointment of members of the EALA.[101] To that extent therefore, the decision not only influenced private citizens in the two other Partner States to pursue similar claims before the EACJ, but also resulted in legal reform in their respective jurisdictions thereby enhancing the respect for democracy and the right to political participation.

Further evidence of this decision's national impact is found in its use as legal precedent in litigation before national courts. A notable instance in this regard was the reliance on the decision by the Ugandan Constitutional Court in *Jacob Oulanyah v Attorney General,*[102] in which the Petitioner argued that the 2006 electoral rules of the National Assembly of Uganda were inconsistent with the Constitution of Uganda to the extent that independent candidates were denied the right to be elected to the EALA. The Constitutional Court found that the rules were not only inconsistent with the Ugandan constitution, but also with

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[100]See Gathii (n 98 above).

[101]*Democratic Party and Mukasa Mbidde v The Secretary General of the East African Community and the Attorney General of the Republic of Uganda* EACJ Reference No. 6 of 2011, First Instance Division and *Mtikila v Attorney General of Tanzania and Others* EACJ Reference No 1 of 2007.

[102]*Jacob Oulanyah v Attorney General* (n 23 above).

article 50 of the EAC Treaty. A notable observation was that this was the first time a national court made reference to a decision of the EACJ in its judgment, thus signifying the legal value attached to EACJ's decisions by the national courts.

The *Anyang' Nyong'o* case has been relied on in subsequent cases before the Uganda High Court, notably in *Akidi Margaret v Adong Lilly and the Electoral Commission*[103] as well as in *Toolit Simon Akesha v Oulanyah Jacob L'Okori and Electoral Commission.*[104] Save for Uganda, this research did not however, find evidence of the case being used as precedent in national courts of the other Partner States.

Lastly, the outcomes of the backlash and the amendments to the EAC Treaty have had negative influences on the human rights discourse within the sub-region, which have also affected the realisation of human rights in the national sphere. The introduction of a 60-day time limit within which to file cases before the EACJ has effectively blocked access to justice for individuals and communities who would wish to have their cases ventilated before the EACJ. It has also denied the Court a chance to pronounce itself on fundamental issues of human rights and governance, which would enrich its jurisprudence. For instance, in *Attorney General of Kenya v Independent Medical Legal Unit,*[105] the Appellate Division of the EACJ held that it could not consider the case filed by the Independent Medical Legal Unit, a Kenyan NGO, alleging human rights violations by Kenyan military officers in a security operation in Mount Elgon area, for the reason that it was filed outside the 60-day time limit. And, in *Omar Awadh & 6 others v The Attorney General of the Republic of Uganda*, the first instance Division of the EAC declined to consider a reference based on rendition of suspected terrorists from Kenya and Tanzania to Uganda on the basis that the claim was filed out of time.[106] Therefore, it is submitted that the 60-day rule that was a direct result of the backlash from the Court's decision in the *Anyang' Nyong'o* case, has negatively affected

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[103]*Akidi Margaret v Adong Lilly and the Electoral Commission* (n 26 above).

[104]*Toolit Simon Akesha v Oulanyah Jacob L'Okori and Electoral Commission.* High Court Election Petition No. 001 of 2011 (unreported).

[105]Appeal No. 1 of 2011: Judgment of 15 March 2012).

[106](n 31 above).

access to justice for the residents and citizens of the EAC Partner States. Notwithstanding the negatives from the backlash, a silver lining arising from the events of the Anyang' Nyong'o case was the galvanising of various non-state actors including the East African Law Society, legal scholars, Kenyan legislators and NGOs around the EACJ to shield it from the negative political fallout.[107] This show of solidarity around the EACJ at its most vulnerable point, resulted in the creation of networks that have been sustained and employed in filing and litigating subsequent human rights cases before the EACJ.[108]

5.2 Mukasa Mbidde Case

Democratic Party and Mukasa Mbidde v The Secretary General of the East African Community and the Attorney General of the Republic of Uganda[109]

5.2.1 Arguments and Findings

The brief facts of this case are that in 2008, Uganda's Constitutional Court declared in the case of *Jacob Oulanyah v The Attorney General*, that the Rules of Procedure of Uganda's Parliament providing for election of members of the EALA were in contravention of article 50 of the EAC Treaty and various articles of the Constitution of Uganda and were declared null and void.[110] The Attorney General of Uganda then applied for, and obtained a stay of execution of that judgment, appealed against it to the Supreme Court of Uganda. Given that there was a valid stay order issued, the Rules of Procedure that were declared unconstitutional by the High Court were technically still valid law until the conclusion of the Supreme Court Petition or until Parliament amended the offending portions.

The applicants therefore moved to the EACJ claiming that the Government and the Parliament of the Republic of Uganda were unwilling to amend the Rules of Procedure of Parliament for the election of the EALA Members to have them conform to the provisions of article 50 of the Treaty and that the Government and Parliament of Uganda intended to conduct the upcoming EALA elections using those un-amended Rules. Their contention at

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[107]See Alter, Gathii and Helfer (n 97 above).

[108]See J Gathii (n 98 above) 271.

[109](n 101 above).

[110](n 23 above).

the EALA was somewhat similar to the contention in the Constitutional Court, that those Rules, specifically Rule 11(1) and Appendix B r3, 10 and 11, were not only inconsistent with the Ugandan Constitution, but also contravened article 50 of the Treaty to the extent that they discriminate and limit the freedom and right of the Democratic Party and its members, to associate in vying for election as representatives of the EALA.

Just like in the *Anyang' Nyongo* case, their argument was that the Rules did not provide for proper election of EALA members by Parliament. In their view, Parliament's role was only limited to a rubber-stamping institution. Their contention was that whereas article 50 of the EAC Treaty required an 'election' to be held by the national parliaments, the Rules only required the political parties to nominate members and thereafter the Speaker to read out the names of the proposed nominees, whereupon the Clerk would publish the names as duly nominated. As such, there was no substantive role for parliament in the process, apart from ratifying the wishes of the political parties.

In addition, the applicants claimed that the inaction of the Parliament of Uganda to amend these Rules to conform to article 50 of the EAC Treaty was in itself an infringement of the fundamental principles and the doctrines and the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights which are enshrined in the Treaty of the Community in particular with regard to peaceful settlement of disputes.

The respondent on the other hand acknowledged that whereas the Rules in question were impugned, they had initiated an amendment process that was already on course. In finding for the applicants the Court observed that the 2006 Rules did not conform to the Treaty. Accordingly, it issued an Order restraining the Parliament of the Republic of Uganda from conducting the EALA elections until the Rules were amended to conform to article 50 of the Treaty.

5.2.2 Influence on National Laws, Policies and Actors

Just like the Kenyan Parliament in the *Anyang' Nyong'o* case, the Ugandan Parliament subsequently amended and enacted the Rules of Procedure for the election of Members of

the East African Legislative Assembly on 18 May 2012.[111] However, the circumstances surrounding their enactment leads to the conclusion that these new Rules of Procedure were not solely attributable to the decision of the Court, given that judgment was rendered on 10 May 2012. It is improbable that Parliament was so zealous to implement the EACJ's decision that it drafted, debated and passed the new Rules of Procedure within one week. Moreover, the respondent had contended in their pleadings that an amendment process was already on course. Nonetheless, it is evident from a reading of the judgment that the applicants' objective in filing the reference was to spur the government of Uganda into fast tracking the amendment process which had stalled since the Constitutional Court's decision four years earlier.

To that extent, it can be concluded that although the decision of the Court in this matter was not solely responsible for the eventual amendment of the offending rules, the filing of the reference and the litigation process directly resulted in the taking of concrete steps by the Ugandan government to ensure their Rules of Procedure for election of Members of the EALA complied with the provisions of article 50 of the EAC Treaty. Just as in the *Anyang' Nyong'o* case, although this was not a human rights case *per se*, it had immediate national impact within the Ugandan legal system through legal reform. From a human rights perspective, the impact was in relation to enhancing the right to political participation in addition to reinforcing the respect for the rule of law and democracy.

5.3 Katabazi Case

James Katabazi and 21 others v The Secretary General of the East African Community and Attorney General of Uganda[112]

5.3.1 Arguments and Findings

The brief facts of this case are that the applicants had been charged with treason before a Ugandan court in 2004 and remanded in custody. Fourteen of them subsequently applied

[111]See *Abdu Katuntu v The Attorney General of the Republic of Uganda*. EACJ Reference No 5 of 2012, First Instance Division.

[112]*James Katabazi and 21 others v The Secretary General of the EAC and Another*. EACJ Reference No. 1 of 2007.

were granted bail by the Ugandan High Court on 16 November 2006, whereupon the High Court was surrounded by security personnel who interfered with the preparation of bail documents and the fourteen were rearrested and put in custody. On 24 November 2006, all the applicants were taken before a military General Court Martial and charged with unlawful possession of firearms and terrorism and remanded in prison. The Uganda Law Society successfully challenged before the Constitutional Court, the interference of the court process by the security agents and the constitutionality of conducting prosecutions simultaneously in civilian and military courts. The Ugandan government ignored the Constitutional Court's decision and continued to remand the applicants in custody. They therefore filed the reference before the EACJ with prayers for a declaration *inter alia* that the acts of the Ugandan government were an infringement of articles 7(2), 8(1)(c) and 6 of the EAC Treaty.

In finding for the applicants, the Court observed 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.'[113] Furthermore the court in this case laid out what is referred to in this study as the *Katabazi* doctrine, when it held that that although it does not have jurisdiction to deal with human rights issues yet, it has jurisdiction to interpret the treaty even if the matters complained of include human rights violations. This position has been reiterated in subsequent decisions where claims, which include allegations of human rights violations, have been brought to the court for determination.

5.3.2 Influence on National Laws, Policies and Actors

Respect for the rule of law including the guarantees of a fair trial is a fundamental pillar in the promotion and protection of human rights. Although this decision did not result in direct legal reform, its direct effect within the national realm was to facilitate an atmosphere in which courts are able to dispense justice in an impartial and independent manner without fear of any reprisals from the military. This conclusion is borne out of the fact that not only

[113] As above, para 23.

were the persons in question subsequently released from unlawful custody but also that there have since been no similar instances of unlawful intimidation of the judiciary by the military.[114] This is evidenced by for instance, the aftermath of the release on bail of Dr. Besigye, who had been charged with treason. It is observed that the response by the Ugandan authorities in the case of Dr. Besigye was markedly different, notwithstanding that the charges were similar to those against the applicants in the *Katabazi* case.[115] Whereas there is no direct evidence to this effect, it is plausible to conclude therefore, that the restraint by the Ugandan authorities may have been attributed in part, to the outcome in the *Katabazi* case.

A further instance of the decision's national influence has been the use of this case as an authority by litigants and the High Court of Uganda. In *Kamurali Jeremiah Birungi and 2 Others v The Attorney General of Uganda and the Secretary General of the EAC*, the High Court referred to the *Katabazi* decision to clarify the Secretary General's responsibilities under the EAC Treaty.[116] Notably, whereas the court did not rely on the substantive decision of the EACJ on the facts of the *Katabazi* case, it nonetheless made reference to the other aspects of the court's reasoning, and in this case, to determine whether the Secretary General to the EAC was a proper party to the suit.

Apart from its immediate results within Uganda, the *Katabazi* decision has reverberated across all the Partner States and has been revolutionary in terms of litigating human rights issues before the EACJ. It is through this decision that the EACJ staked its claim to human rights jurisdiction, albeit in a limited fashion. Accordingly, it has served as a point of reference by litigants in all subsequent references filed at the EACJ, in which claims of human rights violations have been made. Thus, in terms of national impact, the *Katabazi* case has influenced individual litigants, lawyers and civil society organisations within the

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[114]See Interview with Hon. Justice Isaac Lenaola, Judge of the Supreme Court of Kenya and Principle Judge of the East African Court of Justice, dated 16 December 2014, Nairobi, Kenya. (Notes on file with the author).

[115]Daily Monitor Newspaper. 'Besigye released on Bail' Available at <http://mobile.monitor.co.ug/News/Besigye-released-on-bail/2466686-3290918-format-xhtml-ppml77z/index.html> (accessed on 10 November 2016).

[116](n 25 above).

EAC Partner States by opening a crucial door for them to enable the ventilation of human rights issues before the sub-regional court.

5.4 Rugumba Case

Plaxeda Rugumba v The Secretary General of the East African Community and the Attorney General of the Republic of Rwanda[117]

5.4.1 Arguments and Findings

The brief facts of this case are that the applicant in this Reference, Plaxeda Rugumba, moved the EACJ claiming that her brother, Seveline Rugigana Ngabo, a Lieutenant Colonel in the Defence Force of the Republic of Rwanda had been arrested on 20 August 2010 and held *incommunicado* by the Government of the Republic of Rwanda. She also alleged that her brother had not been formally charged before any Court of Law and that his wife was not able to successfully file an application for *habeas corpus* as her attempts to follow up the detention of her husband had led to her being harassed into hiding by the Government of Rwanda.

It is on this basis that she sought *inter alia* a declaration from the court that the arrest and detention without trial of Lieutenant Colonel Ngabo was a breach of the fundamental principles of the Community and in particular, articles 6(d) and 7(2) of the EAC Treaty which demand that Partner States shall govern their populace on the principles of good governance and universally accepted standards of human rights.

In its defence, the respondent, the Republic of Rwanda, claimed that Lieutenant Colonel Ngabo had been arrested on suspicion of having committed crimes against national security, and that the government had since regularized his detention and as such he was detained in a known military prison and was exercising his rights including visitation by his lawyers, family and friends. This however was subsequent to a decision of the Military High Court which ruled on 28 January 2011 that his detention from his date of arrest until arraignment in court was irregular and contravened the provisions of the Rwandan Code of Criminal Procedure.

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[117] *Plaxeda Rugumba v Secretary General of the EAC & Attorney General of Rwanda* (n 6 above).

The first instance division of the EACJ made a finding that the Republic of Rwanda had indeed violated the provisions of article 6(d) and 7((2) of the EAC Treaty by holding the applicant's brother *incommunicado* for a period 5 months. The Court in its judgment not only reaffirmed the *Katabazi* doctrine, but also proceeded to refer substantially to the provisions of article 6 of the ACHPR that protects against unlawful detention. It further observed that 'The invocation of the provisions of the African Charter on Human and Peoples' Rights was not merely decorative of the Treaty but was meant to bind Partner States…'[118]

The respondent appealed the decision in February 2012 on grounds including that the EACJ had no jurisdiction to entertain the claim since it raised issues of violation of human rights.[119] In reaffirming its jurisdiction, the EACJ's appeals chamber acknowledged that although the Court did not yet have express human rights jurisdiction as envisaged under article 27(2), it did have jurisdiction to interpret and apply the treaty provisions. Given that the claim referred to articles 6(d) and 7(2) of the Treaty, it could not abdicate its interpretive jurisdiction merely on the basis that the claim included allegations of a violation of human rights. In its judgment, the court made substantial reference to the decision in *Katabazi* and the *IMLU* case, in which the court clarified that it was not a human rights court adjudicating substantive claims of violation of specific rights, but that it was determining claims of breach of articles of the EAC Treaty.[120] The Court then proceeded to dismiss the appeal and upheld the decision of the first instance division.

5.4.2 Influence on National Laws, Policies and Actors

It is arguable from the judgment of the first instance division that the case contributed to the promotion of human rights and the respect for the rule of law by the Rwandan government albeit in an oblique manner. Based on the facts, Lieutenant Colonel Ngabo was arrested and detained *incommunicado* on 20 August 2010. His elder sister filed the

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[118]See para 37 of the first instance decision.

[119]*Attorney General of the Republic of Rwanda v Plaxeda Rugumba* (EACJ Appeal No.1 of 2012).

[120]*Attorney General of Kenya v Independent Medical Legal Unit* EACJ Appeal No. 1 of 2011 as well as *James Katabazi & 21 Others v EAC Secretary General and the Attorney General of Uganda* (n 112 above).

reference before the EACJ on 8 November 2010. It is only after this reference was filed that the domestic wheels of justice began to turn in Rwanda with the subject being presented to the Military High Court on 21 January 2011. The Military High Court made its decision within a week and on 28 January 2011 declared his detention unlawful and thereafter proceeded to issue a valid preventive detention order as stipulated under Rwandan Code of Criminal Procedure. Indeed, the Appellate Division of the EACJ acknowledges the impact that the filing of the reference had on the national systems when it observed that ' it was agreed by both parties before the court below that upon the Reference being filed; the Republic of Rwanda produced the subject before the Military High Court…'[121] As such, just as in the case of *Democratic Party and Another v the Attorney General of the Republic of Uganda*, the filing of the Reference at the EACJ had the effect of spurring the Rwandan authorities to reverse the breaches that had been committed and comply with its national and international obligations by protecting the rights of the detained person.[122]

5.5 Mohochi Case

Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda[123]

5.5.1 Arguments and Findings

In this reference, the applicant, a Kenyan national, claimed that he had travelled to Uganda from Kenya on 13 April 2011 as part of a delegation from the International Commission of Jurists-Kenya Chapter (ICJ Kenya) scheduled to meet the Chief Justice of Uganda, on 14 April 2011. On arrival at Entebbe International Airport, the applicant claimed that he was denied entry into Uganda, restrained, arrested, detained, declared a prohibited immigrant, returned to Kenya, denied any legal or administrative process and was not furnished with

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[121]See of the decision of the Appellate Division (n 119 above) para 33.

[122]Furthermore, it may also be concluded that the decision has had a deterrent effect within the national framework. The inference here is that the reputational risks that come with a public litigation process at the EACJ which for EAC Partner States would amount to 'airing dirty linen in public' serves to deter state agents from engaging in acts that would result to references being filed at the EACJ. See also interview with Hon. Justice Isaac Lenaola (n 114 above). This of course does not rule out the possibility that Partner States agents have resorted to other methods which are less public and less discoverable but which in essence still amount to human rights violations.

[123](n 3 above).

reasons for these actions. He claimed that these actions violated specific provisions of the Treaty including articles 104, 6(d), 7(2) and article 7 of the Common Market Protocol in addition to articles 2, 6, 7, 9, 10, 11 and 12 of the ACHPR.

The respondent acknowledged that the applicant was denied entry but maintained that the action by the Government of Uganda to deny him entry into Uganda was lawful, *bona fide*, justifiable and in the security interest of the people of the East African Community. It also invoked provisions of Section 52 of the Uganda Citizenship and Immigration Act, which allowed the Minister to declare any person a prohibited immigrant and deny them entry into Uganda.

The Court made a number of notable observations with respect to the EAC human rights framework in this decision which are worth highlighting. Firstly, the Court noted that the EAC Treaty was not a human rights convention but rather a treaty aimed at widening and deepening integration among the EAC Partner States in identified areas of cooperation. Secondly, the Court observed that the cause of action in the reference was allegations of infringements of specific treaty provisions by the Ugandan Government and not the violations of human rights under the Ugandan Constitution or of international law. As such, it declined to make any declarations relating to any alleged violations of human rights including the alleged violations of the ACHPR. Instead the Court moved under the broader concept of good governance under article 6 of the EAC Treaty. However, the Court by implication effectively addressed the notion of human rights when it adopted a progressive view of the EAC's foundational and operating principles outlined in articles 6 and 7 of the Treaty as follows:

> …the provisions of article 6 (d) of the Treaty are solemn and serious governance obligations of immediate, constant and consistent conduct by the Partner States. In our humble view, we know of no other provisions that embody the sanctity of the integration process the way the above do…. ...these principles are foundational, core and indispensable to the success of the integration agenda, and were intended to be strictly observed. Partner States are not to merely aspire to achieve their observance, they are to observe them as a matter of Treaty obligation…[124]

[124]See para 36 of the judgment.

In its view, these principles went beyond mere aspirational inclusion in the Treaty but were rather core to the integration process and were to be strictly observed as mandatory treaty obligations.

The Court, while making a finding for the applicant, observed that being a citizen of a Partner State, his denial of entry into Uganda without according him the due process of law was illegal, unlawful and a breach of Uganda's obligations under articles 6(d) and 7(2) of the Treaty. Furthermore, his detention, removal and deportation to Kenya was discriminatory, illegal, unlawful and in violation of his rights under articles 104 of the Treaty and 7 of the Common Market Protocol.[125]

The Court also seized the occasion to shed light on the relationship between Community law and the provisions of national law. It observed that the Treaty and Protocol did not take away Uganda's sovereignty to deny entry to prohibited persons. However, that right could only be valid if exercised in conformity with articles 104 of the Treaty and articles 7 and 54(2) of the Common Market Protocol.[126] As such, ' Section 52 of the Uganda Citizenship and Immigration Act would have to be read together with, and give precedence to, the relevant Treaty and Protocol provisions, on matters pertaining to the determination of whether a citizen of a Partner State is a prohibited immigrant or not.'[127] The import of this decision is that whereas Section 52 is still applicable where citizens of other nations are concerned, it has to be interpreted and applied in conformity with the provisions of the EAC Treaty and the Protocol where citizens of Partner States are concerned.

5.5.2 Influence on National Laws, Policies and Actors

The main human rights nuances that emerge from this decision revolve around due process, fair administrative action, non-discrimination on the basis of nationality and freedom of movement across the frontiers of the EAC Partner States, all which the decision sought to protect. A direct consequence of this case is that it has added impetus to the review by Uganda of its Citizenship and Immigration Act to bring it into line with the provisions of the

[125]See para 83 and 84 of the judgment.

[126]See para 56 of the judgment.

[127]See Para 122 and 123 of the judgment.

EAC Common Market Protocol.[128] It is anticipated that the concerns raised by the EACJ would be conclusively addressed especially with reference to the provisions of article 52 of the Act. In terms of any spill-over effect of the decision into the other Partner States' immigration practice, the study did not document any reference to this decision by the border control and immigration authorities in Kenya and Tanzania, and thus a conclusion may be reached that the decision has not permeated well into the other EAC Partner States.[129]

5.6 Burundi Press Law Case

Burundian Journalists *Union v The Attorney General of the Republic of Burundi*[130]

5.6.1 Arguments and Findngs

This Reference concerned the Burundi Press Law No.1/11 of 4 June 2013, amending Law No. 1/025 of 27 November 2003 regulating the press in Burundi.[131] The applicant's contention was that the Press Law as enacted, unjustifiably restricted the freedom of the press and the right to freedom of expression which form a cornerstone of democracy, rule of law, accountability, transparency, and good governance. As such these restrictions contravened Burundi's obligations under articles 6(d), 7(2) of the Treaty. The applicant therefore prayed to the Court for a declaratory relief to the effect that the Press Law was in violation of the right to press freedom and the right to freedom of expression, and was consequently inconsistent with Burundi's treaty obligations as set out under articles 6(d) and 7(2) of the Treaty. In its view a free press would result in an informed electorate who would then be

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[128]See Report of the 21st Meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning (n 47 above) ; Report of the 22nd meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning (n 51 above); See also the Report of the 23rd Meeting of the Sectoral Council of Ministers Responsible for EAC Affairs and Planning (n 47 above).

[129]See interview with Kenyan and Tanzanian immigration officers at the Namanga border post, 16 October 2016. Also see interview with Kenyan and Ugandan immigration officers at the Malaba border crossing, 17 September 2016. (Notes on file with the author).

[130]*Burundian* Journalists *Union v The Attorney General of the Republic of Burundi,* EACJ Reference No. 5 of 2013, First Instance Division.

[131]The Press Law was adopted by the National Assembly on 3 April 2013, passed by the Senate on 19 April 2013 and signed into law by the President on 4 June 2013.

able to hold their leaders to account and thus uphold the principles of good governance and democracy.

The applicant also called for the Court to order the Republic of Burundi to either repeal the law or amend the offending provisions to bring them into compliance with the Treaty.

Specific provisions of the Press Law pointed out by the applicant as inconsistent with the Treaty included those relating to among others, compulsory accreditation of journalists, restructions on what may be published by the media, the disclosure of confidential sources of information, provisions for a prior censorship regime for films directed in Burundi, and provisions on fines and penalties.

The respondent on the other hand maintained that the Press Law was consistent with the EAC Treaty and noted that the Parliament of Burundi had exercised its legislative mandate as the representative of the people and its decisions could not be replaced by the wishes of any other organization or person. Furthermore, the respondent contended that in any event, the Press Law had been challenged in the Constitutional Court of Burundi and since its decision was yet to be delivered, the Reference was premature and misconceived as the latter Court was the only one with jurisdiction to interpret the its legality.

A review of the judgment shows that the case was marked by an impressive reference to human rights instruments and standards from diverse sources and jurisdictions. The applicant and *amici curiae* relied on human rights instruments both at the regional and international level, notably General Comments by the Human Rights Committee, Declarations by the African Commission on Human and Peoples' Rights, statements and reports by the UN Special Rapporteur on Freedom of Expression, case law from the African Commission on Human and Peoples' Rights as well as the European Court on Human Rights and the Inter American Court on Human Rights. Reliance was also placed on cases from the EACJ as well as from other jurisdictions notably India, Zimbabwe, USA, South Africa, UK and Kenya.[132]

[132]See paras 76 and 79 of the decision.

In its decision, the EACJ observed that democracy must of necessity include adherence to press freedom a and that free press goes hand in hand with the principles of accountability and transparency which are all entrenched in articles 6(d) and 7(2). Furthermore, the court noted that by acceding to the Treaty 'Partner States including Burundi, are obligated to abide and adhere by each of the fundamental and operational principles contained in articles 6 and 7 of the Treaty and their national laws must be enacted with that fact in mind.'

Accordingly, the Court declared article 19(b), (g), (i) and part of (j) of the Burundian Press Law in violation of the principles enshrined in articles 6(d) and 7(2) of the Treaty to the extent that it unreasonably restricts dissemination of information on the stability of the currency, offensive articles or reports regarding public or private persons, information that may harm the credit of the State and national economy, diplomacy, scientific research and reports of Commissions of inquiry by the State.

It further declared article 20 of the Press Law inconsistent with articles 6(d) and 7(2) of the EAC Treaty to the extent that it required journalists to reveal their sources of information before the competent authorities in situations where the information relates to offences against State security, public order, state defence secrets and against the moral and physical integrity of one or more persons. As such the Court required the Republic of Burundi in accordance with article 38(3) of the Treaty, to take measures, without delay, to implement judgement within its internal legal mechanisms.

5.6.2 Influence on National Laws, Policies, and Actors

The immediate impact of this decision was that Burundi's Parliament reviewed the Press Law and proposed new amendments thereto which remove the contentious provisions in line with the decision of the EACJ. These amendments were debated and approved by the Senate. However, they do not have legal force as they have not yet received Presidential assented.[133] It may also be inferred that this case has blazed the trail for journalists to file

[133]T Rhodes 'Press Law Debate and Journalists' Release Signal Hope for Burundi's Media' March 10 2015. Available online at <https://cpj.org/blog/2015/03/hope-for-burundis-press-with-release-of-radio-dire.php> (accessed on 15 November 2015) See also ' Burundi: nouvelle loi sur la presse' BBC Africa, 4 March 2015, available online at <http://www.bbc.com/afrique/region/2015/03/150304_burundi_press_bill > (accessed on

petitions before the EACJ seeking to protect the freedom of the press. Indeed, in this regard, the Ugandan NGO, Media Legal Defence Initiative has successfully filed an application at the EACJ in relation to a reference that challenges the provisions of Uganda's Penal Code on criminal libel.[134] The Court's decision in this case is yet to be delivered.

5.7 Rufyikiri Case

East African Law Society v Attorney General of Burundi and the Secretary General of the East African Community[135]

5.7.1 Arguments and Findings

This was a reference filed by the East African Law Society on behalf of Mr. Isidore Rufyikiri, who was at the material time the President of the Burundi Bar Association as well as the Burundi Centre for Arbitration and Conciliation (CEBAC). The material facts of the reference are outlined below.

In early 2013, Mr. Rufyikiri was charged and being prosecuted in relation to allegations of corruption as the President of CEBAC. On 24 July 2013, he wrote a letter to the governor of Bubanza Province in Burundi with reference to one of his clients, which culminated in a complaint by Prosecutor General to the Bar Council alleging that the contents of the letter were defamatory and injurious. The Prosecutor therefore requested that the Bar Council institutes disciplinary proceedings against him.

On 29 October 2013, Mr. Rufyikiri held a press conference in which he is alleged to have made statements against state security and public peace. On 30 October 2013, the Prosecutor General filed a second complaint against him, asking that he be disbarred from the Roll of Advocates based on the statements made at the press conference.

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15 November 2015); See also Freedom House Report on Burundi available online at < https://freedomhouse.org/report/freedom-press/2016/burundi > (accessed on 1 December 2016).

[134]P Noorlander 'In the Run-Up to Elections, Court Declares Burundi's Press Gag Law Undemocratic' May 2015, Available online at <https://www.opensocietyfoundations.org/voices/run-elections-burundi-s-press-told-not-report > (accessed on 1 December 2016). See also *Media Legal Defence Initiative and 19 Others v Ronald Ssembuusi v The Attorney General of Uganda*. EACJ First instance Division Application No. 4 of 2016.

[135]EACJ Reference No. 4 of 2014, First Instance Division.

On 17 December 2013, the Prosecutor General moved to the Court of Appeal and obtained an order dated 24 January 2014 disbarring Mr. Rufyikiri from the Roll of Advocates. He applied for a review of the decision in March 2014, but the Court of Appeal reaffirmed its decision to disbar him. Meanwhile, the Prosecutor General of the Anti corruption court had also placed a travel ban on him, forbidding him from leaving Burundi.

Thus, Mr. Rufyikiri approached the EALS to pursue a reference at the EACJ on his behalf, complaining that his prosecution for corruption, his disbarment from the Roll of Advocates as well as the travel ban imposed on him were all unprocedural and in breach of the rule of law, good governance, freedom of movement as stipulated in among others articles 6(d) and 7(2) of the EAC Treaty.

The EALS also sued the Secretary General of the EAC for alleged breach of his duty to monitor the observance by the Republic of Burundi, of the EAC Treaty obligations pursuant to the provisions of article 71(1)(d) of the EAC Treaty.

The applicant sought several reliefs including a declaration that Mr. Rufyikiri's prosecution disbarment and travel restriction was a violation of the EAC Treaty; a declaration that the EAC Secretariat had breached his obligations under article 71 of the Treaty, and an order by the Court quashing his disbarment by the Court of Appeal and reinstating his name to the Roll of Advocates.

In its response, the government of Burundi maintained that the applicant was barred from leaving the country because he wanted to flee the country. It further argued that the applicant was disbarred in accordance with the laws of Burundi on the grounds that he had violated his oath as an advocate by making statements that were prejudicial to state security and public peace.

The Secretary General raised his defence by claiming that he was unaware of the matters complained of by the applicant, and was therefore not blameworthy for failure to discharge his duties under the Treaty. He further averred that as soon as he learnt of the issues raised by the applicant, he constituted a Task Force to investigate among others, the alleged breaches of the EAC Treaty by Burundi, and the cause of increasing litigation at the EACJ emanating from Burundi.

On the allegations of malicious prosecution for corruption, the Court, upon examining Burundi's anti-corruption legislation and Penal Code, concluded that the relevant laws empowered the Prosecutor General to initiate investigations and prosecutions against any person suspected of corruption and thus there was no violation of the EAC Treaty.

With reference to Mr. Rufyikiri's disbarment, the Court examined the relevant provisions of the Burundi Advocates Act and concluded that the Prosecutor General moved to the Court of Appeal before the expiry of the statutory 60-day period within which the Bar Council was required to exercise its disciplinary processes over Mr. Rufyikiri. As such, the flawed procedure followed by the Prosecutor General was a violation of due process and therefore inconsistent with article 6(d) and 7(2) of the Treaty. Whereas the Court made a declaration that the failure of due process by the Court of Appeal was a Treaty violation, it declined to grant an order quashing and setting aside the Court of Appeal's decision to disbar Mr. Rufyikiri, basing its decision on the fact that making such an order was outside its jurisdiction by virtue of the provision to article 27(1) of the Treaty.

On the alleged failures by the Secretary General, the Court noted his submissions that he had, prior to the institution of the reference, engaged with the Republic of Burundi and had formed a Task force to investigate alleged breached of the EAC Treaty and the causes of growing litigation at the EACJ emanating from Burundi. The Court also recorded the Secretary General's report that he had not received any positive cooperation from Burundi with regard to the proposed investigations by the Task Force. The Court then proceeded to order the Secretary General to operationalise the Task Force to investigate the situation in Burundi, and further ordered the Government of Burundi to take measures to implement its judgment including allowing the Secretary General to conduct its investigative mission.

5.7.2 Influence on National Laws, Policies, and Actors

A review of available information reveals that the Task Force created by the EAC Secretariat is yet to conduct its fact finding visit to Burundi as ordered by the Court[136]Follow up

[136]See letter from the Chairperson of the East African Law Society to the EAC Secretary General on continuing breaches of human rights in Burundi 22 September 2015 Re: EALS/SG-EAC/5/2015. See also 2015 Annual Report of the East African Law Society, October 2015. Available online at <

communication from the East African Law Society has not elicited any feedback from the Secretary General. From the foregoing, and taking into consideration the Secretary General's veiled frustrations as may be deduced from their submissions in the case, it appears that there has not been much headway in terms of implementing the decision of the EACJ as envisaged. This may be attributed on the one hand, to lack of cooperation by Burundi with the EAC Secretariat in the discharge of his mandate under article the Treaty, or, on the other hand, to reluctance on the part of the Secretary General to engage with the Council and Summit in the case of an uncooperative Partner State. The overall result is that there has been no observable change in law or policy in Burundi, or elsewhere within the EAC, that draws its origins to the decision of the EACJ in this case. A review of the EACJ caseload shows that cases in which the government of Burundi is accused of human rights violations in the context of the EAC Treaty have risen considerably and continue to mount. This leads to a conclusion that the intransigence by the government of Burundi to comprehensively address the governance and human rights challenges, together with the credibility concerns about the judiciary in Burundi has led litigants and activists to seek legal reprieve at the EACJ.

5.8 Democratic Party Case

Democratic Party v The Secretary General of the East African Community and 4 Others.[137]

5.8.1 Arguments and Findings

This reference was filed by the Democratic Party, a political organisation registered in Uganda, challenging the failure by Burundi, Rwanda, Kenya and Uganda, to make individual country declarations accepting the competence of the African Court on Human and Peoples' Rights (African Court) to receive direct references from individuals and NGOs pursuant to

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<http://www.ealawsociety.org/images/publications/annual_report/annual_report_2015.pdf> (accessed on 10 May 2017).

[137]Democratic Party v Secretary General of the East African Community, the Attorney General of the Republic of Uganda, the Attorney General of the Republic of Burundi, the Attorney General of the Republic of Rwanda and the Attorney General of the Republic of Kenya. EACJ Reference No. 2 of 2012, First instance Division, (judgment delivered on 29 November 2013) and EACJ Appeal No.1 of 2014 (appellate Division, judgment delivered on 28 July 2015).

article 5(3) and 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

The core of the applicant's claim in this case was that the failure by the 4 EAC Partner States to make and deposit the declaration amounted to a violation of among others, articles 5,6 and 7 of the EAC Treaty, the ACHPR and the Protocol on the African Court as well as the 1969 Vienna Convention on the Law of Treaties.

The applicant further claimed that by failing to ensure the Partner States deposited the declarations, the Secretary General of the EAC had abdicated his supervisory role to ensure Partner States adhere to the provisions of the EAC Treaty.

In his defence, the EAC Secretary General, maintained that he had no supervisory powers over Partner States with regard to their obligations under the ACHPR and the Protocol on the African Court. He also intimated that he had sought, and had received no clarification from the Respondents as to the reasons why they had taken no action to make the declarations under article 34(6). He therefore abandoned further engagement with the Partner States on the matter upon filing of the reference before the EACJ.

The Partner States, save for Rwanda, which had prior to the commencement of the proceedings, filed its declaration under article 34(6) of the African Court Protocol, objected to the jurisdiction of the EACJ in determining matters pertaining to obligations arising from other treaties. Furthermore, they maintained that the wording of article 34(6) of the African Court protocol did not create a mandatory immediate obligation on the part of states to deposit the declaration.

In disposing the matter, the first instance division held that whereas it had jurisdiction to hear and determine the reference, it could not delve into, nor enforce obligations created on EAC Partner States by other international instruments. It further held that the depositing of declarations was discretionary and therefore did not amount to a violation of the EAC Treaty.

With regards to the Secretary General's alleged failures, the Court observed that the Secretary General had discharged its responsibility by seeking clarification from the Partner

States and that once the reference was filed, it could proceed no further than await the Court's decision.

The applicant then appealed to the Appellate Division and contended that the first instance Division had erred in law in finding among others, that it had no jurisdiction to interpret the ACHPR and other instruments to which Partner States are party. It also appealed the decision of the Court in finding no fault on the part of the Secretary General.

In allowing the appeal in part, the Appellate Division addressed the question of whether the EACJ has jurisdiction to interpret the ACHPR. It answered the question in the affirmative, noting that article 6 of the EAC Treaty incorporated the ACHPR as one of the standards by which Partner States must adhere to and be examined. Thus, a violation of the ACHPR by any Partner State, would obviously invite scrutiny by the court, but in the context of the EAC Treaty.

5.8.2 Influence on National Laws, Policies, and Actors

Given that the nature of reliefs sought in this reference were declaratory remedies, no tangible implementation of the Court's decision could take place. There was no specific order directed to the Partner States. Furthermore, the Appellate Division of the Court only allowed the appeal in part, rejecting the core of the applicant's claim-a declaration that failure to deposit article 34(6) declarations under the African Court Protocol amounted to a violation of the EAC Treaty. Nonetheless, it is significant to observe that the Republic of Rwanda deposited its declaration soon after the institution of the case at the EACJ. Although it may be inferred that Rwanda's actions were spurred by the filing of this reference, it may also be a product of pure coincidence. Indeed this study did not encounter any tangible information linking Rwanda's declaration to the filing of this reference.

It is also observed that aside from Tanzania, the other EAC Partner States have to date not deposited the declaration under article 34(6). Moreover, Rwanda withdrew its declaration in 2016, leaving Tanzania as the only EAC Partner State having deposited the declaration granting competence to individuals and NGOs to institute suits before the African Court on Human and Peoples' Rights.

From the foregoing, it is inferred that the EACJ's decision in this case had minimal national influence. Nonetheless, this does not mean that this decision has no contribution to the human rights discourse in the EAC. On the contrary, this decision has the potential to spur a fresh angle of litigation at the EACJ based on provisions of the ACHPR. The Court's finding that it has jurisdiction to hear and determine references that include claims of violation of the ACHPR, may be interpreted to imply that it has claimed express human rights jurisdiction, notwithstanding the lack of a specific protocol under article 27 of the EAC Treaty. This argument is based on the logic that since the ACHPR is a human rights instrument, any court adjudicating claims based on the ACHPR will in essence be determining human rights cases, even if that adjudication is made in the context of the EAC Treaty. Therefore, theoretically, the EACJ may in a given case, make a finding of a violation of a provision of the ACHPR and then translate it into a violation of article 6(d) and 7(2) of the EAC Treaty. This logic can be used cumulatively with the *Katabazi* decision to creatively and innovatively push the boundaries of human rights litigation at the EACJ, using the ACHPR as a source of law. From the foregoing, it is submitted that this angle of litigation could very well form the next frontier in human rights litigation at the EACJ.

This can be used to cumulatively, with the *Katabazi* decision by litigants to creatively and innovatively push the boundaries of human rights litigation at the EACJ, using the ACHPR as a source of law.

5.9 Reflections on National Impact of Decisions of the EACJ

The EACJ as an organ of the Community has clearly distinguished itself in the realm of the promotion and protection of human rights. This is notwithstanding that it is yet to be clothed with unfettered jurisdiction to adjudicate rights cases as provided for under article 27(2) of the EAC Treaty.

A review of the cases analysed in this section shows that the court's decisions have had considerable influence in the human rights discourse within the EAC Partner States at various levels. The first level of influence is the immediate impact attributed to the implementation of the EACJ decisions by the respective national institutions to which the decision is directed. This is evidenced through legislative review and change of policy at the national level. For instance, the *Anyang' Nyongo* case and the *Mukasa Mbidde* case had

direct results in Kenya and Uganda respectively, which amended their domestic laws to make them compliant with article 50 of the Treaty, thereby enhancing transparency and democracy in the nomination of members to the EALA.[138]

Closely related to this is the second level of influence, which is the impact of the EACJ decisions on national judiciaries in the Partner States. Although only documented in relation to Uganda, references to the *Anyang' Nyong'o, Katabazi* and *Mukasa Mbidde* cases by the Constitutional Court in Uganda demonstrates the potential that the EACJ jurisprudence has in influencing the development and interpretation of national laws.

Third is the influence that a decision has on national Executives within the Partner State based on what Hon. Justices Lenaola and Ntezilyayo refers to as the 'deterrent effect'. In their view, issues such as outright disregard for the rule of law, where the military intimidates the judiciary through acts of show of force, as exhibited in the facts of the *Katabazi* case have not been reported in Uganda since the delivery of the EACJ decision. As such, a plausible conclusion is reached that the EACJ's decisions have served to deter certain breaches by Partner States.[139] It is however submitted that the flip side of this deterrence is that Partner States would then adhere to human rights standards in order to also avoid the obvious reputational risks that come with litigation before the EACJ. Thus, compliance with human rights standards, and the impact considered in this context may not arise from an overt act on the part of the Partner State concerned, but from refraining from acts which would have otherwise amounted to a breach of human rights in the context of the EAC Treaty.

A fourth layer of impact is found in the spillover effect, where particular EACJ decisions have spurred litigants and non-state actors in other Partner States to found claims of violation of

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[138]This in effect enhanced the right to political participation for individual EALA aspirants who would have otherwise been locked out due to opaque nomination processes. On the other hand it also enhanced the right of the EAC residents in general to be represented in a more democratic manner. However, it is also observed that the EACJ decision in this case precipitated political backlash against the EACJ by the Partner States. For a more in depth study refer to A Possi 'The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community,' LLD Thesis, Faculty of Law, University of Pretoria (2014).

[139]See Interview with Hon. Justice Isaac Lenaola, Lenaola (n 114 above). See also interview with Hon. Justice Dr.Faustin Ntezilyayo at EACJ Headquarters, Arusha, Tanzania, 10 March 2016.

human rights at the EACJ. Thus for instance, the decision in the *Katabazi* case has influenced litigants across the EAC to frame their human rights claims on the basis of article 6(d) and 7(2) of the EAC Treaty.[140] It is also credited with opening the door for litigants to approach the EACJ with human rights claims notwithstanding that the EACJ does not have express jurisdiction to hear and determine claims of human rights violations.[141] Similarly, the *Anyang' Nyong'o* case precipitated the filing of similar cases at the EACJ from Uganda and Tanzania to address the election of representatives of these Partner States to the EALA.

Although in most instances the EACJ decisions have elicited a positive influence on the human rights framework, the political backlash experienced by the EACJ in the wake of its interlocutory ruling in the *Anyang' Nyong'o* case precipitated a negative effect, both short and long term, on the wider human rights framework within the EAC. The effects of the amendments to the EAC Treaty, and in particular the 60-day rule, have denied litigants access to justice even in instances in which gross violations of human rights are alleged.

6. Regulations, Directives and Decisions of the Council

As discussed in Chapter 3 of this study, regulations, directives and decisions of the Council constitute one of the sources of law within the EAC legal framework, and are binding on the Partner States and on all organs and institutions of the Community with the exception of the Summit, the Court and the Assembly.[142] A review of the EAC database reveals that although the Council has not deployed these devices in the context of addressing specific human rights issues, they have nonetheless influenced the promotion and protection of human rights albeit in an indirect manner.

The first observation that is made upon a review of the Council reports is that the EAC Council has so far not issued any regulations that may be amenable to a human rights analysis. Although there are regulations in place pursuant to the Common Market Protocol,

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[140]See Interview with Hon. Justice Isaac Lenaola (n 114 above).

[141]Although not a change in law or policy, one can reasonably infer that the EACJ's decisions, and in particular on matters relevant to human rights, have served the function of emboldening EAC residents to file references with the Court. This has seen the EACJ's caseload increase significantly and in particular with cases from Burundi, which had hitherto not had any references filed against it.

[142]See article 14(3) (d) and article 16 of the EAC Treaty.

their exact status is not clear.[143] Article 52 of the Common Market Protocol provides that all annexes to the Protocol shall form an integral part thereof and are thus read as part of the Protocol. Article 51 empowers the Council to issue directives and make regulations fro the better implementation of the Protocol. There are in place EAC Common Market Regulations relating to free movement of persons, free movement of workers, the right of establishment and the right of residence respectively. These regulations are labelled as annexes to the Protocol. As such, it is unclear, whether they form part of the Protocol, or were passed separately by the Council pursuant to its powers under article 51. The view taken by this thesis is that these regulations are annexes to the Protocol as contemplated under article 52 and are therefore not in the nature of regulations issued by the Council. This is based on an examination of the language used in articles 7, 10, 13 and 14 of the Common Market Protocol, which clearly refers to them as annexes.[144]

The regulations so far issued by the Council are limited to technical aspects of for instance customs or competition law.[145]Thus, for the purposes of this section, reference will be made to decisions and directives of the Council.

A review of reports of the EAC Council meetings between 2014 and 2016 reveals that out of a total of 408 decisions made, only six relate to human rights, and only in an indirect manner.[146] Similarly, only four out of 259 directives issued relate to human rights

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[143]See EAC Common Market (Free Movement of Persons) Regulations, EAC Common Market (Free Movement of Workers) Regulations, EAC Common Market (Right of Establishment) Regulations as well as the EAC Common Market (Right of Residence) Regulations, which were passed pursuant to articles 7, 10, 13 and 14 respectively of the EAC Common Market Protocol.

[144]For instance, article 7 of the Common Market Protocol provides that ' The implementation of this Article shall be in accordance with the East African Community Common Market (Free Movement of Persons) Regulations, specified in Annex I to this Protocol.' This means that the Regulations are in essence Annexes to the Protocol and not regulations passed by the Council.

[145]Examples of Regulations currently in force include the EAC Customs Regulations under the EAC Customs Management Act 2004, and the EAC Competition Regulations pursuant to the EAC Competition Act 2010.

[146]Reference was made to reports of the 29th, 30th, 31st 32nd and 33rd Ordinary Meetings of the Council of Ministers held between 2014 and 2016. Relevant Council Decisions in this regard are EAC/ CM30/ Decision No 70 on recommendation of the draft protocol on the extension of the EACJ jurisdiction to the Summit for approval; EAC/CM30/ Decision 52 on the adoption of the EAC Strategy on Regional Peace and Security; EAC/ CM31/ Decision 19 on harmonisation of work and residence permits; EAC/ CM33/ Decision 49 on

matters.[147] Furthermore, no regulations with clear human rights implications were passed within this period. This means that only 1.47 per cent of the Council's decisions and 1.54 per cent of its directives are applicable to the promotion and protection of human rights within the community. Moreover, only three directives and four decisions were directed to the EAC Partner States for implementation, and all these were with reference to the implementation of the provisions of the EAC Common Market Protocol relating to free movement across national frontiers as well on preferential treatment for citizens from EAC Partner States with regard to the provision of entry, work and resident permits. Although these are not couched in terms of human rights obligations, they are nonetheless essential in contributing towards the human rights aspirations stated within the Common Market Protocol.[148]

6.1 Influence on National Laws, Policies and Actors

Two Council decisions are used in this section to evaluate the national impact of its decisions on the overall human rights framework.

In 2009, the Council established by way of a decision, the EAC Forum of National Human Rights Commissions that brings together five National Human Rights Institutions (NHRIs) from the Partner States for the purposes of coordination, harmonization and experience sharing by the NHRIs.[149] As will be seen in Chapter 5 of the study, the EAC Forum of National Human Rights Commissions has played a significant role in standard setting and the creation of national institutions for the promotion and protection of human rights. For instance, the Forum was instrumental in advocating with the Government of Burundi for the establishment of an independent National Human Rights Commission that is compliant with

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harmonisation of entry, work and residence permits in accordance with the Common Market Protocol; EAC/ CM33/ Decision 16 and 18 on the launch and the implementation of the EAC E-Passport.

[147]See EAC/ CM29/ Directive 23 on Cooperation in Peace and Security and Foreign Policy; EAC/ CM32/ Directive 17 Urging Partner States to fast track the finalisation of the EAC E-International passport; EAC/ CM33/ Directive 26 on Harmonisation of Entry, Work and residence permits, and, EAC/ CM33/ Directive 04 On awareness raising by the Partner States on the availability of the EAC E-international passport.

[148]These findings then lead to the conclusion that human rights matters do not feature prominently in the day to day workings of the Council, highlighting not only a shortcoming, but also an opportunity for more robust engagement by the Council on matters of human rights.

[149]See EAC Council of Ministers Decisions EAC/CM/DECISIONS 33, 34 and 35 of 2009.

the Paris Principles.[150] The Forum was also responsible for the development of the East African Human Rights Action Plan, which serves as a policy blueprint for the EAC's human rights interventions. Thus, the human rights gains and outflows from the Forum are ultimately attributable to the Council decision responsible for its establishment.

Also, the Council in 2011 took a decision requiring Partner States to establish sub-registries of the EACJ in their respective jurisdictions in order to enhance access to justice and especially to the EACJ. [151] The rationale behind this was to not only bring justice closer to the people, but also to enhance the profile of the EACJ, which was seen as inaccessible to a large proportion of the EAC residents given its seat in Arusha. Accordingly, sub-registries have been opened in all the EAC Partner States save for the newest member, the Republic of South Sudan.[152] This has made it easier for litigants to approach the court and file their pleadings and other relevant documents with relative ease. In this respect, there is a clear direct link between the Council decision on the establishment of national sub-registries, and the promotion of the right of access to justice, and in particular at the EACJ.

It is important to observe that these decisions and directives are not issued in isolation, but are made in the context of implementing relevant provisions of the EAC Treaty or its Protocols and other Community legislation. Thus, in terms of analysing their national impact, one comes across for instance a provision of the Common Market Protocol on free movement across national frontiers, which is then given additional impetus by Council decisions and directives to Partner States on the fast tracking of the adoption of the EAC e-

[150]Interview with Mrs. Florence Jaoko, former Chairperson, Kenya National Commission on Human Rights, 10 August 2014, Nairobi. She was the head of delegation from the EAC Forum of NHRIs in their advocacy missions to the Republic of Burundi in 2010. See also interview with Hon. Justice Audace Ngiye, Judge at the EACJ and the then Chairperson of the Burundi Governmental Commission on Human Rights, 10 March 2016, Arusha, Tanzania.

[151]For instance see 'East African Court of Justice Sub registry launched in Nairobi 'available at <http://www.judiciary.go.ke/portal/blog/post/east-african-court-of-justice-sub-registry-launched-in-nairobi > (accessed on 5 April 2016).

[152]See 'EACJ to Launch Sub-registry in Bujumbura 1 March' available at <http://eacj.org/?p=1322 > (accessed on 23 April 2016). See also 'East African Court of Justice Sub registry launched in Nairobi ' available at <http://www.judiciary.go.ke/portal/blog/post/east-african-court-of-justice-sub-registry-launched-in-nairobi > (accessed on 5 April 2016).

international Passport. This yielded fruit in March 2016 when the sub-regional passport was officially launched as a duly recognised travel document for citizens from the EAC Partner States. Although not yet implemented, the issuance of, and the use of the passport will enhance the ability of the EAC citizens to move with ease across their national frontiers, which is inextricably linked with among others, the right to seek employment in other Partner States, the freedom of movement or the right to seek educational opportunities. In addition, the Council decisions and directives relating to the harmonisation of national laws pertaining to entry, work and residence permits have seen legislative and policy review commence in the respective Partner States as discussed earlier in this Chapter with reference to the national influence of the EAC Common Market Protocol.

In view of the foregoing exposition, a number of conclusions may be drawn with respect to the national impact of the decisions, directives and regulations of the Council on the human rights discourse within the Partner States.

In terms of legislative and policy change, the national impact of Council decisions on implementation of the Common Market Protocol can be considered alongside the national impact of the provisions of the Common Market Protocol discussed in the previous section given that these devices by the Council are the vehicles through which provisions of the Protocol are implemented. [153]As such, the legislative and policy reforms discussed therein may also be attributed to the respective Council decisions and directives.

The Council decision on the establishment of the EAC Forum of NHRIs has had more of an indirect influence on the national human rights discourse in the Partner States by contributing to legislative and policy reform. The decision on the establishment of national registries for the EACJ has facilitated enhanced access to the EACJ hence promotion of the right of access to justice. Notably, however, the study did not encounter evidence of the use of Council decisions and directives in national courts, either by litigants or by the courts themselves in rendering their decisions. Consequently, no impact analysis was possible at this stage on their influence on national judiciaries.

[153]See generally the discussion in section3 of this chapter.

In conclusion therefore, one finds a situation where Council decisions have influenced national discourse on human rights, albeit in an indirect manner, by contributing to the adoption of national legislation, policies and institutions which ultimately have a bearing on the promotion and protection of human rights at the national level.

7. Conclusion

This chapter sought to identify whether the EAC's binding measures for the promotion and protection of human rights have had a trickle-down effect or an impact on the Partner States domestic framework. For the purposes of this research, impact was understood to mean the influence of these binding human rights measures on domestic law and policies as well as the actions of domestic actors leading to changes in human rights practices in the EAC Partner States. In this endeavour, the chapter has reflected on various measures to demonstrate this impact-the EAC Treaty, the Common Market Protocol, Acts of the Community as well as decisions of the EACJ. In the course of this chapter, it has emerged that whereas some of these binding measures continue to impact the human rights discourse within the EAC Partner States to varying degrees, others have not had any observable influence on the national systems.

Being the foundation for all human rights interventions within the Community and the foremost binding measure for the protection of human rights, the EAC Treaty, by creating the EAC complete with its organs and institutions, has not only resulted to the development of an emergent EAC human rights system, but has also resulted a sub-regional consciousness on the need to promote and protect human rights within the Partner States. The Common Market Protocol adopted under the Treaty framework in seeking to accelerate economic growth and development through free movement of factors of production as well as guaranteeing the rights of establishment and residence, brings on board a number of human rights guarantees, which are then passed on to the Partner States to implement in terms of law and policy. Key among these include the right to work, freedom of movement and residence, the right to property and the rights of refugees. It has also come to light that the EAC Partner States have taken several measures within their national jurisdictions, including amending existing laws, enacting new legislation and taking administrative action,

all aimed at compliance with the Common Market Protocol obligations which include human rights guarantees.

With reference to the domestic impact of Acts of the Community, this study was not able to conduct an impact analysis given the lack of human rights specific legislation within the EAC legal framework. Efforts by the EALA to enact human rights legislation in the name of the EAC Human and Peoples' Rights Bill as well as the HIV and AIDS Prevention and Management Bill have not borne fruit as the Heads of States have so far failed to assent to these Bills from the Assembly. Other Acts of the Community so far passed are in the form of Appropriation Acts, essentially budget approvals, legislation aimed at strengthening various Community organs and institutions, or specific technical legislation for instance on customs and standards,[154] which are not amenable to a human rights impact analysis based on their content and the areas that they address.

This chapter also undertook a review of selected decisions of the EACJ to determine the domestic impact on their respective national human rights practices. It has emerged that the EACJ has distinguished itself as a champion for the promotion and protection of human rights notwithstanding that it lacks express jurisdiction to hear and determine claims of violation of human rights. Its decisions have had both a direct and indirect influence on both state and non-state actors within the sub-region, resulting to enhanced traction of human rights in the sub-region. Of all the binding measures discussed in this Chapter, it can be safely concluded that the decisions of the EACJ has had the most far reaching national impact on the respective Partner States' human rights discourse. This level of success is attributable to among others, efforts of human rights NGOs and pro-democracy activists who have consistently litigated human rights cases before the EACJ, proactive judges who have encouraged litigants to file human rights cases before the court as well as positive action by governments to comply with EACJ decisions, sometimes spurred by political

[154]For instance, the EAC Emblems Act, the Acts of the Community Act and the EAC Powers and Privileges Act.

goodwill, and at other times due to the 'name and shame' strategies where activists call out EAC Partner States for human rights violations.[155]

An overall observation that is made in the course of this chapter is that the binding human rights measures adopted by the EAC are in most instances not couched in terms of human rights obligations or guarantees. However, when examined through the human rights lens availed by article 6 and 7 of the EAC Treaty, one is able to identify significant human rights implications of these measures. For instance, the free movement of labour under the Common Market Protocol is not stated in human rights terms. However, when free movement of labour is read together with article 3 of the Protocol, free movement of labour is translated into freedom of movement, the right to work, and the right to family, where applicable.

[155]See J T Gathii, 'Variation in the Use of Sub-regional Integration Courts Between Business and Human Rights Actors: The Case of the East African Court of Justice' (2016) 79 *Law and Contemporary Problems* 37.

CHAPTER FIVE

THE DOMESTIC IMPACT OF THE EAST AFRICAN COMMUNITY'S SOFT LAW HUMAN RIGHTS MEASURES

1. Introduction

Whereas the core of the EAC's normative framework consists of binding legal standards in the nature of 'hard law',[1] there is a growing body of non-binding norms (soft law) within the EAC's legal system, which are increasingly being applied in the Community's governance. This Chapter analyses the contribution made by these soft law measures to the enjoyment of human rights within the Community. Particular focus will be on the nature of soft law measures developed by the Community organs, and whether these have influenced national law and policy, or the practices of state and non-state actors within the domestic framework of EAC Partner States. Just like in the previous chapter, the impact analysis will focus on structural as well as process indicators as follows:

- Changes in national law, policy and state practice attributable to the soft law measures under consideration;
- Use of the soft law measures by non-state national level actors such as non-governmental organisations and individuals.

In this endeavour, the first part of this chapter discusses the concept of soft law and its significance in international governance, and in particular, with respect to the promotion and protection of human rights. The second part then focuses on the various soft law measures that have been generated by the EAC organs and institutions, and the extent to which these measures have influenced the human rights discourse within the domestic legal framework of the respective Partner States. The last section will be a summary of findings and a conclusion.

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[1]Hansohm and Kwinga define hard law as 'legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.' See D Hansohm & L Kwinga 'Institutional Anchoring of Regional Integration in the East African Community' in A du Pisani et al (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (2012) 212. See also G Shaffer and M Pollack 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2009) 94 *Minnesota Law Review* 706.

2. Understanding Soft Law

2.1 Key Elements of Soft Law

'Soft law' has been, and continues to be an elusive concept to define.[2] Attempts at definition have been limited to either descriptive accounts, or contrasting it with the notion of 'hard law', that lawyers find more familiar and easier to grasp. Thus for instance, Snyder, writing within the context of the EU, defines soft law as 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.'[3] Morth states that soft law is embodied in optional rules of behaviour, such as guidelines, codes of conduct and declarations.[4] In the same vein, Thurer considers soft law to be commitments that are more than policy statements, but less than law in its strict sense.[5] Chinkin classifies soft law as either 'legal or non-legal soft law,' based on whether these norms appear in a formal source of international law as set out in article 38 of the Statute of the ICJ.[6] Shelton

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[2]An analysis of available literature reveals that there are divergent views by scholars and legal practitioners on what is meant by soft law in international governance. These range from outright rejection by positivist legal scholars, to tacit acceptance of its relevance in regulating the conduct. See Shaffer and Pollack (n 1 above).

[3]F Snyder, 'Soft Law and Institutional Practice in the European Community' European University Institute Working Paper LAW, No. 93/5 (Florence, 1993) 18.

[4]U Morth, 'Soft Law and New Modes of EU Governance-A Democratic Problem?'(2005) available online at < <http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/6/Papers_Soft%20Mode/Moerth.pdf> (accessed on 26 August 2014).

[5]D Thurer, 'The Role of Soft Law in the Actual Process of Eurpoean Integration' in O Jacot Guillarmod, P. Pescatore (eds), *Lávenir du Libre-echangeen Europe: Vers un Espace Economique Europeeen?*' (1990) 132. Furthermore Aho echoes Snyder's definition by observing that soft law is an umbrella concept that refers to rules of conduct that are *not legally binding* as such but may have practical and legal effects, E Korkea-Aho 'EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?' (2009) *16 Maastricht Journal of European and Comparative Law* 271. Blutman adopts a double edged definition of soft law to include on the one hand 'norms which do not appear in the form of a legal source recognized by international law, but are of some legal relevance' and on the other hand 'norms that appear in the form of a formal legal source recognized by international law, but are not enforceable owing to their generality, vague normative content or subjective nature. L Blutman 'In the Trap of a Legal Metaphor: International Soft Law' (2010) 59 *Int'l & Comparative Law Quarterly* 605.

[6]Under this category, legal soft law would include for instance treaty provisions which are not enforceable because of their imprecision or ambiguity. Examples given include Article 2 of the Covenant on Economic, Social and Cultural Rights which obliges state parties to 'take steps, individually and through international assistance with a view to achieving progressively the rights recognized in the treaty', Non-legal soft law on the other hand would refer to norms which are not contained in the formal sources of law under article 38 but are nonetheless of some legal significance. These would for instance include declarations issued by States and international conferences and the General Comments of Treaty Bodies. For a detailed analysis see CM Chinkin

posits that soft law may be classified as either 'primary' or 'secondary'.[7] Kabumba contributes to this conversation to categorise soft law based on the issuing authority of the particular instrument, as opposed to the addressees of the norms. He thus develops the typology of state-generated, non-state generated and quasi-state generated soft law.[8]

The proverbial golden thread that runs through the above scholarly engagements with soft law, is that it is not formally binding in the same manner as positive law. This is evident from the use of terms such as 'optional rules', 'not legally binding' and 'not enforceable' in the various descriptions of soft law, all of which suggest that no formal sanctions exist *per se,* and thus a legal cause of action cannot be founded in any court solely on the basis of a breach of soft law.

This study neither seeks to find an all-encompassing definition, nor to identify a novel categorisation of soft law, but uses the existing works in order to gain a deeper understanding of the nature of soft law in order to showcase how they have been developed and deployed towards the promotion and protection of human rights within the EAC Partner States. Thus, it suffices to observe that notwithstanding the different labels one may assign to it, there is a measure of consensus that soft law consists of non-binding standards, which emanate from both state and non-state actors, and which have a

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'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850.

[7]Primary soft law is said to comprise 'normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization.' Secondary soft law refers to 'recommendations and general comments of international supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other *ad hoc* bodies, and the resolutions of political organs of international organizations applying primary norms. Examples of such primary soft law instruments include the UN Standard Minimum Rules for the Treatment of Prisoners;33 the UN Guiding Principles on Internal Displacement of 1998; the UN Declaration on the rights of Indigenous Peoples of 2007; the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity of 2007. See D Shelton 'Soft law' (2008) George Washington University Law School, Public Law Research Paper No.322, 3.

[8]In his view, state generated soft law instruments comprise of documents authored by states, which would include communiques and declarations issued as the end of international conferences. Non-state generated soft law refers to instruments generated by non-state entities such as NGOs, think tanks or groups of experts. Lastly, quasi-state generated soft law in his view refers to instruments authored by entities which although created by states, do not have the generation of such instruments as their core mandate. This category would include such as instruments as General Comments, which have been issued by a number of treaty bodies. See B Kabumba 'Soft Law and Legitimacy in International Law: A Case Study of the Doha Declaration on the Trips Agreement and Public Health' LLD thesis University of Pretoria, 2014.

considerable measure of legal significance in both national and international governance systems.

2.2 Soft Law in International Relations

Soft law continues to be of considerable influence in the regulation and conduct of relations between states. Legal scholars have argued that the so-called 'proliferation' of soft law instruments is attributable to the distinct advantages these instruments offer over traditional hard law instruments. To begin with, it is argued that the nature of soft law allows for enhanced participation and ownership by non-state actors such as non-governmental organisations, community groups and business associations. This is in view of the fact that the development and enactment of hard law is in most cases, controlled by national legislatures, which, depending on the particular state's governance model, may or may not open up the legislative process to non-state actors[9] Furthermore, soft law may function as an alternative to legislation or 'hard law'.[10] Thus, states may opt for soft instruments to avoid having to deal with complex domestic or international technicalities relating to treaties. Moreover, states may take up soft law instruments to escape deadlocks in negotiations and the 'real' hard law obligations.[11] Thus, in a sense, a soft law instrument 'allows states to be more ambitious and engage in "deeper" cooperation than they would if they had to worry about enforcement.'[12]

In addition, soft law, in some instances, operates as a precursor to hard law, in what Chinkin and Senden describe as 'emergent hard law' and 'pre-law' respectively, or as Abbott and Snidal write, 'as a way-station to harder legalization.'[13] Under this framework, emergent

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[9]See Shaffer and Pollack (n 1 above) as well as M Barelli 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International and Comparative Law Quarterly* 957.

[10]L Senden 'Soft law and its Implications for Institutional Balance in the EC' (2005) *1 Utrecht Law Review* (No. 2) 79.

[11]In this regard, Kirton and Trebilcock observe that soft law is 'politically attractive and cost effective for governments, NGOs, and other stakeholders as an alternative to costly and protracted litigation'. See J Kirton and M Trebilcock 'Hard Choices, and Soft Law in Sustainable Global Governance' in J Kirton and M Trebilcock (eds) *Hard Choices, Soft Law, Voluntary Standards in Global Trade, Environment and Social Governance* (2004).

[12]See Shaffer and Pollack (n1 above).

[13]K W Abbott et al 'The Concept of Legalization' (2000) 54 *International Organization* 401.

principles are set out as non-binding norms with the tacit expectation that they will be 'upgraded' into binding treaty provisions or custom through state practice and *opinio juris*.[14] Lastly, soft law can play an elaborative function *vis-à-vis* hard law. In this sense, soft law principles aid in the filling of *lacunae* in hard law by aiding in its interpretation or application.[15] A practical example in this regard is the use of soft law principles by courts in the determination of cases that are litigated before them, particularly in cases where there is a dearth of case law, or where the law is not yet settled.[16]

2.3 Criticisms of Soft Law

Notwithstanding its utility and influence in international governance at different levels, soft law has come under sharp criticism, especially from legal positivist scholars, who prefer a clear-cut distinction between legally binding norms and those that are in the realm of non-law. Klabbers leads this onslaught in his works, where he reiterates that soft law is redundant and must be done away with altogether for a variety of reasons.[17] He views the idea of soft law as a fallacy. In his words, 'something either is binding or it is non-binding, but never something in-between…an instrument is in force or it is not in force, but never something in-between.'[18] He therefore holds that arguments for soft law are clumsy and cannot stand before a court of law or anywhere else. The supposed grey area between law

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[14]This is clearly illustrated in the context of international human rights law where the principles included in the Universal Declaration on Human Rights, though initially adopted as non-binding standards, have been regarded by a number of authors as having crystallized into customary international law. Moreover, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are in essence a codification of the norms laid out in the UDHR into hard law. See J Dugard *International Law: A South African Perspective* (2005) 28.

[15]See Aho (n 5 above).

[16]Thus for instance, within the EAC, the Kenyan High Court has, in several petitions brought before it challenging unlawful evictions from informal settlements by state agencies and private developers, referred and endorsed soft law instruments including the UN Basic Principles Guidelines on Development based Eviction and Displacement (2007) as well as General Comments by the Committee on Economic Social and Cultural Rights and resolutions of the African Commission on Human and Peoples' Rights, to interpret the content of article 43(1) of the Constitution of Kenya on the right to housing. See for instance *Satrose Ayuma & Others v Registered Trustees of the Kenya Railway Staff Retirement Benefits Scheme and Others* Nairobi Petition No. 65 of 2010 [2013] eKLR; *Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 3 others* [2013] eKLR.

[17]See generally J Klabbers 'The Undesirability of Soft Law' (1998) *67 Nordic Journal of International Law* 381.

[18]As above.

and non-law, in which proponents of soft law thrive, is tantamount to fence-sitting and not tenable in law.

Secondly, he holds that soft law as a distinct category of norms is unsustainable, because once soft law principles are subjected to a specific set of circumstances, they collapse into either binding norms (hard law) or non-law. Thus, a principle that is considered 'soft law' today may through this process be upgraded to 'hard law,' if it gains judicial or legislative approval, or consigned to the category of 'non-law' if it fails the test of judicial scrutiny. Thus, the idea of an in-between concept does not hold water.

Closely related to the foregoing criticisms is the argument that soft law undermines the simplicity and certainty of law. Under hard law, one is able to determine with relative ease and certainty, whether a given conduct is lawful or not, by for instance, consulting the relevant legislation, or making reference to judicial precedent based on the doctrine of *stare decisis*. Klabbers contends that soft law creates so much subtlety that may potentially lead to chaos, thereby undermining the very concept of law as a vehicle for ordering human relations. He observes that '…by creating uncertainty at the edges of legal thinking, the concept of soft law contributes to the crumbling of the entire legal system'.[19]

Klabbers further notes that soft law is an unwanted encroachment of politics into the realm of law. He ostensibly bases this on the argument that soft law sometimes allows for political resolution of contentious matters, that would not otherwise be agreed among parties for instance in the form of a treaty. In his view, this disrobes the autonomy of law and opens the door for arbitrariness of the kind that Montesquieu denounced when he posited on the phenomenon of separation of powers. Thus, 'the law loses its relative autonomy from politics or morality, and therewith becomes nothing else but a fig leaf for power.'[20]

Blutman contributes to this debate by noting that soft law advocates do not draw a convincing argument between non-legal norms and soft law, and of how these non-legal norms are transformed into soft law. Is there a gradual shift from non-law to soft law or

[19]As above.

[20]See Klabbers (n 17 above) 391.

does soft law just emerge from nowhere? Furthermore, what criteria must such a non-legal norm achieve before it is elevated to soft law? Is there an authority that makes this determination, or is it an 'I know it when I see it'-situation?[21]

Additionally, soft law has been criticised based on the 'democratic deficit' argument, which holds that the development of soft law standards by non-state actors without the participation of key legislative or policy institutions robs the resultant standards and instruments of their democratic legitimacy.[22]

Whereas the foregoing criticisms are valid in their own right, they seem to be based on the notion that soft law operates in contention with, and seeks to supplant 'hard' law. On the contrary, it is submitted that soft law operates optimally to either reinforce hard law, to seal lacunae in hard law, or as a way of consolidating emergent principles that would ultimately become hard law. As such, there still is enough room for hard and soft law to exist side by side, in a mutually reinforcing manner as complementary tools for international problem solving. This is particularly crucial given that hard and soft-law instruments offer particular advantages for diverse contexts involving a range of factors that actors consider. As will be shown in the course of this thesis, both hard and soft law operate side by side within the EAC legal framework for the achievement of the objects of integration as agreed by the Partner States.

3. Soft Law Human Rights Measures in the EAC

The EAC Organs continue to develop soft law standards to supplement the formal sources of law in the Community's governance. These have included recommendations and opinions of the Council,[23] resolutions of the EALA, and other non-binding norms and standards developed within the EAC treaty framework, constituting what Kabumba refers to as 'State Generated Soft Law'.[24]

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[21]For additional views on the shortcomings of soft law see Blutman (n 5 above).

[22]See for instance arguments by Kirton and Trebilcock (n 11 above).

[23]Art 14 of the EAC Treaty.

[24]See Kabumba (n 8 above). In addition to the EAC Organs and Institutions, Civil Society has also participated robustly in the development of several non-binding norms at diverse levels within the EAC thus showcasing

These soft law devices have been adopted to enhance the regional integration process in diverse fields including the promotion and protection of human rights. For the purposes of this study, particular focus will be on soft law instruments developed by the EAC organs. These include action plans and strategic documents adopted by the Council as well as soft law emanating from the legislative and oversight mechanisms of the EALA.

3.1 Action Plans and Strategic Documents

Article 14 of the EAC Treaty empowers the Council to make policy decisions as well as consider measures to be taken by Partner States to promote the achievement of the community's objectives. Furthermore, article 71 mandates the Secretariat to institute, receive and submit recommendations to the Council as well as conduct research and engage in strategic planning for the achievement of the integration objectives. As such, the Secretariat, works closely with the Council in the development of Community action plans and strategic documents which are meant to guide the EAC towards the achievement of its integration objectives. Of relevance to this study are a number of strategic documents that seek to enhance the promotion and protection of human rights within the EAC. These include the EAC Plan of Action on the Promotion and Protection of Human Rights as well as the EAC Strategic Plan on Gender, Youth, Children, Persons with Disabilities, Social Protection and Community Development, and are considered in the sections that follow.

3.2 The EAC Plan of Action on Promotion and Protection of Human Rights

The EAC Plan of Action on Promotion and Protection of Human Rights is the Community's policy framework for the enhancement of human rights within the sub-region.[25] The first

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their contribution to the development of soft law within the Community, in what Kabumba subsequently refers to as 'non-state generated soft law'. A notable example was the development of the draft EAC Bill of Rights by the Ugandan NGO-Kituo Cha Katiba. This draft was subsequently adopted by the EAC Secretariat and influenced the development of the final EAC Human and Peoples Rights Bill enacted by the EALA in 2012. Article 5(3) (g) of the EAC Treaty requires the Community to enhance and strengthen partnerships with the private sector and civil society for the achievement of sustainable socio-economic and political development. The role of civil society is then further underscored in articles 127(3) and (4) respectively, in which the Partner States undertake to create an enabling environment for their full participation in the integration processes.

[25]The Plan of Action is a policy document developed by the Secretariat and adopted by the Council. The first Plan of Action was adopted vide EAC/CM 15/Decision 36 and covered a one year period from July 2008 to June 2009. Available at

Plan of Action was adopted in 2008 covering the period from July 2008 to June 2009. It was subsequently extended for a further two years, ending in 2011. There is in place a Second Plan of Action covering the years 2014-2017.[26] The first and second Plans of Action draw inspiration primarily from the EAC Treaty in which Partner States commit to adhere to international and regional human rights standards and principles and more particularly the African Charter on Human and Peoples' Rights.[27] It has also been informed by the East African Community Development Strategy documents, which provide for development of joint regional policies and mechanisms for the promotion and protection of human rights the sub-region.[28] As a soft law instrument, it does not attract any sanctions for non-compliance other than the obvious reputational risk that may accrue.

For purposes of analysis, this study will primarily focus on the first EAC Plan of Action on Human Rights 2008-2011 and touch on elements of the second Plan of Action 2014-2017.[29] The main objective of the EAC Plan of Action (2008-2011) was to 'enhance and complement Partner States laws, policies, strategies and programmes in inculcating the culture of respect for human rights in line with the Community's fundamental principles' as outlined in article 6 of the EAC Treaty.[30] To this end the Plan of Action set out eight main areas of strategic intervention which include facilitating compliance with the Paris Principles on National Human Rights Institutions, enacting an EAC Bill of Rights with mechanisms for enforcement; establishing an EAC Human Rights Policy forum, building capacity of national institution to develop National Action Plans on human rights, capacity building for Partner States to

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<http://www.federation.eac.int/index.php?option=com_docman&task=doc_download&gid=132&Itemid=70> (accessed on 12 April 2015).

[26]For the years 2011-2013 there was no action plan in place. The Second Plan of Action was considered at the Meeting of the EAC Forum of National Human Rights Commissions held in Arusha, Tanzania on 24-25 April 2014. The meeting made recommendations to the Council to adopt the Plan of Action so as to provide a regional platform for the promotion and protection of human rights. For more information see <http://www.eac.int/news/index.php?option=com_content&view=article&id=1211:eac-forum-of-national-human-rights-commissions-meets-in-arusha-&catid=48:eac-latest&Itemid=69> (accessed on 12 April 2015).

[27]See para 2.0 of the Plan of Action.

[28]As above.

[29]This is due to the fact that the 2014-2017 Plan of Action was only adopted in 2015 and has not run its full course.

[30]See EAC Plan of Action on Human Rights for 2008-2011(n 25 above).

comply with their reporting obligations under regional and international human rights instruments, enhancing awareness and understanding of human rights through education and training and working with Partner States towards ratification and domestication of all relevant international and regional human rights instruments. The EAC Partner States were designated as the main drivers for the realisation of the outcomes of the Plan of Action, alongside the EAC Secretariat and other Community organs.

3.2.1 Influence on National Law, Policy and Actors

As the regional human rights policy document, the first action plan yielded a number of positives in the course of its implementation. To begin with, this is the period that saw a lot of activities in earnest towards the enactment of the EAC Bill of Rights. A draft Bill of Rights was developed through the joint efforts of the EAC Secretariat, the EAC National Human Rights Commissions and EALA with technical support from the Ugandan NGO-Kituo Cha Katiba.[31] The EAC Secretariat, on advice from the Council and in collaboration with the national Ministries responsible for EAC matters, then convened national stakeholder forums in the Partner States in which the draft Bill of Rights was discussed at length thereby giving an opportunity for public participation in the development of the instruments.[32] Eventually, the EALA Committee on Justice and Legal Affairs adopted the Bill and reformulated it before it was tabled and passed by the EALA as a private members' Bill in 2012.[33] In this way, the EAC Human and Peoples' Rights Bill is attributable to the EAC Plan of Action on Human Rights. Although it is not yet binding law, it is anticipated that once it gains the force of law, it will influence the respective national legal frameworks for the promotion and protection of human rights.

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[31]Interview with Mrs. Florence Jaoko, former Chairperson, Kenya National Commission on Human Rights, 10 August 2014, Nairobi (Notes of file with author).

[32]The author was the focal point on EAC affairs at the Kenya National Commission on Human Rights between the years 2010- 2013 and participated in a number of events hosted by the EAC Secretariat on the question of the EAC Bill of Rights.

[33]See 'EALA Passes Bill on Human Rights' EAC Press Release available at <http://www.eac.int/index.php?option=com_content&view=article&id=988:eala-passes-bill-on-human-rights&catid=146:press-releases&Itemid=194>(accessed on 5 January 2016).

Another key area of engagement in the Plan of Action was the establishment of an EAC Human Rights Policy forum. To this end, the EAC Secretariat, in collaboration with the EAC National Human Rights Commissions, advocated with the Council towards the establishment of a permanent forum of EAC National Human Rights Commissions, which meets at least once a year.[34] The main object of this forum is to have a mechanism for coordination, harmonization and experience sharing by the NHRIs. One of the key successes of the forum during the currency of the first action plan was its advocacy work with the Government of Burundi on the establishment of a National Human Rights Institution in compliance with the Paris Principles Relating to the Status of National Institutions.[35] Previously, the national mechanism for the protection of human rights in Burundi was the Governmental Commission on Human Rights established in 2000 via Presidential Decree. In the course of 2009 and 2010, the EAC Forum of National Human Rights Commissions held a series of meetings with different levels of government in Burundi to advocate for the adoption of legislation that would specifically constitute the Commission as an independent institution in line with the Paris Principles. This intervention contributed to the replacement of the Government Commission by the Independent National Commission on Human Rights that was set up under specific legislation.[36] As such, in terms of national impact, the adoption of legislation creating a National Human Rights Institution in Burundi can be attributed in part to the work of the EAC Forum of National Human Rights Institutions, which was established under the EAC Action Plan on Human Rights.[37]

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[34]The name of the forum was changed from the Human Rights Policy forum used in the EAC Plan of Action to the EAC Forum of National Human Rights Commissions.

[35]Principles relating to the Status of National Institutions (The Paris Principles). Adopted by General Assembly resolution 48/134 of 20 December 1993. Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx> (accessed on 16 April 2016).

[36]The Independent National Commission on Human Rights in Burundi ('CNIDH') was created by Act No. 1/04 of 5 January 2011. See their weblink on < http://accessfacility.org/independent-national-commission-human-rights-burundi> (accessed on 20 April 2016).

[37]Interview with Mrs. Florence Jaoko, (n 31 above). She was the head of delegation from the EAC Forum of NHRIs in their advocacy missions to the Republic of Burundi in 2010. See also interview with Hon. Justice Audace Ngiye, Judge at the EACJ and the Chairperson of the Burundi Governmental Commission on Human Rights. 10 March 2016, Arusha, Tanzania.

The development of national action plans on human rights by the Partner States was also one of the targets of the EAC Action Plan on Human Rights. The thinking behind this was that the respective national action plans would be harmonised and would feed into the sub-regional action plan, thus creating a coherent policy framework that flows from the national to the sub-regional and vice versa. The development of national action plans on human rights was not an EAC invention *per se,* but was rather a recommendation of the 1993 Vienna Declaration and Programme of Action.[38] The EAC then took the cue from the Vienna Declaration to spur the development of action plans by the Partner States. An analysis of the Partner States compliance with this requirement reveals that Tanzania developed and launched its National Human Rights Action Plan (2013-2017),[39] while Kenya adopted its National Policy and Action Plan on Human Rights in 2014.[40] Uganda[41] and Rwanda[42] are still in the process of developing their documents. Burundi is yet to commence the process.

As the first national human rights action plan concluded by an EAC Partner State, the overall objective of Tanzania's National Human Rights Action Plan is to strengthen the respect, protection, promotion and fulfilment of human rights as protected in the Constitution, and to guarantee human rights according to international agreements entered into by the state. The plan identifies 23 human rights issues and classifies them into four thematic priority areas for enhanced coordination and protection of rights in Tanzania.[43] It also seeks to

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[38]See para 71 of the Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

[39]See Tanzaina's National Human Rights Action Plan. Available at <http://www.chragg.go.tz/docs/nhrap/NHRAP_Final_December_2013.pdf> (accessed on 2 April 2015).

[40]See Kenya's National Policy and Action Plan on Human Rights: Adopted on 28 April 2014 as Sessional Paper No. 3 of 2014. Available at <http://www.knchr.org/Portals/0/Bills/National%20Human%20Rights%20Policy%20and%20Action%20Plan.pdf > (accessed on 10 October 2016).

[41]See Uganda Human Rights Commission on Progress towards development of a National Human Rights Action Plan. Available at< http://www.uhrc.ug/uhrc-together-ministry-foreign-affairs-hold-consultative-meeting-developing-uganda-human-rights> (accessed on 3 April 2015).

[42]For an update on Rwanda's progress towards the development of a National Human Rights Action Plan see <http://www.upr-info.org/followup/assessments/session23/rwanda/Rwanda-NCHR.pdf> (accessed on 3 April 2015).

[43]The thematic areas include Civil and Political Rights; Economic Social and Cultural Rights; Protection of Minority and Vulnerable Groups and Institutional Strengthening for the effective monitoring and implementation of the Action Plan.

infuse a Rights Based Approach into existing national development policies and strategies. Kenya's National Policy and Action Plan seeks to give effect to the Bill of Rights in the Constitution by providing a comprehensive policy framework that serves as a guide to the state and other human rights actors in implementing their functions in a manner that enhances the promotion and protection of human rights. Its stated objectives include capacity building for state and non-state actors on the observance, promotion and protection of human rights, promote a human rights based approach to planning as well as mainstreaming human rights in public policy development and resource allocation.

In terms of attribution, a reading of the Tanzanian and Kenyan Action Plans does not reveal any reference to the EAC Action Plan or any influence of the EAC organs or institutions in its development. However, it is submitted that the lack of express mention of the EAC framework in these documents does not mean that the EAC Action Plan, and the EAC human right framework played no part in the course of their development. Indeed, the Tanzanian Commission on Human Rights and Good Governance (CHRAGG), as well as the Kenya National Commission on Human Rights (KNCHR), were the main national institutions that spearheaded the development of these national action plans within their respective jurisdictions. Given that CHRAGG and KNCHR are part of the EAC Forum of National Human Rights Commissions, and noting that they were among the authors of the EAC Plan of Action which made provision for National Action Plans, it logically follows that the development of the Kenyan and Tanzanian action plans on human rights is attributable in part to the efforts made by the EAC to spur the Partner States towards developing their individual national plans.[44] Furthermore, the ongoing concurrent efforts towards the development of human rights action plans by the other EAC Partner States is not a matter of coincidence, but points to a deliberate effort to comply with the directions in the overarching EAC Policy. Therefore, in terms of national impact, one can draw a conclusion that the development of concrete National Action Plans on Human Rights by the respective Partner States, though an initial

[44]See (n 32 above). The author was present in several meetings of the Forum of EAC National Human Rights Commissions during which the development of respective National Action Plans on Human Rights was a key agenda item.

commitment under the Vienna Declaration and Plan of Action, was given fresh impetus under the EAC framework through the regional Plan of Action on Human Rights.

Lastly, though not an outcome indicated in the regional Plan of Action, this study documented its influence on individuals and non-state actors in the sub region. A notable instance was in the case of *Democratic Party v The Secretary General of the EAC and 4 others,* where the applicant cited the Plan of Action as one of the measures employed by the EAC Partner States to give effect to their international and regional human rights obligations within the EAC framework.[45] Although the EAC Plan of Action did not form the core of the claim in this case, the fact that the applicant made reference to it as forming part of the EAC's human rights framework demonstrated an awareness of its value by national actors in the overall human rights architecture.

Thus, it is concluded that although the EAC Plan of Action on Human Rights has contributed to the promotion and protection of human rights within the sub-region, this has been more of an indirect influence, where the Plan of Action works in concert with other normative standards including hard law.

3.3 East African Community Strategic Plan on Gender, Youth, Children, Persons with Disabilities, Social Protection and Community Development

Another key policy document on human rights within the EAC sub-region is the East African Community Strategic Plan on Gender, Youth, Children, Persons with Disabilities, Social Protection and Community Development. Developed to cover the period 2012 to 2016, this strategic plan is a culmination of a number of deliberate measures undertaken by the EAC to comply with treaty provisions on gender parity, social protection and citizen centred integration.[46] Thus, this plan is based *inter alia* on articles 5, 3(e); 6(d); 121 and 122 of the Treaty, which highlight gender mainstreaming, promotion of the role of women in business and development as core concepts upon which the EAC integration process is built. In addition, the Partner States undertake under article 120(c) of the Treaty to cooperate and

[45] EACJ Reference No. 2 of 2012, First Instance Division.

[46] Preamble to the Strategy Document for a list of Council Decisions and Recommendations that gave rise to the strategy.

adopt common standards and approaches in social welfare including the protection of disadvantaged and marginalized groups such as children and persons with disabilities. Furthermore, article 102(2) requires Partner States to collaborate in setting up education and training programmes for people with special needs and other disadvantaged groups.

A reading of the foregoing provisions reveals that this strategic plan operates under the overarching human rights commitments made by the Partner States not only individually, but also under the provisions of article 6 and 7 of the EAC Treaty in which the EAC undertakes to abide by the international and regional human rights framework.[47] It also operates under the broad strategic framework outlined in the East African Community Development Strategy, which lays emphasis on matters of gender, social development, and other thematic areas covered by this strategic plan.

The plan outlines strategic interventions in six components of integration-gender, youth, children, persons with disabilities, social protection and community development. For purposes of this study, this analysis will be primarily based on thematic areas on gender, children and persons with disabilities.

3.3.1 Promotion of Gender Equality and Women Empowerment

Under the gender component, it is recognised that EAC Partner States have made explicit provisions in the EAC Treaty that underscore the importance of gender parity and women empowerment within the community.[48] Nonetheless, the plan concedes that gender inequality still remains a major challenge to the realization of the Community's objectives. This is exemplified by for instance, the limited access to financial services for women, high unemployment rates for women, limited participation of women in decision-making in the

[47]It states in its Preamble that its framers have in its development considered and incorporated various legal instruments and commitments made at international and regional levels such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Beijing Platform for Action, the UN Convention on the Rights of the Child, the African Youth Charter and the UN Convention on the Rights of Persons with Disabilities.

[48]See articles 5, 3 (e); 6 (d); 121 and 122 of the EAC Treaty. Furthermore, there is in place a Sectoral Council that is designated to articulate matters dealing with gender within the Community. Moreover, the Partner States have also taken up legislative and policy measures individually within their jurisdictions to promote the rights of women.

corporate and political sectors, harmful traditional and cultural practices and inadequate budgetary allocation for national gender machineries.[49]

In order to address these imbalances, the EAC in this strategic plan seeks to mainstream gender in all its sectors, promote the role of women in business and socio economic development, promote gender equality, equity and take steps to empower women and girls within the region. Specific measures to be undertaken in this regard include developing a conducive legislative and policy framework including a regional gender policy, gender responsive budgeting, research, assessments and studies on the status of gender equality and promoting economic security for women. The key drivers of this process as outlined in the strategy are the EAC Secretariat, the EAC Partner States, the Media, private sector and CSOs working within the EAC Partner States.

3.3.2 Promotion and Protection of the Rights of Children

The promotion and protection of the rights of children is another key thematic area of intervention in the Strategy. Just like their counterparts in most developing countries, children within the EAC are exposed to diverse development challenges, including lack of adequate food, health and education, abuse, violence, harmful cultural practices, exploitation and sexual abuse, child labour and child trafficking. This then calls for specific attention to collectively address the plight of children within the EAC.[50] This strategic plan thus presents an attempt at a comprehensive and harmonized regional response to promote children's rights within and among the EAC Partner States.

The overall broad objective under this thematic area is to 'promote child protection in order to foster their social development and wellbeing'.[51] This is to be achieved through among others developing a regional policy on children, increasing budgetary allocations to cater for children's needs, providing social security to vulnerable children, developing a regional

[49]See generally the Preamble to the Strategy Document as well as section 3.1 thereof.

[50]In addition to ratifying international and regional instruments on child protection, the EAC Partner States have also taken up legal and policy measures at the domestic realm in order to enhance the protection and development of children.

[51]See Section 3.3 of the Strategy Document, 30.

database for children and setting up a regional resource centre on child protection. Other activities envisaged under this plan include developing guidelines and work plans for mainstreaming children's issues within the EAC, capacity building for Partner States and other key actors at the EAC on mainstreaming children's issues, establishing a regional forum for children and facilitating Partner States' compliance with international instruments that relate to children.

3.3.3 Protection of Persons with Disabilities

Under the disability component, the strategic plan aims to 'promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities for improved livelihoods'. This comes against the reality that persons with disabilities have for long been viewed as objects of charity rather than active participants in socio-economic development.[52]

The strategy seeks to address disparities in service provision and availability of opportunities for persons with disabilities by removing barriers which have for a considerable time hindered their effective participation in their communities, accessing quality education, and having their voices heard in all spheres of life.

Based on universally accepted human rights standards, and in particular the provisions of the United Nations Conventions on the Rights of Persons with Disabilities, the enduring vision is one in which in which all persons with disabilities live a healthy, comfortable and dignified life. In achieving this vision, the plan sets out a three-pronged approach which includes developing a regional legislative and policy framework for PWDs, improving access by PWDs to essential services and in particular shelter, education, health, employment, microfinance and public information, and to mainstream disability in the EAC programmes, policies, plans, budgets and evaluation systems.[53]

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[52]More often they are consigned to the fringes of social life which has in turn exacerbated their vulnerability. Thus they are in most instances unable to access quality education, health services, assistive devices or gainful employment, which in turn entrenches them to a cycle of poverty, deprivation and dependency.

[53]See Section 3.4 of the Strategy document.

3.3.4 Reflections on the Domestic Impact of the Strategic Plan

Although the EAC has developed an ambitious policy framework for the achievement of key milestones in the thematic areas addressed by this strategy, the outputs so far observed by this research reveals that little has been achieved in terms of implementation both at EAC and national levels. At the various national levels, it appears that the Partner States continue to lay more emphasis on their national priorities as opposed to the EAC framework. A review of the various national policies on children, gender as well as disability across the EAC Partner States revealed no reference to the EAC normative framework. The annual reports of the national agencies charged with enhancing gender equality also revealed scanty reference to the EAC policy and normative framework. As such, there is an apparent disconnect between policy development and implementation at the national level and at the Community level.

Notwithstanding the overall negative outcome of this strategy, this study observed that a number of positive outcomes have been registered. With a view to achieving economic empowerment for women, the EAC has developed a draft strategy on promoting women in socio-economic development and women in business. Part of this strategy entails establishing a regional financial facility for women owned businesses hosted at the East African Development Bank (EADB). This facility will not only provide affordable financing for entrepreneurs but also business training and mentorship for women from across the partner states.[54]

Furthermore, the EAC has developed a number of tools and standards for enhanced gender mainstreaming within the Community. These include the Gender Mainstreaming Strategy for EAC Organs and Institutions, 2013, the Guidelines and Checklists for Gender Mainstreaming in EAC Organs and Institutions,[55] 2013 and the EAC Regional Implementation

[54]This framework has been developed and is awaiting adoption by the Council. See <http://www.eac.int/sectors/gender-community-development-and-civil-society/gender-and-women>. (accessed on 5 July 2016).

[55]Developed in 2013, this is a manual that is designed to guide EAC staff as well as key stakeholders at different levels for effective mainstreaming of gender in regional programs and projects during all phases of project cycle, making them active agents for delivering effective gender analysis and mainstreaming within the community.

Plan on United Nations Security Council Resolution 1325 on Women, Peace and Security 2015–2019.[56]

In terms of development of Community standards on gender equality, the EAC Gender Office of the EAC Secretariat, together with the EALA and the East African Sub-regional Support Initiative for the Advancement of Women (EASSI), a sub-regional Non-Governmental Organisation have been closely involved in the development and drafting of the draft EAC Gender Equality and Development Bill 2015 which was subsequently passed by the EALA and is pending assent by the Heads of State.[57] The object of the Bill is 'to make provision for the accelerated achievement of gender equity and equality, enhanced protection of human rights of those most affected by different forms of gender inequalities and for development in the Community.'[58]

With reference to the promotion of the rights of the child, the EAC launched the EAC Child policy in August 2016 After its adoption by the Sectoral Council on Gender, Youth, Children, Social Protection and Community Development in March, 2016.[59] It draws inspiration from the Partner States commitments towards enhancing the rights of children as set out in the Bujumbura Declaration on the Rights of the Child as well as the UNCRC, the ACRWC and the EAC Treaty. The EAC Child Policy provides a regional framework to facilitate the development, coordination and strengthening of Partner States activities towards the realization of the rights of children. Priority areas identified include strengthening national child protection systems and community mechanisms within the EAC and developing an

[56]See the document available online at <http://www.eac.int/sectors/gender-community-development-and-civil-society/gender-and-women/mainstreaming-documents> (accessed on 28 April 2016).

[57]The EAC Gender Equality and Development Bill was a Private Members Bill which was passed by the EALA on 8 March 2017. See 'EALA Passes Key Gender Bill on International Women's Day' EAC Press Release available at <http://www.eac.int/news-and-media/press-releases/20170308/eala-passes-key-gender-bill-international-womens-day> (accessed on 10 May 2017).

[58]See Memorandum of objects of the draft Bill. Available at <http://www.eassi.org/publications/cat_view/120-human-rights-instruments> (accessed on 28 April 2016).

[59]See EAC Press Release '2nd EAC Child Rights Conference Ongoing in Nairobi' Available at <http://www.eac.int/news-and-media/press-releases/20160825/2nd-eac-child-rights-conference-ongoing-nairobi> (accessed on 26 October 2016).

integrated approach to providing quality education, health and social protection to children, among others.[60]

With regard to the disability component, a notable result of this strategy has been in the development of a regional policy and legislative framework on the rights of persons with disabilities. To this end, the EAC Policy on Persons with Disabilities was adopted as a yardstick to inform other policies, programmes and sectoral plans among the EAC Partner States.[61] The policy aims at providing an enabling environment for the empowerment of persons with disabilities to facilitate their effective participation in and their eventual benefit from development initiatives. In addition to the policy, the EALA passed the EAC Persons with Disabilities Bill in June 2016, which is a sub-regional normative standard for the advancement of the rights on persons with disabilities that considers the various national legal frameworks together with the commitments made by the respective partner states under the UNCRPD to safeguard, promote and protect the rights of persons with disabilities within the Community.[62] Although not yet in force, it is anticipated that the Bill will set in place a formidable framework for the protection of the rights of persons with disabilities.

From the foregoing, it appears that the strategy did not interface much with the national frameworks. Most of the outcomes have been at the EAC Secretariat level in terms of development of policies and guidelines, with a limited spillover onto the EALA with the passing of Bills on Disability and Gender Equality. At the EAC level, the main contributor to this state of affairs was the lack of personnel within the EAC Secretariat for a long period within the life of the strategy, who would be tasked to coordinate and interface with the

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[60]See Ministry of East African Community, Labour and Social Protection 'EAC Children Policy Officially Launched' available at < http://www.meac.go.ke/index.php/2-uncategorised/140-eac-children-policy-officially-launched> (accessed on 24 October 2016).

[61]Adopted in March 2012, the policy is grounded on among others article 120 of the EAC Treaty, article 39 of the Common Market Protocol as well as various resolutions of the Summit and EALA and the UN Convention on the Rights of Persons with Disabilities. It was developed after a comprehensive analysis of national legislations, policies and reports on the status of implementation of the UN Convention on the Rights of Persons with Disabilities.

[62]See 'EALA passes Bill on PWDs, wants dignified, humane treatment for all' EAC Press release available at < http://www.eac.int/news-and-media/press-releases/20160601/eala-passes-bill-pwds-wants-dignified-humane-treatment-all > (accessed on 10 October 2016).

relevant sectoral councils to follow up policy implementation at the national level.[63] Thus, with no dedicated technical staff for over two years, the strategy remained largely unimplemented save for a few attempts at standard setting. As such, its impact within the national human rights frameworks of the EAC Partner States was negligible across all the sectors examined-gender, children and persons with disabilities.

4. Oversight by the East African Legislative Assembly (EALA)

As with any other legislative body, the primary role of the EALA is to make (hard) law. Nonetheless, it also plays, every so often, a key role in the development of soft law principles. This section delves into the soft law dimensions of the EALA and examines whether the Assembly has in the course of its existence developed any soft law measures on human rights. It will then discuss the domestic relevance of these measures-whether these have generated any corresponding measures within the domestic legal sphere within the Partner States.

The EALA's soft law generation competence has mostly been exhibited as it exercises its oversight mandate. Two main soft law instruments are employed in this regard–Resolutions of the Assembly and reports of thematic Committees of the House.

4.1 Resolutions of the Assembly

Resolutions of the Assembly are a soft law device used by the EALA in executing its oversight mandate. Resolutions may be initiated by individual Members of the Assembly either on their own motion, or pursuant to consultations from within the House through the various parliamentary committees.[64] Although resolutions may not carry any sanctions for non-compliance, they are of considerable political weight since they are a collective expression of the EALA's view on issues under consideration. Resolutions of the Assembly are transmitted by the Speaker of the EALA to the relevant EAC organs or the Partner States for

[63]See interview with Generose Minani, Head of EAC Gender Unit, 10 March 2016, EAC Headquarters, Arusha, Tanzania. (Notes on file with author).

[64]According to the EALA Rules of Procedure, any Member may move a motion for a resolution on a matter relating to the activities of the Community. See Rule 35 of the EALA Rules of Procedure. Also available online at <http://www.eala.org/rules> (accessed on 5 December 2014).

further action and follow up, and are also included in the annual reports that the Assembly submits to the Council for conveyance to the Summit.

Typically, the EALA's resolutions may be classified into three categories. The first are resolutions that require concrete actions by the Partner States or the relevant EAC Organs and Institutions to which they are made (actionable resolutions). The second category comprises resolutions of a procedural or administrative nature that assist in the Assembly's internal governance, while the third category comprises resolutions that are passed to provide special recognition to a certain institution or individuals (non-actionable).

Since its establishment, the Assembly has adopted a broad range of resolutions with a view to reinforce its oversight function and as a contribution to enhanced governance within the Community. In this regard, a 2015 study by the EALA Committee on Legal Rules and Privileges revealed that of the 105 resolutions passed by the Assembly between 2002 and 2014, 50 were actionable calling for concrete action, 32 were administrative in nature and 23 were special tributes.[65] Furthermore, 21 out of the 50 resolutions made in that period were either directly or indirectly related to an aspect of human rights. For instance, the Assembly has made resolutions urging the EAC Partner States to eradicate the phenomenon of street children, to eliminate the payment of work permit fees, to ratify the UN Convention on the Rights of Persons with Disabilities, to adopt the African Charter on Democracy, Elections and Governance, to adopt the International Day of Democracy and to enhance access to the EAC Headquarters by Persons with Disabilities. All these resolutions passed are at different stages of implementation. For the purposes of this study, focus will be on four resolutions covering the period 2009-2013.

4.1.1 EALA Resolution on Ending Violence Against Women

In 2009, the Assembly adopted a resolution 'urging the East African Community and Partner States to take urgent and concerted action to end violence against women in the EAC region

[65]See Report of the Committee on Legal, Rules Privileges on Tracking the Implementation of Resolutions and Questions of the Assembly, 1-5 September 2015.

and particularly in the Partner States'.[66] The resolution was informed by international and regional human rights instruments adopted to promote and protect the rights of women. It commended Partner States for good performance and adopted a name and shame strategy for Partner States that had in the Assembly's view not taken sufficient action to address violence against women.[67] Apart from highlighting the major concerns on violence against women, the resolution called on the EAC Partner States to take concrete action at the national level to fulfil obligations imposed by the relevant international instruments.

Influence on National Law, Policy and Actors

Being a soft law measure, the Resolution does not give rise to binding legal obligations on the part of the EAC or the Partner States. Nonetheless, it is useful as an advocacy tool and as a source of persuasive legal authority, both at the national level and at various organs of the EAC such as the EACJ. Writing in 2010, on the wake of its conclusion, Ebobrah observed that '…the Resolution represents one of the most daring human rights actions taken on the platform of the EAC.'[68]

In assessing its implementation, the EALA observes that the resolution was transmitted to the Partner States for appropriate action to be reported in Council Meetings.[69] There is no further observation on whether there has been any follow up with the Council on its implementation. A review of the meeting reports of the Council reveals that the Council simply 'took note of the resolution of the Assembly'. No further action was taken by the Council with a view to following up on national implementation.[70] Even at the EAC level, the

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[66]EALA Resolution moved by Hon. Safina Kwekwe Tsungu dated November 2009. Available at the EALA website on <http://www.eala.org/key-documents/doc_details/8-resolution-action-to-end-violence-against-women-in-the-eac-region-and-particularly-partner-states.html> (accessed on 12 April 2015).

[67]Thus for instance, the Resolution commends Rwanda and Tanzania for 'for having ratified the Maputo Protocol and then shames the Republic of Kenya, Uganda and Burundi by expressing the concern that 'are yet to ratify the Maputo Treaty.'

[68]See S T Ebobrah 'Human Rights Developments in African sub-regional economic Communities during 2009' (2010) 10 *African Human Rights Law Journal* 233.

[69]See Report of the Committee on Legal, Rules Privileges on Tracking the Implementation of Resolutions and Questions of the Assembly (n 64 above)

[70]Available information from NHRIs within the Partner States that work on this thematic area revealed that they were neither aware of this resolution nor did they employ it in their day to day functions. See Interview

resolution has not been referred to as part of the instruments that have formed the basis for the conclusion of the EAC Strategic Plan on Gender, Youth, Children, Persons with Disabilities, Social Protection and Community Development notwithstanding that issues of violence against women form a key component of gender equality.[71] As such, it appears that whereas the resolution was made by the EALA and transmitted to the Council, there was no follow up of its implementation both at the national as well as the sub-regional level. It can therefore be safely concluded that the resolution remains un-implemented to date.

4.1.2 EALA Resolution on Provision of Sanitary Facilities and the Protection of Girls

In 2013, the EALA passed a Resolution urging EAC Partner States to provide sanitary facilities and protection of girls in the EAC region.[72] This resolution is based on the Partner States commitments under articles 5 and 118 of the EAC Treaty to cooperate in the field of health services. It is also inspired by international and regional human rights treaty provisions on the human rights of women and children and in particular the protection of the girl child. The core of the resolution is the need for Partner States to put in place measures to protect the dignity and health of school girls who experience challenges during their monthly periods due to lack of sanitary towels, appropriate sanitary facilities and support. The resolution refers to studies that show the adverse effects of the status quo on access to education and other opportunities for women and girls in the EAC region and calls upon Partner States to *inter alia* invest in appropriate sanitary facilities in learning institutions, education on reproductive health and menstrual hygiene, provision of sanitary pads to school girls and tax cuts on sanitary items. It commends Kenya and Tanzania for abolition of tax on sanitary pads and urges the other Partner States to emulate this example.

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with Patricia Musingura, Director of Research, Uganda Human Rights Commission, 5 May 2015(Notes on file with the author).

[71]See Preamble and Executive Summary of the EAC Strategic Plan on Gender, Youth, Children, Persons With Disabilities, Social Protection and Community Development 2012-2016.

[72]Resolution of the EALA urging EAC Partner States to provide sanitary facilities and Protection of Girls in the EAC Region v EALA/RES/3/10/ 2013. Moved by Hon. Dr. Odette Nyiramilimo and adopted by the EALA on 21 August 2013.

Influence on National Law, Policies and Actors

Just like the resolution on ending violence against women, it affords agencies working on reproductive health rights, children rights and the rights of women, with an important advocacy instrument which functions alongside other international, regional and sub-regional instruments that have been adopted by the EAC Partner States.[73]

With reference to influence on national practices, the EALA's report on the implementation status of its resolutions seems to indicate that the EALA does not have information on its implementation including on whether it was transmitted to the relevant Partner States for implementation.

A review of the respective education sector strategies of the EAC Partner States reveals that it is only Rwanda and Kenya that make particular references to their commitments under the EAC framework as key considerations that inform their education priorities.[74] In terms of making specific provision for sanitary towels for school going girls, the education strategies in Rwanda, Kenya and Uganda make provision for this. However, there is no direct reference in these strategies to the EALA Resolution as being a contributory factor in the adoption of these strategies.

4.1.3 Resolution on the Transfer of the Cases Against Kenyan Suspects Accused at the ICC

Another notable resolution by the Assembly was adopted in April 2012 and addressed to the Council requesting the transfer of the cases against the then four Kenyans accused of crimes against humanity at the International Criminal Court to the East African Court of Justice.[75] Furthermore, the resolution called upon the Council and the Summit to cause amendments

[73]Being a resolution sponsored by a private Member, it is plausible that this was borne out of the individual Member's conviction and experiences dealing with the issues articulated in the resolution.

[74]See generally chapter 4 of Rwanda's Education Sector Strategic Plan 2013/14-2017/18. Available at <http://www.mineduc.gov.rw/fileadmin/user_upload/Education_Sector_Strategic_Plan_2013_-_2018.pdf> (accessed on 20 October 2016).

[75]See Resolution of the Assembly Seeking the EAC Council of Ministers to Implore the International Criminal Court to Transfer the Case of the Accused Four Kenyans Facing Trial in Respect of the Aftermath of the 2007 Kenya General Elections to the East African Court of Justice and to Reinforce the Treaty Provisions. Motion by Hon. Dan Wandera Ogalo adopted by the Assembly on 26April 2012. Available at <www.eala.org> (accessed on 3 January 2016).

to article 27 of the EAC Treaty in order to vest the EACJ with criminal jurisdiction and in particular over crimes against humanity. Although the resolution may have been driven by political considerations, given that all but one of the suspects were senior public figures in Kenya and two of them subsequently became the President and Deputy President, its implementation would have opened an avenue for the prosecution of gross human rights violations at the sub-regional court. [76]

Influence on National Law, Policy and Actors

Pursuant to this resolution, the Council directed the Secretariat to prepare and submit a comprehensive technical paper addressing the capability of the East African Court of Justice to meet all the challenges related to the prosecution of international crimes and circulate it to the Partner States for comments. The Partner States were then directed to submit comments on the Comprehensive Technical paper.[77] The Partner States in their responses expressed a view that they wished to extend jurisdiction to cover only trade and commercial disputes.[78] This was based on the fact that all the EAC Partner States are party to the Rome Statute, which already has the capacity to prosecute such crimes. Furthermore, the EAC would not be able to comfortably absorb the budgetary implications and technical expertise required to run and maintain such an international court.[79] Moreover, they were of the view that there are sufficient safeguards on accountability for gross human rights violations not only within their national constitutions, but also within the framework of the African Union via the African Court on Human and Peoples' Rights.[80] Accordingly, the Heads of States

[76]The most high profile of these suspects were Uhuru Kenyatta and William Ruto, who subsequently successfully contested the positions of President and Deputy President of the Republic of Kenya in 2013.

[77]See Report of the 15th Meeting of the Sectoral Council of Legal and Judicial Affairs, Arusha, 13 November 2013. Ref EAC/SCLJA/15/2013.

[78]As above.

[79]It is not clear whether in the Partner States sought the input of their nationals in formulating their comments to the technical paper developed by the EAC Secretariat. Enquiries with the National Human Rights Institutions of Kenya and Uganda which are state institutions which the national executives would naturally defer to in terms of human rights issues revealed that they were not involved in this process.

[80]See Report of the 16th Meeting of the Sectoral Council on Legal and Judicial Affairs, Arusha, 30 September 2014, Ref EAC/SCLJA/16/2014. This also may be viewed in the context of the Protocol of the African Court of Justice and Human Rights (Malabo Protocol) of 2014 to give it jurisdiction over the three recognised international crimes–genocide, crimes against humanity and war crimes.

approved the Council recommendation to extend the jurisdiction of the East African Court of Justice to cover trade and investment as well as matters associated with the East African Monetary Union. On human rights matters as well as crimes against humanity, the Summit directed the Council of Ministers to work with the African Union.[81]

A notable observation with regard to this particular resolution is that it was targeted to the Council and not to the Partner States. Nonetheless, its implementation had the potential of having far reaching implications on the promotion and protection of human rights. Although it did not require specific action on the part of Partner States, it nonetheless may be concluded that this resolution, taken together with the prevailing circumstances at the time, contributed to the final outcome of the protocol under article 27(2) where the EACJ's jurisdiction was extended, but only to matters dealing with the Protocol on the Monetary Union, and not on human rights as was earlier envisaged. The immediate and more obvious impact at the national level is the introduction of a new legal instrument that requires relevant legal adjustments within the Partner States' respective national legal frameworks to give effect to the provisions of the Protocol. Furthermore, the failure to grant the EACJ with express human rights jurisdiction after a decade of stakeholder engagement, and in particular, the national human rights actors has had notable effects on how litigants at the national level interact with the new scenario. A good example is in the *Burundi Press law* case, in which the litigants and the Court took a markedly different direction from the trend set in litigating human rights cases before the EACJ since the *Katabazi case,* where the litigants and the court consistently made reference to the envisaged Protocol under article 27(2) of the EAC Treaty. In the *Burundi Press Law* case, the litigants proceeded to ventilate their issues before the Court without reference to the envisaged protocol.[82] The Court similarly made its decision without mention of its limited jurisdiction under article 27. A reading of the judgment leads to a conclusion that the Court seems to have charted a new

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[81]See Question: EALA/PQ/OA/3/34/2013 (By Hon. Dora Byamukama). Report of the 4th Meeting of the 2nd Session of the East African Legislative Assembly, Kampala, Uganda, 19- 31 January 2014.

[82]*Burundian* Journalists *Union v The Attorney General of the Republic of Burundi.* EACJ Reference No. 5 of 2013, First Instance Division. See section 5.6 of Chapter 4 of this thesis for a detailed discussion of this case.

path of claiming human rights jurisdiction instead of passively waiting for a 'jurisdictional hand out' from the Council.

4.1.4 Resolution on Measures to Stop the Perpetuation of the Genocide Ideology

A further resolution relevant to the promotion and protection of human rights was adopted by the Assembly in August 2013 urging the Summit to institute mechanisms to stop the perpetuation of genocide ideology and denial.[83] Founded on among others article 124 of the EAC Treaty and the UN Convention on the Prevention and Punishment of Genocide, the resolution urged the Summit to direct the Council to prepare an action plan to deal with genocide and called upon the EAC Partner States to develop national policies and legal instruments in this regard. The Assembly also undertook to develop a select committee under rule 80 of its Rules of Procedure to study and make recommendations on the likely security impact of the perpetuation of the genocide ideology including the denial of genocide. Pursuant to this, the EALA passed a Resolution in January 2015 to form a select Committee on Genocide, charged with among others considering ways and means of combating, outlawing and preventing genocide including action by the EALA and other Community institutions and Organs.[84] In terms of outlawing genocide, it is notable that most of the EAC Partner States, save for Rwanda, are party to the Rome Statute on the International Criminal Court, which outlaws genocide. Also, it is arguable that elements of genocide are already outlawed under national laws in offences such as murder. As such, the more realistic option for the EALA in its resolution would have been to focus on the prevention or combating of genocide.[85] Since the adoption of the resolution in 2013, it

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[83]See Resolution of the Assembly Urging the Summit to Institute Mechanisms to Stop the Perpetuation of the Genocide Ideology and Denial in the Region and to take Appropriate Action. 22 August 2013. Ref EALA/RES/3/12/2013. The Resolution was proposed by Rwanda in the interest of developing a regional response to the challenges that it continues to experience with regard to political views on the 1994 genocide. Available online on <http://www.eala.org/new/index.php/key-documents/resolutions> (accessed on 3 January 2016).

[84]See EAC Press release available at <http://www.eala.org/new/index.php/media-centre/press-releases/777--eala-appoints-select-committee-to-look-into-genocide-and-genocide-ideology> (accessed on 3 January 2016).

[85]Furthermore, the resolution fails to define what is meant by a denial of genocide and the meaning of a genocide ideology. It is submitted that this leaves an open ended subjective interpretation which may be employed to stifle dissent and the legitimate exercise of the freedom of expression in Partner States which have had a history of genocide such as Rwanda and Burundi.

remains unclear whether steps have been taken by the Partner States towards its implementation. Indeed, the EALA assessment report stipulates that the matter is still yet to be conclusively implemented by the EAC Partner States.[86]

4.1.5 Reflections on the Influence on National Laws, Policies and Actors

From the foregoing, it is clear that the EALA resolutions have not had the desired influence on national law, policy as well as on national actors. It is submitted that this is attributable to the disconnect between the EALA and the relevant parties to which these resolutions are made. The EALA has validly lamented that whereas it transmits its actionable Resolutions to the Partner States and the relevant EAC-Organs and Institutions, the Office of the Clerk rarely receives feedback from these entities on the status of implementation of these resolutions. Furthermore, it does not have a mechanism for keeping track of its resolutions in terms of follow up and implementation by the relevant parties to whom they are directed.[87] Whereas the EAC-Secretariat has established an online monitoring system for the Summit and the Council on implementation of the EAC integration agenda, the system excludes the EACJ and EALA. There is need to expand the system to includes resolutions, Bills and laws, questions and reports of oversight activities by the Assembly, and decisions by EACJ.

This is a serious indictment of the systems in place for an institution as important as the EALA. Whereas the obvious capacity gaps at the Assembly need to be addressed, there is also need for deliberate steps to document and track the implementation and impact of its resolutions.

4.2 Reports of Parliamentary Committees

The final oversight measure adopted by the EALA is the use of Parliamentary Committees. (3) of the EAC Treaty provides that:

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[86]Report of the Committee on Legal, Rules Privileges on Tracking the Implementation of Resolutions and Questions of the Assembly (n 64 above).

[87]See interview with Mr. Obatre Lumumba, EALA Deputy Clerk in Arusha, Tanzania, 17 August 2015. (Notes on file with the author). See also 'EALA wants Effective Tracking of its Resolutions' EALA Press release dated 25 November 2015, available at <http://www.eala.org/new/index.php/media-centre/press-releases/892-eala-wants-effective-tracking-of-its-resolutions> (accessed 2 April 2016).

> ..the Assembly shall have committees which shall be constituted in the manner provided in the Rules of Procedure of the Assembly and shall perform the functions provided in respect thereof in the said rules of procedure.

Under (2) (e) of the Treaty, the assembly 'may, for purposes of carrying out its functions, establish any committee or committees for such purposes as it deems necessary.'[88] In this regard, the EALA has established six standing committees, which include the Accounts Committee, the General Purpose Committee, Communication, Trade and Investment Committee, the Agriculture, Tourism and Natural Resources Committee, the Committee on Regional Affairs and Conflict Resolution, and the Legal, Rules and Privileges Committee.[89] This thesis will consider the last two for purposes of demonstrating their national impact. For purposes of clarity, it is the reports of these committees, and not the committees themselves, that bear the character of soft law.

4.2.1 EALA Committee on Legal Rules and Privileges

The Legal Rules and Privileges Committee is created under Rule 78 of the EALA Rules of Procedure with a mandate that includes *inter alia*, research, monitoring and reporting on matters touching on integration. In 2011, the Committee was instrumental in the drafting of the EAC Bill of Rights. Furthermore, it continues to monitor the progress on the enactment of the EAC Protocol on Good Governance. It has also conducted assessments on adherence to Good Governance principles by the EAC Partner States in 2012 and 2013.[90] The outcomes of these assessments have been reports that are targeted to various Partner States and organs of the EAC. Thus for instance, upon conducting a good governance assessment in all the Partner States, it made recommendations to Burundi to follow up on ratification of the

[88] See also *Article 78* of the EALA Rules of Procedure:

[89] See also the EALA Website for more details on the EALA Committees: < http://www.eala.org/committees> (accessed on 20 October 2016)

[90] These assessments are conducted evaluate the existence and implementation of Partner States laws and policies that enhance good governance pursuant to articles 3(b) 6 (d) and 7(2); Identify good practices on good governance, and establish and strengthen relationships between Partner States and EAC structures working on good governance.

United Nations Convention on the Rights of People with Disabilities (UNCRPD),[91] to Kenya to deposit a special Declaration accepting the competence of the African Court on Human and Peoples' Rights (African Court), under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights for the African Court on Human and Peoples' Rights, and to Uganda to translate the Constitution of Uganda into local languages as stipulated in the Constitution of Uganda.[92] Burundi has ratified the UNCRPD, Kenya has still not made the declaration under article 34(6) and Uganda has not translated its Constitution into local languages. With reference to Burundi, whereas the EALA may not take sole credit for influencing the ratification of the UNCRPD, it is arguable that the resolution was one of the many voices that urged it to ratify the Convention, thus providing evidence of domestic impact of this soft law measure. The Committee has also made recommendations to the EAC Heads of State to adopt the EAC Good Governance Protocol in order to set standards on the principle of good governance and to assent to the EAC Bill of Rights.[93] However, both of these instruments have not received assent by all Heads of State to date.

4.2.2 EALA Committee on Regional Affairs and Conflict Resolution

Reports on the Determination of Petitions

Rule 85 of the EALA Rules of Procedure empowers the Assembly to receive and consider petitions from any citizen of the Partner States, and any natural or legal person residing or having its registered office in a Partner State, on any matter within the Community's fields

[91]Burundi signed the UNCRPD on 26 April 2007 and ratified the Convention on 22 May 2014. Ratification details available online at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en> (accessed on 19 April 2015).

[92]See Report of The Legal Rules Committee on the Assessment of Good Governance In Partner States From 1st to 5th October 2012 available at <http://www.eala.org/key-documents/doc_download/331-report-on-the-assessment-of-good-governance-in-partner-states-.html> (accessed on 2 December 2014). So far, the Committee has not made any further assessments after 2012. It has also not made any comment on the recent withdrawal of the article 34(6) declaration by Rwanda.

[93]See Report of the Committee on Legal, Rules and Privileges on the Assessment of Adherence to Good Governance in The EAC And The Status of The EAC Political Federation. 2nd – 6th September 2013, Kampala, Uganda, Dated 29th January 2014. Available at <http://www.eala.org/key-documents/doc_download/450-adherence-to-good-governance-in-the-eac-and-the-status-of-the-eac-political-federation.html> (accessed on 2 December 2014).

of activity and which affects them directly.[94] In terms of admissibility, petitions must be within the Community's field of activities, must disclose details of the Petitioner and must be stated in the Community's official language, which is English. A petition drafted in any other language must have an English translation attached thereto.[95] Once admitted, petitions are committed to the relevant parliamentary committee for consideration based on the competence of the particular Committee.[96] In disposing of the petition, the Committee may organise public hearings or fact-finding missions or draw up a report expressing its opinion thereon. The end result of a petition to the Assembly would normally be either a report by the parliamentary committee concerned, or a motion for a resolution of the Assembly based on the findings and recommendations of the committee.[97]

A review of the available information at the EALA reveals that eleven petitions have been filed with the EALA since 2010 out of which three are related to the promotion and protection of human rights. The Committee on Regional Affairs and conflict resolution has been instrumental in dealing with a number of petitions that centre on the promotion and protection of human rights. Whereas the receipt and handling of the Petitions has no legal quality, it is the outcome of these petitions that possess a soft law character. As observed, the outcome of a petition may take the form of a resolution of the Assembly or a comprehensive report, which may then be used as a reference point for further action by the responsible authorities and stakeholders.

In August 2013, a Ugandan NGO called Invisible Children presented a petition to the EALA urging it to intervene to end the conflict in northern Uganda in which numerous children had fallen victim. Available information from the EALA reveals that the petition was received but no further action taken thereon. In November 2015, another petition was filed by the Pan African Lawyers Union, together with five other civil society organisations to the

[94]See Rule 85 of the EALA Rules of Procedure.

[95]See generally Rule 85(i-iii) of the EALA Rules of Procedure.

[96]Under (2) (e) of the Treaty, the assembly 'may, for purposes of carrying out its functions, establish any committee or committees for such purposes as it deems necessary.' See also *Article 78* of the EALA Rules of Procedure. See also the EALA Website for more details on the EALA Committees: < http://www.eala.org/committees> (accessed on 20 October 2016).

[97]See Rule 85(2) of the EALA Rules of Procedure.

Assembly urging it to, among others, conduct public hearings on the deteriorating human rights situation in Burundi following the political, humanitarian and human rights crisis that unfolded in Burundi from early 2015.[98] In response to this petition, the Assembly designated the EALA Committee on Regional Affairs and Conflict Resolution to dispose of the Petition. The Committee held public hearings in Arusha, Tanzania from 24 January 2016 through to 5 February 2016 and received representations from the Petitioners as well as government representatives and political actors. Upon concluding its sittings, the Committee issued a preliminary report strongly recommending an independent inquiry into alleged human rights violations by the Burundi government and its security forces based on its conviction that the information presented led to the conclusion that there were grounds to believe that human rights violations were continuing in Burundi.[99] As result, the Assembly recommended to the Council to request the EAC Summit to facilitate the establishment of a credible panel of inquiry to investigate all human rights violations in Burundi. As at the writing of this thesis in June 2017, the Summit is yet to establish any formal investigations into possible human rights violations as proposed by the EALA in its report. This being the first Petition on human rights to be conclusively handled by the EALA, it remains to be seen whether it will yield positive outcomes for the promotion and protection of human rights in Burundi.[100] Lastly in February 2016, the Albinism Society of Kenya also petitioned the EALA to advocate for the protection of persons with albinism in terms of access to education, medical services as well as protection from physical harm.[101] It is pursuant to this petition that the EALA adopted a resolution in October 2016 condemning attacks against persons with albinism and urging Partner States to take affirmative action measures to enhance

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[98]See Petition by EAC Civil Society Organisations to EALA. Available at <http://www.eala.org/uploads/Petition_by_Civil_Society_to_EALA.pdf> (accessed on 10 May 2016).

[99]See The East African Newspaper 'EALA: Probe Burundi human rights violations', 20 February 2016. Available online at <http://www.theeastafrican.co.ke/news/EALA-Probe-Burundi-human-rights-violations-/-/2558/3065054/-/ljnmvsz/-/index.html> (accessed on 7 July 2016).

[100]Other Petitions have been on other thematic areas such as business, trade as well as matters relating to customs management. See EALA Petitions database. Available at <http://www.eala.org/documents/category/petitions> (accessed on 5 August 2016).

[101]East African Legislative Assembly 'Petition by the Albinisms Society of Kenya to the EALA to Advocate for the Protection of Albinos'. Available at <http://www.eala.org/uploads/Scan_20160815_(9).pdf> (accessed on 1 December 2016).

access to proper medication and take steps to end their marginalisation in employment, education, decision making and access to economic opportunities. Furthermore, the resolution calls upon Partner States to end all forms of discrimination against persons with albinism in line with established national, regional and international human rights standards as well as provisions of the EAC Treaty.[102]

In terms of soft law quality, the final report of the EALA with regards to the petition although non-binding, would have some legal quality and would spur compliance by relevant actors both at national and sub-regional level. In terms of national impact of the petition handling process-although not a soft law mechanism, the holding of the public hearings by the EALA Committee provided an opportunity for government representatives as well as civil society actors and opposition politicians to present their views on the allegations of human rights violations by the government of Burundi. Their participation in the Petition process, which sought to address human rights concerns, is the first level of influence and impact by this sub-regional device. Whether or not this Petition gives rise to a more in depth investigative mission and triggers accountability mechanisms may only be determined after the mechanisms by the Council and the Summit have run their course. The Assembly's report had not yet been considered by the Council and the Summit as at the writing of this thesis.

As for the petition by the Albinism Society, its immediate outcome was the passing of a resolution by the EALA directed at the Partner States urging them to take measures to safeguard, promote and protect the rights of persons with albinism. Having been made in October 2016, it is not possible at this stage to evaluate its national impact.

Standard Setting in Election Observation and Evaluation

In addition, the Committee on Regional Affairs and Conflict Resolution has been instrumental in particular with regards to election observation and management within the

[102]See Motion for Resolution of the Assembly to Urge the EAC Partner States to Protect the Rights and Freedoms of Albinos. Available at< http://www.eala.org/documents/view/resolution-of-the-assembly-to-urge-eac-partner-states-to-protect-the-rights > (accessed on 25 October 2016).

Community as well as prevention, monitoring and taking action in situations of conflict within the community.[103]

One of the recent engagements of the Committee on human rights has been in relation to the development, together with the Secretariat, of the EAC Principles for Election Observation, Monitoring and Evaluation, which set a common sub-regional standard for assessing the credibility and legitimacy of electoral processes and outcomes.

The Principles are founded on article 6(d) and 7(2) of the EAC Treaty which outlines the Community's fundamental and operational principles, together with article 123 which requires Partner States to 'develop and consolidate democracy and rule of law and respect for human rights and fundamental freedoms.'

They also make reference to the African Union (AU) Declaration on Principles Governing Democratic Elections, which prescribes that elections should be conducted freely and fairly with all the attendant guarantees of a democratic process. The principles take cognizance of article 21 of the Universal Declaration of Human Rights, which stipulates that 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives.'

These principles have been deployed in recent elections within the Partner States in which the Committee Members have participated as part of the EAC Election Observation Missions. Thus, with reference to the elections held in Burundi in July 2015, the Mission noted that the electoral process in Burundi 'fell short of the principles and standards for holding free, fair, peaceful, transparent and credible elections as stipulated in various international, continental as well as the EAC Principles on Election Observation and Evaluation.'[104] And, in the wake of the just concluded elections in Tanzania, the EAC Mission

[103]For details on the structure and membership of the Committee see <http://www.eala.org/new/index.php/committee-system/committee-composition?start=5> (accessed on 3 January 2016).

[104]See the Preliminary Report of the EAC Election Observer Mission to Burundi available at <http://www.eac.int/dmdocuments/EAC%20Election%20Observer%20Mission%20to%20Burundi%20Presidential%20Election%202015%20-%20Preliminary%20Statement.pdf> (accessed on 3 January 2016).

observed that 'the elections had been transparent and peaceful'.[105] In both of these instances, the EAC Election Observation Mission, led by the EALA Committee on Regional Affairs and Conflict Resolution, had been invited by the respective Partner States to conduct election observation. Thus, in terms of domestic impact, it can be confidently concluded that the invitation to observe the electoral process by the various Partner States, which in itself is a useful measure for the promotion and protection of the right to political participation is attributed in part to the works of the EALA Committee. Moreover, the deployment of the EAC Principles on Election Observation and Evaluation as a standard for assessing the credibility and legitimacy of national electoral processes and outcomes is another positive impact of the EALA Committee.

4.2.3 Reflections on Overall Impact of EALA's Oversight Mechanisms

The EALA, in its capacity as one of the Community's organs, serves a crucial function in the promotion and protection of human rights through the use of various soft law devices at its disposal. It is acknowledged that these devices, being non-binding in nature, may not be solely responsible for change in law or policy at the national realm given that they normally function within a context where there may be a multiplicity of actors and other soft and hard law standards. For our purposes, it has emerged in this study that whereas the EALA's Committees have had a considerable impact on the domestic human rights framework, other soft law devices such as Resolutions and Questions to the Council have had far much less impact on the Partner States human rights frameworks. Thus for instance the EALA Committee on Regional Affairs and Conflict Resolution has developed normative standards for the monitoring of elections which have been deployed across the Partner States and which have had a correlation with their national electoral practices. Conversely out of the four resolutions examined none has demonstrated a direct correlation with a change in national law, policy or practice, or even influence on non-state actors. This is attributed to lack of clear monitoring and follow up mechanisms within the EALA to ensure relevant

[105]See Preliminary Report of the EAC Election Observer Mission to Tanzania available at <http://www.eac.int/index.php?option=com_content&view=article&id=1998:preliminary-statement-eac-election-observation-mission-to-the-general-elections-of-the-united-republic-of-tanzania-held-on-the-25th-october-2015&catid=146:press-releases&Itemid=194> (accessed on 3 January 2016).

Community organs as well as Partner States take ownership of the content of its resolutions. Furthermore, the uptake of these soft law options with regard to human rights has been slow at the EALA level. Since its inauguration, the EALA has only registered about four resolutions with a bearing on the promotion and protection of human rights. In addition, the institutional challenges and deficiencies within the EALA such as poor coordination with national parliaments which would play a crucial role in monitoring and follow up of EALA's recommendations at the national level, have hampered the effectiveness of these instruments at the national realm.

5. Bills Passed by the East African Legislative Assembly

A further category of soft law instruments that have influenced the national human rights discourse within the EAC Partner States are Bills passed by the EALA but for which assent has not been given by the respective EAC Heads of State. Their soft law quality is derived from the fact that although not yet formally binding law, diverse national actors within the Partner States have relied on them in advocacy, legislation and benchmarking. The most notable in this regard is the EAC HIV and AIDS Prevention and Management Bill, and to a smaller extent, the East African Community Human and Peoples' Rights Bill (EAC Bill of Rights).

5.1 The East African Community HIV and AIDS Prevention and Management Bill

The East African Community HIV and AIDS Prevention and Management Bill was passed by the EALA as a Bill for an Act of the Community to among others 'provide for the prevention and management of HIV and AIDS and for the protection and promotion of the human rights of persons living with or affected by HIV and AIDS'.[106] The Bill is a culmination of efforts from both civil society, the EALA and the EAC Secretariat, to address the AIDS pandemic not only from a clinical perspective, but also from a human rights optic in line with the Community's commitments under article 6 and 7 of the EAC Treaty.[107] Issues such as non-

[106]See Preamble to the Bill.

[107]See section 4 of the Bill. The objectives and purposes of the Bill include to promote a rights based approach to dealing with all matters relating to HIV and AIDS and to protect the human rights of every person living with or affected by HIV through provision of relevant services, guaranteeing the right to privacy and prohibiting HIV related discrimination.

discrimination, informed consent on testing, the right to privacy and the right of access to medicines would thus be addressed from a strengthened rights- perspective based on the EAC Treaty, which urges the promotion of universally accepted human rights principles as outlined in the ACHPR at all levels of the integration process. To date, only the Heads of State of Burundi, Kenya and Uganda have assented to the Bill.[108] Noting the assent procedure in article 63 of the EAC Treaty, and further given that decisions of the summit must be reached by consensus as set out in article 12(3) of the Treaty, the Bill is not yet law since the Heads of State of Rwanda and Tanzania have not assented to it. [109]As such, it is for the time being considered as a soft law instrument.

5.1.1 Influence on National Laws, Policies and Actors

Although not yet binding, the Bill has had considerable influence on the human rights discourse within the region and in particular with regard to matters relevant to HIV and AIDS. Thus, in terms of influence on national law, the Ugandan experience in enacting its national law on HIV and AIDS provides a vivid example. During the consideration of the now HIV / AIDS Prevention Control Act of 2014, the Parliament of Uganda made specific and constant reference to the EAC HIV and AIDS Prevention and Management Bill 2012 as a bench mark.[110] In this regard, therefore, a reasonable inference would be that the resultant Act was highly influenced by the provisions of the Bill, having been used as a reference point by the Parliament. A review of the Uganda's HIV and AIDS Prevention and Control Act shows similarity in some aspects with the Bill on matters of non-discrimination on the basis of HIV status, pre and post-test counselling and measures to be taken by government to safeguard the rights of those infected and affected by HIV and AIDS. However, there are fundamental

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[108]See Implementation of the EAC Realigned HIV and AIDS Strategic Plan (2012-2014): 8th Semi-Annual Narrative Report (1st July 2013 to 31st December 2013). Available at http://www.eac.int/health/index.php?option=com_docman&task=doc_download&gid=90&Itemid=173 (accessed on 2 December 2015).

[109]Information from the office of the Clerk to the EALA is that the Bill is still undergoing the assent procedures within these Partner States and that it is not that Assent has been declined. See interview with Mr. Obatre Lumumba (n 87 above) (Notes on file with the author).

[110]See Parliament of the Republic of Uganda, Hansard Reports for the Month of May 2014. Available at <http://www.parliament.go.ug/new/index.php/documents-and-reports/daily-hansard > (accessed on 4 January 2016). See also Interview Questionnaire by Patricia Musingura (n 70 above) (Notes on file with the author).

points of departure between the Bill and Uganda's national HIV legislation. For instance, Uganda's national legislation provides for mandatory testing for victims of sexual offences, pregnant women and their partners. It also criminalises intentional transmission of HIV, while medical personnel are required to release results to sexual partners of HIV-positive persons. The Bill on the other hand stipulates that testing should be optional and at the instance of the individual and prohibits the publication of HIV test results without the consent of the subject. Indeed there was uproar by Civil Society Organisations in Uganda when the Act was passed with provisions that were at odds with the EAC Bill. They called for a rejection of the new Act and insisted on having the EAC Bill as the standard, which Partner States should aspire to. As things currently stand, in the event that the EAC Bill is enacted into law upon assent by all the Heads of State, its provisions would in law, supersede those of the Ugandan Act, insofar as it is at odds with the resultant EAC law.

A review of the other Partner States' legislation on HIV and AIDS reveals that Burundi, Tanzania and Kenya passed their laws prior to the enactment of the Bill by the EALA.[111] Thus the opportunity presented by the Bill in influencing Uganda's legislative process on HIV and AIDS was not availed to them.[112] Nonetheless, given that Rwanda does not have specific legislation on HIV and AIDS, the Bill may provide a useful framework for both state and non-state actors in drafting, debating and passing national legislation.

In terms of influence of the Bill on national actors-both state and non-state, the experience of Uganda may be worth noting. To begin with, the use of the Bill as a reference point by Parliament, notwithstanding that the resultant national legislation did not incorporate all of the provisions of the Bill, nonetheless still demonstrates its influence on the Ugandan Parliament.

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[111]Tanzania enacted its HIV and AIDS (Prevention and Control) Act in 2008, Kenya's HIV Act was enacted in 2006 whereas Burundi has in place Law No 1/018 of 12 May 2005 which protects those living with HIV and AIDS. Rwanda has no comprehensive law on HIV and AIDS.

[112]However, given that the Bill was developed and subjected to stakeholder consultations including consultations with legislators from national parliaments, it would be reasonably inferred that the Bill could also have been influenced by provisions of existing legislation from the EAC Partner States.

Secondly, Ugandan Civil Society Organisations in their interaction with the proposed national HIV and AIDS legislation also made reference to the Bill as the preferred normative standard in the enactment of national legislation on HIV and AIDS, and called for a rejection of sections of the proposed HIV / AIDS Prevention Control Act of 2014 which they felt were at odds with the Bill.

In addition to the Ugandan experience, the EAC Secretariat together with the United Nations Development Programme (UNDP) and number of regional NGOs working on human rights aspects of HIV and AIDS have used the Bill as a normative yardstick in reviewing Partner States' laws, policies, strategies on HIV and AIDS and health to among others identify gaps and challenges in the domestic legal and regulatory frameworks, so as to make recommendations to strengthen and harmonize domestic laws and policies, for purposes of regional harmonization.[113]

It is however noted that the Bill's influence on state actors in the other EAC Partner States has been minimal and in particular due to the fact that the other Partner States, save for Rwanda, have already enacted specific legislation on HIV and AIDS.

The Bill's endorsement by state, non-state and international actors is attributable to the targeted advocacy and broad based consensus building that was undertaken prior to its enactment. Several stakeholder forums were held both nationally and regionally drawing participation from national members of parliament, medical practitioners, national policy makers, civil society as well as members of EALA. In this way, broad consensus had been achieved by the time the Bill was introduced in the EALA. [114] Drawing from the foregoing, it can be concluded that whereas the Bill has had considerable influence on non-state actors-

[113]These included the Eastern African National Networks of AIDS Service Organisations (EANNASO), the East African Health Platform (EAHP), and the United Nations Development Programme Regional Service Centre for Africa (UNDP RSCA). See Implementation of the EAC Realigned HIV and AIDS Strategic Plan (2012-2014): 8th Semi-Annual Narrative Report (1st July 2013 to 31st December 2013). Available at < http://www.eac.int/health/index.php?option=com_docman&task=doc_download&gid=90&Itemid=173 > (accessed on 2 December 2015).

[114]See 'The East African Community HIV and Aids Prevention and Management Act: A Success Story of the East African Sub-Regional Support Initiative for the Advancement of Women (EASSI) A Case Study' available at <http://www.the1325hub.org/attachments/article/129/EASSI%20Case%20Study%20on%20HIV%20Bill%20adoption.pdf> (accessed on 1 August 2016).

mostly NGOs and advocacy groups, its influence on state actors within the EAC Partner States has been minimal.[115]

5.2 The EAC Human and Peoples' Rights Bill

Enacted by the EALA in 2012, the stated purpose of the EAC Human and Peoples' Rights Bill (EAC Bill of Rights) is to among others 'establish a mechanism for the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples Rights…' It also seeks to contribute to the integration process by 'guaranteeing human and peoples' rights in the social, economic and political spheres.' The Bill provides for both civil and political rights as well as economic social and cultural rights. It contains extensive provisions aimed at protecting vulnerable groups such as older persons, children, youth, persons with disabilities and minority and marginalised groups. It also secures the rights of consumers and guarantees the right to fair administrative action. The thinking behind the enactment of the Bill was to have a clear normative source of law, which the EACJ would use as a reference point upon the extension of jurisdiction under article 27(2) of the EAC Treaty.

5.2.1 Influence on National Laws, Policies and Actors

With reference to the Bill's impact at the national or sub-regional level, the study did not encounter any influence on national law, policy or actors that would lead to a notable shift in national human rights practices and thus records that it has not had any observable domestic impact. This is partly attributable to the fact that the Bill has not yet acquired the force of law. The lack of assent to the Bill by even one of the Heads of State, four years after the Bill was passed by the EALA is a telling sign of the possible fate of the Bill in the long term. This is discussed below.

5.2.2 Reflections on Assent to the Bill

Whereas the HIV and AIDS Bill which has been assented to by all but one head of state, not even one of the EAC Heads of States has penned their assent to the EAC Human and

[115]This is explained by the fact that the Bill traces its roots to being an NGO initiative. It therefore would follow that the NGOs would publicise it and employ it as much as possible in their work as has been demonstrated. See (n114 above).

Peoples' Rights Bill. This is notwithstanding that it was passed by the Assembly in 2012 and has thus been in abeyance for close to four years with no concrete information on whether it should be remanded to the EALA for further deliberations as set out in article 63 of the EAC Treaty. Available information from the Assembly is that it is still undergoing the assent process and should be signed into law in due course.[116] However, a review of the history of the Bill of Rights, its provisions as well as the relations between the EALA and the Council, point to a less favourable outcome.

To begin with, the Bill of Rights was introduced and passed as a Private members' Bill. Given the content of the Bill and its implications for national sovereignty of the Partner States arising from the fact that it touches of matters that have been incorporated in national constitutions, the arguments by the Council in the case of *Calist Andrew Mwatela and Others v The EAC* come to the fore.[117] In this case, the Council stated its position that policy-oriented Bills or those that have implications on Partner States' sovereignty should emanate from the Council to the Assembly, as provided in article 14(3)(b) of the Treaty, rather than being submitted as private member Bills under article 59 of the Treaty. While the Court discounted the Council's argument and held that there was no restriction on policy bills emanating from private members, the Council position has not shifted in line with the Court's findings.[118]Thus, noting that matters of human rights would obviously have an implication on Partner States' national policies, it appears that the Council has employed its influence and political muscle to ensure that the Bill does not see the light of day.

In addition, the Bill as enacted contains provisions that would be problematic to implement nationally in view of the Partner States' constitutional provisions. For instance the Bill contains provisions on declaration of a State of Emergency under section 46. A reading of the Constitutions of the EAC Partner States reveals that the declaration of a state of

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[116]See interview with Mr. Obatre Lumumba (n 87 above).

[117]EACJ Application No 1 of 2005.

[118]Information from the Office of the Counsel to the Community reveals that the Council is still not comfortable with having private members institute policy oriented legislation in view of its position as the Community's policy making Organ. See recorded interview with Office of the Counsel to the Community, 10 April 2016 (on file with author).

emergency is regulated by the provisions of their respective constitutions and not by ordinary legislation. Given that states of emergency are by their nature sensitive and delicate matters of national security and may at times involve a threat to the existence of the state, it is submitted that the EALA should have restricted itself to general provisions on the protection of rights during an emergency, as opposed to making detailed provisions for instance on the procedures for declaration and extensions of states of emergency. Such provisions may not appeal to Heads of State, who would still want to retain certain aspects of national sovereignty.

Furthermore, the Bill of Rights, as passed was not the product of wide stakeholder consultations and consensus as was the case in the HIV and AIDS Bill which received support from Civil Society actors across the Partner States and was subjected to national consultations as well as input by the Secretariat, Council and the EALA. As such, by the time the EALA was enacting the Bill, it had received wide ownership and validation across different actors within the EAC Partner States. Conversely, the EAC Bill of Rights does not have that wide stakeholder base which can advocate and leverage their influence in diverse forums to call for the Heads of State to sign it into law.

A reading of the Bill reveals that it has borrowed heavily from the Constitution of Kenya, for instance, on sections dealing with the rights of accused persons, the limitation of rights, enforcement of rights among others. It is my view that the EALA could have adopted the relevant provisions of the Kenyan Constitution with changes to fit the regional realities and peculiarities instead of wholesale importation. Given that it is a regional instrument, any perception that its provisions are biased towards any one of the Partner States may, in my view result in a negative attitude towards it by the other Partner States.

An additional factor that may affect assent to the Bill of Rights would be the Protocol under article 27(2) of the EAC Treaty, in which the Partner States declined to vest human rights jurisdiction on the EACJ.[119] The adoption of Community legislation on human rights would

[119]See Report of the 13th Meeting of the Sectoral Council on Legal and Judicial Affairs Ref EAC/ SCLJA/13/2012 and Report of the 16th Meeting of the Sectoral Council on Legal and Judicial Affairs Ref: EACJ/ SCLJA/16/2014.

not make sense with a court, which is not vested with the requisite jurisdiction to hear and determine human rights matters.

In view of the foregoing, the most that the Bill can do for now, is operate as a soft law instrument- a non-binding expression of the collective will of the EALA as representatives of the people of the EAC on the norms and standards that should govern the Community's human rights response. Given the level of odds stacked against the Bill, it would be unlikely that the Heads of State would assent to it in its current form. Indeed, there is an emergent view that specific human rights legislation may not be a priority for the political organs at this point in the EAC since a comprehensive bill of rights will be incorporated as part of the constitution of the new East African Political Federation.[120]

6. Conclusion

This chapter sought to understand and determine the impact of the EAC's soft law human rights measures within the Partner States' domestic legal and policy framework. In this regard, reference was made to various Community instruments including Recommendations and Opinions of the Council, EAC Action Plans and Strategies, Oversight documents by the EALA as well as EALA legislation pending assent by the Heads of State.

The study has documented instances where considerable human rights gains were made within the domestic legal and policy framework as a direct result of these measures. Notable examples in this regard include the establishment of an independent National Human Rights Institution in Burundi, which was a direct result of the advocacy work by the Forum of EAC National Human Rights Institutions, established pursuant to the EAC Action Plan on Human Rights; the references by the Parliament of the Republic of Uganda to the EAC HIV and AIDS Management Bill as a normative standard in the development of national HIV and AIDS legislation, as well as the deployment of the EAC Principles on Election Observation and Evaluation in the elections in Tanzania and Burundi. These Principles owe their roots to the work by the EALA parliamentary Committee on Regional Affairs and Conflict Resolution.

[120]See interview with Mr. Obatre Lumumba (n87 above); See also interview with Mrs. Isabelle Waffubwa, EAC Directorate of Political Federation, Nairobi, Kenya, 17 July 2015. (Notes on file with the author).

On the other hand, this study has also revealed that there are a number of soft law measures that have failed to have the desired national impact on EAC Partner States. For instance, resolutions of the EALA have largely not been implemented due to lack of follow up at national and sub-regional level. There is no positive obligation for the EALA to publicise its resolutions to the EAC citizens and residents of the EAC hence they may not be able to engage effectively with their national governments with respect to follow up on the outcomes of these resolutions. This has then contributed to the dismal national impact of EALA resolutions in terms of influencing the human rights discourse within the EAC Partner States.

In conclusion, therefore, the study has confirmed that although the impact at the domestic level may not be monumental, they are incremental over time, and are, unfortunately, hampered by structural and institutional flaws within the EAC. For instance, the EALA has stated that it lacks the capacity to monitor the implementation of its resolutions. Thus a number of significant human rights and integration related resolutions may be made by the EALA but would not be followed up leading to wasted resources and efforts at the sub-regional level.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

1. Introduction

This thesis sought to investigate the measures employed by the EAC at the sub-regional level to promote and protect human rights, and how have these impacted on the respective national human rights frameworks within the Partner States. This is premised on the argument that the measures taken by the EAC in the fulfilment of its treaty obligations to promote and protect human rights, must radiate from the sub-regional to the domestic sphere in each of the Partner States and influence the development, interpretation or application of law and policy, or the actions of state and non-state actors.

In this endeavour, the study sought to firstly understand the EAC's legal and institutional framework as well as the theoretical and legal basis for the inclusion of human rights into the mandates of RECs-institutions which were initially conceived as vehicles for economic development, and in particular the EAC. Secondly, the study sought to investigate the interplay between the national constitutional orders of the Partner States and the EAC's legal system particularly with reference to the promotion and protection of human rights.

Having been thus informed, this research then focused on an analysis of the impact of the binding and soft law human rights measures taken under the EAC framework within the domestic sphere of the EAC Partner States.

The first part of this chapter will set out the findings in relation to the overall research objectives of this study. The second part of the chapter will reflect on the factors that have influenced the national impact of the measures taken at the EAC level to promote and protect human rights, while the final section of the chapter wraps up the study with a series of targeted recommendations and proposals for further research.

2. Summary of Findings

2.1 Findings on Inclusion of Human Rights into the Mandates of RECs

It is observed that changes in the global political economy-with the advent of democracy, globalisation and the free market-have meant that the promotion and protection of human rights must be a key component in any integration framework. To this end, most regional integration regimes have taken deliberate steps to include human rights guarantees within their constitutive treaties.

Several scholarly arguments have been advanced to explain the foray of African RECs into the arena of human rights. These have included arguments based on state obligations arising from the AEC Treaty,[1] the need for converging states to reflect international and regional standards of human rights protection at the sub-regional level,[2] or state obligations to give effect to the right to development under article 22 of the ACHPR [3]

From a theoretical perspective, it would appear that the so called 'intrusion' or inclusion of human rights into the mandates of RECs may be attributed to the construction and dissemination of norms by the converging states at the national and international levels and the eventual spill-over of these norms into the sub-regional arrangements such as the EAC.

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[1]See O Ruppel 'Regional economic communities and human rights in East and Southern Africa' in Anton Bösl & Joseph Diescho (eds) (2009*) Human Rights Law in Africa: Legal Perspectives on their Protection and Promotion* 319–350. The African Economic Community Treaty (AEC and also known as the Abuja Treaty) was adopted by the African Union (AU) in 1991 and came into force on 12 May 1994. The AEC treaty is an attempt to establish an economic community in Africa through different stages culminating in the establishment of an executive political organ of the African Economic Community. Article 6 of the EAC treaty highlights the modalities for establishing the community by providing a road map of 34 years for its establishment. This is to be done through a gradual process by coordination, harmonization and progressive integration of the activities of existing and future regional economic communities (RECs) in Africa, which are regarded as the building blocks of the AEC. The stated goals of the AEC include the creation of free trade areas, customs unions, a single market, a central bank, and a common currency thus establishing an economic and monetary union by 2028. The implementation of the Abuja Treaty is a process that is envisaged to be completed in 6 stages over 34 years. For additional information refer to <http://www.cislacnigeria.net/2013/02/the-treaty-establishing-the-african-economic-community/> (accessed on 20 October 2014)

[2]T Kaime 'SADC and Human Rights: Fitting Human Rights into the Trade Matrix' (2004) 13 *African Security Review* 109-117.

[3]N Nwogu 'Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS' (2007) 6 (3) *Journal of Human Rights*) 345.

Indeed, the reference made to the ACHPR as the EAC's preferred catalogue of rights points to the influence of norms developed at the AU level on the behaviour of states in their sub-regional arrangements. From a liberalist standpoint, the inclusion of human rights guarantees into the mandates of sub-regional organisations to the 'state bargaining' process marked by the convergence of state interests that are shaped by the demands of domestic interest groups, which include both state and non-state actors. Within the EAC framework, snippets of the influence of the liberalist theory can be deduced from the EAC Treaty negotiation process, where the draft EAC Treaty was subjected to national consultations, albeit in a limited fashion. The influence of national interest groups, that participated in these consultations culminated in the adoption of the text of the Treaty as currently framed.

2.2 Findings on the Interplay between Community Law and National Law

A fundamental requirement for the successful implementation of any regional integration process is that the states concerned must rework their respective national legal systems to ensure that they dovetail with the sub regional legal framework. It is the finding of this study that the EAC Partner States have each established a comprehensive legal architecture within their national jurisdictions that recognises and gives effect to Community law thereby giving effect to article 8(2) of the EAC Treaty. Partner States have enacted domestic legislation to give legal effect and recognition to the EAC Treaty, including Community law and institutions, notwithstanding that they come from diverse legal traditions in terms of the monist-dualist theoretic leanings.[4]

With reference to the status of the EAC Treaty and Community law within the Partner States national legal systems, it was determined that the EAC Treaty is accorded the status of national legislation (Acts of Parliament). However, its provisions on legal precedence mean that it would be superior to national legislation, but only in terms of matters touching on implementation of the EAC Treaty.[5]

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[4]See sections 2.1 and 2.2 of Chapter 3 of this thesis.

[5]See generally sections 4.3 and 4.4 of Chapter 3 of this thesis.

The practice within the EAC Partner States shows that Community law is not designed to function in competition with, but in collaboration with national law, cogent examples in this regard being the EAC Customs Management Act and the Regulations as well as the preliminary ruling procedure under article 34 of the EAC Treaty. However, a full appreciation of the inroads Community law has made into their respective national frameworks is yet to be fully realised nationally, demonstrable for instance, by the actions of the government of Uganda in detaining and deporting the applicant without due process as determined in the *Mohochi* case, and in the legal arguments raised before the EACJ in defence of its apparently unlawful action.[6]

2.3 Findings on the National Impact of the EAC's Binding Measures for the Promotion and Protection of Human Rights

In terms of evaluating impact, this thesis adopts an understanding of impact that goes beyond the conception of impact being limited to state compliance. Thus, impact, for the purposes of this study is understood to not only include state compliance with their treaty obligations, but goes beyond to also refer to the influence of the EAC's human rights measures on domestic law and policies as well as the actions of domestic actors leading to changes in human rights practices in the EAC Partner States. The parameters employed to evaluate the national impact of the EAC's measures for the promotion and protection of human rights were changes in national law, policy and state practice attributable to the specific measure under consideration; use of the particular measure by national courts and use of the measure under consideration by non-state actors such as non-governmental organisations and individuals.

2.3.1 The EAC Treaty and the Common Market Protocol

In assessing the national impact of the EAC Treaty, this study finds that the EAC Treaty has resulted to the enactment of national legislation and legal instruments that give full legal force to the EAC Treaty within their respective Partner States jurisdictions, thus

[6]As above; See also *Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda,* EACJ Reference No. 5 of 2011.

incorporating the EAC Treaty as part of national law. The direct result of this is that the human rights commitments of article 6(d) and 7(2) of the EAC Treaty form part of the national laws of the Partner States and are justiciable. This has added another layer of human rights obligations to the Partner States as duty bearers in addition to their existing national and international human rights commitments.[7]

The EAC Treaty has also spurred the EAC Partner States, save for Tanzania and Burundi, to develop national policies on regional integration, all of which contain commitments to the promotion and protection of human rights in the integration process. Thus, the human rights references contained in the EAC Treaty have permeated into the respective Partner States' national policy frameworks.[8]

Furthermore, the EAC Treaty has direct effect and has been invoked in national courts by national judiciaries, national executives as well as private citizens in the course of litigation. The use of the Treaty in litigation before national courts, and in particular on matters of human rights demonstrates its national impact. Whereas this study has recorded actual reference to the EAC treaty in litigation before national courts in Kenya, Rwanda and Uganda, it is submitted that a strong inference should be made that the legal position on the direct effect of the Treaty is similar across other Partner States.[9]

In addition, the EAC Treaty, being part of national law, has created opportunities for citizens and residents of Partner States to engage with Community organs on human rights matters. Thus for instance, the creation of the EACJ has seen EAC citizens and residents file references before it based on human rights claims. Indeed, references have been filed against all Partner States with respect to allegations of breaches of their human rights commitments under articles 6 and 7 of the EAC Treaty. These references are filed by individual litigants as well as Civil Society Organisations based in the respective Partner States.

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[7]See section 2.1.1 of Chapter 4 of this thesis.

[8]See section 2.1.2 of Chapter 4 of this thesis.

[9]See section 2.2.1 of Chapter 4 of this thesis.

Citizens and residents of EAC Partner States have also engaged with the EALA through its petition competence to address human rights concerns such as the rights of children in northern Uganda, the rights of persons with albinism as well as the human rights situation in Burundi following the 2015 crisis. This further demonstrates the direct influence and impact of the EAC Treaty on non-state actors who have elected to use its organs as an avenue for seeking the protection of their rights.[10]

With reference to the EAC Common Market Protocol, the study determined that the EAC Partner States have taken legislative policy and administrative measures to safeguard among others the freedom of movement, the protection of workers' rights, as well as the protection of the right to property in cross border investment. However, it is observed that whereas these measures are not implemented in terms of specific human rights obligations stipulated in the Protocol, they are undertaken against the backdrop of article 3, which incorporates the overall human rights commitments stipulated under article 6 and 7 of the EAC Treaty.[11]

Just like the EAC Treaty, the Protocol has also served as a point of reference by national level actors such as NGOs, private persons as well as companies in founding their references and litigation before the EACJ. However, the references filed before the EACJ based on the provisions of the Protocol are minimal, standing at only four since the year 2010. The study did not encounter any cases within the respective national courts in which the Protocol was invoked as a source of law.

2.3.2 Acts of the Community

It is the finding of this study that whereas Acts of the Community are a useful tool in the integration process, there is currently no legislation under the EAC legal framework that may be applied towards the promotion and protection of human rights. However, the EALA has been fairly prolific in passing human rights related legislation such as the EAC Human

[10]See section 2.2.2 of Chapter 4 of this thesis.

[11]See generally section 3 of Chapter 4 of this thesis.

and Peoples Rights Bill, the EAC HIV and AIDS Prevention and Management Bill, the EAC Persons with Disabilities Bill, the EAC Gender Equality and Development Bill as well as the EAC Counter Trafficking in Persons Bill.[12] Notably however, these Bills have not yet attained the force of law for the reason that they have not gained assent from the Heads of State. It is submitted that this delay in assent to EAC Bills, especially those dealing with human rights, should be a cause for concern among human rights advocates within the EAC, in order to galvanise them to either advocate with their national governments on the need to expedite the assent procedure, or to litigate on this question at the EACJ.

2.3.3 Decisions of the EACJ

The EACJ lacks express jurisdiction to hear and determine human rights matters. It has nonetheless exercised its jurisdiction creatively to enable it determine cases that may include human rights claims under the *Katabazi* doctrine.[13] It has emerged from this study that decisions of the EACJ have influenced national law and policy as well as national actors at different levels.

Firstly, although the EACJ does not have the jurisdiction to invalidate national law, its decisions have led to changes in national law in instances where the court has declared national law inconsistent with the EAC Treaty. Thus, the *Anyang'Nyongo* and the *Mukasa Mbidde* cases considered in this research provide cogent examples of this level of impact.[14] It may also be concluded that decision of the Court in the *Mohochi* case has contributed to the process of reviewing provisions of the Uganda Citizenship and Immigration Act, which the court had declared inconsistent with the EAC Treaty and Common Market Protocol.[15]Its

[12]See section 5 of Chapter 5 of this thesis.

[13]*James Katabazi and 21 others v the Secretary General of the EAC and Another*. EACJ Reference No. 1 of 2007.

[14]*Prof. Peter Anyang' Nyongo and 10 others v The Attorney General of Kenya and 2 others.* EACJ Reference No. 1 of 2006 and EACJ Appeal No. 1 of 2009 and *Democratic Party and Mukasa Mbidde v The Secretary General of the East African Community and the Attorney General of the Republic of Uganda* EACJ Reference No. 6 of 2011

[15]See the *Mohochi case* (n 6 above).

decision in the *Burundi Press Law* case has also spurred a review of the law governing freedom of the press in Burundi.[16]

Secondly, EACJ decisions have had an impact on national level state and non-state actors in their diverse contexts. For instance, its decisions have influenced national judiciaries, which have expressed a readiness to refer to EACJ decisions as a source of law within the course of litigation before national courts. The Ugandan experience in *Akidi Margaret v Adong Lilly and the Electoral Commission* as well as in *Toolit Simon Akesha v Oulanyah Jacob L'Okori and Electoral Commission* are notable examples in this regard.[17]Representatives of national governments have also relied on EACJ decisions in their submissions to the EACJ. This deference to EACJ decisions as source of strong persuasive authority is significant given that the doctrine of *stare decisis* is not binding on the EACJ.

Also, the Court's decisions have also had what may be termed as a 'spill-over effect,' where its decision on a given case with respect to one Partner State, spurs litigants in other Partner States to file suit on similar aspects of national law that they view as inconsistent with the EAC Treaty. The filing of the *Mbidde* and *Mtikila* cases in Uganda and Tanzania respectively, following the EACJ decision in the *Anyang' Nyong'o* case attests to this spill-over effect. [18]

Lastly, an analysis of the EACJ's human rights jurisdiction is not complete without a discussion of the impact of its landmark decisions in the *Katabazi*[19] and *Anyang' Nyong'o*[20] cases. It is without doubt that the decision of the EACJ in the *Katabazi* case was ground breaking as it opened an opportunity for litigators drawn from different Partner States to file human rights claims before the Court via article 6 and 7 of the EAC Treaty. The *Anyang'*

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[16]*Burundian* Journalists *Union v The Attorney General of the Republic of Burundi,* EACJ Reference No. 5 of 2013, First Instance Division.

[17]See *Akidi Margaret v Adong Lilly and the Electoral Commission*, Election Petition No. 0004 of 2011 (Unreported).See also *Toolit Simon Akesha v Oulanyah Jacob L'Okori and Electoral Commission.* High Court Election Petition No. 001 of 2011 (unreported).

[18]See *Mbidde* and *Anyang'Nyongó* cases (n 14 above) and *Mtikila v Attorney General of Tanzania and Others* EACJ Reference No 1 of 2007.

[19]*Katabazi case* (n 13 above).

[20]Anyang' Nyongó case (n14 above).

Nyong'o case is also significant especially with regards to the impact of the political backlash that ensued in the wake of the EACJ's interim orders granted to the applicants in the case. The amendment of the EAC Treaty and the introduction of a 60-day time limit within which to file cases has effectively blocked access to justice for individuals and communities who would wish to have their cases ventilated before the EACJ. It has also denied the Court a chance to pronounce itself on fundamental issues of human rights and governance, which would enrich its jurisprudence. For instance, in *Attorney General of Kenya v Independent Medical Legal Unit,* the Appellate Division of the EACJ held that it could not consider the case filed by the Independent Medical Legal Unit, a Kenyan NGO, alleging human rights violations by Kenyan military officers in a security operation in Mount Elgon area, for the reason that it was filed outside the 60-day time limit.[21]

2.3.4 Regulations, Directives and Decisions of the Council

The study determined that there is no clarity within the EAC Framework on the specific technical meanings to be attached to regulations, directives and decisions of the Council. There is also no clarity on when to employ these measures in the course of Community governance.

Another finding of this research is that the EAC Council has so far not issued any regulations that may be amenable to a human rights analysis. In addition, it has not made any specific decision or directive based on a human rights situation that required its authoritative pronouncement thereon. Only 1.47% of the Council's decisions and 1.54% of its directives made between 2014 and 2016 may be applied to the promotion and protection of human rights within the community. A large part of these are directives and decisions made in the context of the Common Market Protocol on the free movement of EAC citizens and residents across Partner States. These have worked alongside provisions of the Common Market Protocol to spur changes in national law and policy within the Partner States to enhance freedom of movement across national frontiers. These legal provisions have

[21] EACJ Appeal No. 1 of 2011.

allowed EAC citizens and residents enhanced access to opportunities across their national borders.

2.4 Findings on the National Impact of EAC's Soft Law Measures on Human Rights

Soft law measures under the EAC framework include EALA oversight measures, EAC strategies and action plans as well as EALA Bills pending assent by the Heads of State. These measures fall into the category of state generated soft law as per Kabumba's classification.[22] The study determined that considerable human rights gains were made within the domestic legal and policy framework of several Partner States that are both directly and indirectly attributable to these soft law measures.

2.4.1 EAC Strategies and Plans

The study determined that strategy, policy documents and action plans adopted by the Council although not binding, have nonetheless had some measure of influence on the human rights frameworks of different Partner States. Notably, the EAC Plan of Action on Promotion and Protection of Human Rights resulted in the creation of the EAC Forum of National Human Rights Commissions (NHRI Forum), which advocated with the government of Burundi for the enactment of national legislation creating an independent national human rights commission in line with the Paris Principles. Therefore, in terms of lines of attribution, the passing of national legislation establishing an independent NHRI in Burundi draws its roots in part to the EAC Plan of Action on Promotion and Protection of Human Rights, a soft law instrument. This demonstrates the value that concerted action by community actors may have on national human rights discourse within respective Partner States, and is an opportunity that needs to be scaled up by human rights actors within the EAC.

However, the EAC Strategic plan on Gender, Youth, Children, Persons with Disabilities, Social Protection and Community Development failed to achieve observable national impact on

[22]See B Kabumba 'Soft Law and Legitimacy in International Law: A Case Study of the Doha Declaration on the Trips Agreement and Public Health' LLD Thesis University of Pretoria, 2014.

the thematic areas considered in this thesis principally because of limited engagement thereon by the EAC Secretariat, which was charged with the task of spearheading its implementation in concert with the Partner States. Nonetheless, the strategy played a fundamental role in laying the framework for, and inspiring the drafting and passing of the EAC Bill on Gender and Development as well as the EAC Bill on Persons With Disabilities. Upon gaining the force of law via assent by the Heads of State, the influence of the resultant Community Acts will ultimately trace their roots to the EAC soft law instruments.

2.4.2 Oversight by the EALA

Resolutions of the Assembly as well as the reports of parliamentary committees are part of the measures deployed by the EALA in the exercise of its oversight mandate. When used consistently and appropriately, these devices have the potential to play a useful role in enhancing the promotion and protection of human rights within the sub-region. However, it is the finding of this research that their uptake within the Partner States' national legal and human rights frameworks has remained low, partly due to the lack of a properly structured interface between the EALA and Partner States. There currently exists no follow up or tracing mechanism for EALA resolutions once they are transmitted to the Partner States for action. Furthermore, there is no implementation framework for these resolutions at the EALA level. This has meant that resolutions that have been made over time continue to remain unimplemented.

The study also determined that the EALA has only recently taken up the use of its powers to receive Petitions from EAC residents and citizens. The Petition with reference to the human rights situation in Burundi is the first to be conclusively dealt with by the EALA through its Committee on Conflict Resolution. An evaluation of its national impact on Burundi's human rights framework is not possible at this stage since the process is still ongoing. Nonetheless, available information shows that several public hearings convened by EALA in the course of dealing with the Petition availed an opportunity for several state and non-state actors from Burundi to present their perspectives on the human rights situation in Burundi.

2.4.3 Bills Enacted by EALA

This study has determined that Bills passed by the EALA but which have not been assented to by all Heads of State, have also had an influence on the Partner States national human rights frameworks. However, this has been on a limited scale within and across the sub-region. Indeed, the only documented example in this regard is the Ugandan experience with the EAC HIV and AIDS Management Bill in which the Ugandan Parliament made several references to it as a normative standard and reference point in the development of national HIV and AIDS legislation, thus showcasing its influence on national level actors. National NGOs in the other EAC Partner States have also identified it as a working normative guideline for purposes of sub-regional engagements on human rights aspects of HIV and AIDS.

3. Reflection on National Impact of EAC's Human Rights Measures

The preceding sections have demonstrated that the EAC's human rights measures for the promotion and protection of human rights have influenced the national legal and human rights frameworks of the EAC Partner States. Several factors have been isolated which either give effect to, or hamper national impact and are highlighted below.

To begin with, the inclusion of human rights principles within the EAC Treaty and the incorporation of the EAC Treaty as part of national law serve to legitimise and validate actions taken by various actors within the national and sub-regional framework for the promotion and protection of human rights based on the EAC Treaty. This has meant for example, that national judiciaries have accepted to defer to the EACJ for preliminary ruling when they are confronted with matters relating to the interpretation of the Treaty due to the fact that the EAC Treaty, being part of national law, already prescribes the action to be taken in such instances. This falls in step with the concept of convergence of national interests that forms the core of the liberalist theory. *A priori,* the decision to integrate and form the EAC reflected a convergence of interests among the Partner States. Taken one step further, it is also a convergence of Partner States' interests that they all give legal effect to the EAC Treaty within their respective national legal frameworks. Thus, the granting of legal effect to the EAC Treaty and other sources of law within the Partner States national legal

architecture is ultimately traceable to the common agreement reached by Partner States at the Treaty level.[23]

The EAC Partner States have also exhibited political goodwill (though in measured doses) and commitment to the integration process, including the promotion and protection of human rights. For instance, available information shows that Partner States have largely complied with decisions of the EACJ, notwithstanding that it lacks its own enforcement machinery. This compliance has not been as a result of coercion or enforcement but has been voluntary. However, this level of compliance does not necessarily imply that the EAC Partner States are always eager to implement EACJ judgments. A review of the nature of decisions issued, and orders made by the EACJ reveals that most of them do not have far reaching ramifications for Partner States. For instance, no orders for compensation or restitution have been made by the EACJ following a complaint of a violation of the Treaty. Most of its orders have been declaratory in nature, which would not call for the deployment of vast resources by Partner States or a significant shift in national law or policy.[24] It nonetheless remains to be seen whether the EACJ may issue pecuniary reliefs, and whether Partner States would comply with these orders. The reaction of the EAC Partner States in the wake of the Court's interim orders in the *Anyang' Nyong'o* case is a telling sign of the repercussions that would befall the EACJ in the event that it passes orders that are unpopular with the majority of the Partner States.[25]

Furthermore, national level actors within the EAC Partner States have contributed to the national impact of the EAC's human rights measures. This is especially so in the area of engagement with the EACJ as well as the EALA, where national level NGOs as well as individual litigants have facilitated the development of an emergent EACJ human rights jurisprudence. This level of impact is significant from a theoretical perspective as it lends

[23]See generally section 4.1 and 4.3 of Chapter 3 of this thesis.

[24]See the section 5 of Chapter 4 of this thesis on national impact of the decision of the EACJ.

[25]See section 3.1.3 of Chapter 3 and section 5.1 of Chapter 4 for a discussion of the political backlash that resulted from the *Anyang' Nyong'o* case.

credence to the notion of 'rational strategizing' by the 'strategic social constructivism' or 'quasi constructivism' school of thought. The role of national level NGOs as well as bar associations from the EAC Partner States in strategic litigation before the EACJ has seen several landmark decisions from the EACJ especially with reference to the promotion and protection of human rights. Thus, for instance, the *Katabazi* case was filed with support from national bar associations in the EAC as well as NGOs. Once the *Katabazi* doctrine was developed as a norm by the EACJ subsequent litigation at the EACJ by national level actors reaffirmed the scope and the application of the doctrine. The far-reaching impact of the *Katabazi* case as well as the other decisions of the EACJ can therefore be evaluated and explained from this constructivist approach.[26]

However, a number of factors have also hampered national impact of EAC human rights measures. To begin with, there are several institutional gaps and weaknesses within the EAC itself, that then affect the interplay between the sub-regional and the national legal and human rights frameworks. For instance, the linkages between the EALA and national parliaments are insufficient to facilitate significant national impact of its hard and soft law instruments. The EALA lacks mechanisms for sharing and tracking the implementation of its resolutions, some of which are targeted to Partner States. Similarly, it lacks measures for Partner States' national parliaments to provide input into Community legislative processes. Such formal linkages need to be established and strengthened.[27]

Secondly, there are instances where the Partner States have failed to demonstrate the political goodwill necessary to facilitate national impact of the EAC's human rights measures. The EAC experience with the HIV and AIDS Bill as well as the Human and Peoples' Rights Bill showcase an instance where national impact has been hampered because of deliberate acts or omissions by the EAC Heads of State.[28]

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[26] *Katabazi* case (n 13 above).

[27] See the observations on EALA's oversight measures including its resolutions in section 4.1 of Chapter 5 of this thesis.

[28] See the observations in sections 5.1 and 5.2 of Chapter 5 of this thesis.

Lastly, it is acknowledged that whereas there has been demonstrable national impact of the EAC's human rights mechanisms, it is submitted that this impact has not been the result of a coordinated approach by all the relevant human rights actors in the sub-region. Rather, it is attributable to steps taken by different actors within different contexts at different times, but all taking place within the overall EAC integration architecture. In short, there seems to be lack of coherent strategic coordination and engagement by the EAC citizens and residents with the EAC's human rights framework. Thus, whereas this thesis acknowledges the value added by the EAC Civil Society Organisations, including national Bar Associations and the East African Law Society especially in the context of litigation at the EACJ, and in some instances in standard setting, it is submitted that is insufficient if major shifts in law and policy are anticipated. There must be ardent, sustained and meaningful coordination between non-state actors at the national and sub-regional level, which goes beyond litigation, so as to develop a functioning framework that links the sub-regional to the national human rights regimes in the Partner States.

Thus, whereas the 'strategic social constructivists' outline rational strategizing among national-level actors, as one of the factors that influence national impact of international institutions, it is submitted that to be effective, this strategizing among actors must be coordinated and speak to a generally agreed outcome by all actors. Within the EAC context, it appears that there is a lack of coordinated strategy firstly at the national level within the Partner States on the human rights outcomes that need to be realised from the EAC process, and secondly, at the EAC level, on how to mainstream human rights outcomes in the work of the community as a whole.

4. Recommendations

In view of the findings of this study in the preceding section, a number of recommendations have been proffered which may be employed to enhance national impact of the EAC's human rights measures.

4.1 Strengthen Linkages Between the EALA and National Parliaments

Community organs and their corresponding national organs play a complementary role to ensure that policies and laws developed at EAC level are implemented within the national legal framework. Although Partner States have established ministries responsible for EAC affairs within their national governance frameworks, there is still need for enhanced cooperation particularly between the national parliaments and the EALA. The implementation of most regional laws and policies imply and would require the enactment or amendment of national laws. For instance, as noted in Chapter 4 of the study, the EAC Partner States are in the process of reviewing their respective national laws on immigration in order to give effect to the guarantee of freedom of movement, residence and right of establishment in the Common Market Protocol.

It is the recommendation of this research that national Parliaments must be involved at as early a stage as possible in any regional legislative initiative that will require legislative action at the national level. This could take the form of giving a formal but limited role to national parliaments in the regional legislative process in the context of a clarified subsidiarity principle. For example, all regional Bills could be transmitted to national parliaments at the same time as they are introduced at the EALA. The national parliaments could then submit observations within a certain deadline, but without having a right to block the legislation.

Part of the responsibility for increasing the involvement of national Parliaments in the EAC legislative work lies with those Parliaments themselves. Current linkages between national parliaments and the EALA are limited to the communication of documents, except for the speakers Forum, which allows for more formal, but insufficiently in-depth engagement.[29] The creation of dedicated national parliamentary committees of EAC Affairs, following the example set by Uganda, would be an important step in this regard. Such committees are a

[29]EALA has acknowledged that more active engagement was necessary and identified the creation of Standing Committees on EAC Affairs in National Parliaments as one of its areas of action under the 2010/2011-2015/16 EAC Development strategy

crucial awareness-raising tool for national parliaments and could also provide the basis for the creation of a forum of EAC national Committees and the EALA.

4.2 Enhance Grassroots Engagement with the EAC Human Rights Mechanisms

This study has determined that the EAC human rights framework is only accessible to a small segment of the EAC citizens and residents. For instance, litigation before the EACJ has been dominated by NGOs, lawyers, and prominent political figures within the respective Partner States which projects engagement with the EACJ as more of an elitist venture than as a means of ensuring access to justice. Thus, whereas there is evidence of national impact of its decisions, the scale of this impact is minimal when analysed in the context of the need to ensure that the rights of every citizen and resident are protected. There is need for the Secretariat to engage with the respective Partner States including their National Human Rights Commissions and NGOs in order to have broad based grassroots engagement with the EAC's human rights framework. This is not only useful for purposes of enhanced awareness on the sub-regional mechanism, but also as a component of enhancing people centred integration which is a core requirement under the EAC Treaty.

4.3 Review the Assent Procedure to EAC Bills

The EAC experience with two human rights instruments enacted by EALA - the EAC HIV and AIDS Management Bill and the EAC Human and Peoples Rights Bill, where the EAC Heads of State have taken inordinately long to assent (or withhold assent) calls for a need to review the provisions of article 63 of the EAC Treaty. It is proposed to have a default mechanism whereby a Bill either lapses after a certain period if all Heads of State withhold their assent or fail to act on it or where it becomes binding law but only in relation to the Partner States that have assented to it. In this way the uncertainty surrounding the fate of such Bills would be curtailed.

4.4 Establish a Human Rights Coordination Office at the EAC Secretariat

This study has determined that there is generally a lack of strategic coordination and engagement by the EAC citizens and residents with the EAC's human rights framework. The result is that all well-intentioned actors are each pulling in different directions in an attempt

to enhance the promotion and protection of human rights within the sub-region. In order to remedy this, it is recommended that there be established a human rights coordination office at the EAC Secretariat. This office will serve to work with EAC Organs, Partner States and Civil Society actors on mainstreaming human rights standards under articles 6 and 7 of the Treaty, as well as working with the Partner States towards the development, implementation and monitoring of their human rights obligations. This coordination office would then dovetail with the respective national human rights mechanisms to facilitate tracking and implementation of any sub-regional human rights commitments made by the Partner States.

4.5 Clothe the EACJ with Human Rights Jurisdiction

The EAC Partner States undertake in article 5(2) of the Treaty to establish a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation. This translates to the deepest form of legal integration, where participating states not only engage in economic integration but move one step closer to political integration. Article 6 and 7 of the EAC Treaty set out the promotion and protection of human rights as one of the fundamental and operational principles of the Community. The study observed in Chapter 4 that the EACJ, the Community's judicial organ, still does not have the competence to hear and determine human rights matters. The process of passing a protocol as envisaged under article 27(2) of the EAC Treaty to give the Court human rights jurisdiction was unfortunately derailed, with the Council and Summit opting to vest the court with competence over matters dealing with the Monetary Union and deferring human rights to further consultations between the Council and the African Union.

Chapter 1 of this study observed that integration presupposes the creation of spheres of the exercise of public power that affect the rights of people. Thus, it would be inconceivable that such integration processes lacked human rights guarantees, especially if they imply

awarding competences to the supranational entity.[30] Accordingly, a rule of thumb would be that the deeper the integration process, the greater the significance for the observance of human rights within the countries involved. Moreover, Chapter 4 of this study revealed that the decisions of the EACJ have had the most significant and direct impact on human rights practices within the Partner States' national framework. In this context, the importance of vesting the EACJ with human rights jurisdiction cannot be over emphasized. It is therefore the recommendation of this study that the relevant organs of the EAC revisit the issue of vesting the EACJ with human rights jurisdiction, as this is an indispensable tool in the promotion of good governance within the Community. Whereas it is acknowledged that the EAC Partner States are also state parties to the Protocol on the African Court on Human Rights, it is submitted that the EACJ is better positioned to determine human rights complaints given that it would better understand the human rights contexts and peculiarities of the sub-region. Moreover, access to the court is not restricted as in the case of the African Court in which individual litigants are locked out of directly accessing the Court, unless their countries of nationality have made a declaration under article 34(6) of the Protocol. In addition, the EACJ has already established linkages with national judiciaries, with sub-registries having been established in all the Partner States. In view of the foregoing, and with the envisaged integration of the EAC into a political federation, the presence of a sub-regional court with human rights competence cannot be gainsaid.

4.6 Address EAC's Institutional Shortcomings

There are also a number of institutional shortcomings within the EAC organs that in turn negatively impact on its capacity to enhance the realisation of human rights within the Community. Key among these are capacity challenges for the EAC Organs. For instance, the EALA has conceded that it does not have the capacity to follow up on the implementation of its resolutions, blaming it on the lack of staffing and systems. As such, it is not able to effectively discharge its oversight mandate, contributing to deficiencies in community

[30] A L Garin 'Human Rights and Regional Integration in Mercosur: a Bipolar Relationship.' Presentation at the VIII[th] World Congress on Constitutional Law, Mexico 6-10 Dec 2010. Available at <> (accessed on 23 February 2016).

governance, which would obviously impact on national governance structures. The question of capacity and resource challenges is not only a preserve of the EALA. Other community organs continue to express their concerns about the funding levels of their mandates and their treaty obligations. As such, there is a need to revisit the resourcing of the EAC Organs and Institutions to enhance their capacity to fulfil their treaty obligations.

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