

# **RELATIONAL ISSUES OF LAW AND ECONOMIC INTEGRATION IN AFRICA**

**Perspectives from Constitutional, Public and Private International Law**

by

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## ABSTRACT

This thesis examines how relational issues of law in economic integration are being approached in Africa. At its core, relational issues deal with the legal interactions among community, national, regional and international legal systems within the context of economic integration. The theory is that effective economic integration is the product of properly structuring and managing – within well-defined legal frameworks – vertical, horizontal and vertico-horizontal relations among states, legal systems, laws and institutions. Put differently, an economic community must have well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness. After expounding this theory and applying it to the state of affairs in Africa (focusing principally on four regional economic communities), the original contribution of the thesis to knowledge on economic integration in Africa can be captured in a few words: Africa’s economic integration processes have not paid systematic or rigorous attention to relational issues. The interactions between community and member states’ legal systems, among the various communities, as well as among member states’ legal systems, have neither been carefully thought through nor placed on a solid legal framework. Where attempts have been made to provide a legal framework, it has been incomplete, unsatisfactory, and, sometimes, grounded on questionable assumptions. The thesis argues that, unless these shortfalls are remedied, the progress and effectiveness of Africa’s economic integration will be seriously undermined. The thesis reveals that even if all the infrastructural, socio-economic and political challenges that bedevil Africa’s economic integration were to disappear, - and it is these challenges that most of the scholarship on Africa’s economic integration are devoted to - there remains so much in the realm of law which, if unaddressed, will hinder its success and effectiveness.

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## **LIST OF ACRONYMS AND ABBREVIATIONS**

AEC: African Economic Community

AMU: Arab Maghreb Union

AU: African Union

CENSAD: Community of Sahel-Saharan States

COMESA: Common Market for Eastern and Southern Africa

EC: European Community

EAC: East African Community

ECOWAS: Economic Community of West African States

ECCAS: Economic Community of Central African States

ECJ: European Court of Justice

ICJ: International Court of Justice

IGAD: Inter-Governmental Authority for Development

OAU: Organization of African Unity

REC: Regional Economic Community

SADC: Southern African Development Community

WTO: World Trade Organization

### **African Law Reports**

B.L.R.: Botswana Law Reports

East Africa L.R.: East African Law Reports

eKLR: Electronic Kenya Law Reports

G.L.R.: Ghana Law Reports



K.A.L.R.: Kampala Law Reports

K.L.R.: Kenya Law Reports

LawAfrica R.: LawAfrica Law Reports

N.R.: Namibia Law Reports

N.W.L.R.: Nigerian Weekly Law Reports

S.A.: South African Law Reports

S.C.G.L.R.: Supreme Court of Ghana Law Reports

T.L.R.: Tanzania Law Reports

Zam.L.R.: Zambia Law Reports

Z.L.R.: Zimbabwe Law Reports

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**DEDICATION**

**MARY ADJEI**

*It saddens me that you did not live to see this, but Maame I've done it! Thanks.*

## CHAPTER ONE: INTRODUCTION

### 1.1 INTRODUCTION

Economic integration is defined ‘as the elimination of economic frontiers between two or more economies’.<sup>1</sup> In this regard, an economic frontier represents a demarcation – often the geographical boundaries of a state – into which the flow of goods, labour and capital is restricted. Economic integration involves the removal of obstacles to trans-boundary economic activities which occur in the fields of trade, movement of labour, services and the flow of capital. Economists identify various stages in the process of economic integration. According to Balassa, economic integration passes through five stages.<sup>2</sup> These stages are, ‘a free trade area, a customs union, a common market, an economic union, and complete economic integration’.<sup>3</sup>

The first three stages involve negative integration. These stages entail the removal of discrimination in national economic rules and policies under joint and authoritative surveillance and, generally, placing limitations on national economic decision-making.<sup>4</sup> These are difficult stages in integration since they entail restrictions on the sovereign rights of countries to take decisions affecting the socio-economic well-being of their residents. An economic union and complete economic integration are characterized as positive integration. They involve ‘the transfer of public market-rule-making and policy-making powers from the participating polities to the union level’.<sup>5</sup> Balassa’s linear model of economic integration has been criticized,<sup>6</sup> but it is still

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<sup>1</sup> Jacques Pelkmans, “The Institutional Economics of European Integration” in Mauro Cappelletti *et al.* eds., *Integration through Law Europe and the American Federal Experience* bk. 1 (Berlin, New York: Walter de Gruyter, 1986) at 318 [Pelkmans].

<sup>2</sup> Bela Balassa, *The Theory of Economic Integration* (London: Allen and Unwin, 1962) at 2 [Balassa]. Balassa describes the stages as follows. In a free-trade area, tariffs (and quantitative restrictions) between the participating countries are abolished, but each country retains its own tariffs against non-members. Establishing a customs union involves, besides the suppression of discrimination in the field of commodity movements within the union, the equalization of tariffs in trade with non-member countries. A higher form of economic integration is attained in a common market, where not only trade restrictions but also restrictions on factor movements are abolished. An economic union, as distinct from a common market, combines the suppression of restrictions on commodity and factor movements with some degree of harmonization of national economic policies in order to remove discrimination due to the disparities in these policies. Finally, total economic integration presupposes the unification of monetary, fiscal, social, and countercyclical policies and requires the setting-up of a supra-national authority whose decisions are binding on member states.

<sup>3</sup> *Ibid.*

<sup>4</sup> Pelkmans, *supra* note 1 at 321.

<sup>5</sup> Balassa, *supra* note 2 at 2.

<sup>6</sup> Colin McCarthy, “Is African Economic Integration in Need of a Paradigm Change? Thinking out of the Box on African integration” (2008) 8 *Monitoring Regional Integration in Southern Africa Yearbook* 4 at 24-40.

widely followed by economists.<sup>7</sup> It has shaped many economic integration initiatives including some in Africa. Accordingly, the linear model is adopted as the framework for analysis in this thesis.

Regional economic integration is important to Africa. The urgency with which it must be pursued was expressed by the United Nations Economic Commission for Africa (UNECA) in these words:

This shift [the global move to integrate economies] is nowhere more urgent than in Africa, where the combined impact of our relatively small economies, international terms of trade, and the legacy of colonialism, mis-rule, and conflict has meant that we have not yet assumed our global market share—despite our significant market size.<sup>8</sup>

It is envisaged that uniting African economies will permit economies of scale, make them more competitive, provide access to wider trading and investment environments, promote exports to regional markets, provide the requisite experience to enter global markets, and provide a framework for them to co-operate in developing common services for finance, transportation and communication.<sup>9</sup> The economic philosophy that underlies these visions is neo-liberal economic thinking that emphasizes, among others, free trade and the removal of obstacles to investment.

The need to integrate the economies of Africa is widely accepted. But its nature, scope, focus and theoretical underpinning remain contested.<sup>10</sup> More important for this thesis, the legal

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<sup>7</sup> Pelkmans, *supra* note 1 at 323, 324-26.

<sup>8</sup> UNECA, *Assessing Regional Economic Integration in Africa* (Addis Ababa: UNECA, 2004) at ix. See also United Nations Conference on Trade and Development, *Economic Development in Africa Report 2009: Strengthening Regional Economic Integration for Africa's Development* (Geneva: UNCTAD, 2009).

<sup>9</sup> UNECA, *Economic Report on Africa 2002: Tracking Performance and Progress* (Addis Ababa: UNECA, 2002) at 2-11.

<sup>10</sup> For example, Boas questions the state-centred formal economy focus of Africa's economic integration processes. Boas advocates a refocus on informal trading structures that exist within and among African countries. See Morten Boas, "Regions and Regionalisation: A Heretic's View" in Meagher Bods Page ed., *Regionalism and Regional Integration in Africa: A Debate of Current Aspects and Issues* (Uppsala: Nordiska Afrikainstitutet, 2001) at 27. For a critique of Boas' approach see Kate Meagher, "Throwing out the Baby to Keep the Bathwater: Informal Cross-border Trade and Regional Integration in West Africa" in Meagher Bods Page ed., *Regionalism and Regional Integration in Africa: A Debate of Current Aspects and Issues* (Uppsala: Nordiska Afrikainstitutet, 2001) at 41. A recent study has found that informal trade represents a significant proportion of regional cross-border trade in Sub-Saharan Africa. The study argues that informal trade is a threat to long-term economic development. See Caroline Lesser & Evdokia Moise-Leeman, "Informal Cross-border Trade and Trade Facilitation in Sub-Saharan Africa" (OECD Trade Policy Working Paper No. 86, February, 2008). Mazzeo also argues against the market approach to integration and advocates

issues arising from economic integration have not yet been fully explored.<sup>11</sup> Some advocate regionalism. Others emphasize the need for immediate continent-wide integration. This debate in Africa can be seen as part of the wider international economic law debate on regionalism and multilateralism.<sup>12</sup>

Regionalism in Africa has benefits.<sup>13</sup> It will allow for region-specific initiatives. The relatively small size of regional economic communities (RECs), in terms of the number of countries engaged, also makes for easy management and decision-making. Africa consists of fifty-three sovereign countries. Thus, perhaps, regionalism is the only manageable option. Competition among RECs may also be an avenue for development through efficiency gains. Regionalism in Africa also has disadvantages. It can reduce member states' commitment to ensure the emergence of continent-wide integration. Multiple commitments given by states to RECs, resulting from multiple memberships of such organizations, can lead to non-compliance and jurisdictional conflicts. Additionally, countries with relatively large and developed economies may benefit at the expense of the smaller regional members.

A difficult problem in economic integration is what I characterize as relational issues of law in economic integration (hereinafter termed relational issues). These issues become more prominent especially when the economic integration process progresses through the various stages of integration. A free-trade area may exist without well-structured and managed relations between the community and national legal systems, but a customs union, common market or economic union cannot operate effectively without attention to relational issues. This is because the

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co-operation on specific projects in areas such as agriculture, infrastructure and technology. See Domenico Mazzeo, "The Experience of the East African Community: Implications for the Theory and Practice of Regional Cooperation in Africa in Domenico Mazzeo ed., *African Regional Organizations* (Cambridge: Cambridge University Press, 1984) at 165; Jeggan C. Senghor, "Theoretical Foundations for Regional Integration in Africa: An Overview" in Peter Anyang Nyong'o ed., *Regional Integration in Africa: Unfinished Agenda* (Nairobi: African Academy of Sciences, 1990) at 17.

<sup>11</sup> See generally Simon E. Kulusika, "The Lawyer and the Challenges of Economic Integration" (2000) 32 *Zambia L.J.* 20; Iwa Salami, "Legal Considerations for Devising a Governance Structure for the African Union" (2008) 16 *Afr. J. Int'l & Comp. L.* 262; Iwa Akinrinsola, "Legal and Institutional Requirements for West African Economic Integration" (2004) 10 *Law & Bus. Rev. Am.* 493.

<sup>12</sup> See generally Sungjoon Cho, "Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism" (2001) 42 *Harv. Int'l L.J.* 419; Jagdish Bhagwati, "Regionalism and Multilateralism: An Overview" in Jagdish Bhagwati *et al.* eds., *Trading Blocs, Alternative Approaches to Analyzing Preferential Trade Agreements* (Cambridge, Massachusetts: MIT Press, 1999) at 3.

<sup>13</sup> Teshome Mulat, "Multilateralism and Africa's Regional Economic Communities" (1998) 32:4 *J. World Trade* 115.

interactions between legal systems deepen as economic integration progresses through the various stages of integration. In Africa, relational issues are further complicated by Africa's unique approach to achieving continental integration. The approach uses pre-existing RECs as building blocks for a continent-wide economic community called the African Economic Community (AEC).<sup>14</sup> Other RECs have adopted an approach that involves expansion through the addition of new states to a core of founding members.

My emphasis on relational issues aims at bringing to the fore the importance of law as an instrument for economic integration. A purely economic or socio-political approach to, or analysis of, economic integration should be viewed with caution. Such an approach fails to appreciate the important fact that obstacles to trans-boundary economic activity are not only economic or socio-political, but are also sometimes legal. National laws and international agreements limit the movement of persons, goods, services and capital. These limitations may be informed by economic and socio-political considerations, but it is through the medium of law that the limitations are realized. An understanding of economic integration that envisions laws as an instrument for integration should immediately position law at the forefront of economic integration processes. As Pescatore has observed, '[t]he process of integration can have no real consistency and, above all, no real stability or lasting force unless we succeed in giving it a sufficiently solid institutional and legal framework'.<sup>15</sup> Attention to relational issues is an important aspect of this endeavour.

To emphasize the place of law in Africa's economic integration processes is not to underestimate the importance of socio-economic and political factors in these processes. Indeed, economic integration should be well grounded in the socio-economic and political realities of a region. As discussed below, these realities can and often do shape the workings or effectiveness of law in the processes. The emphasis placed on law on this thesis is meant to challenge the existing literature, which is vast and sees progress in economic integration in Africa as being hindered by

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<sup>14</sup> The Treaty establishing the African Economic Community was adopted by members of the Organisation of African Unity (OAU) on 3 June 1991. It set up the AEC as an integral part of the OAU (Article 98). It entered into force on 12 May 1994. It has not been abrogated by the Constitutive Act of the African Union which replaced the OAU. However, under article 33(2) of the Constitutive Act, its provisions have precedence over any inconsistent or contrary provision of the AEC Treaty. See *Treaty establishing the African Economic Community*, 3 June 1991, 30 I.L.M. 1241 [AEC Treaty]; Constitutive Act of the African Union, 11 July 2000, (2005) 13 Afr. J. Int'l & Comp. L. 25 [Constitutive Act].

<sup>15</sup> Pierre Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations based on the Experience of the European Communities* (Leiden: A.W. Sijthoff Publishing Company, 1974) at 2.

socio-economic, political, cultural and infrastructural problems. Without denying the importance of these problems, this thesis aims to demonstrate that even if all the problems were to disappear today, there are many legal issues, which if unaddressed will hinder the effectiveness of Africa's economic integration processes. In other words, this thesis focuses on a very narrow and specific aspect of economic integration. It does not pretend to offer – and should not be read as an attempt to offer - a comprehensive treatise on all the challenges that face or are likely to be faced by economic integration processes in Africa. The notion of effectiveness is used in this thesis to refer to the extent to which the regional economic communities are and will be able to achieve the objectives which they have clearly defined in their respective treaties.

The role of law in economic integration can be discussed from multiple perspectives, but this thesis focuses mainly on issues of legal structures, processes of law-making, implementation and enforcement of laws. Admittedly, one could argue that law should not be given any role or a major role to play in economic integration. Rather, emphasis should be placed on informal structures, voluntary compliance and the good faith of politicians to implement agreed objectives. This is a view which I do not subscribe to and this thesis does not advance it. Indeed, contrary to this view, the relational framework which I use in the thesis in essence presupposes or creates a very high degree of legal integration and expectation of it. The existence of such a framework is advocated as a necessary (but not a sufficient) condition for the effectiveness of economic integration in Africa.

## **1.2 RESEARCH PROBLEM**

Relational issues are endemic in economic integration processes. They become more visible as the processes progress through the various stages of economic integration. Africans have had a long-standing commitment to economic integration. However, it appears that, against the background of the professed political enthusiasm to integrate, not much attention has been devoted to articulating the relational issues that bedevil Africa's economic integration processes, the effect they have on the processes, and how they should be approached or resolved. Indeed, the opinion in some circles is that Africa's economic integration processes have generally shied away from addressing the serious legal issues that precede and come with economic integration.<sup>16</sup> The

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<sup>16</sup> Most of the leading writings on the subject in Africa have been from a politico-economic perspective. There has not been much work on the legal issues in economic integration. See generally Samuel K. B. Asante, *Regionalism and*



processes have been mere political constructs with no attention to the importance of solid legal frameworks.<sup>17</sup> Indeed, a recently concluded report of the UNECA found the existing legal framework for Africa's integration to be 'ambiguous and imprecise'.<sup>18</sup> Relational issues are a key aspect of the legal issues of economic integration.

Perhaps, the best manifestation of Africa's economic integration processes' inattention to relational issues is the disjunction between national and community legal systems. This disjunction is, in part, reflected in the absence of national legislation necessary to implement decisions taken by Africa's RECs.<sup>19</sup> As discussed in Chapter Seven, national constitutions and courts also appear ambivalent to the demands of economic integration. Existing jurisprudence of courts and national constitutional laws appear ill-prepared to accommodate the laws of RECs (community law). Obligations assumed by states at the community level have not been translated into domestic rights and benefits for individuals. Individuals face formidable legal obstacles when they seek to benefit from community law at the national level. In general, national legal systems appear insensitive to the demands economic integration makes upon them.

A similar lack of attention to relational issues is manifest in the field of interstate and inter-community relations. For example, the issue of interstate recognition and enforcement of judgments, and the general role of private international law as a means of regulating interstate relations have not received any systematic attention in the community treaties and related laws. As discussed in Chapter Nine, in general, within member states, judgments and laws of other states do

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*Africa's Development* (London: Macmillan Press, 1997); Adebayo Adedeji *et al.* eds., *The Challenge of African Economic Recovery and Development* (London: Frank Cass, 1991); Ademola Oyejide, Ibrahim Elbadawi & Paul Collier, *Regional Integration and Trade Liberalisation in Sub-Saharan Africa* Vols 1, 2, 3 and 4 (London: Macmillan Press Ltd, 1999).

<sup>17</sup> See generally Kofi Oteng Kufour, "Law, Power, Politics and Economics: Critical Issues Arising out of the New ECOWAS Treaty" (1994) 6 *Afr. J. Int'l. & Comp. L.* 429; Christian Joerges, "Law, Economics and Politics in the Constitutionalisation of Europe" (2002-2003) 5 *Cam. Ybk. Eur. Leg. Stud.* 122; Christian Joerges, "Taking Law Seriously: On Political Science and the Role of Law in the Process of European Integration" (1996) 2 *Eur. L.J.* 105; Stefan A. Riesenfeld, "Legal Systems of Regional Economic Integration" (1996-1997) 20 *Hastings Int'l & Comp. L. Rev.* 539.

<sup>18</sup> United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa II-Rationalizing Regional Economic Communities* (Addis Ababa: UNECA, 2006) at 21.

<sup>19</sup> Member states of the East African Community have passed national legislation giving effect to the Treaty Establishing the East African Community. See Tanzania, Treaty for the Establishment of East African Community Act, 2001, (Act No. 4); Kenya, Treaty for the Establishment of East African Community Act, 2000, (Act No. 2); Uganda, East African Community Act, 2002.

not enjoy any preferential status as far as the principles of private international law are concerned. There is also no precise legal framework for regulating the relations between the many RECs in Africa.

Concomitant with the disjunction between national and community legal systems in Africa's economic integration processes is the absence of a consideration of the relations between the processes and other international economic arrangements. Prominent among these is the World Trade Organization (WTO), the organization under whose aegis most present-day international trade is conducted. Indeed, the very foundation of most regional economic integration initiatives is in Article XXIV of the General Agreement on Tariffs and Trade or the Enabling Clause,<sup>20</sup> both of which are parts of WTO law. Regional economic integration initiatives must comply with WTO law. The relations between the various economic integration processes in Africa and the WTO, the status of WTO law within the framework of community law and national law, how the multiple commitments of African states under community law and WTO law can be reconciled, and the rules for resolving conflicts between WTO law, community law and national law are all important issues that have, so far, not been articulated and addressed in writings on Africa's economic integration processes.

These are important issues for the stability of the world trading system and Africa's economic integration. Irreconcilable differences between community laws and national laws *vis-à-vis* WTO law are susceptible to challenge under the WTO dispute settlement system. Currently, forty-two African countries are members of the WTO and a number of African RECs have already been notified to the WTO.<sup>21</sup> Thus, although it will not be explored in this thesis, the issue of their relations with the WTO is not merely academic.

Against this background, this thesis seeks to address a number of issues:

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<sup>20</sup> WTO, *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, 28 November 1979, online: WTO <[http://www.wto.org/english/docs\\_e/legal\\_e/enabling\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/enabling_e.pdf)>.

<sup>21</sup> They include COMESA, EAC, ECOWAS, SADC, Southern African Customs Union, West African Economic and Monetary Union, Economic and Monetary Community of Central Africa. An updated list of notification is available at <<http://rtais.wto.org/UI/PublicSearchByCrResult.aspx>>.

- A. The extent to which relational issues are visible in Africa's economic integration processes and how, if at all, the existing community laws and jurisprudence have approached or resolved them;
- B. The extent to which national legal systems are attentive to relational issues and how, if at all, existing national constitutional laws and jurisprudence have approached or resolved them;
- C. The extent to which community and national approaches to relational issues can affect or enhance the effectiveness of the economic integration processes;
- D. The extent to which principles of public and private international law can aid the resolution of some of the relational issues that confront Africa's regional economic integration processes; and
- E. Generally, the extent to which attention or the lack of it to relational issues in Africa's integration processes accounts for their effectiveness or ineffectiveness.

It is remarkable that, notwithstanding the importance of relational issues to the effective development of Africa's economic integration processes, little or no attention has been devoted to them. Indeed, works on the legal aspects of Africa's economic integration processes are scant. A cursory look at the pages of leading African journals reveals this.<sup>22</sup> Monographs and treatises are similarly rare.<sup>23</sup> This thesis is a unique attempt to fill a void in the discourse on Africa's economic integration processes by situating law at their heart.

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<sup>22</sup> See e.g., *Journal of African Law*, *African Journal of International and Comparative Law* and *Monitoring Regional Integration in Southern Africa Yearbook*. The Yearbook is the only African journal devoted solely to economic integration processes, albeit mainly those of Southern Africa. A recent addition is the *African Integration Review* which is published by the AU Commission.

<sup>23</sup> Among the few written from the legal perspective are: Peter K. Kiplagat, *Legal Dynamics of Regional Integration in Developing Countries: A Case Study of the Common Market for Eastern and Southern Africa (COMESA)* (JSD Thesis, Yale Law School, 2000) [unpublished]; M.A. Ajomo & Omobolaji Adewale eds., *African Economic Community Treaty, Issues Problems and Prospects* (Lagos: Nigerian Institute of Advanced Legal Studies, 1993); Yash P. Ghai, *Reflections on Law and Economic Integration in East Africa* (Uppsala: Scandinavian Institute of African Studies, 1976); S.A. Akintan, *The Law of International Economic Institutions in Africa* (Leyden: A. W. Sijthoff, 1977). A more recent text is Kofi Oteng Kufuor, *The Institutional Transformation of the Economic Community of West African States* (Aldershot: Ashgate Publishing Company, 2006) [Kufuor, Institutional Transformation].

Admittedly, other RECs outside Africa have confronted relational issues and address them through various means. The body of learning accumulated by these communities is useful comparative source for this work. However, this does not make this work less important, duplicative or non-original. Its anticipated contributions to academic discourse on Africa's economic integration are to: draw attention to relational issues; critically examine current attempts to address them and their effectiveness; and investigate the extent to which the future progress of Africa's economic integration processes may be hindered or boosted by attention to relational issues. In other words, an assessment of the merits of this work, which begins with citations of general or region-specific writings on economic integration, without attention to the state of learning on the issues in Africa, is flawed and problematic.

### 1.3 METHODOLOGY

The methodology for this thesis entails a detailed and comparative consideration of the governing laws of selected RECs in Africa, constitutions and statutory laws, and the jurisprudence of national and regional courts. In other words, the thesis relies heavily on primary sources. Academic commentary and the comparative jurisprudence and experiences of other RECs outside Africa are also brought to bear on the work.

The RECs which are focused on are the East African Community (EAC),<sup>24</sup> the Common Market for Eastern and Southern Africa (COMESA),<sup>25</sup> the Economic Community of West African States (ECOWAS)<sup>26</sup> and the African Economic Community (AEC).<sup>27</sup> These communities do not vary too significantly in their structures. Indeed, as Mistry observes, 'it appears as if the drafting of all these arrangements across Africa was done from the same template'.<sup>28</sup> The communities share the common objective of creating a larger economic space for trade among their members through

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<sup>24</sup> See *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 U.N.T.S. I-37437 [EAC Treaty].

<sup>25</sup> See *Treaty establishing the Common Market for Eastern and Southern Africa*, 5 November 1993, 33 I.L.M. 1067 [COMESA Treaty].

<sup>26</sup> See *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, 35 I.L.M. 660, (1996) 8 Afr. J. Int'l & Comp. L. 187 [ECOWAS Treaty].

<sup>27</sup> See AEC Treaty, *supra* note 14.

<sup>28</sup> Percy S. Mistry, "Africa's Record of Regional Co-operation and Integration" (2000) 99 African Affairs 553 at 564-565.

the gradual elimination of tariff and non-tariff barriers to trade.<sup>29</sup> The AEC, which currently operates as an integral part of the African Union (AU), is the result of the ultimate merger of all the RECs in Africa. As will be discussed in Chapter Three, in principle, the AEC can be envisioned as the umbrella organization under whose aegis the other RECs operate with a view to fulfilling the AEC's ultimate vision of a continent-wide economic integration arrangement.

The choice of these communities is apposite. Geographically, they cover all the regions of Africa, namely Central, East, North, Southern and West Africa. Cumulatively, they have a membership which encompasses thirty-five of the fifty-three African countries.<sup>30</sup> All of them are also active in the field of economic integration. COMESA became a customs union in 2009 and plans to be an economic union by 2025. The EAC is already a customs union. It is currently negotiating a common market protocol.<sup>31</sup> ECOWAS has pursued a free-trade area in goods within the framework of the ECOWAS Trade Liberalization Scheme. Its plans to introduce a customs union in 2008 have been delayed, but it is well advanced on the issue of the free movement of persons within the community.<sup>32</sup> All the selected communities envision progress on the stages of economic integration,<sup>33</sup> which, as will be discussed in Chapter Two, makes the need to address relational issues important for them. All of them have also been accepted by the AU as RECs

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<sup>29</sup> Institutionally, one major thing which separates COMESA from the EAC and ECOWAS is that COMESA does not have a parliament. In terms of objects, a major difference between the EAC, COMESA and ECOWAS is that the EAC aims at creating a political federation – a vision which is on the agenda of neither ECOWAS nor COMESA.

<sup>30</sup> COMESA consists of Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe. ECOWAS comprises Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. EAC consists of Burundi, Kenya, Uganda, Rwanda and Tanzania.

<sup>31</sup> The East African Community Customs Union Protocol entered into force on 1 January 2005. See *Protocol on the establishment of the East African Customs Union*, 2 March 2004, online: Trade Law Centre for Southern Africa <[https://www.givengain.com/unique/tralac/pdf/20060629\\_Cuctoms\\_Union\\_Protocol.pdf](https://www.givengain.com/unique/tralac/pdf/20060629_Cuctoms_Union_Protocol.pdf)>.

<sup>32</sup> An ECOWAS protocol on the free movements of persons, the right of residence and establishment was agreed as early as in 1979. See *Protocol relating to Free Movement of Persons, Residence and Establishment*, 29 May 1979, 1906 U.N.T.S. 32496. There are a number of supplementary protocols to this protocol.

<sup>33</sup> See e.g. EAC Treaty, *supra* note 24 art. 2(2). It enjoins member states to establish an East African Customs Union and a Common Market as transitional stages to and integral parts of the community; ECOWAS Treaty, *supra* note 26 art. 54 where members undertook to achieve an economic union; COMESA Treaty, *supra* note 25 art. 177 on the establishment of an Economic Community for Southern and Eastern Africa.

which are, ultimately, to merge and form the African Economic Community.<sup>34</sup> Finally, all of them have undergone some metamorphosis with a view to becoming more effective and rule-oriented.<sup>35</sup>

There are limitations on the methodology and the scope of the thesis which should be immediately noted. Firstly, because of linguistic limitations, the focus on member states is mostly on English-speaking Africa, especially on common law and Roman-Dutch law jurisdictions.<sup>36</sup> Secondly, due to the absence of a highly-developed system of law reporting in most of the countries, I occasionally rely on ‘unreported’ cases. Judgments of the courts of the RECs are also unreported. However, most of these cases are available online.<sup>37</sup> Thirdly, it is acknowledged that relational issues between RECs and the international legal system (especially, the WTO), and among the RECs are important. However, the focus of this work is principally on the relational issues between the RECs and member states and the member states *inter se* in the context of pursuing the goals of regional economic integration.

The thesis draws on the jurisprudence, laws and experiences of other RECs within and outside Africa such as the Southern African Development Community (SADC) and the European Community (EC).<sup>38</sup> The European experience offers invaluable insights for the AEC as it is

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<sup>34</sup> In 2006, the Assembly of the AU suspended, until further notice, the recognition of new RECs with the exception of the following eight: ECOWAS; COMESA; EAC; Economic Community of Central African States (ECCAS); Southern African Development Community (SADC); Inter-Governmental Authority for Development (IGAD); Arab Maghreb Union (AMU) and; Economic Community of Sahelo-Saharan States (CENSAD). See African Union, *Decision on the Moratorium on the Recognition of Regional Economic Communities* (Assembly/AU/ Dec.112 (VII), 2006).

<sup>35</sup> COMESA began its life under the 1982 Preferential Trade Area Agreement for Eastern and Southern Africa See *Eastern and Southern African States: Treaty for the establishment of a Preferential Trade Area*, 21 December 1981, 21 I.L.M. 479; ECOWAS began life under the 1975 *Treaty establishing the Economic Community of West African States*, 28 May 1975, 1010 U.N.T.S. I-14843; 14 I.L.M. 1200; and the EAC is a resurrection of the defunct East African Community established under the 1967 *Treaty for East African Cooperation*, 6 June 1963, 6 I.L.M. 932. See generally Michael Gondwe, “From PTA to COMESA: The Quest for Sub-regional Economic Integration in Eastern and Southern Africa” (1998) 6 Afr. Y.B. Int’l L. 3.

<sup>36</sup> The common law countries are: Gambia; Ghana; Kenya; Malawi; Nigeria; Tanzania; Sierra Leone; Uganda and Zambia. The Roman-Dutch law countries are: Botswana; Lesotho; Namibia; South Africa; Swaziland and Zimbabwe.

<sup>37</sup> For example, most Southern African national courts’ judgments cited as unreported can be found at <[www.saflii.org](http://www.saflii.org)> ; judgments from Kenya, Uganda and Tanzania may be found at <<http://www.kenyalaw.org/eKLR/>>; <<http://www.lawafrica.com/>>; <<http://www.ugandaonlinelawlibrary.com/default.asp>>. Some judgments of the ECOWAS, COMESA and EAC courts of justice are available at <<http://www.ecowascourt.org/cases.html>> ; <[http://www.comesa.int/institutions/court\\_of\\_justice/precedents/Judgements/view](http://www.comesa.int/institutions/court_of_justice/precedents/Judgements/view)>; and <[http://www.eac.int/index.php/downloads/cat\\_view/63-east-african-court-of-justice.html](http://www.eac.int/index.php/downloads/cat_view/63-east-african-court-of-justice.html)>.

<sup>38</sup> See generally L. Alan Winters, “What can European Experience Teach Developing Countries about Integration” (1997) 20 World Economy 889.

ostensibly modelled on the EC.<sup>39</sup> However, the European experience is not the centre of this thesis. Admittedly, some of the principles discussed in the thesis have been adopted and, one may add, perfected in Europe. However, as Chapter Two will reveal, some of the principles exist in other RECs. Indeed, some of the principles pre-date the EC. There are factors that counsel for caution when relying on insights from Europe. There are differences between the EC and AEC in terms of their historical circumstances and the extent of their respective development. Indeed, the AEC is still in its formative stages. Additionally, as discussed below, the socio-economic and political contexts of Africa's integration are obviously very different from those of Europe. The European insights are particularly useful when dealing with community-state relations. But, they are of limited value when it comes to dealing with the unique African phenomena of having autonomous RECs operating under the umbrella of the AEC, and with the ultimate goal of merging into an African Economic Community.<sup>40</sup>

## **1.4 THE SELECTED REGIONAL ECONOMIC COMMUNITIES: AN OVERVIEW**

### **1.4.1 Introduction**

Africa is home to a bewildering array of economic integration processes.<sup>41</sup> The UNECA puts the number at fourteen. In its words:

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<sup>39</sup> See Craig Jackson, "Constitutional Structure and Governance Strategies for Economic Integration in Africa and Europe" (2003) 13 *Transnat'l L. & Contemp. Probs.* 139 at 139-40.

<sup>40</sup> The closest Europe came to experiencing this phenomenon was the co-existence of three separate communities namely, the European Economic Community, the European Coal and Steel Community (ECSC), and the European Atomic Energy Community (EAEC). The ECSC and EAEC had very narrow economic mandates. Also, the ECSC had a temporal limit on its existence. Early in their history, the three communities benefited from common membership and common institutions (See: *A Convention on certain Institutions Common to the European Communities*, 25 March 1957, online: <http://europa.eu/abc/treaties/archives/en/entr12.htm>; *Treaty establishing a Single Council and a Single Commission of the European Communities*, 8 April 1965, 4 I.L.M. 776). This might have avoided many of the complex issues arising from the relations between the AEC and Africa's RECs, which are explored in Chapter Three. Also, although the EC has historically co-existed with the European Free Trade Area (EFTA), they have enjoyed separate memberships. Indeed, most of the founding members of the EFTA moved to join the EC.

<sup>41</sup> Each geographical region of Africa contains an average of three to four organizations with a mandate to carry out economic integration of its members. In West Africa, ECOWAS coexists with the West African Economic and Monetary Union (UEMOA), the Mano River Union (MRU), and the Community of Sahel-Saharan States (CEN-SAD). In Central Africa, the Economic Community of Central African States (ECCAS) coexists with the Central African Economic and Monetary Community (CEMAC) and the Economic Community of Great Lakes Countries (CEPGL). In Southern Africa, the Southern African Development Community (SADC), the Southern African Customs Union (SACU), and the Indian Ocean Commission (IOC) share space with COMESA, which also covers East Africa and parts of North and Central Africa. In addition, East Africa has the EAC and Intergovernmental Authority on Development (IGAD). North Africa also has the Arab Maghreb Union (UMA).

Even though the African Union recognizes only eight [regional economic communities], the continent currently has fourteen inter-governmental organizations (IGOs), working on regional integration issues, with numerous treaties and protocols governing relations among them, and between them and the Member States. This proliferation of institutions and protocols means that out of the 53 Member States of the African Union (AU), 26 belong to two of the fourteen IGOs, 20 belong to three of them, and one country belongs to four.<sup>42</sup>

This number necessarily presents an academic challenge to works on Africa's economic integration processes. As noted above, no attempt will be made to cover all the fourteen communities; the focus of the thesis will be on three of the eight AU-recognized communities and the AEC. The table below provides the membership of the eight AU-recognized communities, as well as the countries which are members of the WTO.

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<sup>42</sup> UNECA, *Rationalizing II*, *supra* note 17 at X.



**Table 1: African Union Recognized Regional Economic Communities and their Membership**

COUNTRIES	ECOWAS	EAC	COMESA	SADC	IGAD	AMU	ECCAS	CENSAD	AEC/AU	WTO
Algeria						X			X	
Angola				X			X		X	X
Benin	X							X	X	X
Botswana				X					X	X
Burkina Faso	X							X	X	X
Burundi		X	X				X		X	X
Cameroon							X		X	X
Cape Verde	X								X	X
Ken. Afr. Republic							X	X	X	X
Chad							X	X	X	X
Comoros			X						X	
Congo							X		X	X
Congo DR	X		X	X			X		X	X
Cote d'Ivoire									X	X
Djibouti			X		X			X	X	X
Egypt			X			X		X	X	X
Equatorial Guinea							X		X	
Eritrea			X					X	X	
Ethiopia			X		X				X	
Gabon							X		X	X
Gambia	X							X	X	X
Ghana	X								X	X
Guinea	X								X	X
Guinea Bissau	X								X	X
Kenya		X	X		X				X	X
Lesotho				X					X	X
Liberia	X								X	
Libya			X			X		X	X	
Madagascar			X	X				X	X	X
Malawi			X	X					X	X
Mali	X							X	X	X
Mauritania						X			X	X
Mauritius			X	X					X	X
Morocco						X		X	X	X
Mozambique				X					X	X
Namibia				X					X	X
Niger	X							X	X	X
Nigeria	X							X	X	X
Rwanda		X	X					X	X	X
SaoTome & Principe							X		X	
Senegal	X							X	X	X
Seychelles			X						X	
Sierra Leone	X								X	X
Somalia					X			X	X	
South Africa				X					X	X
Sudan			X		X			X	X	
Swaziland			X	X					X	X
Tanzania		X		X					X	X
Togo	X							X	X	X
Tunisia						X		X	X	X
Uganda		X	X		X				X	X
Zambia			X	X					X	X
Zimbabwe			X	X					X	X
<b>TOTAL</b>	<b>15</b>	<b>5</b>	<b>19</b>	<b>14</b>	<b>6</b>	<b>6</b>	<b>11</b>	<b>18</b>	<b>53</b>	<b>42</b>

ECOWAS: Economic Community of West African States  
 COMESA: Common Market for Eastern and Southern Africa  
 IGAD: Inter-Governmental Authority for Development  
 ECCAS: Economic Community of Central African States  
 AEC: African Economic Community  
 WTO: World Trade Organization

EAC: East African Community  
 SADC: Southern African Development Community  
 AMU: Arab Maghreb Union  
 CENSAD: Community of Sahel-Saharan States  
 AU: African Union

## 1.4.2 African Economic Community

The history of the need for continental economic integration in Africa dates back to the formation of the Organisation of Africa Unity (OAU) [now AU] in 1963.<sup>43</sup> One purpose of the OAU was to co-ordinate and strengthen co-operation efforts between member states to improve the lives of their people.<sup>44</sup> To this end, they were enjoined to ‘co-ordinate and harmonize their general policies’ in economic and other fields.<sup>45</sup> However, it was not until 1980 that a major continental step was taken towards economic integration. Before then, resolutions and declarations were made to promote integration, and various RECs emerged and achieved different levels of integration.<sup>46</sup> At an extraordinary summit in 1980, the OAU adopted the Lagos Plan of Action which culminated in the signing of the Treaty Establishing the African Economic Community (AEC Treaty).<sup>47</sup> The AEC Treaty came into force in May 1994.<sup>48</sup> The treaty envisages an integrated economic area covering all of Africa.<sup>49</sup> Following the establishment of the AU in 2002, the AEC became an integral part of its constitutional structure.<sup>50</sup>

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<sup>43</sup> *Charter of the Organization of Africa Unity*, 25 May 1963, 2 I.L.M. 766 [OAU Charter]. The OAU has been replaced with the African Union. See Constitutive Act of the African Union, *supra* note 14. For a discussion on the structure, characteristics, and workings of the African Union, see generally Konstantinos D. Magliveras & Gino J. Naldi, “The African Union—A New Dawn for Africa?” (2002) 51 Int’l & Comp. L. Q. 415; Nsongurua J. Udombana, “The Institutional Structure of the African Union: A Legal Analysis” (2002-2003) 33 Cal. W. Int’l L.J. 69; Symposium, “The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift?” (2003) 13 Transnat’l & Contemp. Probs. 1; T. Maluwa, “From the Organization of African Unity to the African Union: Rethinking the Framework for Inter-State Cooperation in Africa in the Era of Globalisation” (2007) 5 U. Botswana L.J. 4.

<sup>44</sup> OAU Charter, *ibid.* art. 2(1)(b).

<sup>45</sup> OAU Charter, *ibid.* art. 2(2).

<sup>46</sup> Examples are EAC and ECOWAS, which were established in 1967 and 1975 respectively. See generally Rene N’Guettia Kouassi, “The Itinerary of the African Integration Process: An Overview of the Historical Landmarks” (2007) 1 African Integration Rev. 1. The EAC was, perhaps, the most advanced African REC. Before its collapse in 1977, a lot of academic interest was devoted to it. See generally Thomas M. Franck, *East African Unity through Law* (New Haven: Yale University Press, 1964); Paulo Sebalu, “The East African Community” (1972) 16 J. Afr. L. 345; Kodwo J. Bentil, “The Legal Framework and the Economic Aspects of the East African Common Market” (1969) 4 J. L. & Econ. Dev. 27.

<sup>47</sup> AEC Treaty, *supra* note 14.

<sup>48</sup> As of January 2009, fifty-two African countries had signed the treaty and forty-nine had ratified it. However, unlike the EAC Treaty, *supra* note 24, I am unaware of any countries (especially common law countries) that have domestically implemented the AEC Treaty through legislation.

<sup>49</sup> AEC Treaty, *supra* note 14 preamble.

<sup>50</sup> *Ibid.* art. 98. Constitutive Act, *supra* note 14 art. 33. In this thesis, unless a contrary provision exists in the Constitutive Act, references are made to the institutional structures established under the AEC Treaty for consistency and clarity. On some of the difficulties of making the AEC an integral part of the AU, see Craig Jackson,

The objectives of the AEC include the promotion of economic development and the integration of African economies in order to increase self-sufficiency, the promotion of endogenous and self-sustained development, and the fostering of the gradual establishment of the African Economic Community<sup>51</sup> through co-ordination and harmonization among existing and future economic communities.<sup>52</sup> To ensure the attainment of these objectives, the AEC is enjoined to ensure: (1) the harmonization of national policies particularly in the fields of agriculture, industry, transport and communication, energy, natural resources, trade, money and finance, human resources education, culture, and technology; (2) the adoption of a common trade policy with regard to third-party states; (3) the establishment and maintenance of a common external tariff; (4) the establishment of a common market; (5) the gradual removal of obstacles among member states to the free movement of persons, goods, services, and capital; and (6) the right of residence and establishment.<sup>53</sup>

The AEC Treaty provides for the gradual establishment of the African Economic Community through six stages over a period of thirty-four years.<sup>54</sup> This process is to be completed in 2028. The first stage involves the ‘strengthening of existing regional economic communities’.<sup>55</sup> The second involves the stabilization of tariff and non-tariff barriers, custom duties and internal taxes at the level of the RECs and the strengthening of sectoral integration at the regional and continental level. The third stage envisions the establishment of a free-trade area and a customs

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“Constitutional Structure and Governance Strategies for Economic Integration in Africa and Europe” (2003) 13 *Transnat’l L. & Contemp. Probs* 139 at 140.

<sup>51</sup> The AEC both is and is to be! Understandably, this may sound confusing for the reader. In this thesis ‘AEC’ will be used to refer to the current organization irrespective of the stage in its development, while reference to the ultimate stage of the AEC will be written in full as ‘the African Economic Community’.

<sup>52</sup> AEC Treaty, *supra* note 14 art. 4.

<sup>53</sup> *Ibid.* art. 4(2)

<sup>54</sup> *Ibid.* art. 6(1). The following are the timelines for the evolution of the African Economic Community: 1. Creation of regional blocs in regions where such do not yet exist (to be completed in 1999) 2. Strengthening of intra-REC integration and inter-REC harmonization (to be completed in 2007) 3. Establishing of a free trade area and customs union in each regional bloc (to be completed in 2017) 4. Establishing of a continent-wide customs union and thus also a free trade area (to be completed in 2019) 5. Establishing of a continent-wide African Common Market or (to be completed in 2023) 6. Establishing of a continent-wide economic and monetary union (and thus also a currency union) and pan-African Parliament (to be completed in 2028) 7. End of all transition periods by 2034 at the latest. Source: United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa III: Towards Monetary and Financial Integration in Africa* (Addis Ababa: UNECA, 2008) at 28 [UNECA, *Assessing Regional Integration in Africa III*].

<sup>55</sup> *Ibid.* art. 6(2).

union at each regional level. The fourth focuses on the co-ordination and harmonization of tariff and non-tariff systems among the RECs with a view to establishing a continental customs union. The fifth stages calls for the establishment of an African common market through the adoption of common policies, harmonization of monetary, financial, and fiscal policies, and the application of the principles of the free movement of persons and the right of residence and establishment. Finally, the sixth stage focuses on: the strengthening of the African common market; the application of the free movement of people, goods, capital and services; the integration of the social, economic, political and cultural sectors; the establishment of a single domestic market; a Pan-African Economic and Monetary Union; a Pan African Parliament;<sup>56</sup> and a single African currency, among other things.<sup>57</sup> It is worth noting that these stages follow the Balassian model of economic integration.

A distinct feature of the framework for integration under the AEC Treaty is the use of RECs as building blocks for the African Economic Community. With a membership of over fifty states, this approach ensures a degree of manageability in the initial development of the community. As noted above, there are over fourteen RECs at various stages of development in Africa. These communities have their separate institutions, members, objectives and legal personalities. It is also not uncommon to find states that are members of more than one of these communities. The thesis argues that, from a relational perspective, these pose significant legal challenges to the success of the AEC.<sup>58</sup>

The principal institutions of the AEC are: Assembly of Heads of State and Government; Council of Ministers; Pan-African Parliament; Economic and Social Commission; Court of Justice; General Secretariat; and Specialised Technical Committees.<sup>59</sup> The Assembly is the supreme organ of the Community.<sup>60</sup> It is responsible for implementing the Community's objectives.<sup>61</sup> To this end,

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<sup>56</sup> See *Protocol to the Treaty establishing the African Economic Community relating to the Pan-African Parliament*, 2 March 2001, (2005) 13 Afr. J. Int'l & Comp. L. 86 [Protocol on Pan-African Parliament]. The Parliament was inaugurated in 2003.

<sup>57</sup> AEC Treaty, *supra* note 14 art. 6.

<sup>58</sup> P. Kenneth Kiplagat, "Jurisdictional Uncertainties and Integration Process in Africa: The Need for Harmony" (1995-1996) 4 Tul. J. Int'l & Comp. L. 43; Jackson, *supra* note 50 at 151-54.

<sup>59</sup> AEC Treaty, *supra* note 14 art. 7.

<sup>60</sup> *Ibid.* art. 8(1). Although article 8 is labelled composition and functions, it does not set out who constitutes the Assembly. It is, however, obvious that it comprises the Heads of State or Government of the AEC member states.

it shall *inter alia*: determine the general policy and major guidelines of the Community, and give directives, coordinate and harmonize the economic, scientific, technical, cultural and social policies of member states; take any action to attain the objectives of the Community; oversee the functioning of Community organs as well as the follow-up of the implementation of its objectives; approve the organizational structure of the Secretariat; elect the Secretary-General, his Deputies and, appoint the Financial Controller, the Accountant and the External Auditors; adopt the Staff Rules and Regulations of the Secretariat; take decisions and give directives concerning the RECs in order to ensure the realization of the objectives of the Community; approve the Community's programme of activity and budget, and determine the annual contribution of each member state; refer any matter to the Court of Justice when it confirms that a member state or organ of the Community has not honoured any of its obligations or has acted beyond the limits of its authority or has abused the powers conferred on it by the provisions of the Treaty, by a decision of the Assembly or a regulation of the Council; request the Court of Justice to give advisory opinion on any legal question.<sup>62</sup>

The Council is responsible for the functioning and development of the Community.<sup>63</sup> To this end, it shall *inter alia*: make recommendations to the Assembly on any action aimed at attaining the objectives of the Community; guide the activities of the subordinate organs of the Community; submit to the Assembly proposals concerning programmes of activity and budget of the Community as well as the annual contribution of each member state; propose to the Assembly the appointment of the Financial Controller, the Accountant and the External Auditors; request the Court of Justice to give advisory opinion on any legal questions; and carry out all other functions assigned thereto under this Treaty and exercise all powers delegated to it by the Assembly.<sup>64</sup>

The Pan-African Parliament was set up to ensure that Africans are fully involved in the economic development and integration of the continent.<sup>65</sup> The composition, functions, powers and

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<sup>61</sup> *Ibid.* art. 8(2).

<sup>62</sup> *Ibid.* art. 8(3).

<sup>63</sup> *Ibid.* art. 11(2). Article 11(1) of the AEC Treaty provides that the Council shall be the Council of Ministers of the OAU. Under article 12(1) of the Charter of the Organization of African Unity, the Council shall consist of foreign ministers or other ministers as designated by the Governments of the member states.

<sup>64</sup> *Ibid.* art. 11(3).

<sup>65</sup> *Ibid.* art. 14.

organization of the Pan-African Parliament are outlined in a protocol adopted after the AEC Treaty came into force.<sup>66</sup> Currently, it has only consultative and advisory powers.<sup>67</sup> The ultimate aim is for it to evolve into an institution with full legislative power, with the members who are currently appointed,<sup>68</sup> elected by universal suffrage.<sup>69</sup>

The Commission comprises ministers responsible for the economic development, planning and integration of each member state. They may be assisted, as and when necessary, by other ministers. Representatives of RECs participate in meetings of the Commission and its subsidiary organs. The Commission's functions include: prepare programmes, policies and strategies for co-operation in the fields of economic and social development among African countries on the one hand, and between Africa and the international community on the other, and make appropriate recommendations to the Assembly, through the Council; coordinate, harmonize, supervise and follow-up the economic, social, cultural, scientific and technical activities of the Secretariat, of the Committees and any other subsidiary body; examine the reports and recommendations to the Assembly, through the Council, and ensure their follow-up; make recommendations to the Assembly, through the Council with a view to co-ordinating and harmonizing the activities of the different RECs; supervise the preparation of international negotiations, assess the results thereof and report thereon to the Assembly through the Council.

The composition and function of the Court of Justice is discussed in detail in Chapter Six.<sup>70</sup> The Secretary-General directs the activities of the Secretariat and is its legal representative. The

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<sup>66</sup> Protocol on Pan-African Parliament, *supra* note 56.

<sup>67</sup> *Ibid.* art. 2(3)(i).

<sup>68</sup> Each member state is represented by five parliamentarians, at least one of whom must be a woman. The parliamentarians are elected or designated by their respective national parliaments or any other deliberative organs of the member states, from among their members. See *ibid.* arts. 4 and 5.

<sup>69</sup> *Ibid.* art. 2(3).

<sup>70</sup> It was provided in article 20 of the AEC Treaty that a protocol was to be adopted to regulate the work of the court of justice of the community. No such protocol has been adopted. Rather, what has been adopted is the *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008, (2009) 17 Afr. J. Int'l & Comp. L. (forthcoming) [Protocol on the African Court of Justice]. This protocol merges two courts established under the *Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights*, 10 June 1998 and the *Protocol of the Court of Justice of the African Union*, 11 July 2003, (2005) 13 Afr. J. Int'l & Comp. L. 115. The former protocol entered into force on 25 January 2004. The latter entered into force on 10 February 2008. The two courts established under both protocols never became fully operational. The inaugural Judges for the African Court on Human and Peoples' Rights were sworn in on 2 June 2006. By 2 June 2008, at which time the term of two of the judges expired, the court had not considered any cases. Judges for the Court of

Secretary-General performs the following functions: follow up and ensure the implementation of the decisions of the Assembly and the application of the regulations of the Council; promote development programmes as well as projects of the Community; prepare proposals concerning the programme of activity and budget of the Community and upon their approval by the Assembly ensure the implementation thereof; submit a report on the activities of the Community to all meetings of the Assembly, the Council and the Commission; prepare and service meetings of the Assembly, the Council, the Commission and the Committees; carry out studies with a view to attaining the objectives of the Community and make proposals likely to enhance the functioning and harmonious development of the Community; recruit the staff of the Community and make appointments to defined posts.<sup>71</sup>

It is important to set out the relationship between the AEC and the AU. In its founding treaty, the AEC is described as forming an ‘integral part’ of the OAU.<sup>72</sup> As an integral part of the OAU, the AEC is a distinct organization with economic integration as its object. Its budget is linked to that of the OAU. In theory, the AEC could have maintained its separate institutions. In practice, that did not happen; the functions of its institutions were taken over by the co-ordinate

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Justice of the African Union have not been appointed, and, given the new protocol merging the two courts, may never be appointed. There is some uncertainty as to whether the newly established African Court of Justice and Human Rights [African Court of Justice] will assume the jurisdiction of the court of justice envisaged under article 18 of the AEC Treaty. It is, however, almost certain that that will be the case. This is because the AEC is an integral part of the AU; there is a trend towards having a single multi-purpose court as evidenced by the merger of the two courts; and there is a need to reduce costs. It is unlikely that any other court will be established. Indeed the jurisdiction of the African Court of Justice, which covers ‘the interpretation, application or validity of Union treaties and all subsidiary legislation adopted within the framework of the Union or Organization of African Unity’ (article 28(b)) is wide enough to encompass the work of the court envisaged under article 18 of the AEC Treaty. Unless this is the case, difficult questions of jurisdiction will arise and the potential for conflict of jurisdictions between the two courts exists. Indeed, it is recommended that the African Court of Justice utilises the provisions of article 17, which divides the court into a General Affairs Section and a Human Rights Section, and article 19, which allows for these sections to be constituted into chambers to set up a special chamber to deal with cases relating to the AEC Treaty and other AEC laws. The Protocol on the African Court of Justice is currently not in force. However, in this thesis, references are made to provisions in the Statute of the African Court of Justice and Human Rights [Statute of the African Court of Justice], which is annexed to the Protocol on the African Court of Justice. This is because, to all intents and purposes, the two earlier courts are no longer of legal significance.

<sup>71</sup> AEC Treaty, *supra* note 14 art. 22.

<sup>72</sup> See preamble: ‘We, the Heads of State and Government of the Member States of the Organization of African Unity ... have decided to establish an African Economic Community constituting an integral part of the OAU’. Article 1(c): ‘Community shall mean the organic structure for economic integration established under article 2 of this Treaty and constituting an integral part of the OAU’. Art. 82(1): ‘The annual regular budget of the Community, which constitutes an integral part of the OAU regular budget, shall be prepared by the Secretary-General and approved by the Assembly upon the recommendation of the Council’. Article 98(1): ‘The Community shall form an integral part of the OAU’. Article 99: ‘This Treaty and the Protocols shall form an integral part of the OAU Charter’.

organs of the OAU.<sup>73</sup> Indeed, articles 11(1) and 15(1) of the AEC Treaty expressly provided that the Council of Ministers and Economic and Social Commission [of the AEC] shall be the Council of Ministers and Economic and Social Commission of the OAU respectively.<sup>74</sup> Membership of the AU is not coterminous with membership of the AEC; of the fifty-three AU member states, forty-nine have ratified the AEC Treaty.<sup>75</sup>

The OAU Charter<sup>76</sup> has been replaced by the Constitutive Act of the African Union.<sup>77</sup> In the Constitutive Act, member states affirmed their commitment to achieving the objectives of the AEC Treaty and promised to work to accelerate the establishment of the African Economic Community.<sup>78</sup> No attempt was made to clarify the relationship between the AEC and the AU. The only provision that deals directly with the AEC is article 33(2). It provides that ‘the provisions of this Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community’. Undoubtedly, the AEC still constitutes an integral part of the AU.<sup>79</sup> Accordingly, the functions of the AEC institutions have been taken over by the co-ordinate organs of the AU.<sup>80</sup> However, in this thesis, unless an express inconsistency exists, in which case the provisions of the Constitutive Act of the African Union will prevail, reference will be made to the organs as established under the AEC Treaty.

### 1.4.3 Economic Community of West African States

The ECOWAS currently operates under the Revised<sup>81</sup> Treaty establishing the Economic Community of West African States (ECOWAS Treaty). It has fifteen members, namely Benin,

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<sup>73</sup> One problem with this approach was that the OAU Charter did not provide for a court of justice. It was not until the adoption of the Constitutive Act of the African Union that a court of justice was provided for.

<sup>74</sup> See also article 21(1) which provides that the Secretariat shall be the General Secretariat of the OAU.

<sup>75</sup> Djibouti, Eritrea, Madagascar and Somalia have not ratified the treaty.

<sup>76</sup> OAU Charter, *supra* note 43.

<sup>77</sup> Constitutive Act, *supra* note 14.

<sup>78</sup> *Ibid.* preamble.

<sup>79</sup> See provisions in the AEC Treaty cited in *supra* note 72 and Constitutive Act, *supra* note 14 art. 33(1). In the words of Kouassi, the AEC ‘today forms the economic wing of the African Union’. See Kouassi, *supra* note 46 at 6.

<sup>80</sup> The organs of the AU are the Assembly of the Union; Executive Council; Pan-African Parliament; Court of Justice; Commission; Permanent Representatives Committee; Specialized Technical Committees; Economic, Social and Cultural Council; and Financial Institutions. See the Constitutive Act *supra* note 14 art. 5.

<sup>81</sup> The original founding treaty was the *Treaty establishing the Economic Community of West African States*, 28 May 1975, 1010 U.N.T.S. 18.



Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. It began life under the Treaty establishing the Economic Community of West African States which came into force in June 1975.

The aims of ECOWAS are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, to maintain and enhance economic stability, foster relations among member states and contribute to the progress and development of the African continent.<sup>82</sup> To these ends, members have agreed to ensure, in stages: the harmonization and co-ordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism, legal matters;<sup>83</sup> the establishment of a common market;<sup>84</sup> and the establishment of an economic union through the adoption of common policies in the economic, financial social and cultural sectors, and the creation of a monetary union.<sup>85</sup>

The principal institutions of ECOWAS are: the Authority of Heads of State and Governments; Council of Ministers; Community Parliament; Economic and Social Council; Community Court of Justice; Executive Secretariat; Fund for Co-operation, Compensation and Development, and Specialized Technical Commissions.<sup>86</sup>

#### **1.4.4 The Common Market for Eastern and Southern Africa**

The Treaty establishing the Common Market for Eastern Southern Africa (COMESA Treaty) entered into force in 1994. COMESA currently has nineteen members namely Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and

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<sup>82</sup> ECOWAS Treaty, *supra* note 26 article 3(1).

<sup>83</sup> *Ibid.* art. 3(2)(a).

<sup>84</sup> *Ibid.* art. 3(2)(d).

<sup>85</sup> *Ibid.* art. 3(2)(e).

<sup>86</sup> *Ibid.* art. 6(1).

Zimbabwe. COMESA began life under the 1982 Treaty for the establishment of the Preferential Trade Area for Eastern and Southern African States.

The objectives of COMESA include: attaining sustainable growth and development of its member states; promoting a more balanced and harmonious development of its production and marketing structures;<sup>87</sup> promoting joint development in all fields of economic activity, and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples; and fostering closer relations among its member states.<sup>88</sup> To these ends, members have agreed to establish a customs union, abolish all non-tariff barriers to trade among themselves, establish a common external tariff and co-operate in customs procedures and activities.<sup>89</sup>

The principal institutions of COMESA are the: Authority of Heads of State and Government; Council of Ministers; Court of Justice; Committee of Governors of Central Banks; Intergovernmental Committee; Technical Committees; Secretariat; and Consultative Committee.<sup>90</sup>

#### **1.4.5 East African Community**

The Treaty of the East African Community,<sup>91</sup> which entered into force in 2001, established a community consisting of Kenya, Uganda and Tanzania. In 2008, the community was expanded to include Burundi and Rwanda. The history of the EAC dates back to colonial times.<sup>92</sup> In its present form, the EAC is a resurrection of the East African Community established under the 1967 Treaty on East African Co-operation.<sup>93</sup>

The objectives of the EAC include developing policies and programmes aimed at widening and deepening co-operation among the partner states in political, economic, social and cultural

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<sup>87</sup> COMESA Treaty, *supra* note 25 art. 3(a).

<sup>88</sup> *Ibid.* art. 3(b).

<sup>89</sup> *Ibid.* art. 4(1)(a).

<sup>90</sup> *Ibid.* art. 7(1).

<sup>91</sup> *Supra* note 24. See generally W. Kaahwa, "The Treaty Establishing the New East African Community: An Overview" (1999) 7 *African Yearbook of Int'l L.* 61; Susan Fitzke, "The Treaty for East African Co-Operation: Can East Africa Successfully revive one of Africa's most Infamous Economic Groupings?" (1999) 8 *Minn. J. Global Trade* 127.

<sup>92</sup> Ingrid Doimi di Delupis, *The East African Community and Common Market* (London, Longmans 1970) at 19-50.

<sup>93</sup> 6 *I.L.M.* 932.

fields, research and technology, defence, security, and legal and judicial affairs for the states' benefit.<sup>94</sup> The EAC Treaty envisages a customs union, a common market and, ultimately, a political federation of the states involved.<sup>95</sup> Currently, the EAC operates as a customs union and negotiations for a protocol on developing it into a common market are underway.

The principal institutions of the EAC are the Summit of Heads of State and Government, Council of Ministers, Co-ordination Committee, Sectoral Committees, East African Court of Justice, the East African Legislative Assembly and the Secretariat.<sup>96</sup>

## 1.5 SOCIO-ECONOMIC MATRIX OF AFRICA'S ECONOMIC INTEGRATION

The focus of this thesis is on relational issues of law in economic integration in Africa. However, a proper understanding of these issues will be enhanced with a background on the socio-economic and political context of Africa's economic integration. The socio-economic and political factors provide the *raison d'être* for Africa's regional economic integration and, sometimes, condition their progress and effectiveness.

The RECs examined in this thesis comprise countries in Sub-Saharan Africa. Except for COMESA, the communities consist of geographically-contiguous countries. Geographical proximity is often combined with common colonial experience such as with the EAC where all the founding members – Kenya, Tanzania, and Uganda – were British colonies.<sup>97</sup> From the perspective of the legal aspects of economic integration, this experience often translates into a common legal infrastructure – an important complement to economic integration. Many of the states examined adhere to the common, Roman-Dutch law or civil law tradition because of their colonial associations with Britain and France, and to a lesser extent Belgium, Portugal, Germany and the Netherlands.

As will be shown in parts of this thesis, the colonial legal legacy sometimes constrains economic integration. This is reflected in, for example, the approach of the common law countries

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<sup>94</sup> EAC Treaty, *supra* note 24 art. 5(1).

<sup>95</sup> *Ibid.* art. 5(2).

<sup>96</sup> *Ibid.* art. 9.

<sup>97</sup> ECOWAS consist mainly of former British and French colonies. The former French colonies have their own regional organization, the West African Economic Monetary Union.

to giving effect to international law which has been extended to community law. But, at the same time, the colonial legacy can be meaningfully harnessed in addressing some of the challenges in integration, for example, on the issue of harmonization of laws.<sup>98</sup> Geography is important to Africa's economic integration in another respect. Many African countries are landlocked; they depend on their neighbours with coastlines for access to transportation for their exports and imports. This creates a natural bond of inter-dependency.<sup>99</sup>

The communities share a common vision of promoting trade and economic development within their respective sub-regions. This vision is to be achieved through progress through the various stages of economic integration. To date, progress has been slow, especially for COMESA and ECOWAS, both of which have been in existence for decades. As noted above, COMESA became a customs union in 2009, ECOWAS is edging closer to creating a customs union and the EAC is already a customs union. The next stage for these communities would be to evolve into common markets. Indeed, the EAC is currently negotiating a common market protocol.<sup>100</sup> The slow progress made by these communities can be attributed to a number of factors, including their size, internal political conflicts and multiple commitments of member states, which sometimes lead to legally-irreconcilable duties. For example, progress toward a customs union between COMESA member states was delayed because some members are also parties to the EAC and SADC customs union.<sup>101</sup>

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<sup>98</sup> The work of the Organization for the Harmonization of Business Law in Africa, which is discussed further in Chapter Four of this thesis, illustrates how the colonial legal legacy in Africa can be advantageously exploited.

<sup>99</sup> On the impact of geography on Sub-Saharan Africa's growth and development, see Benno J. Ndulu, "Infrastructure, Regional Integration and Growth in Sub-Saharan Africa: Dealing with the Disadvantages of Geography and Sovereign Fragmentation" (2006) 15 J. Afr. Econ. 212.

<sup>100</sup> The relatively faster pace at which the EAC is progressing can be attributed to a number of factors. These include its size, the fact that the founding members enjoy relatively stable and democratic political structures, and the fact that a strong bond existed between the member states from colonial times and the days of the old East African Community.

<sup>101</sup> See [http://about.comesa.int/index.php?option=com\\_content&view=article&id=87:postponement-of-the-13th-comesa-summit-to-be-held-in-zimbabwe&catid=4:press-releases](http://about.comesa.int/index.php?option=com_content&view=article&id=87:postponement-of-the-13th-comesa-summit-to-be-held-in-zimbabwe&catid=4:press-releases) announcing the postponement of the 13th Summit of Heads of State and Government scheduled for 7-8 December 2008 to ensure the completion of consultations aimed at harmonizing the free trade areas and common external tariffs among the COMESA-EAC-SADC. It was at this Summit that the COMESA customs union was scheduled to be launched.

The economic conditions in most of the member states of the communities are nothing to write home about.<sup>102</sup> Some countries, such as Lesotho, Swaziland and Gambia, are so small that it is sometimes difficult to contemplate their economic survival as independent economic entities. Admittedly, the experiences of some ‘small states’ such as Luxemburg, Liechtenstein indicate that size is not necessarily an obstacle to economic development. However, in Africa, this has not been the case. Indeed, the economic development of Lesotho and Swaziland is fostered by their close and long-standing economic integration arrangement with South Africa under the Southern African Customs Union.<sup>103</sup>

The levels of intra-African trade are generally low.<sup>104</sup> This is not because there are no reciprocal markets for each other’s exports. Rather, it is due to numerous obstacles to trade. These include governments’ unwillingness to surrender macro-economic policy-making to the dictates of a regional group, fear of tariff revenue loss, inadequate infrastructure, cumbersome customs procedures, political instability, and currency inconvertibility.<sup>105</sup> Recent studies have shown that regional integration has generated significant increases in trade among African countries.<sup>106</sup> Indeed, a suggestion that the level of intra-African trade is low should be approached with caution. Official national trade statistics in Africa are often difficult to come by and the level of unrecorded trans-border trade is estimated to be high, if not higher than recorded trade.<sup>107</sup>

A key to successful integration is political stability, democratic governance, and the rule of law. A number of countries in the RECs examined in this thesis have suffered from political instability, undemocratic regimes and abuse of power. Political instability, which sometimes

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<sup>102</sup> See generally Sambit Bhattacharyya, “Root Causes of African Underdevelopment” (2009) 18 *Journal of African Economies Advance Access* published on April 22, 2009. doi:10.1093/jae/ejp009.

<sup>103</sup> It consists of Botswana, Lesotho, Namibia, South Africa and Swaziland.

<sup>104</sup> But see Faezeh Foroutan & Lant Pritchett, “Intra-Sub-Saharan African Trade: Is it little?” (1993) 2 *J. Afr. Econ.* 74. They concluded that, from a positive perspective, as opposed to a normative perspective, the level of intra-African trade is as one would expect in economies having the same characteristics.

<sup>105</sup> See Alemayehu Geda & Haile Kebret, “Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA” (2007) 17 *J. Afr. Econ.* 357; Celine Carrere, “African Regional Agreements: Impact on Trade with or without Currency Unions” (2004) *J. Afr. Econ.* 199; UNECA, *Assessing Regional Integration in Africa III*, *supra* note 54.

<sup>106</sup> See Dominique Njinkeu & Bruno Powo Fosso, “Intra-African Trade and Regional Integration” Paper presented at the ADB/AERC International Conference on ‘Accelerating Africa’s Development Five Years into the Twenty-first Century’ Tunis, Tunisia, 22-24 November 2006 [unpublished].

<sup>107</sup> Foroutan & Pritchett, *supra* note 104 at 98.

translates into regional conflicts and frequent undemocratic changes in government, has been a drain on the progress of Africa's RECs. Their attentions have been directed more towards conflict resolution and prevention and diverted from promoting economic integration.<sup>108</sup> For over a decade, ECOWAS through the ECOWAS Monitoring Group (ECOMOG) struggled with conflicts in Liberia and Sierra Leone. The persistent conflict in the Democratic Republic of Congo has also been a trouble spot in the southern African region.

Arguably, political instability can provide a boost to Africa's integration. It is difficult for economic allies to be at war with each other. Also, political instability suggests that governments committed to the course of integration should agree more readily to community policies. This averts the risk of the rejection of those policies when there is a change in government. Indeed, Kufuor notes that internal domestic strife threatened the ECOWAS member states' ruling elites and called for strong intervention from ECOWAS. He theorizes that these in part accounted for the revision of the 1975 ECOWAS Treaty to strengthen the community's institutions.<sup>109</sup> It is also worth remembering that security considerations arising from threats posed by Apartheid South Africa informed the formation of the Southern African Development Coordination Conference, which is now the Southern African Development Community.

## **1.6 STRUCTURE OF THE THESIS**

Chapter Two develops the thesis that effective economic integration is the product of properly structuring and managing, within well-defined legal frameworks, vertical, horizontal and vertico-horizontal relations among states, legal systems, laws and institutions. The chapter draws on the comparative jurisprudence, treaties and experiences of RECs, including some in Africa.

Chapter Three addresses the complex relationship between the AU, AEC and Africa's RECs. It draws on the emerging scholarship on international regime complexity. It argues that, to an extent, the character of international institutional density in Africa on the issue of economic integration is unique and presents its own challenges. It examines some of these challenges. Chapter Four focuses on the AEC. It examines aspects of the AEC Treaty with an eye on issues

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<sup>108</sup> See Willie Breytenbach, "Peacekeeping and Regional Integration in Africa" (2008) 8 *Monitoring Regional Integration in Southern Africa Yearbook* 249.

<sup>109</sup> Kufuor, *Institutional Transformation*, *supra* note 23.

such as the nature of the AEC's legal system, supremacy of community law, and harmonization of national laws. Without underplaying the importance of the issues examined in Chapters Three and Four, it must be cautioned that, given the state of development of the AEC – it is still in formation and its development is largely contingent on the development of the constituent RECs – a lot of the issues examined in both chapters will become more concrete in future.

Chapter Five draws on the concrete experiences of COMESA, EAC and ECOWAS with relational issues. It uses their constitutive treaties and the jurisprudence of their respective community courts. Although the jurisprudence is comparatively scant and has mainly dealt with issues not directly related to economic integration, the few that have offer very useful insights. The chapter examines how the RECs have approached relational issues and the limitations on their approach. Chapter Six will return to the AEC. With the experiences of COMESA, EAC and ECOWAS in mind, and against the background of the theory that structured relations between community and national institutions are important for effective economic integration, the chapter examines the adequacy of the institutions of the AEC. It devotes particular attention to the structure and jurisdiction of the African Court of Justice and examines whether it is adequately designed to meet the needs of economic integration.

Individuals play a central role in relational issues arising from economic integration. Their actions, especially through litigation, bring to the fore the existence and importance of the relational issues. They serve as mediums for creating relations between legal systems. This provides the background to Chapter Seven. The chapter assesses the implementation of community law within member states. This is an issue of direct concern to individuals who seek to benefit from community law in those member states. The chapter examines how national implementation of community law is approached within Africa's RECs and member states. It also assesses how national constitutions and jurisprudence may constrain or enhance the communities' vision of the place of their laws in member states.

The issue of the relations between community and member states is largely addressed by principles of public international law and national public or constitutional law. However, a place exists for private international law in approaching that particular issue. Accordingly, Chapter Eight addresses some relational issues arising from provisions in the treaties and other laws of the RECs on which public and private international law principles may have an impact. The chapter examines the impact that public and private international law may have on the effective operation

of community institutions. The focus is mainly on the judicial institutions of the RECs. Among the issues examined are: arbitral jurisdiction of the community courts; enforcement of their judgments; conflict of jurisdiction between community courts; and international jurisdiction co-operation between community and national courts.

Effective economic integration must strengthen horizontal relations between the constituent national legal systems. This is conducive for economic transactions. Chapter Nine uses private international law as a barometer to measure the extent to which African national legal systems currently relate to each other through the medium of litigation. The aim is to provide us with a sense of how African national legal systems are 'integrated'. Private international law principles co-ordinate or regulate relations between legal systems. It can aid or constrain economic integration processes and economic transactions which take place within them. A principal issue addressed in the chapter is the recognition and enforcement of foreign judgments. Enforcing foreign judgments is, perhaps, the best manifestation of how sovereign legal systems relate to the other; they validate and give effect to each other's norms. Chapter Ten provides the conclusion.



## CHAPTER TWO: LEGAL FRAMEWORK FOR ADDRESSING RELATIONAL ISSUES IN ECONOMIC INTEGRATION

### 2.1 INTRODUCTION

At present, the international community is witnessing a proliferation of RECs. They have become a predominant mode for organizing international trade.<sup>1</sup> Each differs in its ultimate goal; it may create a free trade area, customs union, common market, economic union or complete economic integration.<sup>2</sup> Whichever stage a REC is at, it is undeniable that economic integration results in a juxtaposition of states, laws, legal systems and institutions for the purpose of achieving a common economic vision. This creates a complex web of relations in which the principal actors are the community, member states, individuals and other international organizations. Accordingly, a fundamental challenge in economic integration is that of structuring and managing the relations between and among these actors.

Relational issues of law in economic integration (relational issues)<sup>3</sup> take on various forms. Among them are: the relations between the laws of a community (community law), its institutions and those of its member states; mechanisms for normative exchange or communication between a

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<sup>1</sup> As of May 2009, two hundred and forty seven regional trade agreements have been notified to the World Trade Organization (WTO). Of these, sixty-one have been characterized by the WTO as economic integration agreements. See <http://rtais.wto.org/ui/publicsummarytable.aspx>. The following treaties have been consulted and some are often cited in this chapter: *Consolidated Version of the Treaty establishing the European Community*, 25 March 1957, [2002] O.J. C 325/33 [EC Treaty]; *Marrakesh Agreement establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. I-31874, 33 I.L.M. 1144 [WTO Agreement]; *North American Free Trade Agreement between the United States of America, Canada and Mexico*, 17 December 1992, 32 I.L.M. 296 [NAFTA]; *Treaty establishing the African Economic Community*, 3 June 1991, 30 I.L.M. 1241 [AEC Treaty]; *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 U.N.T.S. I-37437 [EAC Treaty]; *Treaty instituting the Benelux Economic Union*, 3 February 1958, 381 U.N.T.S. 5471 [Benelux Treaty]; *Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy*, 5 July 2001, 2259 U.N.T.S. I-40269 [CARICOM Treaty]; *Agreement on the European Economic Area*, 17 March 1993, 1793 U.N.T.S. I-31121 [EEA Agreement]; *Treaty for the establishment of a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay*, 26 March 1991, 2140 U.N.T.S. I-37341 [Asuncion Treaty]; *Agreement on the Foundation of the EURASIAN Economic Community*, 10 October 2000, 2212 U.N.T.S. I-39321 [EURASIAN Agreement]; *Treaty establishing the Common Market for Eastern and Southern Africa*, 5 November 1993, 33 I.L.M. 1067 [COMESA Treaty]; *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, (1996) 8 Afr. J. Int'l & Comp. L. 187 [ECOWAS Treaty]; *Southern African Customs Union Agreement*, 21 October 2002 online: SACU

<<http://www.sacu.int/main.php?include=docs/legislation/2002-agreement/main.html>> [SACU Agreement]; *Treaty of the Southern African Development Community*, 17 August 1992, 32 I.L.M. 120 [SADC Treaty].

<sup>2</sup> See Bela Balassa, *The Theory of Economic Integration* (London: Allen and Unwin, 1962) at 2.

<sup>3</sup> Admittedly, there are also socio-economic and political challenges to economic integration. These include the absence of mutual trust among the relevant state parties, diversity in political ideology and political systems, lack of homogeneity in the level of economic development, and how to distribute evenly the benefits of economic integration.

community and its member states and member states *inter se*; jurisdictional conflicts between a community and its member states; the allocation of competences between a community and its member states; access of individuals to community institutions; and the recognition and enforcement of member state and community normative acts. The extent to which these issues are present in a community, how they are approached, and the urgency with which they are addressed have a direct relationship with the stage of integration reached or envisioned. The further economic integration progresses, the more obvious these issues become and the more immediate the need to address them.<sup>4</sup>

This thesis argues that effective economic integration is the product of properly structuring and managing, within well-defined legal frameworks, vertical, horizontal and vertico-horizontal relations among states, legal systems, laws and institutions. In other words, a community must have well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness. By structured relations, I am referring to a legal framework that: defines the relations between community and national laws; spells out the modalities for implementing community law in member states; defines the respective competences of the community and member states; and anticipates and provides rules for resolving conflicts of laws and jurisdictions. The object of such a legal framework should be to ensure the overall effectiveness of the community.

The management of relational issues looks beyond the legal framework. Reciprocal trust and harmonious political co-existence among member states, education on community law and objectives, building up or nurturing constituencies with interest in the integration process, accessibility, the presence and free flow of information on community matters, and a general sense of the need for co-operation are all important in this regard. For example, a legal framework which allows individuals to rely on community law in member states will be useless unless it is complemented with education on and accessibility to community law. Also, that framework must be utilized by constituencies to champion their individual causes and the cause of promoting

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<sup>4</sup> Apart from federal states (which, if you take out the political aspects, very much resemble an economic integration arrangement), the European Community (EC), is perhaps the best example of an organization that has progressed furthest through the stages of economic integration. Accordingly, within the EC, these issues have been very prominent and attended to. However, as it will be shown, the importance of relational issues is recognized in most, if not all, economic integration organizations, but they are addressed differently.

integration. Similarly, a legal framework which gives national courts discretion to refer issues of interpretation of community law to a court established by a community (community court) will be ineffective if there is no reciprocal trust or co-operation between both courts.

This chapter explores comparatively how communities all over the world have attempted to provide a legal framework which uses various principles and mechanisms of law to address relational issues. In general, these principles and mechanisms have their foundations in public and private international law. They are also influenced by domestic constitutional laws.<sup>5</sup> I characterize them as relational principles of law for economic integration (relational principles). The chapter identifies and assesses relational principles used by communities to provide a legal framework for the relations between themselves and their member states, as well as among the member states. Without pretending that the list is exhaustive, the chapter argues that the identified relational principles are a necessary part of the constitutional architecture of communities and should influence their design, especially as they progress through the stages of economic integration. However, using the principles is not a sufficient condition for ensuring an effective community. Accordingly, the chapter examines the social-matrix within which the principles operate and argues that it often conditions their effectiveness.

## 2.2 RELATIONAL ISSUES, PUBLIC AND PRIVATE INTERNATIONAL LAW

For centuries, the relations between states and international organizations as well as among states have been addressed by public and private international law.<sup>6</sup> International organizations and

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<sup>5</sup> The EC has adopted and perfected most of the relational principles and mechanisms for the purpose of enhancing its economic integration processes. But, it would be wrong to assume or accept that these principles are the preserve of the EC or have been utilized only by it. For example, in international law, the idea of a preliminary reference procedure dates back to about 1907. Indeed, in 1929, Lauterpacht suggested that the Permanent Court of International Justice might one day be given jurisdiction to hear references from national courts. H. Lauterpacht, "Decisions of Municipal Courts as a Source of International Law" (1929) 10 *British Yearbook Int'l L.* 65 at 94-95. For a long time, monists have also appreciated the importance of the relations between international and national law. They argue that both constitute a single legal order and many argue that, in cases of conflict, international law prevails.

<sup>6</sup> On the use of private international law to regulate relations between laws of different legal systems see generally Antonio Boggiano, "The Law of Relations Between Legal Systems: A Methodological Analysis" in Jurgen Basedow ed., *Private Law in the International Arena: From National Conflict Rules Towards Harmonization and Unification - Liber Amicorum Kurt Siehr* (The Hague: TMC Asser Press, 2000) at 79-94; Kurt Siehr, "Coordination of Legal Systems in Private International Law", in Talia Einhorn & Kurt Siehr eds., *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter Nygh* (The Hague: TMC Asser Press, 2004) at 325; Peter Hay et al. "Conflict of Laws as a Technique for Legal Integration" in Mauro Cappelletti et al. eds., *Integration through Law Europe and the American Federal Experience* Vol. 1 bk. 2 (Berlin, New York: Walter de Gruyter, 1986) at 161; R.H. Graveson, "The Conflict of Laws in Non-Unified Legal Systems" in Edward McWhinney & Pierre Pescatore

states expect that their laws, or at least some of them, will be given effect and observed in other states. However, this expectation is often limited. A state cannot expect that its laws will be automatically applied in a foreign court. Indeed, at common law, foreign revenue, penal and other public laws will not be applied in a national court.<sup>7</sup> A state cannot also expect that a foreign court will refer an issue of interpretation of its laws back to its courts for determination, or that its law will be accorded a status superior to the *lex fori*. From a dualist perspective, international law, especially treaty law cannot also claim to be directly part of, let alone superior to, national law. National courts can refuse to apply or put their own varying interpretations on international law. They are under no obligation to seek clarification from the international organization which adopted that law or an institution established by it. In other words, within a dualist state, foreign and international law enjoy no autonomous or privileged status. Individuals cannot have any directly enforceable rights, or directly imposed duties under international law, except those expressly created or imposed by national law. In other words, even though rights and responsibilities could be created for individuals at the international level, they remain ineffective at the national level unless they are so recognized under national law. Similarly, a right founded on foreign law is enforceable in another state only at the discretion of that state. Surely, this state of affairs affects the effectiveness of international law and foreign states' laws in other states.

For international organizations, international lawyers have found ways of addressing this challenge to the effectiveness of international law. Firstly, in monism, they argue that international and national law are part of one legal order. Secondly, they have designated specialist norms such as *ius cogens* from which no derogations can be made, and customary international law, which some countries consider as automatically part of their laws. Finally, and more importantly for this chapter, they have elevated some organizations to the status of supranational organizations.

Hay describes supranational organizations as organizations that 'possess both independence from and power over their constituent states to a degree which suggests the emergence of a new federal hierarchy and which goes beyond traditional intergovernmental cooperation in the form of

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eds., *Federalism and Supreme Courts and the Integration of Legal Systems* (Heule, Belgium: Editions UGA, 1973) at 193.

<sup>7</sup> See generally Jurgen Basedow, "Foreign Revenue Claims in European Courts" (2004) 6 Yearbook of Priv. Int'l L. 1; James Fawcett & Janeen M. Carruthers, *Cheshire, North and Fawcett Private International Law*, 14th ed (Oxford: Oxford University Press, 2008) at 121-151.

international organizations'.<sup>8</sup> There are no accepted criteria of supranationalism. Independence of the organization from member states, the adoption of binding decisions by majority votes, the direct and binding effect of the organizations' laws on individuals in member states, financial autonomy, the impossibility of unilateral withdrawal from the organization, the power to enforce the organization's decisions even without the co-operation of governments such as by using national courts, parliaments or other member states, and the transfer of sovereign powers to the organization have all been suggested as relevant criteria.<sup>9</sup> To Hay, the key to supranationalism is an appreciation of the relation of the organization and its laws to member states and to the international community.<sup>10</sup>

Supranationalism is not a static feature of international organizations. It is dynamic in nature. It may evolve with an organization. It may be limited to specific areas of an organization's activities; in other words, supranationalism and intergovernmentalism may co-exist within the same organization but on different issues or subject matters. Supranationalism inversely relates to the sovereignty of member states of a supranational organization; the greater the loss of sovereignty, the more supranational the organization is. As Hay has argued, 'with few exceptions ... the criteria for loss of sovereignty coincide with those which much of the literature regards as the elements of supranationalism. Thus, the concept of transfer of sovereignty may be the legal-analytical counterpart of the political-descriptive notion of supranationalism'.<sup>11</sup>

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<sup>8</sup> Peter Hay, "International and Supranational Organizations: Some Problems of Conceptualization" (1965) U. Ill. L.F. 733 at 733.

<sup>9</sup> *Ibid.* at 736-738; Henry G. Schermers, *International Institutional Law*, vol. 1 (Leiden: A.W. Sijthoff, 1972) at 19-21. At page 23, Schermers distinguishes between supranationalism in structural terms and supranationalism in operation. The latter depends on 'the behaviour of men and groups of men'. In his words: 'To a great extent surpranationality depends on the opinion of civil servants and governments about an organization, on how they see it. Their attitude may more determine the influence of an organization more than the text of its constitution. Even without constitutional amendment, the supranational character of an international organization may increase or diminish'. Pescatore has defined surpranationality as 'a real and autonomous power placed at the service of objectives common to several states'. Pierre Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations based on the Experience of the European Communities* (Leiden: A.W. Sijthoff Publishing Company, 1974) at 51 and generally at 48-55.

<sup>10</sup> Hay, *supra* note 8 at 740.

<sup>11</sup> Peter Hay, *Federalism and Supranational Organizations Patterns for New Legal Structures* (Urbana and London: University of Illinois Press, 1966) at 69 [Hay, *Federalism and Supranational Organizations*].

Significantly, the international organizations that first demonstrated supranational characteristics were economic communities, namely the European Communities,<sup>12</sup> and subsequently, the East African Community.<sup>13</sup> The work of some international organizations may not directly affect many internal policies of member states. In contrast, the activities of economic communities have a direct impact on policies in member states. Their effectiveness may require a transfer of sovereign powers to the community as regards those activities. The European Communities and the East African Community were products of international law; they were all created by treaties.<sup>14</sup> But, it was realized that, as regards their legal relations with member states' laws, a legal framework very different from that hitherto existing between international organizations and member states would be required to ensure their effectiveness.<sup>15</sup> In his work on the subject, Weiler uses the concept of 'normative supranationalism' to describe an aspect of this legal framework. Normative supranationalism is 'concerned with the relationships and hierarchy which exist between community policies and legal measures on the one hand and competing policies and legal measures of the member states on the other'.<sup>16</sup> He provides three key elements or core attributes of the concept, namely direct effect, supremacy and pre-emption.<sup>17</sup>

Weiler's analysis of normative supranationalism is important. He provides very useful analysis of the principles of direct effect and supremacy which are discussed below. But, to provide a more comprehensive and broader legal framework, it is helpful to look beyond 'legal

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<sup>12</sup> These are the European Economic Community, the European Atomic Energy Community and the European Coal and Steel Community. Indeed, the European Coal and Steel Community was expressly labelled 'supranational' in its founding treaty. See *Treaty establishing the European Coal and Steel Community*, 18 April 1951, 261 U.N.T.S. 140, art. 9 paras. 5 and 6.

<sup>13</sup> See Schermers, *supra* note 9 at 21 where he characterizes the East African Community together with the European Communities as the most supranational organizations existing at the time.

<sup>14</sup> *Treaty establishing the European Coal and Steel Community*, *supra* note 12; *Treaty establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 11; *Treaty establishing the European Atomic Energy Community*, 25 March 1957, 298 U.N.T.S. 140; *Treaty for East African Co-operation*, 6 June 1967, 6 I.L.M. 932.

<sup>15</sup> As far back as 1966, Hay observed that 'one important reason for the success of European integration is the organizational form which it adopted for the three European Communities'. Hay, *Federalism and Supranational Organizations*, *supra* note 11 at 4.

<sup>16</sup> Joseph Weiler, "The Community System: The Dual Character of Supranationalism" (1981) 1 Y. B. Eur. L. 267 at 271 [Weiler, Dual Character of Supranationalism]. He distinguishes between normative supranationalism and decisional supranationalism. The latter relates to the institutional framework and decision-making processes by which community policies and measures are, in the first place, initiated, debated and formulated, then promulgated and finally executed. See also J.H.H. Weiler, "The Transformation of Europe" (1991) Yale L.J. 2403.

<sup>17</sup> Weiler, Dual Character of Supranationalism, *ibid.* at 273-279.

measures' and focus on the broader notion of relations between legal systems,<sup>18</sup> namely the community's and member states', international and regional. A robust legal framework for successful integration should not concentrate only on the relations between a community and its member states. It is equally important to provide a framework for the relations among member states of the community, as well as for the community's relations with legal systems outside its member states. Indeed, even as regards the relations between the community and member states, there are principles other than direct effect, supremacy and pre-emption, which are important.

As noted above, the traditional rules of private international law, which determine the relations between state laws, sometimes affect the domestic effectiveness of foreign laws. To overcome this, and for the purposes of ensuring effective integration, some communities have made reform of traditional private international rules a key part their agenda. The reforms by the communities provide supranational coordination for the principles of a subject which, despite its name, is part of municipal law. For example, within the European Community (EC), a very restricted meaning is given to public policy – a concept which is often used in traditional private international law to exclude the application of foreign laws or deny recognition of foreign judgments.<sup>19</sup> Certainly, an unrestricted invocation of public policy to deny the recognition of other member states' judgments, or the application of their laws, can restrict the free movement of persons, services and capital within the community.<sup>20</sup> Also, there is the principle of mutual recognition, which, like choice of law, determines whether and to what extent domestic effect should be given to another member state's laws.<sup>21</sup> Furthermore, the scope for the domestic application of other member states' laws is enhanced through definite and uniform choice of law rules on defined subject matters.

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<sup>18</sup> The concept of a legal system is a difficult one. It has engaged the attention of jurists for a considerable period of time. See generally Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford: Clarendon Press, 1970).

<sup>19</sup> See generally Alex Mills, "The Dimensions of Public Policy in Private International Law" (2008) 4 J. Priv. Int'l L. 201.

<sup>20</sup> Luigi Fumagalli, "EC Private International Law and the Public Policy Exception – Modern Features of a Traditional Concept" (2004) 6 Yearbook of Priv. Int'l L. 171 at 176.

<sup>21</sup> Marc Fallon & Johan Meeusen, "Private International Law in the European Union and the Exception of Mutual Recognition" (2002) 4 Yearbook of Priv. Int'l L. 37.

In summary, an effective legal framework to regulate community-state and interstate relations may have to depart from some traditional public and private international law principles. This should be borne in mind when creating a legal framework which aims at addressing the vertical, horizontal and vertico-horizontal relational issues arising in economic integration

### 2.3 AN ECONOMIC COMMUNITY AS A LEGAL SYSTEM

An economic community is not a state. However, an attribute it shares with states, which is important as far as its relations with member states and other entities is concerned, is that it constitutes a legal system with law-making and enforcement powers. The concept of a legal system is a difficult concept, but four elements are generally considered necessary for the existence of a legal system or legal order.<sup>22</sup> Firstly, rules for conduct must be present. Secondly, there must be defined entities to which the rules apply or relate. These are the subjects of the legal system. The legal system confers benefits and imposes burdens on the subjects. Thirdly, there must be a source from which one can identify the rules that form part of the legal system. It is not every norm that can claim a legitimate place within a legal system. Finally there is the element of obligation to obey the norms of the legal system.<sup>23</sup> This obligation is enforceable through both public and private means. The subjects must generally adhere to the rules of the legal systems. However, occasional infractions of specific rules do not necessarily negate the existence of the entire legal system. Hart captured these elements when he argued the following as the conditions for the existence of a legal system. They are: the existence of a union of primary rules of obligation and secondary rules of change, adjudication and recognition; the acceptance by officials of the system that the rule of recognition provides the standards of official behaviour; and the existence of general compliance with the rules that are valid under the system's rule of recognition.<sup>24</sup>

These elements do not exhaust what may actually comprise a legal system. For example, Dworkin has ably demonstrated the importance of principles and policies to the operation of a legal system. To him, an undue emphasis on rules provides an inadequate account of a legal

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<sup>22</sup> See generally Raz, *supra* note 18; James William Harris, *Law and Legal Science: An Inquiry into the Concepts of Legal Rule and Legal System* (Oxford: Clarendon Press, 1979). D.M. McRae, "Sovereignty and the International Legal Order" (1971) 10 W. Ont. L. Rev. 56 at 67.

<sup>23</sup> McRae, *ibid.* at 67.

<sup>24</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994).



system.<sup>25</sup> Additionally, the obligation to obey the laws of the legal system may be attributed to the legal subjects' appreciation of the benefits obedience brings, rather than any inherent force of the law or sanctions attached to it. In many instances, co-operation and compromise, rather than coercion, may be more effective methods for eliciting compliance with obligations imposed by the legal system.<sup>26</sup> These are important considerations, especially when one applies the concept of legal system to institutions which consist of sovereign states such as economic communities. As Dworkin has observed in the context of the EC, one of its salient features is that 'for the most part it is essentially a co-operative, a consensual system, not a coercive order'.<sup>27</sup> Member states' commitment to a community and their preparedness to make it work, more than anything else, guarantees the success of a community through compliance with its laws.

Although jurists differ on the characteristics of a legal system, there is near unanimity, at least among legal positivists, on the requirement of an ultimate and unrivalled source for the valid norms of the legal system. Norms from this source cannot be contradicted or made subordinate to any other norm, except where that source so decrees. Thus, not only is the source important but also there must be clear rules on how norms emanating from it relate to other norms. As noted above, Hart, in *The Concept of Law*, described a legal system as a unity of primary and secondary rules, the latter comprising the rules of adjudication, change and recognition.<sup>28</sup> The rule of recognition helps identify rules that are a valid part of the legal system's set of norms.<sup>29</sup> John Austin wrote that a legal system must contain a determinate human superior, a 'sovereign', who will issue commands to his subjects.<sup>30</sup> Hans Kelsen also conceived of a legal system as a series of hierarchical norms that rest on the 'grundnorm', which is the ultimate source of authority.<sup>31</sup> The existence of an ultimate authority is not enough to constitute a legal system; however, its absence is fatal.

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<sup>25</sup> Ronald M. Dworkin, "The Model of Rules" (1967-1968) 35 U. Chi. L. Rev. 14.

<sup>26</sup> Abraham Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995).

<sup>27</sup> F.E. Dworkin, "A Model of the European Communities' Legal System" (1983) 3 Y. B. Eur. L. 169 at 180.

<sup>28</sup> Hart, *supra* note 24 at 94.

<sup>29</sup> *Ibid.* at 94-95.

<sup>30</sup> John Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, Wilfrid R. Rumble ed., 1995) at 212-213.

<sup>31</sup> Hans Kelsen, *General Theory of Norms* (Oxford: Clarendon Press, Michael Hartney trans., Clarendon Press 1991).

For an economic community, the fact that it should be the ultimate and unrivalled source of law on matters within its competence is particularly important. If member states exercise competences reserved for a community or interpret and apply community law without uniformity it can be inimical to a community's development. As will be discussed below, a number of relational principles such as supremacy of community law, interpretive autonomy and a preliminary reference procedure aim at ensuring that a community remains the ultimate and unrivalled source of law. The above conceptualizations of a legal system offer useful insights into understanding how economic communities relate to member states' legal systems. Indeed, commentators have applied these conceptualizations to the study of economic communities and other trade regimes. A similar exercise is undertaken as regards the African Economic Community in Chapter Four. For example, Jones argues that Hart's theory of a legal system provides a model and framework of analysis that illustrates, explains and supports the European Court of Justice's claim that there exists an autonomous European Community legal system.<sup>32</sup>

There is need for caution in treating economic communities as legal systems. The traditional conceptualizations of a legal system have often been made from the perspective of states and not the organizations resulting from their coming together. Indeed, Kelsen conceived of only two legal systems – the many national legal systems and one international legal system. He did not extend the idea of a legal system to international organizations. Surely, a legal system which derives from several states will look different from that of a single state. For example, it will raise more complicated questions as to who its subjects are, and how it relates to them.

In summary, like a state's legal system, an economic community is norm-generating. It is endowed with institutions with ultimate powers granted by treaty to make laws and enforce them. Its subjects are the member states, institutions and individuals to whom its laws may be directed. The founding treaty of a community – its *grundnorm* – often provides for sanctions for non-compliance with its laws. But what is most important is member states' voluntary adherence to

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<sup>32</sup> Mark L. Jones, "The Legal Nature of the European Community: A Jurisprudential Analysis using H.L.A. Hart's Model of Law and a Legal System" (1984) 17 Cornell Int'l L.J. 1. See also Dowrick, *supra* note 27; David Palmetier, "The WTO as a Legal System" (2000) 24 Fordham Int'l L.J. 444; Stefan A. Riesenfeld, "Legal Systems of Regional Economic Integration" (1996-1997) 20 Hastings Int'l & Comp. L. Rev. 539; Ines Weyland, "The Application of Kelsen's Theory of the Legal System to European Community Law – The Supremacy Puzzle Resolved" (2002) 21 Law and Philosophy 1. William C. Starr, "Hart's Rule of Recognition and the E.E.C." (1977) 28 N. Ir. Legal Q. 258.

community law. Relational principles are adopted by communities with the aim of enhancing their law-making and enforcement powers as a legal system.

## **2.4 RELATIONAL PRINCIPLES FOR ECONOMIC INTEGRATION**

### **2.4.1 Introduction**

As noted above, economic integration progresses through various stages – free trade area, customs union, common market, economic union and complete economic integration. The stages are not watertight. Nor is progress through them necessarily sequential. A community may manifest features which straddle the various stages.<sup>33</sup> The extent to which relational principles are significant and merit application within the legal framework governing community-state and interstate relations varies with the stage of integration attained. A community which is merely a free trade area or customs union may apply a modest number of relational principles. But a common market or economic union is unlikely to be effective without utilizing many of them. This is because, the further one progresses through the stages of integration, the deeper the level and scope of community-state and interstate legal interactions become. And, the more immediate the need for a robust legal framework to regulate those interactions becomes.

This section examines relational principles used by communities all over the world to regulate those interactions. It exposes the inadequacies of traditional public and private international laws in dealing with the relational issues faced by communities. It assesses the contribution each relational principle makes to ensure that community-state and interstate relations enhance the effectiveness of a community.

### **2.4.2 The Relational Principles and Mechanisms**

#### **2.4.2.1 Community Autonomy as the Foundation of Relations**

The autonomy of an international organization is a multifaceted concept. It covers a wide range of issues, including its separateness from member states, the independence of its institutions, finances and personnel, its ability to control the making, nature and effects of its law, and its ability

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<sup>33</sup> For example the NAFTA, *supra* note 1 establishes a free trade area for Canada, Mexico and the United States of America. But, it also has provisions on the free movement of labour and capital, which are normally features of a common market. The Economic Community of West African States and the Southern African Development Community are not common markets. Nonetheless, each has a protocol dealing with the free movement of persons.

to act using its own legal personality. As with some international organizations, the autonomy of some economic communities is expressly provided for in their founding treaties.<sup>34</sup> The treaty may confer a separate legal personality on a community to emphasize its separateness from member states.<sup>35</sup> It may provide for the neutrality and independence of personnel of specific institutions within the organization. It may also confer exclusive or final jurisdiction to its judicial institutions to interpret community laws.<sup>36</sup> Schilling characterizes this as ‘interpretive autonomy’, and defines it to mean that only the institutions of the particular legal order are competent to interpret its constitutional and legal rules.<sup>37</sup> Interpretive autonomy prevents institutions outside a community from interfering with the law-making and interpretation prerogatives of a community, and mitigates the concomitant prospect of inconsistencies in the interpretation and application of community law.<sup>38</sup>

More often than not, one has to infer a community’s autonomy from its founding treaty by examining its law-making powers, its legal status, modes for the application of its laws, and the character of its dispute settlement institutions. Seldom, if at all, will one find an express provision in a community’s founding treaty that the community constitutes an autonomous and separate legal

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<sup>34</sup> See e.g. NAFTA, *supra* note 1 art. 103(2). It provides that ‘in the event of any inconsistency between this Agreement and such other agreements [including the *General Agreement on Tariffs and Trade*], this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement’.

<sup>35</sup> See e.g. EC Treaty, *supra* note 1 art. 281; EAC Treaty, *supra* note 1 art. 138; Benelux Treaty, *supra* note 1 art. 95; CARICOM Treaty, *supra* note 1 art. 228; ECOWAS Treaty, *supra* note 1 art. 88; SACU Agreement, *supra* note 1 art. 4; SADC Treaty, *supra* note 1 art. 3.

<sup>36</sup> See e.g. EC Treaty, *ibid.* art. 292. It provides that ‘Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein’; Benelux Treaty, *ibid.* art. 51(1); *Treaty Creating the Court of Justice of the Cartagena Agreement*, 28 May 1979, 18 I.L.M. 1203 as revised by the *Protocol Modifying the Treaty Creating the Court of Justice of the Cartagena Agreement*, 10 March 1996, art. 42; *Protocol of Tegucigalpa of Reforms to the Charter of the Organization of the Central American States*, 13 December 1991, art. 35; *Agreement on the Statute of the Central American Court of Justice*, 10 December 1992, 1821 U.N.T.S. I-31191, 34 I.L.M. 921, art. 25 [Statute of the Central American Court of Justice]. A less absolute form of an exclusive jurisdiction clause is article 23 of the *WTO Dispute Settlement Understanding*. But in *US: Sections 301-310 of the Trade Act of 1974* (1999), WT/DS/152/R at para. 7.43 (Panel Report). It was held that article 23(1) was an ‘exclusive dispute resolution clause’.

<sup>37</sup> Theodor Schilling, ‘The Autonomy of the Community Legal Order: An Analysis of Possible Foundations’ (1996) 37 *Harv. Int’l L.J.* 389 at 389-390. But see Benelux Treaty, *supra* note 1 art. 50, which allows appeals to the International Court of Justice in the event that a member of the Union does not put into effect a judgment or conservatory measure of the Union’s College of Arbitrators.

<sup>38</sup> Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003) at 182.

system.<sup>39</sup> Indeed, a community's autonomy must often be earned through the decisive work of its institutions and personnel. It must also be supported by forces outside the community if it is to be sustained. In other words, attaining the status of an autonomous legal system will always involve legal and political contestation.

Autonomy lies at the heart of any legal framework designed to regulate community-state relations. The relations between a community and its member states and, indeed, with other international organizations should be founded on the community's autonomy.<sup>40</sup> Autonomy should be a key aspect of the supranational character of the organization. It provides the foundation for adopting and applying relational principles, which ensure the effectiveness of community laws *vis-à-vis* their relations with the laws of other legal systems.<sup>41</sup> In summary, pragmatically and theoretically, autonomy is a *sine qua non* for the creation and effective existence of a community legal system.

Accordingly, an economic community which aims to be effective should strive for autonomy. But its legal system should not be self-contained; it should not be sealed off from the legal systems of member states and the international community. Indeed, it must interact with

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<sup>39</sup> For example, the autonomy of the European Community was the creation of the European Court of Justice. Firstly, the court proclaimed that the Community constitutes 'a new legal order of international law'. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1. Secondly, that the 'EEC Treaty has created its own legal system'. *Flaminio Costa v. ENEL*, Case 6/64 [1964] E.C.R. 585. See Rene Barents, *The Autonomy of Community Law* (The Hague: Kluwer Law International, 2003). More recently, the MERCOSUR Tribunal has also affirmed the autonomy of MECOSUR integration law. The case is discussed in: Daniel Pavon Piscitello & Jan Peter Schmidt, "In the Footsteps of the ECJ: First Decision of the Permanent MERCOSUR-Tribunal" (2007) 34 *Legal Issue of Economic Integration* 283. See also Gabriel Albarrancin, "The Relationship between the Laws Derived from the Organs of MERCOSUR and the Legal Systems of the Countries that Comprise MERCOSUR" (1998) 4 *ILSA J. Int'l & Comp. L.* 897. Compare *United States-Section 301-310 of the Trade Act of 1974*, *supra* note 37, at para. 7.72. The panel held that 'the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals'. See generally Max Sorensen, "Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organizations in the World Legal Order" (1983) 32 *Int'l & Comp. L. Q.* 559.

<sup>40</sup> It is a fundamental principle of European Union law that the EC's external relations with other international organizations should not affect the autonomy of the community's legal order. See e.g. Opinion 1/91, *Draft Agreement between the Community and the Countries of the European Free Trade Association relating to the Creation of the European Economic Area* [1991] E.C.R. 1-06079; Opinion 1/00, *Proposed Agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* [2002] E.C.R. 1-03493. Piet Eeckhout, *External Relations of the European Union – Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2004) at 206-209.

<sup>41</sup> The European Court of Justice derived two key principles from asserting the autonomy of the community legal order. Firstly, the validity of community law can be judged only in terms of community law. Secondly, member states' constitutions cannot prejudice the supremacy of community law. See Roman Kwiecien, "The Primacy of European Union Law over National Law under the Constitutional Treaty" (2005) 6:11 *German L.J.* 1479 at 1482.

them.<sup>42</sup> For example, the jurisprudence of a community's court should not be developed in 'clinical isolation' from the jurisprudence of other international courts or international law generally.<sup>43</sup> However, community-state relations and the relations between a community and other international organizations should have as their ultimate object the enhancement of the objectives of the community.

#### 2.4.2.2 Direct Applicability of Community Law

For international lawyers, a principal problem with international law is implementation at the national level or becoming part of national law. In dualist countries, as opposed to monist countries, the solution lies in transformation; international law must be implemented nationally using national constitutional procedures or measures. This opens the way to a number of difficulties: states may not implement international law at all; they may delay in implementing it; or they may implement it incompletely or partially.

Some communities have found ways of bypassing these difficulties through the principle of direct applicability.<sup>44</sup> It allows for the integration of community law into member states' legal systems without intervening national implementation procedures or measures.<sup>45</sup> To the European Court of Justice (ECJ), direct applicability means that the entry into force of community law is

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<sup>42</sup> Indeed, the very foundation of a community may be in international law or the community may have to comply with the requirements of international law. *General Agreement on Tariffs and Trade 1994*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153, art. XXIV; *General Agreement on Trade in Services*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1168, art. V; For example, article 1.1 of the CAFTA Agreement, *supra* note 1 provides that 'the Parties to this Agreement, consistent with Article XXIV of the *General Agreement on Tariffs and Trade 1994* and Article V of the *General Agreement on Trade in Services*, hereby establish a free trade area'. See generally Trevor C. Hartley, "International Law and the Law of the European Union-A Restatement" (2001) 72 *British Yearbook Int'l L.* 1.

<sup>43</sup> See e.g. *United States-Standard for Reformulated and Conventional Gasoline* (1996), WT/DS2/AB/R at 17 (Appellate Body). The WTO Appellate Body held that 'the *General Agreement* is not to be read in clinical isolation from public international law'.

<sup>44</sup> EC Treaty, *supra* note 1 art. 249; EEA Agreement, *supra* note 1 art. 7(a). But others expressly deny the direct applicability of their laws in member states. CARICOM Treaty, *supra* note 1 art. 240(1). It provides that 'decisions of competent Organs taken under this Treaty shall be subject to the relevant constitutional procedures of the Member States before creating legally binding rights and obligations for nationals of such States'. EURASIAN Agreement, *supra* note 1 art. 14; COMESA Treaty, *supra* note 1 art. 5(2); ECOWAS Treaty, *supra* note 1 art. 5(2); EAC Treaty, *supra* note 1 art. 8(2); SADC Treaty, *supra* note 1 art. 6(5).

<sup>45</sup> The principle of direct applicability does not deny the need to make community law known within member states. Often, there is the need for measures to bring community law to the attention of the general public, and fulfilling that aims at awareness creation and not the transformation of community law into a national law.

‘independent of any measure of reception into national law’.<sup>46</sup> This implies that direct applicability is concerned with how community law enters member states’ legal systems, it is silent on the effect of community law once it so enters.<sup>47</sup>

In community-state relations, direct applicability enhances community law in a number of ways. Firstly, a community may consist of monist and dualist countries. For such a community, direct applicability provides a uniform platform or procedure for the reception of community law into member states’ legal systems. Community law takes effect in member states at the same time and without potentially varying preconditions based on national laws. By using direct applicability, delay in implementation, non-implementation and partial implementation of community law are avoided. Secondly, direct applicability maintains the specificity of community law in member states. It avoids a negative consequence of the dualist mode of nationally implementing international law, which is through an act of transformation such as with an Act of Parliament, parliamentary resolution, executive or legislative instrument. An Act of Parliament implementing international law is national law. Unless expressly stated, the Act does not enjoy any privileged status in national law. Accordingly, the Act is subject to national rules on the hierarchy of laws. Conflicts between the Act and another national law may be resolved by using internal conflict of laws rules such as *lex posterior derogat priori*. The same applies to using parliamentary resolutions, executive or legislative instruments to implement international law.

The application of the *lex posterior derogat priori* rule to resolve conflicts between community and national laws can be inimical to vertical community-state relations.<sup>48</sup> Direct applicability ensures that this does not happen. This is because even where community law conflicts with a national law, because each is of a different genus or to borrow from Hart’s theory of legal system, each is subject to a different rule of recognition, it will be inappropriate to resolve the conflict using the *lex posterior derogat priori* rule.<sup>49</sup> Also, by maintaining the distinct character

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<sup>46</sup> *Amsterdam Bulb v. Produktschap voor Siergewassen*, Case 50/76, [1976] E.C.R. 137 at 146.

<sup>47</sup> John Tillotson & Nigel G. Foster, *Text Cases and Materials on European Union Law*, 4th ed (London: Routledge-Cavendish, 2003) at 81.

<sup>48</sup> In monist countries where international law automatically becomes part of national law and is ‘superior to law’ this is avoided as far as conflict between international (community) law and national law (excluding the constitution) is concerned.

<sup>49</sup> See generally Stanley L. Paulson, “On the Status of the *Lex Posterior Derogating Rule*” (1983) 5 *Liverpool L. Rev.* 5.

of community law, direct applicability enhances the prospect of using the preliminary reference procedure if the procedure is provided for in the community legal system. In other words, issues involving community law become more visible as a result of the distinct nature of the community laws involved.

### **2.4.2.3 Direct Effect of Community Law**

It is largely insignificant if international law becomes part of national law but individuals cannot rely on it, or reliance on it is contingent on preconditions that make such reliance largely illusory. An example of the former is section 102(c) of the USA's Uruguay Round Agreements Act.<sup>50</sup> Under section 101 of the Act, Congress approved the Uruguay Round Agreements, in other words, Congress gave the force of law to the Agreements in the USA. However, under section 102(c) of the Act:

No person other than the United States shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

Canada's World Trade Organization Agreement Implementation Act<sup>51</sup> illustrates the latter position. Arguably, section 8 of the Act gives that Agreement the force of law in Canada. However under sections 5 and 6 of the Act:

5. No person has any cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right of obligation that is claimed or arises solely under or by virtue of Part I or any order made under Part I.

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<sup>50</sup> Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809, 19 U.S.C. 3501. See generally John James Barcelo III, "The Status of WTO Rules in U.S. Law" Cornell Legal Studies Research Paper No. 06-004, online: SSRN: <<http://ssrn.com/abstract=887757>>.

<sup>51</sup> World Trade Organization Agreement Implementation Act, S.C. 1994, c. 47. See *Pfizer Inc. v. Canada (T.D.)* [1999] 4 F.C. 441, (1999), 2 C.P.R. (4th) 298. The court held that the provisions of section 3 (the purpose of the Act is to implement the Agreement) and section 8 (the Agreement is hereby approved) of the Act were not sufficient to establish that the WTO Agreement and the TRIPS Agreement had been legislated into federal law. Also, the plaintiffs were barred from commencing the present action by sections 5 and 6 of the Act which require the consent of the Attorney General. See also *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, sec.6



6. No person has any cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of the Agreement

The above means of giving effect to international law, in this instance WTO law, when extended to community law renders it potentially ineffective, or subject to variable 'force' in member states. The principle of direct effect, which is adopted in some communities, overcomes this.<sup>52</sup> Direct effect enables individuals to invoke community law before a national court.<sup>53</sup> It brings home to individuals rights created at the community level without subjecting the enforcement of those rights to varying nationally determined preconditions. It allows a national court to use community law as an independent, direct, and autonomous basis of its decision. Direct effect integrates community law into member states' legal systems by turning national courts and individuals into enforcers of community law.

This should clarify the difference between the principles of direct applicability and direct effect.<sup>54</sup> Direct applicability deals with the processes or means by which community law is implemented nationally. Direct effect deals with the legal enforceability of rights created by the laws which have become part of national law. Thus, although all directly effective laws are part of national law, not all directly applicable laws are directly effective; indeed, it is trite that not all laws are enforceable. A directly applicable law may be so vague, ambiguous, conditional, or so targeted at a particular group or issue, that a legally enforceable right cannot be founded on it. Surely, this does not mean that such a law is useless in a state. It might, for example, inform a court's interpretation of another national law, or be a basis for political agitation for reform and change.

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<sup>52</sup> *Van Gend en Loos*, *supra* note 40. Direct effect is denied by the founding treaties of some communities. See e.g. NAFTA, *supra* note 1 art. 2021. It prohibits state parties from allowing any private right of action under the treaty in national courts. It provides that 'no Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement'. See also *US-Section 301-310 of the Trade Act of 1974*, *supra* note 37 at para. 7.72. It was held that 'neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect'.

<sup>53</sup> See P.P. Craig, "Once upon a Time in the West: Direct Effect and the Federalization of EEC Law" (1992) 12 *Ox. J. L. Stud.* 453; Alan Dashwood, "The Principle of Direct Effect in European Community Law" (1977) 16 *J. Common Market Stud.* 229.

<sup>54</sup> J.A. Winter, "Direct Applicability and Direct Effect two Distinct and Different Concepts in Community Law" (1972) 9 *CML Rev.* 425.

### 2.4.2.4 Supremacy of Community Law

Community-state relations extend beyond the issues of how community law becomes part of national law, and whether community law can be enforced in national courts. An equally important issue to be taken into account in providing a legal framework to regulate community-state relations is the prospect of conflict between community and national laws. As regards public international law, states often rely on ordinary rules of statutory interpretation, such as the *lex posterior derogat priori* and *lex specialis derogat generali* principles, which rely on the nature of the conflicting laws (e.g. an Act of Parliament versus a subsidiary legislation), or constitutional provisions which declare international law as superior or subordinate in cases of conflict. States vary in their approach to resolving internal conflict of laws. And, not all approaches are or will be favourable to maintaining vertical community-state relations.

The principle of supremacy of community law overcomes this challenge to vertical community-state relations. It provides a uniform and community interest-oriented solution to conflicts between community and national law. Supremacy may be enshrined in a community's founding treaty,<sup>55</sup> or it may be judicially decreed through a teleological interpretation of the treaty.<sup>56</sup> The principle of supremacy enhances community law in that it bypasses potentially inimical national internal conflict of laws rules. It affirms the autonomy of the community legal system, ensures that the community law is not overridden by national law, and fosters a coherent community legal system.

To an extent, the principle of supremacy operates like choice of law rules in private international law; in cases of conflict, it mandates a choice of community law as the applicable

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<sup>55</sup> See e.g. EAC Treaty, *supra* note 1 art. 8(4). It provides that 'Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty'. The principle of supremacy may be relevant in the context of organizations which are not necessarily operating in the field of economic integration. See e.g. *Treaty Establishing the Organization for the Harmonisation of Business Laws in Africa*, art. 10; *Charter of the United Nations*, 26 June 1945, 1 U.N.T.S. XVI, art. 103. It may also be relevant as between the laws of organizations dealing with international trade. See e.g. NAFTA, *supra* note 1 on the supremacy of NAFTA over 'other agreements'.

<sup>56</sup> See e.g. *Flaminio Costa*, *supra* note 40 in which the European Court of Justice declared the supremacy of EC law. Alter also reports a decision of the Andean Community Tribunal which declared the supremacy of Andean Community law. See Karen J. Alter, "Delegating to International Courts: Self-Binding vs. Other Binding Delegation" (2008) 71 *Law & Contemp. Probs.* 37 at 50 in footnote 29. See generally Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001); Per Cramer "Does the Codification of the Principle of Supremacy Matter?" (2004-2005) 7 *Cambridge Yearbook Eur. Leg. Stud.* 57.

law. But, unlike in private international law, the mandate admits no exceptions or limitations. A national court cannot exclude or deny the application of community law on the grounds that it violates the forum's public policy or that it is a penal or revenue law. Thus, the principle is designed to enhance community law by moving beyond traditional private international law principles on the relations between the *lex fori* and *lex causae*.

The principle of supremacy should also be distinguished from provisions often found in the founding treaties of communities which oblige member states to ensure the conformity of their laws with community law.<sup>57</sup> In theory, such provisions are not conflict of laws resolution provisions. They could be characterized as law-implementation provisions. They look to the executive and legislature rather than the judiciary for action. Their violation will often be a breach of an international obligation remediable at the international rather than the national level. What the principle of supremacy declares is that where national law is not in conformity with community law, national courts should give preference to and apply community law.

#### **2.4.2.5 Preliminary Reference Procedure**

The application of law often entails issues of interpretation and the concomitant problem of who should be the ultimate interpreter of a particular law. For example, in some states, the interpretation of the national constitution is reserved for the Supreme Court. A lower court faced with an issue of interpretation relating to the constitution must refer that issue to the Supreme Court. International law has no such ultimate interpreter: a national court is not barred from putting its own meaning on words in an international treaty which has been implemented domestically; it has no jurisdiction nor, indeed, standing to refer interpretive problems to the International Court of Justice; and the state in which the interpretive problem has arisen cannot, on its own, request an advisory opinion from the International Court of Justice.<sup>58</sup> Extending this state of affairs to community law will imply that although national courts may give effect to community law, they can interpret it differently. Accordingly, community law will not be applied uniformly in member states.

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<sup>57</sup> See e.g. WTO Agreement, *supra* note 1 art. XVI: 4. It provides that 'each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'.

<sup>58</sup> See articles 34 and 65 of the Statute of the International Court of Justice, online: International Court of Justice <<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>>.

A preliminary reference procedure as part of the legal framework regulating community-state relations helps to overcome this challenge. In general, it is a procedure in the administration of justice which allows a lower court to seek interpretive guidance from a superior court on a point of law before making a final determination consistent with the superior court's ruling. In the context of economic integration, it unites community and national courts in an integrated system of judicial decision-making. In other words, it creates an organic or institutional link between community and national courts. The procedure provides a means through which the meaning of law is diffused into member states to be applied by their courts.

The efficacy of the procedure depends on whether or not it is mandatory, the willingness of national courts to find an interpretive problem and make a reference, the ability of a community court to influence national courts to make reference, and whether the interpretation given by a community court is binding on all national courts within the community. Within the EC, the influence of the ECJ has been achieved largely through the use of this procedure. Indeed, Richemont describes it as the 'keystone of the Communities legal structure'.<sup>59</sup> More recently, the importance of the procedure has also been demonstrated in the Andean Community.<sup>60</sup> Because the procedure relates to the jurisdiction of a community court, it has to be expressly provided for in community law.<sup>61</sup>

Another procedure for institutionalizing relations between community and national legal systems akin to the preliminary reference procedure is to allow national institutions to seek advisory opinion from community institutions, including its courts, on issues of community law.

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<sup>59</sup> Jean de Richemont, *Integration of Community Law within the Legal Systems of the Member States: Article 177 of the Treaty of Rome* (Journal des Notaires et des Avocats, 1978) at 6. Although there is near unanimity on the utility of the procedure, there is some disagreement on why the procedure is used. On this, see Clifford J. Carrubba & Lacey Murrah, "Legal Integration and the use of the Preliminary Ruling Process in the European Union" (2005) 59 Int'l Org. 399. See also Laurence R. Helfer & Karen J. Alter, "Building Judicial Supranationalism in the Andes: Understanding Preliminary Reference Patterns in the Andean Community" (2009) 41 N.Y.U. J Int'l L. & Pol. (forthcoming).

<sup>60</sup> Laurence Helfer Karen Alter & Maria Florencia Guertzovich, "Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community" (2009) 103 Am. J. Int'l L. 1.

<sup>61</sup> See e.g. EC Treaty, *supra* note 1 art. 234; COMESA Treaty, *supra* note 1 art. 30; EAC Treaty, *supra* note 1 art. 34; CARICOM Treaty, *supra* note 1 art. 214; *Treaty concerning the establishment and Statute of the Benelux Court of Justice*, 31 March 1965, 924 U.N.T.S. 13176, art. 6; *Treaty creating the Court of Justice of the Cartagena Agreement*, 28 May 1979, 18 I.L.M. 1203, art. 28-31; *Agreement between the EFTA states on the establishment of a Surveillance Authority and a Court of Justice*, [1994] O.J. L344/3, art 34 [EFTA Court Agreement].

This procedure is reflected in article 2020 of the North American Free Trade Agreement.<sup>62</sup> It provides in part:

If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a Party that any Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Parties and its Section of the Secretariat. The [Free Trade Commission] shall endeavor to agree on an appropriate response as expeditiously as possible. The Party in whose territory the court or administrative body is located shall submit any agreed interpretation of the Commission to the court or administrative body in accordance with the rules of that forum

#### **2.4.2.6 Individuals' Participation and Standing**

Historically, individuals were not considered subjects of international law; only states were. Individuals did not have standing before international courts and could not participate on their own in international decision-making. Increasingly, this is ceasing to be so; individuals are now potential subjects of international law, they have standing before international courts and can participate, singularly or collectively, in the decision-making processes of many international organizations.<sup>63</sup>

For communities which aim to strengthen their relations with member states, individuals are a particularly important medium. Admittedly, a community that envisions its subjects as only member states may not necessarily be concerned with integrating individuals into its activities. For such an 'inter-governmental' organization, there is no direct role for individuals. On the other hand, a community that envisions individuals as its subjects will have avenues to encourage and facilitate their participation in its activities. Through various means, such communities strive to enhance individuals' participation in their economic integration processes. For a community's legal system, this is important. A legal system thrives on its legitimacy. It must be legitimate in the eyes of its subjects to merit their adherence to its laws. In the context of economic integration, participation ensures the legitimacy of the community legal system. It is also a means by which the

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<sup>62</sup> See also EFTA Court Agreement, *ibid.* art. 34.

<sup>63</sup> A. Orakelashvili, "The Position of the Individual in International Law" (2001) 31 California Western Int'l L.J. 241; Mark Weston Janis, "Individuals as Subjects of International Law" (1984) 17 Cornell Int'l L.J. 61.

community and national legal systems interact with each other. The laws generated as a result of individuals' participation in the law-making processes of the community can in turn become a source of normative change within member states. For example, a finding by a community court that national law is inconsistent with community law may lead to reform, review or abolition of that national law.

International organizations have seldom made use of legislative organs whose membership is drawn directly from parliaments of member states, or elected through universal suffrage from member states. However, increasingly, community parliaments, such as the European Parliament and East African Legislative Assembly, are being used by communities to ensure people's participation in community legislative processes. Both have full legislative powers, and members of the former are elected by universal suffrage. Other community parliaments, such as the Economic Community of West African States' Parliament and the Pan-African Parliament, have only advisory roles.

Another means of participation increasingly used by communities is granting individuals standing before their respective community courts. Indeed, as a departure from the historical position in international law, a number of communities currently allow individuals to litigate directly against member states and the organizations' institutions before their community courts.<sup>64</sup> The communities vary in the preconditions to standing before the community courts, and also over what measures can be challenged. Some communities provide for unconditional and direct individual standing,<sup>65</sup> others provide standing but with the leave of the community court,<sup>66</sup> and

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<sup>64</sup> See e.g. COMESA Treaty, *supra* note 1 art. 26; EAC Treaty, *supra* note 1 art 30; Agreement Establishing the Caribbean Court of Justice, 2001, online: CARICOM <[http://www.caricom.org/jsp/secretariat/legal\\_instruments.jsp?menu=secretariat](http://www.caricom.org/jsp/secretariat/legal_instruments.jsp?menu=secretariat)>. Art. XXIV [Caribbean Court Agreement]; Statute of the Central American Court, *supra* note 36 art. 22(g). For a comprehensive list of these courts see Karen J. Alter, *The European Court's Political Power – Selected Essays* (Oxford: Oxford University Press, 2009) at 266-268.

<sup>65</sup> An example is the East African Court of Justice.

<sup>66</sup> An example is the Caribbean Court of Justice.

some require the exhaustion of local remedies before an individual can have standing in the community court.<sup>67</sup>

These preconditions to standing sometimes pose difficulties for individuals. But, from the perspective of community-state relations, they could be important. The exhaustion of local remedies rule is illustrative of this. This rule of international procedural law provides that ‘a state should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question at [the] international level’.<sup>68</sup> In other words, national mechanisms for the redress of alleged wrongs should be resorted to prior to invoking international avenues. In classical international law, the rule serves as a source of deference to states; it upholds and protects state sovereignty.<sup>69</sup>

In economic integration, the rule creates relations between a community and member states. It regulates jurisdictional interactions between national and community courts. It allows national courts to have a ‘first bite at the cherry’ in cases involving community law before the community court has the last word.<sup>70</sup> In the words of Amerasinghe, ‘national courts perform functions as agents of the international legal order...’.<sup>71</sup> Through this, national courts become engaged and familiar with community law, indeed the rule sometimes performs an educational function. Also, national courts become validated and legitimized when their decisions are ultimately upheld by a community court. It has been argued that this encourages national courts to forge a stronger bond with the community legal system.<sup>72</sup>

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<sup>67</sup> See e.g. COMESA Treaty, *supra* note 1 art. 26; Protocol to the Southern African Development Community Tribunal and Rules Thereof, 7 August 2000, art. 15(2) online: SADC <<http://www.sadc.int/index/browse/page/163>> [SADC Tribunal Protocol].

<sup>68</sup> A.A. Cancado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (New York: Cambridge University Press, 1983) at 1; *Interhandel Case: Switzerland v. United States* [1959] I.C.J. Rep. 6.

<sup>69</sup> Chittharanjan Felix Amerasinghe, *Local Remedies in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2004) at 62.

<sup>70</sup> Admittedly, given the limitation on the exhaustion of local remedies rule (See Amerasinghe, *ibid.* at 200-215), it is not always the case that national courts will have a first take on disputes in which community laws are engaged. For example, the Southern African Development Community Tribunal has recently held that, where an individual seeks an interim measure of protection pending the final determination of a dispute, the individual need not exhaust local remedies. *Mike Campbell (PVT) Limited v. Republic of Zimbabwe* [2007] SADCT 1

<sup>71</sup> Amerasinghe, *supra* note 69.

<sup>72</sup> Laurence R. Helfer & Anne-Maria Slaughter, “Towards a Theory of Effective Supranational Adjudication” 1997 Yale L.J. 273. The benefits of adopting the exhaustion of local remedies rule may be achieved through other means

### 2.4.2.7 Inter-system Jurisprudential Communication

Apart from relational principles which integrate community law into the legal systems of member states through direct implementation, a legal framework on community-state relations should also emphasize indirect ways of exchanging norms. Whilst the direct means of implementation such as direct effect and direct applicability are uni-dimensional – from community to member states – indirect means of implementation emphasizes mutual exchange. An example of an indirect means of implementation is what I characterize as inter-system jurisprudential communication. This is a process by which law flows between legal systems. Civilizations thrive on borrowing; so do legal systems. Inter-system jurisprudential communication emphasizes comparativism and should take place at both legislative and judicial levels. Inter-system jurisprudential communication strengthens the relational bond between a community and member states; both become sensitive to each other's jurisprudence. This enhances the prospect that community law will fit into or be well received in member states.<sup>73</sup>

In making community law, the community legislator or court may take as its starting point the laws of member states. It may also borrow from the jurisprudence of other communities or generally from international law. Indeed, in some instances, community law expressly enjoins reliance on national law in the resolution of disputes before community institutions.<sup>74</sup> But, even in the absence of this express mandate, the use of extra-community laws may be legally supported. The founding treaties of some communities mandate their courts to ensure that, in the interpretation and application of the treaty, 'the law is observed',<sup>75</sup> or to 'ensure adherence to

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such as a preliminary reference procedure. Another procedure, which looks more political than judicial, exists under chapter eleven of the *Olivos Protocol for the Settlement of Disputes in MECOSUR*, 18 February 2002, 42 I.L.M. 2. Under it, private claims have to be submitted to the National Chapter of the Common Market Group. If the Group is unable to find a solution, it can submit the claim to the Common Market Group for settlement.

<sup>73</sup> Koen Lenaerts, "Interlocking Legal Orders in the European Union and Comparative Law" (2003) 52 Int'l Comp. L. Q. 873 at 879-883.

<sup>74</sup> See e.g. EC Treaty, *supra* note 1 art. 288, which provides that, in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties; SADC Tribunal Protocol, *supra* note 67 art. 21(a) also provides that the Tribunal shall 'develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States'.

<sup>75</sup> See e.g. EC Treaty, *supra* note 1 art. 220.



law'.<sup>76</sup> This suggests that there is a wider legal context within which the treaty and law made under it should operate. In other words, the treaty and laws made under it are the nucleus of a more extensive legal order.<sup>77</sup> Arguably, this legitimizes resorting to general principles of law<sup>78</sup> as well as other legal principles developed in member states, other communities and international organizations.

Because of the importance of inter-system jurisprudential communication, a community should have institutional mechanisms designed to facilitate communication between it and member states. For example, the fact that judges of a community court are drawn from national courts, that representatives in a community parliament are nominated from national parliaments, and that there are institutionalized workshops and seminars which bring together community legislators and judges and their national counterparts is important in this respect. In addition to communication between a community and its member states, member states should also communicate with each other. National legislators and judges may draw on jurisprudence from other states in making laws or deciding cases.<sup>79</sup> This promotes the harmonization of laws across the community. Communication between states is enhanced if they all adhere to the same legal tradition. However, the diversity of legal traditions should not necessarily hinder it.<sup>80</sup> In summary, jurisprudential communication and mechanisms which enhance it should be key components of a legal framework designed to regulate community-state and interstate relations.

#### **2.4.2.8 Interpretive and Adjudicative Relational Principles**

Legal systems possess interpretive and adjudicative principles that allow them to take account of foreign laws in resolving disputes. Examples of these principles are the principle of consistent interpretation, choice of law, the doctrine of judicial notice and rules of evidence on foreign law. Considerations of justice, comity, effectiveness and efficiency in the administration of

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<sup>76</sup> See e.g. COMESA Treaty, *supra* note 1 art. 19; EAC Treaty, *supra* note 1 art. 23.

<sup>77</sup> Pescatore, Law of Integration, *supra* note 9 at 74.

<sup>78</sup> These include the principles of legality, good faith, legal certainty, proportionality, *res judicata*, estoppel, respect for vested rights and respect for fundamental rights.

<sup>79</sup> See generally Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).

<sup>80</sup> See e.g. *Fairchild v. Glenhaven Funeral Services Ltd.* [2003] 1 A.C. 32 especially at [23]-[27] where the House of Lords referred to materials from a number of civil law jurisdictions including Germany, France and The Netherlands, all member states of the European Union.

justice influence the use of these principles. These principles can be applied to community law to enhance its effectiveness in member states. The utility of these principles is that, compared with other modes of implementing community law such as direct applicability, the relevant community law need not already part of national law. In other words, even without direct applicability or a national statute implementing community law, it can still be used beneficially in member states.

The principle of consistent interpretation enjoins national courts to interpret national law in conformity with public international law so as to give effect to the latter.<sup>81</sup> There are constitutions and statutes that endorse this principle. For example, article 233 of the Constitution of the Republic of South Africa, 1996, provides that ‘when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’.<sup>82</sup> The absence of a constitutional or statutory endorsement of the principle is not fatal to its application. Indeed, it has been suggested that, on the whole, the application of the principle is only marginally influenced by constitutional provisions, and can be relied on by national courts in most instances.<sup>83</sup> Community law may also enjoin national courts to apply the principle of consistent interpretation.<sup>84</sup>

The principle of consistent interpretation enables courts to escape the strictures of the monist-dualist approaches to the relationship between international and national law. It can be applied by national courts under either tradition. Unlike other means for giving effect to

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<sup>81</sup> Katrine Sawyer, “The Principle of ‘*interpretation conforme*’: How far can or should National Courts go when Interpreting National Legislation Consistently with European Community Law” (2007) *Statute L. Rev.* 165; Garrit Betlem & Andre Nollkaemper, “Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Principle of Consistent Interpretation” (2003) *Eur. J. Int’l L.* 569 at 571.

<sup>82</sup> This provision was invoked to ‘give effect’ to article 11 of the *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, 1994 in *Progress Office Machines v. South African Revenue Services* 2008 (2) S.A. 13. See generally Gray S. Eisenberg “The GATT and the WTO Agreements: Comments on their Legal Applicability to the Republic of South Africa” (1993-4) 19 *South Afr. Y. B. Int’l L.* 127.

<sup>83</sup> Betlem & Nollkaemper, *supra* note 81 at 571.

<sup>84</sup> *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891. The foundation of this European Court of Justice decision is in article 10 of the EC Treaty which provides that ‘Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty’. Similar provisions are found in a number of other regional economic integration treaties. See e.g. COMESA Treaty, *supra* note 1 art. 5(1); CARICOM Treaty, *supra* note 1 art. 9; ECOWAS Treaty, *supra* note 1 art. 5(1).

community law, there is no justiciability test for the community law that is to be given effect under the principle. In other words, community law need not be of any specific quality; indeed, it is suggested that a court can look beyond ‘law’ and take account of a community’s goals and objectives. It must be noted that there are limitations on the use of the principle of consistent interpretation. Its application is contingent on the national text which is being interpreted; where there is no question of interpretation or where national law is not open to an interpretation which can be in conformity with community law, the principle cannot be applied.

National courts may take judicial notice of the existence of a community, its objectives and goals or particular community laws.<sup>85</sup> These may be treated as a fact which needs not be proved.<sup>86</sup> In other words, the failure of a party to plead them should not prevent the court from taking account of them and allowing them to influence the courts’ decisions. Also, unlike the way common law courts treat foreign law, the meaning, effect and proof of community law can be deemed questions of law, and, accordingly, a party need not prove it with expert evidence. This will reduce litigation costs and enhance the prospect of individuals relying on community law. In summary, what is being argued here is that a court can, subject to limitations imposed by national law, remedy the ignorance of counsel or a party about the possibilities that community law, goals and objectives offer to its case.

It is also possible for courts to apply community law as the applicable law if parties have so chosen. To be sure, this presumes the existence of a body of substantive community law on the issue and a judicial philosophy which upholds party autonomy. In such an instance the relevant community law need not have been implemented in national law.<sup>87</sup> For example, with a view to enhancing intra-community trade, a community can adopt a set of principles on contract law which are not directly applicable and which member states need not incorporate into their national laws.

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<sup>85</sup> See generally, United Kingdom: *European Communities Act*, 1972, c. 68, sec. 3.

<sup>86</sup> Under public international law, national laws are treated as facts before international tribunals. Contrary to what is being proposed here, an international tribunal will not take judicial notice of national laws. They must be proved like any other facts. See *German Interests in Polish Upper Silesia*, PCIJ Ser. A No. 7 (1926) at 19; Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003) at 38-40; Sharif Bhuiyan, *National Law in WTO Law – Effectiveness and Good Governance in the World Trading System* (Cambridge: Cambridge University Press 2007) at 207-243.

<sup>87</sup> This possibility may be constrained by the fact that the national court may view it as an attempt to bypass national treaty incorporation procedures which are often constitutionally mandated.

These principles can be chosen by individuals as the applicable law of their contracts, and have that choice respected by the courts.

#### **2.4.2.9 Recognition and Enforcement of Foreign Normative Acts**

The phrase ‘normative act’ is used here to cover judicial decisions, laws, and administrative and executive acts which produce legal consequences. The recognition and enforcement of foreign normative acts, a key aspect of private international law, is a means through which legal systems interact. In economic integration, the recognition and enforcement of state and community normative acts facilitate their effective implementation and enhances cross-border economic transactions. Accordingly, a regime for the recognition and enforcement of foreign normative acts should be a key part of a community’s legal framework on community-state as well as interstate relations. Indeed, as Professor Casad has observed, ‘an effective scheme for the mutual recognition and enforcement of civil judgments’ is a feature of any economic integration initiative ‘likely to achieve significant integration’.<sup>88</sup>

Already, many states have regimes regulating the recognition and enforcement of foreign normative acts. These regimes are often imbued with discretionary elements, may be founded on reciprocity, and may exclude certain normative acts from recognition and enforcement. For example, in common law countries, the courts will not apply foreign revenue, penal or other public law. Also, aside from the many defences available to a judgment-debtor, there is no automatic right to have a foreign judgment recognized and enforced. Where statutes exist to regulate foreign judgment enforcement, they may be founded on reciprocity and only a few community member states may be designated. It is also important to note that state regimes on the recognition and enforcement of foreign normative acts have often been developed for normative acts emanating from other states. Accordingly, their extension to community normative acts, such as community court judgments, may be problematic. All these can pose difficulty for the free circulation of normative acts within a community and concomitantly adversely affect economic transactions. Accordingly, a legal framework to regulate relational issues in integration should pay attention to the regimes for the recognition and enforcement of normative acts which exist in the member

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<sup>88</sup> Robert C. Casad, “Civil Judgment Recognition and the Integration of Multi-state Associations: A Comparative Study” (1980-1981) 4 *Hasting Int’l & Comp. L. Rev.* 1.

states. Indeed, some communities have developed or encouraged schemes<sup>89</sup> or principles aimed at ensuring the free circulation of normative acts.<sup>90</sup>

## **2.5 RELATIONAL PRINCIPLES – FEATURES, INTER-RELATIONS AND THE IMPORTANCE OF CONTEXT**

### **2.5.1 Introduction**

In the preceding sections, I have argued that a fundamental challenge for economic integration is structuring and managing relations between states, laws, legal systems and institutions. It has been suggested that, in structuring these relations, a legal framework is needed. Various principles and mechanisms that should be part of this framework have been discussed. Admittedly, the principles and mechanisms discussed above are all legal in nature. This is not meant to deny or underplay the importance of ‘non-legal’ factors that serve to strengthen community-state and interstate relations. Examples of these factors are education and awareness creation about the work of a community, a commitment to common values and the degree of socio-cultural and ethnic homogeneity of a community’s citizens. Ignorance and socio-cultural diversity engender a sense of alienation and indifference which can weaken community-state and interstate relations.<sup>91</sup> This section assesses the features and relationships between relational principles, and the importance of the socio-cultural and political context within they operate.

### **2.5.2 Features and Interrelationships**

A defining feature of relational principles is that they intrude into national legal systems and could potentially be construed as eroding sovereignty. The extent of intrusion will vary from country to country. For example, a number of states, especially of the civil law tradition, have already made international law part of their law, granted it precedence over conflicting national laws, and allowed courts to directly apply it.<sup>92</sup> For such countries, direct applicability, direct effect

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<sup>89</sup> See e.g. the EC, *Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, [2001] O. J. L 012/1; CARICOM Treaty, *supra* note 1 art. 223; EAA Agreement, *supra* note 1 art. 110.

<sup>90</sup> An example of this is the principle of mutual recognition which operates within the EC.

<sup>91</sup> See generally Ronald Inglehart, “Public Opinion and Regional Integration” (1970) 24 Int’l Org. 764.

<sup>92</sup> See generally Andre Nollkaemper, “The Direct Effect of Public International Law” in J.M. Prinssen & C. Schrauwen eds., *Direct Effect Rethinking a Classic of EC Legal Doctrines* (Groningen, Europa Law Publishing, 2002) at 166-169. Chapter Seven of this thesis surveys the law on this subject in Africa.

and supremacy may not be entirely unfamiliar principles. Also, in some common law countries, customary international law is often considered as being automatically part of national law. But, it must be admitted that community law will hardly ever qualify as customary international law. Also, many countries have procedures akin to the preliminary reference procedure which allows lower courts to seek interpretive guidance from superior courts on defined points of law. From a private international law perspective, the principles of direct applicability, direct effect and supremacy have some affinity with how foreign law is treated in states. Courts allow parties to found claims on foreign laws (direct effect). These laws need not be, indeed are not, implemented domestically (directly applicable), and, in some instances, the court may give effect to a foreign law even though it is inconsistent with a substantive law of the forum (supremacy). In other words, in almost all states within a community, there will be principles and procedures akin to some of the relational principles discussed above. The existence of these pre-existing national principles and procedures can be deployed as analogies in invoking relational principles in states.

A careful look at relational principles also reveals that some contain elements of deference to states. For example, with direct effect, the enforcement of community laws begins and potentially ends at the national level. A state is not dragged, at the first instance, to a community forum for its breaches of community laws to be 'exposed'. The exhaustion of local remedies rule contains a similar deferential element. The same case can be made for the principle of supremacy of community law. Its effect is to compel the disapplication and not the abrogation of the national law to the issue at stake. The national law remains intact and could be applied to cases falling outside the scope of the relevant community law, as for example in cases involving non-member states of a community. A state may decide, in the light of the conflict, to amend the affected law, but in principle, the principle of supremacy of community law does not require that. Furthermore, direct effect and direct applicability need not be extended to all community laws; some community law may be in a form that allows member states to implement it in a manner appropriate to them without defeating community objectives.

At the community level, the adoption of principles such as supremacy and direct applicability suggests the need for attention to detail and sensitivity in law-making. This is necessary to ensure the smooth integration of community law into national law. This is especially important in a community in which member states belong to different legal traditions. In other words, the intrusiveness of relational principles can be mitigated by attention to national exigencies

in the community law-making creation processes. Indeed, inter-system jurisprudential communication and the participation of individuals in a community's lawmaking processes can be helpful in achieving this.

Another important feature of relational principles is their interconnectedness. Often, one cannot be effectively deployed without its complement. For example, the principles of direct effect and supremacy are 'tightly connected'.<sup>93</sup> The principles of direct applicability and supremacy create favourable conditions for the effective operation of direct effect. The enforcement of rights created by a community becomes illusory if a conflicting national law prevailed. Similarly, direct effect and the preliminary reference procedure create a trilateral relationship among individuals, national courts and the community court for the effective enforcement of community law. A legal framework to regulate community state relations must pay attention to the interconnectedness of these principles.

### **2.5.3 Importance of Context**

The social-matrix within which a legal system operates is as important as its substantive contents. Socio-cultural, economic and political conditions affect the extent to which relational principles can be effectively adopted or made to operate within a community and its member states. Indeed, they condition the extent to which states will be receptive to community law and normative acts of other member states. Merely providing for relational principles in treaties – as has been done in the founding treaties of many communities, often with inspiration from Europe – will not guarantee their use or effectiveness.

Indeed, to date, it appears that it is only within the EC that many of the relational principles operate most effectively. A recent study on the Andean Community by Helfer, Alter and Guerzovich suggests that whilst the overall experiment of economic integration may be judged unsuccessful, the use of some relational principles can enhance integration on specific subject matters.<sup>94</sup> Arguably, apart from the EC, communities, including those in Africa, that have adopted

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<sup>93</sup> Weiler, Dual Character of Supranationalism *supra* note 16 at 276; Cornelia Koch, "The Doctrine of Supremacy of European Community Law as a Condition Precedent for the Doctrine of Direct Effect" (2005) 9 Int'l Trade & Bus. L. Rev. 201.

<sup>94</sup> *Supra* note 60. This work explores how, despite the difficult legal, political and economic conditions that prevail within the member states of the Andean Community, the Andean Court of Justice has effectively used the preliminary reference procedure to construct an effective intellectual property rights regime within the community.

relational principles in their founding treaties are at an early stage of development. For the African communities, an appreciable body of community law and case law has yet to emerge. It is too early to make a detailed and objective assessment of the success or otherwise of the principles adopted by them. As revealed in this thesis, the obstacles to their effective implementation are many. However, the Helfer, Alter and Guerzovich study suggests that these principles, or at least some of them, can be made to work outside Europe.

The architecture of national legal systems as well as domestic institutional and socio-cultural features affects the extent to which community and national legal systems can be integrated. Neither the fact that relational principles contain elements of deference to states nor that they are complementary imply that they will be adopted wholesale or that their application will not meet resistance at the national level. Resistance could be the result of existing socio-cultural and political conditions in member states.<sup>95</sup> A country's legal system is part of its cultural heritage. It is an aspect of the state's social life and may be resistant to outside 'intrusions'. For example, studies have shown that, within the European Community, the effective implementation of community law is inextricably linked with social and cultural processes within member states.<sup>96</sup> In the words of Wallace, 'legal culture constitutes a significant factor in the process of European integration'.<sup>97</sup> More recently, Biukovic has demonstrated the importance of local practices and cultural norms in Japanese and Chinese compliance with WTO norms.<sup>98</sup>

Indeed, legal culture – the assemblage of a society's attitudes, perceptions and ways of dealing with the law – may influence the extent to which states comply with community law or become legally integrated. A culture that favours respect for the rule of law and international law, emphasizes litigation and the pro-active use of law as an instrument of change and development, is endowed with an activist and independent judiciary and lawyers with international perspectives,

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<sup>95</sup> Another avenue of resistance could be in the existing national laws especially the constitutions – the supreme law of the land. This issue is discussed in greater detail in chapter seven of this thesis.

<sup>96</sup> See Imelda Maher, "Community Law in the National Legal System: A Systems Analysis" (1998) 36 J. Common Market Stud. 237; Imelda Maher, "Limitations on Community Regulation in the UK: Legal Culture and Multi-level Governance" (1996) 3 J. Eur. Pub. Policy 577; Chloe J. Wallace, "European Integration and Legal Culture: Indirect Sex Discrimination in the French Legal System" (1999) 19 Legal Stud. 397.

<sup>97</sup> *Ibid.* at 413.

<sup>98</sup> Ljiljana Biukovic, "Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan" (2008) 11 J. Int'l Econ. L. 803. See also Ljiljana Biukovic, "Compliance with International Treaties: Selective Adaptation Analysis" (2006) 44 Can. Y.B. Int'l L. 451.



and is possessed of national actors and forces interested in the integration process, is more likely to favour the effective integration of community law into member states for the achievement of the objectives of a community.<sup>99</sup>

## 2.6 CONCLUSION

Relational issues are an endemic challenge in economic integration. How they are approached affects the effectiveness of the integration process, especially as regards the implementation of community law. There have been varying responses from communities to this challenge. It has been noted that, in meeting the challenge, communities have deployed various relational principles and mechanisms. These principles and mechanisms often depart from the traditional private and public international law modes of giving effect to foreign and international law. At first sight, relational principles and mechanisms appear very intrusive of national legal systems. But, it has been noted that they also contain elements of deference to states. The effective deployment of these principles and mechanisms demand constitutional accommodation in member states. It requires a rethink of existing national laws and procedures, and the legislature, judiciary and executive have a crucial role to play in this regard. In addition, there are various socio-cultural, economic and political factors that may affect the effective use of relational principles in regulating community-state relations.

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<sup>99</sup> See Karen J. Alter, “Jurist Advocacy Movements in Europe and the Andes: How Lawyers help Promote International Legal Integration” (Center on Law and Globalization Research Paper No. 08-05, 2008). Karen J. Alter, *The European Court’s Political Power – Selected Essays* (Oxford: Oxford University Press, 2009) at 63-91.

## CHAPTER THREE: THE AU, AEC AND REGIONAL ECONOMIC COMMUNITIES: A COMPLEX WEB OF LEGAL RELATIONS

### 3.1 INTRODUCTION

Africa is awash with regional economic communities (RECs). Indeed, as far back as 1976, Ajomo picturesquely described the ‘mercurial proliferation and disappearance’ of regional economic institutions in Africa.<sup>1</sup> For political, economic and strategic reasons many countries belong to more than one REC. The multiplicity of RECs and the concomitant multiple state memberships have created a complex patchwork that complicates decision-making for states, community officials, individuals and businesses. In what is, to date, the only detailed continent-wide empirical study into the effect of the twin phenomena of many RECs and multiple memberships, the United Nations Economic Commission for Africa (UNECA) concluded that the phenomena impact negatively on the achievement of the goals of the African Economic Community (AEC).<sup>2</sup> In June 2009, some member states could not join the newly formed COMESA customs union due to the fact they belonged to other RECs. The phenomena also impact negatively on Africa’s international trade relations. In the recent European Union led Economic Partnership Agreements negotiations, countries in Eastern and Southern Africa – the regions where the phenomena are most prevalent – had to form new regional groupings for the purposes of the negotiations.<sup>3</sup>

Against this background, a fundamental issue with Africa’s economic integration is the relationship between the African Union (AU), RECs and AEC. This is a complex question. But, so far, it has not received any systematic examination in the discourse on Africa’s economic integration.<sup>4</sup> Finding answers to it and clarifying the relationship are important for the success of economic integration in Africa.

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<sup>1</sup> M.A. Ajomo, “Regional Economic Organisations: The African Experience” (1976) 25 Int’l & Comp. L. Q. 59 at 101.

<sup>2</sup> United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa II - Rationalizing Regional Economic Communities* (Addis Ababa, UNECA, 2006) [UNECA, *Rationalizing Regional Economic Communities*]. See also Cord Jakobeit *et al.*, *Overlapping Membership in COMESA, EAC, SACU and SADC: Trade Policy Options for the Region and for EPA Negotiations* (Eschborn: GTZ, 2005).

<sup>3</sup> Cord Jakobeit, *ibid.*

<sup>4</sup> But see Richard Frimpong Oppong, “The AU, African Economic Community and Africa’s Regional Economic Communities: Untangling a Complex Web of Legal Relations” (2009) 17 Afr. J. Int’l & Comp. L. (forthcoming). Senghor’s commentary on the processes leading to the formation of the AEC suggests that there were some

The proliferation of RECs in Africa is part of a wider international phenomenon, the proliferation or increased density of international institutions. Against the background of this phenomenon, scholars have recently begun to discuss in great detail theories on ‘regime complexes’<sup>5</sup> or ‘international regime complexity’.<sup>6</sup> A regime complex is an ‘array of partially overlapping and non-hierarchical institutions governing a particular issue-area’.<sup>7</sup> The components of a regime complex are the ‘elemental regimes’.<sup>8</sup> International regime complexity refers to the presence of nested, partially-overlapping, and parallel international regimes that are not hierarchically ordered.<sup>9</sup> International regime complexity empowers and dis-empowers.<sup>10</sup> It may work to the advantage of certain groups by providing opportunities for ‘forum shopping’ and arbitration.<sup>11</sup> It may also disadvantage certain states or groups, such as on the basis of the sheer volume of information that has to be processed from the various regimes.

Studies on regime complexes help in understanding the relations between the many RECs in Africa. These RECs are non-hierarchical regimes with overlapping membership and jurisdiction. However, in terms of the focus of this chapter, there is one limitation in the studies I have so far examined which is worth pointing out to avoid a misreading. The existing studies have focused mainly on the evolution and interactions between rules or norms generated by elemental regimes of a regime complex. However, this chapter focuses principally on the institutional aspects of the co-existence of elemental regimes. In other words, the focus is mainly on institutions, not the norms generated by the institutions. Specifically, the chapter addresses the issue: how do the RECs as regional institutions relate to each other and with the AU and AEC? Also, the issues discussed in

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discussions on this question. Indeed, he suggests that the relationship between the OAU and the AEC was a theme of special study by experts. Arguably, the existing legal framework does not suggest that the question was thoroughly addressed. See Jeggan Senghor, “The Treaty establishing the African Economic Community: An Introductory Essay” (1993) 1 Afr. Y.B. Int’l L. 183.

<sup>5</sup> Kal Raustiala & David G. Victor, “The Regime Complex for Plant Genetic Resources” (2004) 58 Int’l Org. 277.

<sup>6</sup> Karen J. Alter & Sophie Meunier, “The Politics of International Regime Complexity” (2009) 7:1 Perspectives on Politics 13

<sup>7</sup> Raustiala & Victor, *supra* note 5 at 279.

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

<sup>9</sup> Alter & Meunier, *supra* note 6.

<sup>10</sup> Daniel W. Drezner, “The Power and Peril of International Regime Complexity” (2009) 7:1 Perspectives on Politics 65.

<sup>11</sup> Raustiala & Victor, *supra* note 5 at 280, 299-300.

this chapter arise largely from the specific and apparently unique character of institutional density on economic integration in Africa. That is, the RECs ostensibly operate under an umbrella regime, the AEC, and their activities should be geared towards the realization of one objective, the creation of an African Economic Community. Thus, unlike other complex regimes, what exists in Africa is a complex regime on economic integration consisting of many elemental regimes (the RECs) and an umbrella regime (the AEC) all working towards a common and singular treaty mandated vision.

### **3.2 THE EXISTING REGULATORY LEGAL FRAMEWORK**

International regime complexity on many issues, such as intellectual property protection, human rights, international security and environment do not have an overarching or umbrella regime that regulates the multiple regimes dealing with the particular issue. Arguably, as regards international trade in goods and services and regional trade agreements, an overarching regime apparently exists in the World Trade Organization (WTO).<sup>12</sup> WTO law provides the legal foundation for regional trade agreements on goods and services. The WTO has mechanisms for notifying such agreements, reviewing them and for monitoring their compliance with WTO law. Such mechanisms do not affect the non-hierarchical nature of regional trade agreements. But, the mechanisms could have ensured a measure of co-ordination and harmonization among them through their compliance with a higher norm - WTO law. However, as scholars have noted, the mechanisms are ill-equipped and ineffective, and the powers of enforcement and review have not been exercised rigorously.<sup>13</sup>

Unlike with the WTO and regional trade agreements, international regime complexity on economic integration in Africa benefits from an umbrella regime, the AEC, and a modest regulatory framework under the Protocol on Relations between the African Union and the Regional Economic Communities [Protocol on Relations].<sup>14</sup> The framework aims at harmonizing

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<sup>12</sup> *General Agreement on Tariffs and Trade*, art. XXIV; *General Agreement on Trade in Services*, 15 April 1994, 33 I.L.M. 46, art. V; *Decision on Differential and more Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, 28 November 1979, GATT B.I.S.D (1980), 203, paragraph 2(c)

<sup>13</sup> Youri Devuyt & Asja Serdarevic, "The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Gap" (2007-2008) 18 *Duke Int'l & Comp. L.J.* 1

<sup>14</sup> July 2007, (2010) 18 *Afr. J. Int'l & Comp. L.* (forthcoming) [Protocol on Relations]. This protocol replaces the *Protocol on Relations between the African Economic Community and the Regional Economic Communities*, 25 February 1998, (1998) 10 *Afr. J. Int'l & Comp. L.* 157.

and co-ordinating the activities of the RECs.<sup>15</sup> This is important since, unlike regional trade agreements established with the imprimatur of the WTO, the aim of Africa's RECs is to evolve and ultimately be absorbed into the African Economic Community.<sup>16</sup> The Protocol on Relations aims to formalize, consolidate and promote close co-operation among the RECs, and between them and the AU through the co-ordination and harmonization of their policies, measures, programmes and activities in all fields and sectors.<sup>17</sup> Another object of the protocol is to establish a framework for co-ordinating the activities of RECs in their contribution to the realization of the objectives of the Constitutive Act of the African Union<sup>18</sup> and the AEC Treaty.<sup>19</sup>

To ensure the realization of these objectives, the parties to the protocol, namely the AU and the RECs, have undertaken to co-operate and co-ordinate the policies and programmes of the RECs with those of the AU.<sup>20</sup> Specifically, the RECs have undertaken to establish an organic link with the AU with a view to strengthening their relations with the AU and provide for their eventual absorption into the African Common Market as a prelude to the African Economic Community.<sup>21</sup> To enhance cooperation among the RECs, there are also provisions mandating or advocating entering into co-operation arrangements,<sup>22</sup> and participation in each other's meetings.<sup>23</sup> The RECs and the AU can attend and participate in, without voting rights, each other's meetings.<sup>24</sup> The Protocol of Relations establishes the Committee on Co-ordination and the Committee of Secretariat Officials as the institutions responsible for ensuring the co-ordination of policies and

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<sup>15</sup> Protocol of Relations, *ibid.* at 3(a)(b).

<sup>16</sup> *Treaty establishing the African Economic Community*, 3 June 1991, 30 I.L.M. 1241, art. 88(1) [AEC Treaty].

<sup>17</sup> Protocol of Relations, *supra* note 14 art. 3(a).

<sup>18</sup> 11 July 2000, (2005) 13 Afr. J. Int'l & Comp. L. 25.

<sup>19</sup> Protocol on Relations, *supra* note 14 art. 3(b).

<sup>20</sup> *Ibid.* art. 4(a).

<sup>21</sup> *Ibid.* art. 5.

<sup>22</sup> *Ibid.* art. 15(1).

<sup>23</sup> *Ibid.* art. 16(1).

<sup>24</sup> *Ibid.* arts. 17 and 19.

activities of the RECs and the implementation of the protocol.<sup>25</sup> The AU is also expected to open a liaison office at the Headquarters of each REC.<sup>26</sup>

The regulatory framework under the Protocol on Relations is complemented by provisions in the treaties founding the RECs dealing with their relations with other RECs and the AEC. For example, the EAC Treaty provides that the member states ‘shall foster co-operative arrangements with other regional and international organisations whose activities have a bearing on the objectives of the Community’.<sup>27</sup> The COMESA Treaty also allows the organization to ‘enter into co-operation agreements with other regional communities’.<sup>28</sup> A similarly worded provision is contained in the ECOWAS Treaty.<sup>29</sup> Obviously, these provisions are empowering, and some RECs have relied on them to establish co-operation arrangements with other RECs.

The first and perhaps the most historic was the COMESA-EAC-SADC Tripartite Summit of Heads of State and Government held in Kampala, Uganda in October 2008 under the theme: *Deepening COMESA-EAC-SADC Integration*. In a joint communiqué issued after the summit,<sup>30</sup> it was noted that the Heads of State and Government reviewed the activities of the three RECs, agreed on a programme of harmonization of their activities, and expressed their resolve to co-operate in the future. It was also resolved that the three RECs should immediately start working towards a merger into a single REC with the objective of fast tracking the attainment of the African Economic Community. A taskforce was set up to design a roadmap for this merger.<sup>31</sup> The Heads of State and Government also approved the expeditious establishment of a free trade area

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<sup>25</sup> *Ibid.* arts. 6-10.

<sup>26</sup> *Ibid.* art. 21.

<sup>27</sup> *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 U.N.T.S. I-37437, art. 130(3) [EAC Treaty].

<sup>28</sup> *Treaty establishing the Common Market for Eastern and Southern Africa*, 5 November 1993, 33 I.L.M. 1067, art. 179(1) [COMESA Treaty].

<sup>29</sup> *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, 35 I.L.M. 660, (1996) 8 Afr. J. Int'l & Comp. L. 187, art. 79(1) [ECOWAS Treaty]. The *Treaty of the Southern African Development Community*, 17 August 1992, 32 I.L.M. 120 contains little detail on its relations with the AEC apart from a reference to the AEC in its preamble and a general reference to co-operation with regional and international organizations in article 24.

<sup>30</sup> See Final Communiqué of the COMESA-EAC-SADC Tripartite Summit of Heads of State and Government, 22 October 2008, Kampala Uganda  
[http://www.tralac.org/cause\\_data/images/1694/FinalCommuniqueKampala\\_20081022.pdf](http://www.tralac.org/cause_data/images/1694/FinalCommuniqueKampala_20081022.pdf)

<sup>31</sup> *Ibid.* at [13].

encompassing the member states of the three RECs with the ultimate aim of establishing a single Customs Union.<sup>32</sup> In line with a mandate from the Heads of State and Government, a Memorandum of Understanding on Interregional Co-operation and Integration has been signed among the three RECs.

As regards relations with the AEC, the founding treaties of the RECs acknowledge the existence of the AEC and undertake to facilitate its goals.<sup>33</sup> However, they do not provide much detail on how and what form their relations with the AEC are or should be. The COMESA Treaty, the most detailed as far as this issue is concerned, affirms that its ultimate objective is to facilitate implementation of the AEC Treaty.<sup>34</sup> It enjoins member states to implement the provisions of the COMESA Treaty with due consideration to the provisions of the AEC Treaty,<sup>35</sup> and convert the organization, at a time to be agreed between it and the AEC, into an organic entity of the African Economic Community.<sup>36</sup> It enjoins the Secretary General of the Community to co-ordinate the activities of COMESA with the AEC and report regularly to the Council of Ministers.<sup>37</sup> Indeed, in the preamble to the COMESA Treaty, the foundation of COMESA is traced to article 28(1) of the AEC Treaty which called for the strengthening and creation of RECs as the first stage in the evolution of the African Economic Community. Also, ‘the establishment, progress and the realisation of the objectives of the African Economic Community’ are stated as the aims and objectives of COMESA.<sup>38</sup> These very generous provisions demonstrate a level of attention to problems of the relations between the AEC and COMESA. Admittedly, they still leave many hard issues unresolved. But, compared with other RECs, they are an advance. In the EAC Treaty, the EAC is described as ‘a step towards’ the achievement of the objectives of the AEC Treaty.<sup>39</sup> In the ECOWAS Treaty, members undertake to facilitate ‘the co-ordination and harmonization’ of the

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<sup>32</sup> *Ibid.* at [14].

<sup>33</sup> ECOWAS Treaty, *supra* note 29 art. 78; EAC Treaty, *supra* note 27 art. 130(2)(3); COMESA Treaty, *supra* note 28 art. 3(f).

<sup>34</sup> COMESA Treaty, *ibid.* art. 178(1).

<sup>35</sup> *Ibid.* art. 178(1)(b).

<sup>36</sup> *Ibid.* art. 178(1)(b).

<sup>37</sup> *Ibid.* art. 178(2).

<sup>38</sup> *Ibid.* art. 3(f).

<sup>39</sup> EAC Treaty, *supra* note 27 art. 130(2).

community's policies and programmes with those of the AEC.<sup>40</sup> However, none of the treaties provide concrete details on its relations with the AEC. In other words, they do not address specific issues such as: the legal nature of their relations with the AEC; whether they are bound by decisions of the AEC; and whether AEC law will prevail over their law in cases of conflict.

The above framework for regulating relations among the RECs as well as their relations with the AEC is short on detail and leaves many issues unaddressed. The next section discusses some of these issues and argues that, unless addressed, they could undermine the effectiveness of Africa's economic integration.

### **3.3 UNADDRESSED INTER-COMMUNITY RELATIONAL ISSUES**

#### **3.3.1 Legal Status: RECs within the AEC, AEC within the AU**

Perhaps, one of the greatest mysteries about Africa's economic integration is the legal status of the RECs within the AEC, and the AEC within the AU. The treaties do not shed much light on the issue and academic commentary on it is largely non-existent.<sup>41</sup> The starting point to unravelling this mystery, if it can be done at all, is the idea of legal personality.<sup>42</sup> All the RECs are endowed with legal personality in their founding treaties.<sup>43</sup> Although the AEC Treaty does not expressly say so, the legal personality of the AEC can be inferred from article 98(2), which provides that, in his capacity as the legal representative of the community, the Secretary-General may, on behalf of the community, enter into contracts and be a party to judicial and other legal proceedings. The Constitutive Act of the African Union [Constitutive Act]<sup>44</sup> is silent on the legal personality of the AU. This may, however, be explained by the fact that, under the General

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<sup>40</sup> ECOWAS Treaty, *supra* note 29 art. 78.

<sup>41</sup> M.A. Ajomo, "International Legal Status of the African Economic Community" in M.A. Ajomo & Omobolaji Adewale eds., *African Economic Community Treaty: Issues, Problems and Prospects* (Lagos: Institute of Advanced Legal Studies, 1993) at 40.

<sup>42</sup> See generally C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed (Cambridge: Cambridge University Press, 2005) at 66-104.

<sup>43</sup> COMESA Treaty, *supra* 28 art. 186(1); EAC Treaty, *supra* note 27 art. 138(1); ECOWAS Treaty, *supra* 29 art. 88(1).

<sup>44</sup> *Supra* note 18.



Convention on Privileges and Immunities of the Organization of African Union, the OAU (now AU) possesses ‘juridical personality’.<sup>45</sup>

With these provisions, the legal separateness of the RECs, AEC and AU is established in international law. Accordingly, the legal status of one within the other should be defined by agreement to which both are parties, or, at least, in some definite and binding agreement. As regards the AEC and the AU, the AEC Treaty is very clear that the AEC is an ‘integral part’ of the AU.<sup>46</sup> The Constitutive Act further provides that its provisions take precedence over and supersede any inconsistent or contrary provisions of the AEC Treaty.<sup>47</sup> If one envisions the AU as a political and umbrella organization championing the course of Africa unity – social, cultural, political and economic – then the AEC is that part of the AU solely devoted to the issue of economic integration. In other words, it is the economic leg of the AU. Comparatively, the relationship between the AEC and the AU is akin to that between the European Community (EC) and the European Union (EU). But, it must be admitted that even the relationship between the EC and EU is not without difficulty.<sup>48</sup>

A difficult issue concerning the idea of the AEC as an integral part of the AU is how the idea appears to have been interpreted and applied. Like many words, ‘integral’ has multiple meanings. To the extent relevant here, the word describes component parts which, together, constitute a unity. It emphasizes divisibility, separateness and unity at the same time. As regards the relations between the AEC and the AU, it seems unity has been overemphasized and this has led to the complete or near complete loss of the separateness or distinct identity of the AEC. Laws and policies dealing with AEC-related issues are adopted by the AU instead of the AEC.<sup>49</sup> Also, as will be discussed in Chapter Six, institutions of the AU, have been co-opted to perform the functions of institutions of the AEC. But, there has neither been a clear separation of mandates nor examination

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<sup>45</sup> *General Convention on Privileges and Immunities of the Organization of African Union*, 25 October 1965, online: African Union <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>>.

<sup>46</sup> AEC Treaty, *supra* note 16 art. 98(1).

<sup>47</sup> *Ibid.* art. 33(2).

<sup>48</sup> Werner Schroeder, “European Union and European Communities” (Jean Monnet Working Paper 9/03).

<sup>49</sup> See e.g. Protocol on Relations, *supra* note 14 (which should in principle have nothing to do with the AU but is misleadingly titled as such and signed ‘for the AU’ not the AEC). Compare Protocol on Relations between the African Economic Community and the Regional Economic Communities, *supra* note 14 (which was signed by the AEC).

of whether, as designed, the AU institutions are equipped to manage effectively the economic integration agenda.

An equally difficult issue is the legal status of the RECs within the AEC. Although the AEC Treaty contains over twenty references to ‘regional economic communities’, and provides that the African Economic Community shall be established through the co-ordination, harmonization and progressive integration of the activities of the RECs, and imposes many duties with exact timelines on them, there is not a single provision on the status of the RECs within the AEC. Are they mere institutional observers within the AEC? Are they its organs, members, agents or subjects? Commentators on Africa’s integration have assumed, and rightly so, that the RECs are the building blocks of the AEC. But, so far, none has investigated this important issue. The Protocol on Relations does not address this issue either.<sup>50</sup> It is an issue of both theoretical and practical importance. For example, it is legally difficult to suggest that a REC is bound by decisions of the AEC<sup>51</sup> unless one is able to prove that the former is an organ, member, agent or subject of the latter.

The AEC Treaty does not set out a membership criterion, but it is implicit in article 2 that states which are parties to the treaty are the members of the AEC. There is no provision limiting membership of the AEC only to states.<sup>52</sup> However, membership of an international organization cannot be inferred; there must be a conscious act on the part of a prospective member to become a member of an international organization and an acceptance of its membership application by the organization.<sup>53</sup> In the absence of a definite agreement to that effect, it cannot be suggested that the RECs are members of the AEC. Nor, can it be argued that the RECs are organs of the AEC; article 7 of the AEC Treaty clearly does not mention them.<sup>54</sup> It can, however, be argued that, from a

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<sup>50</sup> Articles 18 and 20 deal with the status of the RECs at AU meetings and the status of the AU at the RECs meetings respectively.

<sup>51</sup> See AEC Treaty, *supra* note 16 arts. 10(2) and 13(2).

<sup>52</sup> There are international organizations that allow other international organizations to become members. See e.g. *Statute of The Hague Conference of International Law*, art. 3; *Marrakesh Agreement Establishing the World Trade Organisation*, art. XII; *Constitution of the Food and Agriculture Organisation of the United Nations*, art. II.

<sup>53</sup> Amerasinghe, *supra* note 42 at 104-114.

<sup>54</sup> It provides that the organs of the Community shall be the: Assembly of Heads of State and Government; Council of Ministers; Pan-African Parliament; Economic and Social Commission; Court of Justice; General Secretariat; and Specialised Technical Committees.

purposive reading of the AEC Treaty, to which the RECs are not parties and the Protocol on Relations, to which they are parties, the RECs are subjects of the AEC. They are also agents of the AEC with a mandate to work towards the realization of the African Economic Community.

### 3.3.2 The Future Merger of the Regional Economic Communities

As noted in Chapter One, the foundation of the AEC is the RECs; progress by the RECs is one step closer to the African Economic Community. This unique and hitherto unexplored approach to forming the African Economic Community raises numerous legal challenges. The size of the AEC makes the approach of using RECs as its building blocks almost inevitable. But this approach comes at a price. For example, a recent UNECA study suggests that there is often tension between member states' commitment to the goals of the RECs and those of the AEC.<sup>55</sup> Also, concurrent membership of RECs creates tension among member states and between the RECs.<sup>56</sup>

The RECs are ultimately expected to merge or be 'absorbed'<sup>57</sup> to form the African Economic Community. Under article 88(1) of the AEC Treaty, the African Economic Community 'shall be established mainly through the co-ordination, harmonization and progressive integration of the activities of [RECs]'.<sup>58</sup> The simplicity of this provision masks the complexity of the engagement of merging or absorbing international organizations such as RECs. Firstly, it is a unique and quite complicated approach to economic integration. To my knowledge, it has not been experimented with anywhere else. Usually, countries form economic communities – free trade areas, customs union, economic unions, or complete economic integration. Indeed, to date, it appears the only known case of a successful 'merger' of RECs has been the merger of the European Community with the European Free Trade Area to form the European Economic Area.<sup>59</sup> A more recent attempt is the Union of South American Nations<sup>60</sup> which is a continent-wide free-

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<sup>55</sup> UNECA, Rationalizing Regional Economic Communities, *supra* note 2.

<sup>56</sup> *Ibid.*

<sup>57</sup> Protocol on Relations, *supra* note 14 art. 5(1)(d).

<sup>58</sup> Article 3 of the Constitutive Act of the African Union also underscores the need to 'coordinate and harmonize the policies between existing and future Regional Economic Communities for the gradual attainment of the objectives of the [African] Union'. Indeed, this is described as an 'objective' of the Union.

<sup>59</sup> See Kurt Riechenberg, "The Merger of Trading Blocks and the Creation of the European Economic Area: Legal and Judicial Issues" (1995) 4 Tul. J. Int'l & Comp. L. 63.

<sup>60</sup> It consists of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela. See Union of Southern American States Constitutive Treaty, 23 May 2008.

trade zone that unites the Common Market of the Southern Cone and the Andean Community. Secondly, the status of the RECs after the formation of the African Economic Community is not free from doubt. Whether they will disappear entirely or would continue to operate as a mid-level legal system is not dealt with in the AEC Treaty or any protocol.<sup>61</sup> Nor do the founding treaties of the RECs shed any brighter light on these issues.

The COMESA Treaty envisages the conversion of COMESA into an organic entity of the African Economic Community.<sup>62</sup> This suggests that COMESA does not envision the formation of the African Economic Community as its demise. The treaty provides that the Authority of Heads of State and Government may, on the recommendation of the Council of Ministers, terminate the operations of the COMESA.<sup>63</sup> This suggests that a legal mandate exists for bringing COMESA to an end, if that is what is envisioned under the AEC Treaty after the formation of the African Economic Community. Neither the ECOWAS Treaty<sup>64</sup> nor the EAC Treaty<sup>65</sup> contains any provision directly relevant to their status after the formation of the African Economic Community. Indeed, the EAC Treaty is of perpetual duration.<sup>66</sup> Also, some of the RECs have and pursue objectives beyond economic integration such as conflict prevention and political unification. Accordingly, it is difficult to suggest that the formation of the African Economic Community will represent the end of the RECs.

The founding treaties of the RECs were drafted after the AEC Treaty. Therefore, one would have expected them to address the issue of their status after the formation of the African Economic

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<sup>61</sup> The UNECA conceives the future relationship between the AEC and the RECs in this way: After the RECs have achieved a customs union and a common market, they will merge to form the African Common Market, and the fully-fledged African Economic Community intervention will follow. The African Economic Community will take the lead on dealing with member countries, and the functions and structures of the regional economic communities will be revised to serve as its implementation arms. See UNECA, Rationalizing Regional Economic Communities, *supra* note 2 at 94.

<sup>62</sup> COMESA Treaty, *supra* note 28 art. 178(1)(c).

<sup>63</sup> *Ibid.* art. 192(1).

<sup>64</sup> Article 2(1) provides that the member states have decided that ECOWAS shall ultimately be the sole economic community in the region for the purpose of economic integration and the realization of the objectives of the African Economic Community.

<sup>65</sup> In the preamble to the treaty, the member states affirmed their desire for a wider unity of Africa and regarded the Community as a step towards the achievement of the objectives of the Treaty Establishing the African Economic Community.

<sup>66</sup> EAC Treaty, *supra* note 27 art. 144. This provision modifies the wording of article 92(2) of the Treaty for East African Co-operation, 6 June 1967, 6 I.L.M. 932, which provided that the treaty 'shall have indefinite duration'.

Community more comprehensively and, perhaps, uniformly. As organizations created by treaties, the state parties retain an inherent right to terminate the treaties<sup>67</sup> if that is what will be needed for them to merge and form the African Economic Community. As the RECs are progressing further through the stages of integration, the merger issue should engage the attention of the AEC. A merger protocol is needed. Indeed, I would suggest that negotiating a merger protocol should start now, given the complexity and size of the undertaking. It should address *inter alia* issues relating to: the post-merger legal status of the RECs; their assets and liabilities after the merger; whether the merger is compulsory or voluntary and, if compulsory, how that is going to be enforced; when the merger is to occur (simultaneously for all the communities or incrementally after each reaches the necessary stage of integration); status of their personnel and institutions such as the various community courts; and the status of active RECs, such as the Southern African Customs Union, which is not an AU-recognized REC and, accordingly, will not, in my opinion, participate in the anticipated merger of the RECs.

The anticipated merger of the RECs to form the African Economic Community raises other issues. Some RECs, like the EAC, are at an advanced stage of development. It is difficult to predict whether they would willingly merge with the AEC or with their less progressive counterparts such as the Inter-Governmental Authority on Development. Indeed, one may query whether the AU has the political will, legitimacy and wherewithal to impose its vision of an African Economic Community on the RECs. They are not parties to the AEC Treaty. Additionally, as shown in Chapters Five and Six, the treaty provisions of some of them on issues such as the jurisdiction of their community courts, *locus standi* for private parties, supremacy of community law, and the relations between community courts and national courts are superior to those of the AEC Treaty. Arguably, these advancements in community law and economic integration could be lost when they merge with the AEC if AEC law is not amended to incorporate those advances.

It is also debatable whether a merger of the RECs will be supported by interest groups within the RECs. Public choice theorists characterize international organizations as bureaucracies that are more responsive to the demands of organized interest groups, including their staff. As Vaubel notes, 'like all bureaucracies, international organizations fight for their survival and for

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<sup>67</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, art. 54(b).

more powers and resources. Thus, it is more difficult to abolish an international organization than to establish it, or to reduce its powers and resources than to increase them'.<sup>68</sup> Indeed, already, an appreciable number of staff cases have appeared before the community courts. This is evidence of people trying to protect their 'turf'.<sup>69</sup> The number of staff cases, and the tenacity with which they appear to have been litigated, lends some credence to Rasul's thesis that economic integration has become a job-generating venture for Africa's educated elite,<sup>70</sup> and raises the prospect of obstructionist litigation before, during, and, perhaps, after the merger.

Additionally, the RECs are legal systems in their own right. Unlike the AEC, they are expressly endowed with separate legal personality.<sup>71</sup> Thus, even before the merger, there is the need to structure and manage the relations between the AEC and RECs' legal systems as well as among the RECs.<sup>72</sup> The current legal framework on the relations between the AEC and the RECs does not go very far in addressing these complicated issues.

### 3.3.3 Conflict of Laws and Jurisdictions

A central issue in the relations between the AEC and RECs' legal systems is the prospect of conflict of jurisdictions and laws. Alter and Meunier have observed that international regime complexity, such as that which exists in Africa on the issue of economic integration, reduces the clarity of legal obligations by introducing overlapping sets of legal rules and jurisdictions

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<sup>68</sup> Ronald Vaubel, "International Organization" in Charles K Rowley & Friedrich Schneider eds., *The Encyclopedia of Public Choice* (Springer, 2003) at 319.

<sup>69</sup> See e.g. *Muleya v. Common Market for Eastern and Southern Africa* (No. 3) [2004] 1 East Afr. L. R. 173; *Muleya v. Common Market for Eastern and Southern Africa* (No. 2) [2003] 2 East Afr. L. R. 623; *Muleya v. Common Market for Eastern and Southern Africa* [2003] 1 East Afr. L. R. 173; *Ogang v. Eastern and Southern African Trade and Development Bank* [2003] 1 East Afr. L. R. 217; *Eastern and Southern African Trade and Development Bank v. Ogang* [2001] 1 East Afr. L. R. 46; *Eastern and Southern African Trade and Development Bank v. Ogang* (No. 2) [2002] 1 East Afr. L. R. 54; *Tokunbo Lijadu Oyemade v. Executive Secretary of ECOWAS*, Suit No. ECW/CCJ/APP/01/04 (ECOWAS Court of Justice, 2006); *Executive Secretary of ECOWAS v. Tokunbo Lijadu Oyemade*, Suit No. ECW/CCJ/APP/01/05 (ECOWAS Court of Justice, 2006); *Executive Secretary of ECOWAS v. Tokunbo Lijadu Oyemade*, Suit No. ECW/CCJ/APP/04/06 (ECOWAS Court of Justice, 2006).

<sup>70</sup> Rasul Shams, "The Drive towards Economic Integration in Africa" (Hamburg Inst. Of Int'l Econ., Discussion Paper No. 316, 2005) at 6-7.

<sup>71</sup> COMESA Treaty, *supra* note 28 art. 186(1); EAC Treaty, *supra* note 27 art. 138(1); ECOWAS, *supra* note 29 art. 88(1); SADC Treaty, *supra* note 29 art. 3(1).

<sup>72</sup> See generally Nsongurua J. Udombana, "A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development" (2002) 13 Ind. Int'l & Comp. L. Rev. 185 at 222-24. A similar issue currently playing out at international law level is the relationship between the World Trade Organisation and the various regional trade arrangements it sanctions under article XXIV of the GATT, 1994.

governing an issue.<sup>73</sup> To Raustiala and Victor, ‘regime complexes are marked by the existence of several legal agreements that are created and maintained in distinct fora with participation of different sets of actors. The rules in ... elemental regimes functionally overlap, yet there is no agreed upon hierarchy for resolving conflicts between rules’.<sup>74</sup> In the area of international trade, especially against the background of the proliferation of regional trade agreements, this is becoming a very prominent issue.<sup>75</sup>

The AEC appreciates the potential for these conflicts. The Protocol on Relations<sup>76</sup> is meant to provide the institutional framework for co-ordinating and harmonizing relations between the AEC and the RECs. It emphasizes the co-ordination and harmonization of their activities. However, characteristic of the minimal significance given to relational issues in Africa’s economic integration processes, there are no definitive provisions in the protocol addressing the issue of conflict of jurisdictions and laws. Does AEC law enjoy supremacy over conflicting laws of the RECs? Are the RECs also enjoined to ‘observe the legal system’<sup>77</sup> of the AEC? Are there any areas where only the AEC can legislate? How are breaches of AEC decisions and directives to the RECs to be enforced?<sup>78</sup> Are the RECs competent before the AU Court of Justice? And can the AEC intervene in an action before a REC’s community court where the interest of the AEC is affected? The answers to these important questions remain largely unknown.<sup>79</sup>

The protocol’s lack of attention to these complex relational issues is disheartening. This is because it explicitly recognizes that external and internal policies of the RECs may conflict with

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<sup>73</sup> Alter & Meunier, *supra* note 6 at 16.

<sup>74</sup> Raustiala & Victor, *supra* note 5 at 279.

<sup>75</sup> See e.g. Tim Graewert, “Conflicting Laws and Jurisdictions in the Dispute Settlement Process of Regional Trade Agreements and the WTO” (2008) 1 *Contemp. Asia Arb. J.* 287; Kyung Kwak & Gabrielle Marceau, “Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements” in Lorand Bartels & Federico Ortino eds., *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006); William J Davey & Andre Sapir, “The Soft Drinks Case: The WTO and Regional Agreements” (2009) 8 *World Trade Rev.* 5.

<sup>76</sup> Protocol on the Relations, *supra* note 14.

<sup>77</sup> AEC Treaty, *supra* note 16 art. 3(e).

<sup>78</sup> *Ibid.* art. 21. This article allows the Assembly or Council to give directives to the communities. Their decisions may include sanctions. A similar provision is in article 22 of the Protocol on Relations, *supra* note 14.

<sup>79</sup> The Protocol of the Relations sheds dim light on some of these issues. For example, it allows the AU to sanction RECs or member countries that do not comply with its directives. It also includes a dispute resolution mechanism which gives RECs standing before the African Court of Justice and Human Rights.

the objectives of the AEC Treaty.<sup>80</sup> In this, we witness, yet again, another manifestation of inattention to relational issues; the possibility of conflict of jurisdictions and laws is acknowledged, but concrete steps have not been taken to address them.

### **3.3.4 The Relations between the Regional Economic Communities**

An important issue for the RECs and AEC is the need to rationalize relations between the RECs in the light of the fact of their multiple memberships. It is arguable that this issue is short-term; as they progress along the stages of integration, a process of natural selection will take place. It will be difficult for a state to maintain membership of two custom unions – apply two different external tariffs – unless the policies of the customs unions are harmonized. At that stage, each state will have to decide, taking into account political, economic and geographic considerations, which community it wants to be part of. Thus, some scholars speculate that if the Southern African Development Community’s customs union succeeds, the Southern African Customs Union ‘would fall away’.<sup>81</sup>

However, this is a too optimistic vision. The trajectory of Africa’s integration suggests that it is not only legal and economic considerations that dictate membership of RECs.<sup>82</sup> A more dominant consideration is political. Indeed, the only case I know of, of REC demise, was that of the first East African Community in 1977. Even with this, its demise was due mainly to political mistrust between the members. Therefore, it has to be accepted that unless there are structured mechanisms instituted and enforced to eliminate the problem of multiple memberships, the vision of some communities ‘dying a natural death’ will not materialize.

## **3.4 ADDRESSING THE PROBLEMS – THE TWO STEPS SOLUTION**

Effectively and boldly addressing the problems resulting from multiple memberships and the troubling relational issues between the RECs and AEC requires legal imagination, economic thought, and strong institutional and political will. There is an urgent need for the AEC actively to rationalize the relations among the RECs, and between the RECs and itself. This is important for

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<sup>80</sup> See Protocol on Relations, *supra* note 14 art. 28(1).

<sup>81</sup> Peter Draper *et al.*, “SACU, Regional Integration and the Overlap Issue in Southern Africa: From Spaghetti to Cannelloni?” Trade Policy Report No. 15 (Southern African Institute of International Affairs, 2007) at 20.

<sup>82</sup> The UNECA has observed that ‘countries seem to have barely analyzed the economic rationale of belonging to a particular group’. See UNECA, Rationalizing Regional Economic Communities, *supra* note 2 at 36.



the development of the African Economic Community. The 2006 AU moratorium on the establishment and recognition of more RECs was an important first step.<sup>83</sup> So far, it has been heeded. Another important step is for the AEC to adopt a protocol founded on the principle of ‘one country-one community’ of the eight AU recognized RECs. With the help of national institutions and commissioned experts, countries should be guided to decide on predominately economic criteria, which REC best suits their needs taking into account the fact that the ultimate realization of the vision of an African Economic Community may help address some of the needs. This should be viewed not as an inappropriate infringement on state sovereignty, but as a measure needed to pool state sovereignty effectively for the common good.

The legal foundation for this protocol can be found in article 5(1) of the AEC Treaty. In it, member states undertook to ‘create favourable conditions for the development of the Community and the attainment of its objectives, particularly by harmonising their strategies and policies’, and to ‘refrain from any unilateral action that may hinder the attainment of the said objectives’. I argue that the unilateral decision of AEC member states to be members of more than one REC creates unfavourable conditions for the development of the AEC.

Admittedly, getting support for and enforcing this protocol will be difficult. It will be the ultimate test not only of the enforcement powers of the AEC, but also member states’ commitment to the realization of its vision beyond their political rhetoric of support. It is suggested that non-complying states should be threatened with expulsion and, ultimately, expelled from the AEC and all but one of the RECs of which they are members.<sup>84</sup> I dare say that the vision of an African Economic Community should not be founded on the ideal of all African countries as members. The European Community does not consist of all the states in Europe. The North American Free Trade Agreement does not include all countries on the North American continent. And the World Trade Organization comprises less than all the countries of the world. There is no legitimate reason why an African Economic Community cannot consist of something less than all of Africa! For a continent consisting of fifty-three states, a few of them dysfunctional, collapsed or collapsing, and

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<sup>83</sup> See African Union, *Decision on the Moratorium on the Recognition of Regional Economic Communities* (Assembly/AU/ Dec.112 (VII), 2006).

<sup>84</sup> These countries can still maintain their membership of the African Union, which is largely a political association of states.

many with different levels of socio-economic, legal and political development, the pursuit of this ideal will delay, indeed thwart, the timely realization of a noble economic vision.

Writing in the context of the collapse of the OAU, Kufuor perceptively observed that ‘unrestricted access in the form of virtually no entry requirements led to the tragedy of the regional commons, the degrading of the OAU as an organization of any value’.<sup>85</sup> Wouldn’t the stature, integrity and effectiveness of the OAU/AU be enhanced if it consisted of, say, twenty democratic, human-rights-respecting, socially- and economically-developed states which extend the benefits of the organization to non-members on defined conditions? Like Kufuor, I argue here that Africa’s economic integration is being devalued, delayed and diluted due to the fact that countries are able to sign up at will without strict, previously-defined and continuous commitments to implementation. An African Economic Community which consists of a few African states can extend, through conditioned agreements, the benefits of integration to other countries that need not necessarily be members. The expansion of economic space need not be a concomitant of the expansion of institutional space.

The ‘one country-one community’ principle advocated above should be combined with full integration of the RECs into the legal framework of the AEC by making them members. It is unfortunate that neither the Protocol of Relations between the AEC and the RECs, nor the new Protocol of Relations, does this. For the RECs to become members of the AEC, it may demand an amendment to the AEC Treaty. Currently, the treaty does not have a membership provision or criterion, but it appears to assume that all African states are potential members. By becoming fully signed-up members of the AEC, the RECs will be bound by all AEC laws including laws aimed at rationalizing and co-ordinating their activities. They will become subject to AEC-enforcement processes and active and interested participants in its decision-making processes. This will help eliminate, or at least minimize, the potential for conflicting laws, policies and jurisdictions. When the RECs become members of the AEC, decisions being taken which are within the competence of the RECs should be taken by the RECs rather than the individual member states who are also

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<sup>85</sup> K. O. Kufuor, “The Collapse of the Organization of African Unity: Lessons from Economics and History” (2005) 49 J. Afr. L. 132 at 133.

members of the AEC. In other words, as regards matters within the competence of the RECs, they should be the decision-makers during discussions at the AEC level.<sup>86</sup>

The two steps advocated above, as solution to the problem of multiple memberships and multiple RECs, and the latter's relations with the AEC differ in material respects from the five potential solutions advocated by the UNECA.<sup>87</sup> Central to the two steps is the principle of 'one country-one community', the view that membership of RECs should be determined largely on the basis of an economic criterion, and a call to abandon the ideal of an African Economic Community consisting of all African states. It should be emphasized that although the RECs have independent legal personality, they exist because they have states as members. Therefore, any solution to the above problem should begin with the members, or at least pay very close and immediate attention to them. Although the two steps are radical and will demand a lot of political will to be taken, in my opinion, it is the only sure and rapid path to achieving an African Economic Community using states and RECs that are genuinely committed to that object.

### 3.5 CONCLUSION

In this chapter, the complexity of the path to the formation of the African Economic Community has been discussed. The approach of using RECs as building blocks of the AEC is fraught with legal challenges most of which have not been adequately addressed by the existing legal framework. The chapter provides means of overcoming some of the challenges. More generally, this chapter shows that one of the ways of overcoming the challenges posed by international regime complexity is to provide for an umbrella regime responsible for co-ordinating and harmonizing the activities of elemental regimes within the complex regime. However, providing for such a regime, if deemed necessary at all, comes with difficulty: defining the legal status and mandate of the regime and ensuring the binding effect and compliance with its laws are

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<sup>86</sup> At present, the relationship between the European Communities and the WTO and between the European Community and the Hague Conference on Private International Law is illustrative of what is being advocated here. The Community together with all its member states are members of both organizations. In general, decisions on issues within the competence of the Community are taken by it, while those falling outside its competence are taken by member states.

<sup>87</sup> These are: maintaining the status quo; rationalizing by merger and absorption; rationalizing around rooted communities; rationalizing through division of labour; and rationalizing by harmonizing policies and instruments. See UNECA, *Rationalizing Regional Economic Communities*, *supra* note 2 at 115-126.

potentially difficult issues. The AEC as an apparent umbrella regime for the elemental regimes of African RECs is a case in point.

## CHAPTER FOUR: RELATIONS BETWEEN COMMUNITY AND NATIONAL LEGAL SYSTEMS IN AFRICA'S ECONOMIC INTEGRATION

### 4.1 INTRODUCTION

Economic integration results in a juxtaposition of legal systems. These legal systems include the legal system of the organization responsible for the integration process (community), the legal systems of the member states, the legal systems of regional organizations, and the international legal system, which often provides the legal basis for the integration initiative.<sup>1</sup> This juxtaposition of legal systems requires an examination of the relations between them. What is the relation between community and national legal systems? What is the place of national law in the community legal system?<sup>2</sup> What is the place of community law in national legal systems? What are the rules for resolving conflicts between and among these systems?<sup>3</sup> Effective and successful integration depend, in part, on properly structuring and managing these relational issues.

This chapter argues that Africa's economic integration processes have neglected the importance of relational issues. It investigates relational issues which have not received any systematic discussion in the discourse on Africa's economic integration, and proposes new directions for dealing with some of these. To what extent have Africa's integration initiatives attempted to address the relational problems inherent in integration? Are there national conditions that may hinder a structured community-state relationship? Has the place of community law in national law and *vice versa* been properly defined? Are there clear rules for resolving potential conflicts between community and national laws? The chapter discusses the idea of the African Economic Community (AEC) as a legal system. It examines the relations between the community and member state's legal systems.

The chapter uses the AEC as its principal focus. It, however, draws on the constitutive treaties and experiences of other economic integration organizations within and outside Africa. The goal of the comparative exercise is to identify and analyze the relational principles that

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<sup>1</sup> See *General Agreement on Tariffs and Trade*, 5 April 1994, 33 I.L.M 29 art. XXIV.

<sup>2</sup> See generally Sharif Bhuiyan, *National Law in WTO Law, Effectiveness and Good Governance in the World Trading System* (Cambridge: Cambridge University Press, 2007).

<sup>3</sup> See generally Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press 2003).

promote success in these organizations and determine if, and how, they are reflected in the AEC Treaty or whether they can be adopted by the AEC.

## 4.2 LEGAL ISSUES IN INTEGRATION AND THE AEC TREATY

From a legal perspective, the approach to economic integration adopted by the AEC raises important issues which are yet to be addressed in practice and in the discourse on Africa's integration. These include the legal status of community institutions and law within member states' legal systems, the effectiveness of community institutions as enforcers of community law, the role of the judicial branch as an arbiter of jurisdictional conflicts between and among the constituent legal systems, and the co-ordination and harmonization of the laws of member states. These issues form part of the more profound and broader problem that bedevils all economic integration processes: what are, or should be, the legal relations between the economic community and the member states?

In this regard, one cannot but notice the conspicuous absence in the AEC Treaty of an emphasis on legal issues in the integration process. Indeed, in the sixty-five page treaty,<sup>4</sup> the word 'law' appears only three times.<sup>5</sup> None of these references relates to the laws of members states or to the impact of the AEC on their legal systems. Of the seven specialized technical committees the

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<sup>4</sup> The treaty contains twenty-two chapters and a hundred and six articles. These chapters are devoted to: definitions; establishment, principles, objectives, general undertakings and modalities; organs of the community; RECs; customs union and liberalization of trade; free movement of persons, rights of residence and establishment; money finance and payments; food and agriculture; industry, science, technology, energy, natural resources and environment; transportation, communication and tourism; standardization and measurement systems; education, training and culture; human resources, social affairs, health and population; co-operation in other fields; special provisions in respect of certain countries; solidarity, development and compensation fund; financial provisions; settlement of disputes; relations between the community, RECs, regional continental organizations, third states and international organizations; relations between member states, third states, regional, sub-regional and international organizations; and miscellaneous provisions. Although the list of issues covered is comprehensive, detailed treatment of most of the issues were reserved for protocols, most of which have not been adopted. Not less than thirty protocols are envisaged under the treaty.

<sup>5</sup> See *Treaty establishing the African Economic Community*, 3 June 1991, 30 I.L.M. 1241 [AEC Treaty], preamble, arts. 18(2) and 35(1)(a). Harmonization of law is only explicitly envisaged in the harmonization of the 'legal text' regulating existing stock exchanges. *Ibid.* art. 44(2)(d). The AEC Treaty may generally be criticized for its lack of detail and the relegation of detail to protocols with the attendant negotiating and ratification problems. Compare the *Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 11 [Treaty of Rome] which made about 25 references to law including, especially, the municipal laws of the member states.

treaty establishes,<sup>6</sup> none is specifically mandated to deal with the legal issues of integration including the relational issues noted above.<sup>7</sup>

As noted in Chapter Three, even an issue as important as the legal status of the AEC is left in doubt. It is provided that the AEC forms an integral part of the Organization of African Unity (OAU) which is now the African Union (AU).<sup>8</sup> But, this leaves unanswered the question as to whether the AEC has its own legal personality.<sup>9</sup> Under the principles of international law, the lack of an express provision on the legal personality of the AEC should not be problematic. In the *Reparations case*,<sup>10</sup> the International Court of Justice held that the legal personality of an international organization can be inferred from the provisions of its constitutive treaty. According to Brownlie, the criteria for legal personality of organizations are: a permanent association of states with lawful objects and equipped with organs; a distinction in terms of legal powers and purposes between the organization and its members; and the existence of legal powers exercisable on the international plane and not solely within the national legal systems of one or more states.<sup>11</sup> The AEC meets these criteria.

It is possible that the specialized technical committees may deal separately with some of the issues identified above. However, such a fragmented approach may lead to unnecessary difficulties in the integration process. Generally, the treaty reveals a lack of appreciation of the need for a comprehensive legal framework for economic integration. Such a legal framework would set out the relevant jurisdictional parameters, define the legal relations between the

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<sup>6</sup> The committees are: the Committee on Rural Economy and Agricultural Matters; the Committee on Monetary and Financial Affairs; the Committee on Trade, Customs and Immigration Matters; the Committee on Industry, Science and Technology, Energy, Natural Resources and Environment; the Committee on Transport, Communications and Tourism; the Committee on Health, Labour and Social Affairs; and the Committee on Education, Culture and Human Resources.

<sup>7</sup> AEC Treaty, *supra* note 5 art. 25.

<sup>8</sup> *Ibid.* art. 98.

<sup>9</sup> *General Convention on the Privileges and Immunities of the Organisation of African Unity*, 25 October 1965, art.1, online: AU <<http://www.africaunion.org/root/au/Documents/Treaties/text/GENERAL%20CONVENTION%20PRIVILEGES.pdf>>. It confers judicial personality on the organisation with the capacity to enter into contracts and institute legal proceedings. See generally M.A. Ajomo, “International Legal Status of the African Economic Community” in M.A. Ajomo & Omobolaji Adewale eds., *African Economic Community Treaty, Issues, Problems and Prospects* (Lagos: Nigerian Institute of Advanced Legal Studies, 1993) at 40.

<sup>10</sup> [1949] I.C.J. Rep. 174.

<sup>11</sup> Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003) at 649.

community and member states, and pay attention to the broader international legal context within which economic integration operates.

It is difficult to fathom the minimal emphasis on legal issues in the AEC Treaty. As shown in Chapter Three, other important legal issues such as the sources of AEC law, its status within member states, and the status of the regional communities – the building blocks of the AEC – after their merger to form the African Economic Community are all left unaddressed. Admittedly, not every issue can be anticipated and addressed in a treaty, but some issues are just too important to be left unattended to. Comparatively, the regional communities’ treaties do not fare any better. The adoption of the AEC Treaty was not preceded by any form of wider consultation with interested parties including lawyers or law associations in the member states.<sup>12</sup> This is ironic for a treaty that sets as one of its guiding principles ‘popular participation in development’.<sup>13</sup> Kulusika’s observation that lawyers’ participation in drafting regional integration treaties and economic integration processes has been minimal may also explain the minimal emphasis on legal issues in the AEC Treaty.<sup>14</sup>

Notwithstanding the above, the AEC Treaty contains an innovative provision which is interesting from a legal perspective and merits discussion. Article 3(e) enjoins member states to ‘observe... the legal system of the Community’. It can be argued that this positively affirms the AEC as a legal system and imposes an obligation on member states to promote its objectives. However, characteristic of the treaty’s lack of attention to relational issues, we are left in doubt about the true character of this legal system and its relations with member states’ legal systems. Is it an aggregation of the member states’ legal systems, the RECs’, or a distinct legal system? What is the relation between it and other legal systems – national, regional and international? What is entailed in the obligation to ‘observe’ the legal system? Does the obligation to observe the legal system of the community extend to other institutions of member states such as the judiciary? What

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<sup>12</sup> Compare, for example, the *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 U.N.T.S. I-37437 [EAC Treaty]. It was adopted after consultations resulting in a book analyzing the draft treaty from socio-economic, political and legal perspectives. See Segundo E.A. Mvungi, *The Draft Treaty for the Establishment of the EAC: A Critical Review* (Dar es Salaam, Dar es Salaam University Press Ltd, 2002). But see L.O. Wauna Oluoch, “Legitimacy of the East African Community” (2009) 53 J. Afr. L. 194 who criticizes the extent of public consultation prior to the establishment of the EAC.

<sup>13</sup> AEC Treaty, *supra* note 5 art. 3(h).

<sup>14</sup> Simon E. Kulusika, “The Lawyer and the Challenges of Economic Integration” (2000) 32 Zambia L.J. 20.



are the implications of this for their work? Article 3(e) and the difficult questions it raises appear not to have captured the attention of commentators on the AEC. Their focus has been on the legal personality of the AEC,<sup>15</sup> a concept which, compared with ‘legal system’, is inferior both in scope and effect. The next section addresses some of the issues arising from article 3(e).

### 4.3 SOVEREIGNTY AND THE AEC’S LEGAL SYSTEM

#### 4.3.1 AEC as a Legal System

The existence of rules and rule-making institutions is an essential component of any legal system. In my opinion, the AEC is a legal system, but, as will be shown below, this is not an assertion free from difficulty. Like any domestic legal system, the AEC has these institutions. Its law-making institutions are the Assembly of Heads of State or Government (Assembly), the Council of Ministers (Council), and the AEC Court of Justice, which is now the African Court of Justice and Human Rights [African Court of Justice].<sup>16</sup> In addition to these institutions, one may add the Pan-African Parliament which currently has only an advisory role in the AEC’s legislative process, but is ultimately to have legislative powers. Aside the African Court of Justice, whose protocol is not yet in force, the remaining institutions are operating.<sup>17</sup>

The AEC Treaty is silent on what the sources of law of the community will or should be. This is no idle omission. By failing to be explicit on its sources of law, one is left in doubt not only as to the sources, but also to the relations between them. Undoubtedly, the AEC Treaty and protocols constitute the basic sources of law of the AEC. Decisions of the Assembly and regulations of the Council are also considered sources of law. The judgments of the African Court of Justice represent another source of community law. The general principles of law recognized by

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<sup>15</sup> See Nsongurua J. Udombana, “The Institutional Structure of the African Union: A Legal Analysis” (2002-2003) 33 *Ca. W. Int’l L.J.* 69 at 81-83; Tiyanjana Maluwa, “Reimagining African Unity: Preliminary Reflections on the Constitutive Act of the African Union” (2001) 9 *Afr. Ybk. Int’l L.* 3 at 32-33; Ajomo, *supra* note 9 at 40. But see Udombana, *ibid.* at 128-32 (discussing the relationship between legal systems of the AU and its members, and concluding that AU law will bind member states and that natural, legal persons are under their jurisdiction).

<sup>16</sup> See Protocol on the Statute of the African Court of Justice and Human Rights, 01 July 2008 [Protocol on the African Court of Justice], and the Statute of the African Court of Justice and Human Rights [Statute of the African Court of Justice], which is annexed to the Protocol, (2009) 17 *Afr. J. Int’l & Comp.* (forthcoming).

<sup>17</sup> For decisions of the Assembly and Council see <<http://www.africa-union.org/root/au/Documents/Decisions/decisions.htm>>. Rule 33 of the Rules of Procedure of the Assembly of the Union, (2005) 13 *Afr. J. Int’l & Comp. L.* 41, and Rule 34 of the Rules of Procedure of the Executive Council, (2005) 13 *Afr. J. Int’l & Comp. L.* 55, outline the legal effect of different types of decisions of the Assembly and Council in member states. This issue is discussed in Chapter Seven.

member states, as well as general principles of international law, may also be important sources of AEC law.

The Statute of the African Court of Justice<sup>18</sup> remedies, in part, the omission on sources of law in the AEC Treaty. Article 31 of the statute lists various sources of law the court ‘shall have regard to’, but it is not clear on how the sources relate to each other as, for example, in situations of conflict. Ultimately, the African Court of Justice will have to lay down principles for resolving internal conflict of laws problems within the AEC legal system. In doing this, the court should be cautious in applying and, if possible avoid, mechanical rules (e.g. the last in time prevails rule) for resolving these problems. Rather, it should look at the substantive content of the laws in conflict and allow the law whose substance best promotes the objectives of Africa’s economic integration to prevail.<sup>19</sup> Indeed, the promotion of integration should be the cornerstone of the court’s interpretation and application of all laws.

Comparatively, it is worth recalling that, unlike the AEC Treaty, there was no express provision in the Treaty establishing the European Economic Community, 1957 (Treaty of Rome),<sup>20</sup> declaring that the EC was a legal system. The European Court of Justice (ECJ) inferred from the text and purpose of the Treaty of Rome that the EC exists as a distinct legal order. In *Van Gend en Loos v Neder-Landse Tariefcommissie*,<sup>21</sup> the ECJ held that the EC ‘constitutes a new legal order of international law, for whose benefit 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’.<sup>22</sup> The court did this through a teleological interpretation of the Treaty of Rome. For the AEC, the judgment teaches that, even in the absence of an express treaty provision characterizing the AEC as a legal system, inferences could be drawn from the treaty to support a claim that it constitutes a new legal system with sovereign characteristics.

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<sup>18</sup> *Supra* note 16.

<sup>19</sup> Other community law-making institutions should pay attention to pre-existing laws in making laws. This may help avoid internal conflict of laws problems.

<sup>20</sup> Treaty of Rome, *supra* note 5.

<sup>21</sup> Case 26/62, [1963] C.M.L.R. 105.

<sup>22</sup> *Ibid.* at 129.

As will be discussed below, whether through a treaty provision or judicial declaration, the existence of an international organization as a legal system has implications for national legal systems which should be conditioned, legally, socially and politically, for such implications to work. These conditions include an activist and independent judiciary, a culture of respect for the rule of law, judicial decisions and international law, favourable constitutional laws, and the political will to legislate to allow the implications to prevail or to abstain from legislating to counteract them. These conditions, which prevailed in Europe, are not wholly present in most African countries. But some countries are making progress on these conditions; South Africa's judiciary is noted for its independence and the quality of its judgments. In 2008, Ghana democratically changed government for the fifth time since 1992. Botswana, Namibia and Tanzania have been democratic, peaceful and stable for a very long time. Sadly, the success stories in Africa do not make it into the international media.<sup>23</sup> It must be remembered that the acceptance of the full implications of the ECJ declaration that the EC was a legal system was gradual in each member state. The same is likely to be the case in Africa.

The existence of the AEC as a legal system distinct from the legal systems of the member states can also be teleologically derived from the text of the AEC Treaty and its institutional arrangements. The preamble to the treaty acknowledges the need to secure the 'well-being' of the people.<sup>24</sup> Article 14 establishes a Pan-African Parliament to ensure that the people of Africa are fully involved in the economic development and integration of the continent.<sup>25</sup> The treaty also establishes institutions to make decisions which are binding on and automatically enforceable in the member states.<sup>26</sup> Presumably, and as discussed in Chapter Seven, these decisions are enforceable without any national implementation measures such as incorporation by an Act of Parliament. The institutions and their competence represent derogations from national sovereignty.

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<sup>23</sup> See generally Daniel N. Posner & Daniel J. Young, "The Institutionalization of Political Power in Africa" (2007) 18 *Journal of Democracy* 126.

<sup>24</sup> See AEC Treaty, *supra* 5 note preamble.

<sup>25</sup> *Ibid.* art 14. See also *Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament*, 2 March 2001, (2005) 13 *Afr. J. Int'l & Comp. L.* 86; Konstantinos D. Magliveras & Gino J. Naldi, "The Pan-African Parliament of the African Union: An Overview" (2003) 3 *Afr. Hum. Rts. L.J.* 222 at 222-23. A recent judgment of the East Africa Court of Justice reveals the crucial role these community parliaments can play in the integration process. See *Mwatela v. East African Community*, Application No. 1 of 2005 (East African Court of Justice, 2005).

<sup>26</sup> See AEC Treaty, *supra* note 5.

Additionally, the fact that AEC member states are expressly enjoined to observe ‘the legal system of the Community’ makes any claim that it does not have a distinct legal system untenable. Such a claim offends the text of the AEC Treaty and fails to appreciate the unique place that community legal systems have in economic integration agreements.<sup>27</sup> The existence of an economic community as a legal system has socio-economic and legal benefits. It constitutionalizes the community by granting it an identity with the autonomy and independence it needs to pursue its objectives. Having an independent existence reduces national governments’ interference with the community. It also stabilizes the level of economic integration and reduces the risk and uncertainty associated with intra-community economic transactions. This is due to the fact that defined categories of economic activity within the community can be subject to only one legal regime that is independent of national legal systems. Even on economic matters regulated by national regimes, the community may set out the parameters of the national rules or play a superintending role. This promotes economic interaction and development within the community.<sup>28</sup> Socially, the fact that people live under one legal system may foster a sense of belonging and unity among the inhabitants of the community.

If these benefits are not to elude the AEC, the integrity of its legal system at the community level and its status within member states must be well defined and respected. But, so far, that has not been done. Without structured relations between the AEC and national legal systems, the effectiveness or success of the AEC will be undermined. The goals enumerated in article 4 of the AEC Treaty, require a strong role for law and effective institutions capable of taking the decisions that will bind member states and be effective within national legal systems. These are facilitated by the surrender of state sovereignty to the AEC and its institutions. As our writer has noted:

The depth of legislative coordination required to achieve these economic goals [the goals of a common market, including that of free movement of people, capital, and services] would appear to require the member states of a common market to cede large portions of sovereignty to an institutional structure capable of not only implementing such integration but also policing whether member states follow

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<sup>27</sup> An examination of economic integration treaties in Africa shows that the status of a legal system is not explicitly given to the communities.

<sup>28</sup> Thomas Heller & Jacques Pelkmans, “The Institutional Economics of European Integration” in Mauro Cappelletti *et al.* eds., *Integration through Law, Europe and the American Federal Experience*, vol. 1 bk. 1 (Berlin; New York: Walter de Gruyter, 1986) at 350.

through with their obligations. Without a strong institutional structure, a common market could only be created by countries capable of achieving a political consensus on the content and implementation of each common commercial policy.<sup>29</sup>

### 4.3.2 Sovereignty as a Challenge to the AEC's Legal System

From a positivist perspective, a legal system is more than a set of laws. As discussed in Chapter Two, there must be an ultimate source whose laws directly bind its subjects. Also, these laws cannot be contradicted or subordinated either by its subjects or any other external source. The absence of an ultimate source of law represents a serious challenge to the effectiveness of a legal system. Indeed, it calls its legal existence into question. It is in this regard that the AEC, as a community of sovereign states, faces an enormous challenge in the form of the sovereignty of the member states.<sup>30</sup>

States have their own legal systems and enact laws which directly bind their subjects. The laws cannot be contradicted or subordinated by any other law within or outside their legal systems. States seldom surrender this sovereign power. Indeed, as discussed in Chapter Seven, there are often constitutional provisions proclaiming the national constitution as the ultimate source of law and legality within the state's legal system.<sup>31</sup> The idea of a legal system, like the AEC legal system, existing independently of the state yet having its norms directly binding on the state (and its subjects), being directly applicable within the state's legal system or prevailing over contradictory laws of the state's legal system, sits ill within this framework. It is only through a surrender of sovereignty at the international level and the legitimization of that surrender at the national level that such an idea can operate.<sup>32</sup>

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<sup>29</sup> Cherie O'Neal Taylor, "Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?" (1996-1997) 17 Nw. J. Int'l L. & Bus. 850 at 867.

<sup>30</sup> Perhaps no concept defies definition more than sovereignty. In this thesis, the term connotes the notion that a state's legal system is supreme and independent of other legal systems such that no norm outside of it can claim to be directly applicable or effective within it or override its norms.

<sup>31</sup> See e.g. Constitution of the Republic of Ghana, 1992, art. 1(2); Constitution of the Republic of South Africa, 1996, art. 2; Constitution of the Republic of Malawi, 1994, art. 5.

<sup>32</sup> *Blackburn v. Attorney General* [1971] 1 W.L.R 1073. In this action the plaintiff sought declarations that, by signing the Treaty establishing the European Economic Community, 1957, the United Kingdom (UK) government would irreversibly surrender in part the sovereignty of the Crown in Parliament and in so doing would be acting in breach of the law. The action was dismissed for disclosing no reasonable cause of action. However, Lord Denning admitted that, if the UK should go into the Common Market [European Economic Community] and sign the Treaty, it would mean that an irreversible step had been taken. The sovereignty of the UK would thenceforward be limited.

A manifestation of the surrender of state sovereignty is to allow for the direct application and supremacy of laws generated by extra-state institutions. In other words, surrendering sovereignty is more than a mere delegation or abdication of decision-making powers to external institutions. Decisions made should become part of the delegating state's legal system and have binding effect within it. Sovereignty may be surrendered in whole or in part. A mere political association of states may exist without even a partial surrender of sovereignty, but no strong economic community may exist under such circumstances. It is impossible to envisage a common market or economic union in which member states have not partially ceded sovereignty and created a new legal order. Integrated economies like Australia, Canada, the EC, Nigeria and the USA exist because of the partial surrender of sovereignty by the member states.<sup>33</sup> In these economies, the laws made by the community (or federal government) in their areas of defined competence are generally directly applicable and supreme in the constituent states or provinces.

The AEC Treaty is largely silent on the issue of member states' sovereignty and how it relates to the AEC's legal system.<sup>34</sup> As discussed in Chapter Seven, neither does it appear that existing national constitutions have taken notice of the potential impact of AEC law, and are prepared to treat it differently from ordinary international law.<sup>35</sup> Indeed, the word 'sovereignty' is not used in the AEC Treaty,<sup>36</sup> although 'sovereign equality' is affirmed as one of the governing principles of the AU under its Constitutive Act.<sup>37</sup> Consequently, one can only draw inferences

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<sup>33</sup> In theory, it can be argued that because the federating 'states' in Canada, USA and Nigeria were not sovereign states before the formation of their respective federations this point does not apply to them. However, the reality is that they (USA and Nigeria) have ceded some powers to the federal government in a manner akin to the surrender of sovereignty to an external entity. In Canada, a more accurate description is that the constitution divides sovereignty.

<sup>34</sup> It can be argued that the fact that the treaty establishes institutions with powers to make decisions that are automatically enforceable in member states' suggests that it is not silent on the issue of state sovereignty. However, as will be shown Chapter Seven, one difficulty with this argument is that the concept of 'enforceable automatically' is not free from doubt. Indeed, its implications for member states are yet to be worked out.

<sup>35</sup> What exist are general constitutional provisions supporting continental unity and economic integration. See e.g. Constitution of the Republic of Nigeria, 1999, art. 19(b), which declares that one of the foreign policy objectives of the government is the promotion of African integration and support for African unity; the Constitution of the Republic of Ghana, 1992, art. 40(b)(ii)(iv), which provides that the government shall adhere to the principles, aims and ideals of the Charter of the Organisation of African Unity (now AU) and the Treaty of the Economic Community of West African States; the Sierra Leone Constitution, 1991, art. 10(b), which provides that the foreign policy objectives of the state shall be the promotion of sub-regional, regional and inter-African co-operation and unity.

<sup>36</sup> AEC Treaty, *supra* note 5.

<sup>37</sup> Constitutive Act of the African Union, 11 July 2000, (2005) 13 Afr. J. Int'l & Comp. L. 25 [Constitutive Act], art. 4.

from the text of the AEC Treaty as to whether its member states have partially surrendered sovereignty to it.

The silence in the AEC Treaty should be contrasted with the ECOWAS Treaty which explicitly acknowledges in its preamble that ‘the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will’.<sup>38</sup> Admittedly, it does not appear that the fact that the ECOWAS Treaty is more explicit on the question of sovereignty has placed ECOWAS law in a better position within the member states than AEC law. ECOWAS law still has minimal presence within member states and is seldom invoked before national courts.<sup>39</sup> This suggests that while there may be significant provisions in international treaties, their true effect is often conditioned by social and political situations in states which are parties to them. Indeed, it can be argued that a formal declaration that states have surrendered sovereignty to the community is unnecessary, especially in the early stages of integration. States may find this politically unpalatable. Successful integration necessarily eats into member states’ sovereignty, and in that sense a gradual surrender of sovereignty, even if not expressly provided in a treaty is inevitable.

Although the AEC Treaty is silent on the issue of sovereignty, it can be argued that AEC member states are required to cede sovereignty partially to it because they are enjoined to observe its legal system. As already noted, the presence of an ultimate source of authority is indispensable for a viable legal system. By affirming and declaring in article 3(e) of the AEC Treaty that they will observe the legal system of the community, therefore implicitly acknowledging that the legal system exists, member states have accepted the community as, at least, partially sovereign. The characteristics of such sovereignty include the ability to bind its subjects and to override ‘private’ laws. A state cannot be held to have observed the legal system of the community when community laws have no effect in its legal system or are overridden by its laws. Ultimately, the sovereignty issue will be presented to the African Court of Justice. Indeed, as discussed in Chapter Five, the

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<sup>38</sup> *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, (1996) 8 Afr. J. Int’l & Comp. L. 187-227 [ECOWAS Treaty], preamble.

<sup>39</sup> My search of law databases and reports in Ghana and Nigeria did not reveal any significant cases in which ECOWAS law has been invoked before national courts. It is possible that ECOWAS law is invoked in administrative and executive channels. I have not been able to access cases from Gambia, Liberia and Sierra Leone. However, I speculate that given the political instability experienced over the past decade in Liberia and Sierra Leone – conflicts which have had significant impact on the progress of integration in the sub-region – it is unlikely any such cases made their way to the courts.

relationship between state sovereignty and the goals of economic integration has already become an issue before the courts of Africa's RECs.

### 4.3.3 Surrendering Sovereignty – the Existing Evidence

Already, some African states have realized the need sometimes to surrender sovereignty partially in order to promote economic development through regionally co-ordinated policies. The Treaty establishing the East African Community (EAC Treaty) accords sovereignty to EAC institutions and organizations and elevates community laws above national laws.<sup>40</sup> This development within the EAC, which represents a great leap towards the collective exercise of sovereignty through a distinct institution, is worth emulating in Africa.<sup>41</sup>

The Treaty establishing the Organisation for the Harmonization of Business Laws in Africa (OHADA Treaty)<sup>42</sup> represents another example of the willingness of African governments to surrender sovereignty partially to promote economic development. Under the treaty, OHADA member states have partially given up national sovereignty in order to establish a single regional regime of uniform business laws called Uniform Acts. Uniform Acts are directly applicable and overriding in the member states, notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws.<sup>43</sup> In other words, they are automatically and immediately applicable in member states and abrogate contrary national laws.<sup>44</sup> The treaty also establishes the Common Court of Justice and Arbitration as the final authority on the interpretation and enforcement of the treaty, its regulations, and the Uniform Acts.<sup>45</sup> The court hears appeals on

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<sup>40</sup> *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 U. N. T. S. I-37437, art. 8(4) [EAC Treaty].

<sup>41</sup> It also represents a significant advance in international law. Even within the European Union, where the principles of supremacy of community law and direct effect are accepted doctrines, these principles still have 'the status of unwritten principles of law'. Bruno de Witte, "Direct Effect, Supremacy, and the Nature of the Legal Order" in Paul Craig & Gráinne de Búrca eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) 177 at 194. Article 10 (1) of the unadopted Treaty establishing a Constitution for Europe provides that 'The Constitution, and law adopted by the Union's institutions in exercising competences conferred on it, shall have primacy over the law of the Member States'.

<sup>42</sup> *Treaty on the Harmonization of Business Law in Africa*, 1997, online: Organization for the Harmonization of Business Law in Africa <<http://www.ohada.com/traite.php>> [OHADA Treaty].

<sup>43</sup> *Ibid.* art. 10.

<sup>44</sup> Claire Moore Dickerson, "Harmonizing Business Laws in Africa: OHADA Case Calls the Tune" (2005) 44 Colum. J. Transnat'l L. 17, 55 n.151 (citing decisions from the Court of Justice of OHADA).

<sup>45</sup> OHADA Treaty, *supra* note 42 art. 14.



referral from national courts or directly from aggrieved individuals.<sup>46</sup> The court's decisions are 'final and conclusive' and are entitled to enforcement and execution within member states.<sup>47</sup>

Given the appalling under-development and economic marginalization of Africa, its governments should realize the urgency with which they must put aside their national and personal interests to forge a common course through the AEC. The threat of Communism, and the devastations caused by World War II propelled Europe to integrate. So too should the tragic economic conditions in Africa motivate leaders to work together. Africa's underdevelopment and marginalization in the face of world prosperity should be enough, without any external force, to propel African governments to unite and confer supranational decision-making powers onto the AEC to pursue the common economic agenda laid out in the AEC Treaty. The benefits of economic integration in other regions of the world should encourage African leaders to approach the AEC integration initiative with zeal. Admittedly, success on this front will not come easily. But, with the necessary legal framework, institutional arrangements, political support and a favourable social, economic and political climate, it can be done.

To be sure, the above exposition is founded on a vision of the AEC as a supranational organization. However, not all commentators support the idea of supranational institutions to push forward Africa's economic integration processes. In his pioneering work, *Institutional Transformation of the Economic Community of West African States*, Kufuor argues that there is probably very little real demand for supranational institutions and organizations within ECOWAS.<sup>48</sup> He provides a number of reasons to support this stance. However, as I argued in a review of the book,<sup>49</sup> a careful assessment of the reasons provided suggests that, while he might have been successful in demonstrating that the conditions conducive for supranationalism are not yet present in West Africa, a reader would still be left unconvinced as to whether such institutions are not demanded. Indeed, the United Nations Economic Commission for Africa has identified the

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<sup>46</sup> *Ibid.* art. 15.

<sup>47</sup> *Ibid.* art. 20.

<sup>48</sup> See also Domenico Mazzeo, "The Experience of the East African Community: Implications for the Theory and Practice of Regional Cooperation in Africa" in Domenico Mazzeo ed. *African Regional Organizations* (Cambridge: Cambridge University Press, 1984) at 164-165 where he notes: 'Regional institutions among developing countries should, consequently, be conceived not as centres of supranational authority, a notion which runs counter to the developing countries' basic concern with nation-building, but as forums for consultation and coordination of policies'.

<sup>49</sup> (2008) 16 Afr. J. Int'l & Comp. L. 115.

absence of supranational authority<sup>50</sup> to enforce the commonly agreed policies of the communities as a principal weakness of African economic communities.<sup>51</sup> It is also arguable that conditions conducive to supranationalism, such as the rule of law and democratic governance, are gradually emerging in some African countries.

To summarize, I have argued that the AEC is a legal system; it should be conceived and made to operate as a supranational legal system. It should be the ultimate source of law in matters within its competence. The member states of the AEC are its primary subjects. Arguably, individuals are its secondary subjects. These subjects must observe its laws and institutions.

#### **4.4 RELATIONS BETWEEN AEC AND NATIONAL LEGAL SYSTEMS**

##### **4.4.1 Introduction**

Regional economic integration creates and operates within the context of vertical, vertico-horizontal and horizontal relations. Vertical relations exist between a community and its member states. Vertico-horizontal relations exist between a community and the international legal system. Horizontal relations exist among member states of a community. Establishing, defining and managing these relations are important for a community's success and effectiveness. This is especially so as it progresses through the various stages of economic integration. Where these relations are not clearly defined, structured and managed, they can result in uncertainty, jurisdictional conflicts, non-uniform application of community law and, ultimately, destabilization of the community. Important issues in this regard are the status of community law in member states, and how to overcome the challenge posed to economic integration by differences in national laws. This section addresses both issues.

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<sup>50</sup> In addition to this, one must note the absence of strong state 'powerhouses' within the communities to push forward politically and be the paymasters for the integration processes. Within the EAC and ECOWAS, this role is weakly performed by Kenya and Nigeria respectively. The success and endurance of the Southern African Customs Union can, in part, be attributed to the leadership and financial commitment of South Africa.

<sup>51</sup> UNECA, *Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities*, (Addis Ababa: UNECA, 2004) at 7 [UNECA, *Rationalizing Regional Economic Communities*]. The UNECA suggests that this weakness has opened up a substantial gap between the aspirations of the member countries expressed in the treaties and protocols creating the RECs and the reality on the ground. *Ibid.* at 7

## 4.4.2 Supremacy of AEC Law

### 4.4.2.1 An Overview

Conflicts between national and community laws occur in economic integration. From the perspective of community-state relations, such conflicts are part of the broader issue of the relations between national and international law. Accordingly, the rules developed in the latter context are useful in addressing the former. However, this should be done with caution. Automatic application of the traditional rules on the relationship between national and international law can work against a community's interests and development.

The relations between national and international law are often discussed from a monist-dualist perspective.<sup>52</sup> Monists view international and national law as part of a single legal system. To them, international law is directly applicable in national legal systems. In other words, there is no need for any domestic implementing legislation; international law automatically becomes part of the national legal system. Indeed, to monists, international law is superior to national law.<sup>53</sup> The dualists, on the other hand, view international and national law as separate legal systems. To them, for international law to be applicable in states, it must be received through domestic legislative measures, which transforms the international rule into a national one. It is only after such a transformation that individuals may benefit from or rely on the international (now national) law. To dualists, international law cannot claim supremacy within states although it is supreme in the international legal system. As discussed in Chapter Seven, constitutions of African states reflect both schools.<sup>54</sup> In that chapter, I argue that effective economic integration in Africa demands a rethink of constitutional laws, especially with regard to the methods for giving effect to

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<sup>52</sup> Janne E. Nijman & Andre Nollkaemper eds., *New Perspectives on the Divide between National and International Law* (Oxford: Oxford University Press, 2007).

<sup>53</sup> Not all monists adhere to such a conception of the relationship between national and international law. For example, although Hans Kelsen was an advocate of monism, he did not argue that international law was superior to national law. In his view, international law may be subjected to particular norms within national legal systems. In other words, to him, monism required that legal norms be part of a single system of law, but left open the question of the relationship between the norms. See Hans Kelsen, *The Pure Theory of Law* 328-47 (Max Knight trans., 1967).

<sup>54</sup> See generally Richard F. Oppong, "Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa" (2007) 30 *Fordham Int'l L.J.* 297; P.F. Gonidec, "The Relationship of International Law and National Law in Africa" (1998) 10 *Afr. J. Int'l. & Comp. L.* 244.

international laws, rules on resolving conflicts between international and national laws, and the doctrines of sovereignty and supremacy of national constitutions.<sup>55</sup>

The AEC Treaty does not provide that community law enjoys supremacy over national laws. Indeed, of all the African economic integration treaties I have examined, only the EAC Treaty contains such provision.<sup>56</sup> Some writers have attempted to infer the supremacy of AEC law over national laws by using the text, structure, and objectives of the AEC Treaty.<sup>57</sup> The treaty requires the harmonization of policies. Conflicting national laws hinder the achievement of the AEC's objectives. Article 5 requires member states to refrain from acts that hinder the attainment of the AEC's objectives. Community decisions and regulations are also automatically enforceable in member states. These, together with the fact of the community's division of competence between itself and the member states, are cited as logically implying that community law is supreme.<sup>58</sup> The existing literature has not gone beyond these inferences to examine, as I do here, whether such a claim to supremacy is sustainable under prevailing constitutional and political conditions. Surely, these inferences are easily made in academic circles. But, in the absence of an express treaty provision, it will take an activist African Court of Justice to assert the supremacy of AEC law, strong and supportive national judicial will and favourable constitutional laws to internalize in member states, and a general political culture of respect for international law to sustain it. It is debateable whether these conditions are currently present in Africa, but there is nothing to suggest that these conditions can never be present.

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<sup>55</sup> See generally Tiyanjana Maluwa, "The Incorporation of International Law and Its Interpretational Role in Municipal Legal Systems in Africa: an Exploratory Survey" (1998) 23 S. Afr. Yearbk. Int'l L. 45 [Maluwa, Incorporation of International Law]; Tiyanjana Maluwa, *International Law in Post-Colonial Africa* (The Hague: Kluwer Law International, 1999) at 31-51. Within the European Community, some member countries had to amend their constitutions to meet the demands of community law. See Gerhard Bebr, "Law of the European Communities and Municipal Law" (1971) 34 M.L.R. 481 at 485-487 for a survey of these amendments.

<sup>56</sup> Article 8(4) provides that community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty. Article 8(5) envisaged that the member states would make the necessary laws to confer precedence on community organs, institutions and laws over similar national ones. So far, it appears that no such laws have been enacted. The national statutes incorporating the EAC Treaty are silent on the issue. See Tanzania: Treaty for the Establishment of East African Community Act, 2001; Kenya: Treaty for the Establishment of East African Community Act, 2000; Uganda: East African Community Act, 2002.

<sup>57</sup> See e.g. Gino J. Naldi & Konstantinos D. Magliveras, "The African Economic Community: Emancipation for African States or Yet another Glorious Failure?" (1999) 24 N. C. J. Int'l L. & Com. Reg. 601 at 620-21.

<sup>58</sup> *Ibid.*

In this regard, the experience of the EC merits examination.<sup>59</sup> The Treaty of Rome, like the AEC Treaty, was not explicit on whether EC law enjoyed supremacy over member states' laws. Nonetheless, the ECJ was able to constitutionalize the Treaty of Rome and elevate it above national laws. In *Van Gend en Loos*,<sup>60</sup> the ECJ held that the EC constituted a new legal order that was separate and distinct from its members' legal order. But it was in *Flaminio Costa v. E.N.E.L.*<sup>61</sup> that the court, relying on teleological interpretation, elevated EC law above national laws. It held that:

The law stemming from the Treaty, an 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.<sup>62</sup>

At present, the doctrine of supremacy of EC law is firmly entrenched; not even a fundamental rule of national constitutional law can be invoked to challenge an EC law.<sup>63</sup> In the sobering words of Weatherill: 'Even the most minor piece of technical Community legislation ranks above the most cherished national constitutional norm'.<sup>64</sup>

It took some time before EC member states accepted the supremacy of EC law. It was resisted on the ground that it challenged national sovereignty and rested on 'weak' textual arguments.<sup>65</sup> National courts initially provided mixed responses.<sup>66</sup> Even though now well accepted and entrenched in member states, courts have often explained their acceptance in terms of the

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<sup>59</sup> For a comprehensive treatment of this subject see Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001).

<sup>60</sup> *Van Gend en Loos*, *supra* note 21 at 129.

<sup>61</sup> *Flaminio Costa v. E.N.E.L.*, Case 6/64, [1964] E.C.R. 585 at 592-593.

<sup>62</sup> *Ibid.* at 592-93.

<sup>63</sup> *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case 106/77, [1978] E.C.R. 629, 3 C.M.L.R. 263 [*Simmenthal*].

<sup>64</sup> Stephen Weatherill, *Law and Integration in the European Union* (Oxford: Clarendon Press, 1995) at 106.

<sup>65</sup> Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases and Materials* 3rd ed. (Oxford: Oxford University Press, 2003) at 279.

<sup>66</sup> *Ibid.* at 285-314; Mauro Cappelletti & David Golay, "The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration" in *Integration through Law: Europe and the American Federal Experience*, vol. 1 bk. 2, (Berlin; New York: Walter de Gruyter, 1986) at 261, 311-15.

national legal framework<sup>67</sup> instead of any inherent superior power attributed to EC law by the ECJ.<sup>68</sup> Indeed, to this day, there are still occasional judicial dicta from English courts suggesting that they may uphold an Act of Parliament which expressly overrides EC law.<sup>69</sup>

The idea of a supreme AEC law would be good for Africa's economic integration. It would ensure that community law is consistently applied across member states. This will be important for the stability of the AEC and create a secure and certain legal framework for business decision-making. It will also ensure the equal treatment of all people affected by AEC law. It remains to be seen whether, when an opportunity is presented, the African Court of Justice will adopt a teleological approach to interpreting the AEC Treaty and assert the supremacy of AEC law over national laws. Since the court is yet to be operational, we have no cases from it from which we can infer its jurisprudential vision for community law. However, the EAC Court of Justice has considered the issue. In *Peter Anyang' Nyongo v. The Attorney General of the Republic of Kenya*, one issue it had to decide was the legal position when an EAC Treaty provision conflicts with national law.<sup>70</sup> The court held, in apparent disregard of article 8(4) of the EAC Treaty,<sup>71</sup> that the

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<sup>67</sup> See e.g. *Macarthys Ltd. v. Smith* [1981] Q.B. 180 at 200 in which Lord Denning held "It is important now to declare – and it must be made plain – that the provisions of article 119 of the E.E.C. Treaty take priority over anything in our English statute on equal pay which is inconsistent with article 119. That priority is given by our own law. It is given by the European Communities Act 1972 itself. Community law is now part of our law: and, whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it."

<sup>68</sup> *Craig & de Búrca*, *supra* note 65 at 285–314; *Regina v. Secretary of State for Transp. ex parte Factortame Ltd.*, Case C-213/89, [1991] 1 A.C. 603.

<sup>69</sup> See e.g. *Macarthys Ltd. v. Smith* [1979] I.C.R. 785 at 789, Lord Denning said, 'If the time should come when our Parliament deliberately passes an Act - with the intention of repudiating the Treaty or any provision in it – or intentionally acting inconsistently with it – and says so in express terms – then I should have thought that it would be the duty of our courts to follow the statute of our Parliament'. *Thoburn v. Sunderland City Council* [2003] Q.B. 151 at 184-185, Lord Justice Laws held that '...there is nothing in the 1972 Act which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly, there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts'.

<sup>70</sup> *Anyang' Nyong'o v. Attorney General* [2008] 3 K.L.R 397 [*Anyang' Nyongo-2008*]. The judgments of the ECOWAS court also contain dicta that one may interpret as supporting the supremacy of community law. In *Frank Ukor v. Alinno*, Suit No. ECW/CCJ/APP/01/04 (ECOWAS Court of Justice, 2005) at [21], the court held that the treaty is "the supreme law of the ECOWAS, and it may be called its Constitution." In *Jerry Ugokwe v. The Federal Republic of Nigeria*, Case No. ECW/CCJ/APP/02/05 (ECOWAS Court of Justice, 2005) at [32] it held that the

treaty did not provide an explicit solution for such conflicts!<sup>72</sup> Rather, it looked at basic principles of international law<sup>73</sup> and the persuasive jurisprudence of the ECJ<sup>74</sup> for answers. The court rightly came to the conclusion that the treaty prevailed in the event of conflict with national law.<sup>75</sup> However, its apparent disregard of the clear words of article 8(4) is troubling. There is no stronger foundation for a judicial decision than a legislative provision.

#### 4.4.2.2 The Response of National Courts

It is unclear how national courts will respond to an assertion by the African Court of Justice that AEC law is supreme over national laws. The effectiveness of such an assertion will depend, in part, on their responses. The existing national jurisprudence reveals two approaches both of which appear inimical to the supremacy of community law within national legal systems. The first outrightly rejects the supremacy of community law. The second, a refined version of the first, suggests a rigid separation of community and national legal systems. For this approach, community law is supreme only at the community level. It cannot override domestic laws, and remedies for breaches of community laws must be sought at the community level. Both approaches reflect the dualist school's perspective on the relations between international and national laws – a perspective prevalent in the former British colonies.

*Kenya v. Okunda*<sup>76</sup> illustrates the first approach. At issue was the supremacy of EAC law over Kenyan law. Two individuals were prosecuted under the EAC's Official Secrets Act of 1968 without the consent of the counsel for the EAC. Under section 8(1) of the Act the consent was necessary. The issue was whether the Attorney General of Kenya could institute the proceeding without that consent. Resolving this issue involved examining the relationship between EAC law and section 26(8) of the Kenyan Constitution, which provides that, in the performance of his duty,

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distinctive feature of the community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in community law.

<sup>71</sup> It provides that "community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty."

<sup>72</sup> *Anyang' Nyong'o-2008*, *supra* note 70.

<sup>73</sup> That is, a state party to a treaty cannot justify a failure to perform its treaty obligation by reason of its internal law.

<sup>74</sup> The court referred to *Van Gend en Loos*, *supra* note 21; *Flaminio Costa*, *supra* note 61; *Simmenthal*, *supra* note 63.

<sup>75</sup> *Anyang' Nyong'o-2008*, *supra* note 69 at 430-431.

<sup>76</sup> *Kenya v. Okunda* (1969) 91 I.L.M. 556 [*Okunda*].

‘the Attorney-General shall not be subject to the direction or control of any other person’.<sup>77</sup> Counsel for the EAC submitted that the conflict between the two provisions should be resolved in favour of community law. He argued that under the Treaty for East African Co-operation, members agreed to take all steps within their power to pass legislation to give effect to the treaty and to confer the force of law upon acts of the community within their territory. Furthermore, under article 4 of the treaty, the members were enjoined to ‘make every effort to plan and direct their policies with a view to creating conditions favourable for the development of the Common Market and the achievement of the aims of the Community’.<sup>78</sup> Counsel argued that, by these provisions, member states agreed to ‘surrender part of their sovereignty’.<sup>79</sup>

The court held that Kenya did nothing to breach these obligations and that the laws of the community are, under the Kenyan Constitution, part of the laws of Kenya. In the event of conflict, EAC laws are void to the extent they are inconsistent with the national constitution.<sup>80</sup> The constitution is the supreme law of the land. An appeal from this decision was dismissed by the Court of Appeal for East Africa.<sup>81</sup> The court recognized that the case raised an issue of fundamental importance. It held that ‘the Constitution of Kenya is paramount and any law, whether it is of Kenya, of the Community or any other country which has been applied in Kenya, which is in conflict with the Constitution, is void to the extent of the conflict’.<sup>82</sup> This decision of the Court of Appeal can be criticized. But, one may rationalize it with an argument that the court heard appeals from decisions of national courts on issues designated by national law.<sup>83</sup> The power to interpret and apply the treaty was entrusted to the Common Market Tribunal.<sup>84</sup> Accordingly, the Court of Appeal did not necessarily have to take account of the promotion of the objects of

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<sup>77</sup> *Ibid.* at 556-57.

<sup>78</sup> *Ibid.* at 557 (citing Treaty for East African Co-operation, 1 December 1967, 6 I.L.M. 932, art. 4).

<sup>79</sup> For comparative purposes, it is revealing how these arguments of counsel mimic, without making reference to them, similar teleological and textual arguments used by the European Court of Justice to assert the supremacy of European community law above the national laws of member states. See *Flamino Costa*, *supra* note 61. In an article in the East African Law Journal some few years before the *Okunda* decision, the author made reference to the *Flamino Costa* decision but did not comparatively discuss its implications for East African Community law. See F.X. Njenga, “Contrast between the Effect of Laws of E.E.C. and E.A.C” (1968) 4 East Afr. L.J. 138 at 151.

<sup>80</sup> *Okunda*, *supra* note 76 at 558.

<sup>81</sup> *East African Community v. Republic of Kenya* (1970) 9 I.L.M. 561.

<sup>82</sup> *Ibid.* at 565-66.

<sup>83</sup> Treaty for East African Co-operation, *supra* note 78 art. 81.

<sup>84</sup> *Ibid.* art. 32.



economic integration in deciding cases.<sup>85</sup> Like a national court, domestic legal considerations should be paramount even if such an outlook on issues in which community law is engaged can be detrimental to the objective effective economic integration.

Another case which again affirmed the supremacy of Kenya law was *In the Matter of an Application by Evan Maina*.<sup>86</sup> It arose under the East African Customs and Transfer Management Act, a community legislation, which defined a number of offences. Section 174 provided that, if the Commissioner of Customs was satisfied that any person has committed an offence against the Act in respect of which a fine was provided, he may compound the offence and summarily order him to pay a sum not exceeding 200 shillings. The section was held inconsistent with section 77(1) of the Kenyan Constitution which provides that, 'if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing, within a reasonable time, by an independent and impartial court established by law'. The court rejected the contention for the customs' authorities that the offence under consideration was a 'customs' rather than a 'criminal' offence and therefore section 77 of the Constitution had no bearing on the case. Other subsections of section 77 required the trial to proceed only in the presence of the accused, unless he agreed otherwise, or his conduct made it difficult. Also, the accused had to be provided with an opportunity to defend himself in person or by a legal representative of his choice. Both these provisions were held inconsistent with section 174. Moreover, the Commissioner of Customs was not a 'court' within the meaning of section 77 of the Constitution. There was therefore a clear clash between section 174 of the community Act and section 77 of Kenya's Constitution. The court held that community law could not be upheld since the Constitution provides that 'if any law is

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<sup>85</sup> Compare *Independent Jamaica Council for Human Rights (1998) Limited v. Marshall Burnett and another* [2005] 2 A.C. 356. The Judicial Committee of the Privy Council (PC) declared as unconstitutional for lack of conformity with domestic constitutional procedures three Jamaican pieces of legislation (the Judicature (Appellate Jurisdiction) (Amendment) Act 2004, the Caribbean Court of Justice (Constitutional Amendment) Act 2004 and the Caribbean Court of Justice Act 2004) which sought *inter alia* to revoke the right of appeal to the PC and replace it with the right of appeal to the Caribbean Court of Justice (CCJ). The judgment did not pay any attention to its potential implications for Caribbean integration. So far, Jamaica has not been able to meet the procedural requirements that will enable it to replace the right of appeal to the PC with that of the CCJ. At present, only Barbados and Guyana have acceded to the appellate jurisdiction of the CCJ. See generally, Michael Anthony Lilla, "Promoting the Caribbean Court of Justice as the Final Court of Appeal for the States of the Caribbean Community" (unpublished Thesis submitted for admission as Fellow of the Institute for Court Management, National Center for State Courts, USA, 2008).

<sup>86</sup> Case no. 7/1969. I have been unable to access a copy of this case. The account here relies on a summary of it in Yash P. Ghai, *Reflections on Law and Economic Integration in East Africa* (Scandinavian Inst. of African Studies, Research Report No. 36, 1976) at 34-35. See also Yash P. Ghai, "East African Community" in N.N. Rubin & E. Cotran eds., *Annual Survey of African Law*, vol. III (London: Frank Cass, 1969) at 76-78.

inconsistent with this Constitution, this Constitution shall prevail and the other law shall to the extent of inconsistency be void’.

It was, perhaps, to avoid similar judgments in future that article 8(4) of the EAC Treaty was introduced. However, so far, this provision appears to have gone unnoticed by courts within the EAC.<sup>87</sup> In *Peter Anyang’ Nyong’o v. Attorney General*<sup>88</sup> the High Court of Kenya again held that if a treaty is in conflict with the Constitution, the municipal court’s first duty is to uphold the supremacy of the Constitution.<sup>89</sup> Given that the EAC Treaty has the ‘force of law’ in Kenya<sup>90</sup> and article 8(4) of the treaty does not exclude national constitutions from the scope of its supremacy provision, this holding by the High Court of Kenya is arguably a breach of EAC law.

The second approach, which suggests a rigid separation between community and national legal systems, is also reflected in the Kenya case of *Peter Anyang’ Nyong’o v. Attorney General*.<sup>91</sup> The central issue was whether amendments of the EAC Treaty should follow the procedure laid down in the Kenyan Constitution or that set out in the EAC Treaty. A peripheral issue was whether the applicant could bring a suit relying on provisions of the EAC Treaty. The court held that individuals could not enforce any rights under the treaty because the state was not their agent or trustee; remedies for alleged breaches of EAC law should be sought at the community level. This was so notwithstanding the fact that the treaty had been incorporated into Kenya law and, as the court rightly recognized, the municipal Act was to provide ‘an enabling climate for the objectives of the Treaty to be implemented’.<sup>92</sup> According to the court, incorporation did not make the treaty lose its independent existence at the international level,<sup>93</sup> such that it should be amended in accordance with municipal law. Certainly, this interpretation is right. However, I suggest that the reasoning of the court should be approached with caution. A rigid separation of community and national legal systems in an economic integration process can undermine the effectiveness of

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<sup>87</sup> But see *Shah v. Manurama Ltd* [2003] 1 East Afr. L. R. 294 where the court cited the provision as one of the reasons why a resident of the community need no longer pay security for costs when litigating before national courts.

<sup>88</sup> [2007] eKLR (Kenya High Court, 19 March 2007) [*Anyang’ Nyong’o-2007*].

<sup>89</sup> *Ibid.* at 13.

<sup>90</sup> Treaty for the Establishment of the East African Community Act 2000.

<sup>91</sup> *Anyang’ Nyong’o-2007*, *supra* note 88.

<sup>92</sup> *Ibid.* at 10

<sup>93</sup> The court rightly described the applicants description of the Treaty as a subsidiary legislation as ‘a horrendous view’.

community law. In general, the above judgments reflect inattention to the interconnectedness of both legal systems in economic integration.

At present, it appears that only the Kenyan courts and the EAC Court of Justice have dealt with the issues of supremacy and conflict between community and national laws, including national constitutions. Generally, their responses do not portend well for establishing a proper nexus between community and national laws with a view to strengthening economic integration. Their approaches suggest that community law is treated as another kind of international law. The traditional judicial approaches to the place of international law in states have been automatically extended to community law. I argue that this is wrong. As far back as 1974, Pescatore cautioned against the ‘...tendency to transfer in rather too facile a manner to community law the solutions – good or bad – which had previously been worked out in relation to the domestic application of international law’.<sup>94</sup> It is a caution which African courts should take notice of when dealing with community law.

To an extent, it is difficult to criticize the Kenya courts on their decisions in *Okunda*, *Maina* and *Anyang’ Nyong’o*. Indeed, in all three cases, the courts’ task was not made any easier by the fact that the cases involved conflicts between community law and the constitution – the highest law of the land. As discussed further in Chapter Seven, national courts’ responses to community law will be influenced and constrained by domestic constitutional imperatives. This appears to have been a paramount consideration in the Kenya cases. In those countries where the constitution is declared as the supreme law of the land and any other law found to be inconsistent with it is void, it will take a great deal of judicial imagination to accept the supremacy of community law. It is possible that the three decisions might have been different had the conflicts involved ‘ordinary’ domestic legislation. Apart from *Okunda*, it also does not appear that the specific demands EAC law makes on Kenya’s legal systems were argued in court. Surely, if community law is to assume a paramount and superior place in states, lawyers have a crucial role to play.

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<sup>94</sup> Pierre Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations based on the Experience of the European Communities* (Leiden: A.W. Sijthoff Publishing Company, 1974) at 96.

This raises a broader issue, which is, the extent to which African lawyers and judges are aware of the national implications of Africa's economic integration agreements.<sup>95</sup> The development of community consciousness in these professionals is essential to ensuring that community law occupies a superior place in member states. In this regard, it is a welcome development that law societies of EAC member states successfully challenged a decision of the community and member states before the EAC Court of Justice.<sup>96</sup> The litigation evidences an awareness of the existence and importance of the EAC and demonstrates a willingness to defend its values. Many more of such legal challenges are needed to advance Africa's economic integration through law.

It is inappropriate to suggest that other African courts will follow the Kenyan courts on the issue of conflicts between community and national law. It must be admitted, however, that the prospect does not look good for community law unless national courts appreciate its unique character and do not treat it as just another type of international law. Indeed, making AEC law take precedence over national law implicates national sovereignty. This is likely to be resisted. Intensive judicial and legal education is needed on the distinct nature of community law (as opposed to public international law), its appropriate relations with national laws, and the role expected of judges and lawyers in their approach to community law issues. In this regard, national seminars, conferences, workshops and the inclusion of the legal aspects of economic integration in the curriculum of law schools are important.<sup>97</sup> This education will definitely take time to bear fruits. But, one can be cautiously optimistic, especially if the benefits of economic integration are felt directly in the lives of peoples and industry.

#### **4.4.2.3 The Political Reaction**

Apart from national judicial response to an assertion by the African Court of Justice that AEC law supersedes national laws, the domestic socio-political climate is also important. The issue is whether there is a general political culture of respect for international law to sustain this

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<sup>95</sup> Kulusika, *supra* note 14.

<sup>96</sup> See *East African Law Society and Others v. Attorney General of the Republic of Kenya and Others*, Ref. No. 3 of 2007 (East African Court of Justice, 2008) [*East African Law Society*].

<sup>97</sup> Between April 23-25 2008, the Faculty of Law, Eduardo Mondlane University, Mozambique organized the *First International Conference on Regional Integration Issues and Southern African Development Community Law*. This is a classic example of what is being advocated here.

assertion and, especially, its full legal implications for national legal systems. In Europe, Alter has demonstrated how socio-political forces shaped and enhanced the influence the ECJ exercises over the EC's integration process through its jurisprudence.<sup>98</sup> Her comparative work with Helfer on the Andean Community Tribunal also reveals how 'the environment' of that community constrains the Tribunal's jurisprudence.<sup>99</sup>

An investigation into political reactions to international law and judicial decisions can provide some guidance on the future role of the African Court of Justice in Africa's economic integration. There has been occasional resistance to international law in some African countries. Maluwa discusses an amendment to the Constitution of Zimbabwe that was introduced ostensibly to prevent judges from relying on international law.<sup>100</sup> More recently, an unfavourable decision from the EAC Court of Justice<sup>101</sup> was met with amendments to the EAC Treaty.<sup>102</sup> The amendments have subsequently been found by the court to have been effected in a manner inconsistent with the procedures laid down in the EAC Treaty.<sup>103</sup> This political reaction towards community law is inimical and should be condemned. On the other hand, I have argued elsewhere, using national constitutions and international treaties, that Africa is becoming more 'international

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<sup>98</sup> Karen J. Alter, *The European Court's Political Power – Selected Essays* (Oxford: Oxford University Press, 2009).

<sup>99</sup> Karen J. Alter & Laurence Helfer, "Nature or Nurture? Judicial Law-Making in the European Court of Justice and the Andean Tribunal of Justice" [Unpublished Manuscript].

<sup>100</sup> Maluwa, *Incorporation of International Law*, *supra* note 55 at 64.

<sup>101</sup> In *Peter Anyang' Nyong'o v. The Attorney General of Kenya*, Reference No. 1 of 2006 (East African Court of Justice, 2007), the court restrained the Clerk to the East African Legislative Assembly and the Secretary General of the EAC from recognizing nine persons named by Kenya as duly elected by its National Assembly to the East African Legislative Assembly or permitting them to participate in any function of the Assembly.

<sup>102</sup> The amendments were to: restructure the Court into two divisions, i.e. a First Instance Division and an Appellate Division; expand the grounds for removing a judge of the court from office; provide for suspension of a judge who is under investigation for removal or is charged with such offence; limit the court's jurisdiction so as not to apply to jurisdiction conferred by the treaty on organs of member states; provide a time limit within which a reference to the court by legal and natural persons may be instituted; provide grounds on which appeal may be made; and deem past decisions of the court and existing judges to be decisions and judges of the First Instance Division respectively. The court accepted the argument that some of these amendments were meant to intimidate the judges.

<sup>103</sup> *East African Law Society*, *supra* note 96. The court reasoned that the failure to carry out consultation on the amendments outside the community institutions was inconsistent with the principle of promoting people's participation in the activities of the EAC as envisaged in various provisions of the treaty. However, the court declined to invalidate the amendments. It declared that its holding on the requirement of involvement of people in the treaty amendment process should have prospective application. This anticlimax to an otherwise bold decision left the question of the future status of the amendments to the political will of member states, who unsurprisingly have implemented the amendments.

law-friendly'.<sup>104</sup> Indeed, in the unadopted Proposed Constitution of Kenya, 2005, EAC law was listed as part of the laws of Kenya.<sup>105</sup> This provision could have had profound impact on the status of EAC law in Kenya's legal system.

It must be admitted that the real political reaction to international law, especially decisions of international courts, such as the African Court of Justice, is difficult to assess.<sup>106</sup> In countries such as Botswana, Namibia and South Africa where international law occupies a respected place in their legal systems,<sup>107</sup> it is likely that community law and an assertion that community law supersedes national law may be well received. In countries where democracy and the rules of law are absent, the reaction may be hostile. For example, a recent decision of the SADC Tribunal declared Zimbabwe's policy of seizing farms of the applicants as a breach of the Southern African Development Community Treaty.<sup>108</sup> In his reaction to the decision, President Mugabe has said that the Tribunal had no right to intervene on the farmers' behalf. In his words: 'Some farmers went to the SADC, but that's nonsense, absolute nonsense, no-one will follow that. We have courts here in this country that can determine the rights of people. Our land issues are not subject to the SADC tribunal'.<sup>109</sup> International law resisted by politicians often takes the form of international human rights laws, which act as constraints on state action. Community laws need not always be of such

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<sup>104</sup> Oppong, *supra* note 54.

<sup>105</sup> See Proposed New Constitution of Kenya (2005), Kenya Gazette Supplement No. 63, art. 3. This Constitution was rejected in a referendum held on 21 November 2005 for reasons mainly related to its provisions on presidential powers.

<sup>106</sup> So far, there does not appear to have been a systematic study on the level of African states' compliance with decisions of international courts. However, a recent survey on compliance with decisions of the African Commission on Human and Peoples Rights offers useful insights. See Frans Viljoen & Lirette Louw, "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004" (2007) 101 Am. J. Int'l L. 1 at 4-8 They report that between 1994-mid 2003 the African Commission for Human Rights found violations of the African Charter for Human and People's Rights in respect of forty-three communications (complaints). As at 31 December 2004, only six had been complied with fully and in a timely fashion; states clearly had failed to comply in thirteen cases and had only partly complied in fourteen cases. In the words of the authors there was 'clearly an overall lack of state compliance with the recommendations of the African Commission'.

<sup>107</sup> See e.g. Ob Tshosa, "The Status and Role of International Law in the National Law of Botswana" in C.M. Fombad ed., *Essays of the Law of Botswana* (Cape Town: Juta & Co, 2007).

<sup>108</sup> *Mike Campbell (Pvt) Ltd. & Others v. The Republic of Zimbabwe*, SADC (T) Case No. 2/2007, (SADC Tribunal, 2008).

<sup>109</sup> B.B.C News, "Mugabe Vows to Seize more Farms", 28 February 2009, online: B.B.C. <<http://news.bbc.co.uk/2/hi/africa/7916312.stm>>. In June 2009, the SADC Tribunal held that Zimbabwe and its agents had failed to comply with the decision of the Tribunal and, pursuant to article 32(5) of the Protocol on the Tribunal reported its findings to the Summit of Heads of State and Government for the latter to take appropriate action. See *William Michael Campbell v. The Republic of Zimbabwe*, Case No SADC (T) 03/2009 (SADC Tribunal, 2009)

character. The fact that supremacy of community law does not imply the abrogation of the national law, but rather its disapplication in the specific issue at stake should make it a little easier to accommodate.

It remains to be seen whether, when the African Court of Justice becomes operational and the opportunity presents itself, the court will assert the supremacy of AEC law. If it does, the next challenge will be the national judicial and political responses. The responses may vary from country to country. Indeed, it may take considerable time for all to be in favour of the supremacy of AEC law. In the meantime, there is a need for the AEC and the RECs to conduct studies on their members to ascertain how their legal systems relate to the communities' and what should be done by member states to ensure the supremacy of community law. A potential route will be for states nationally to legislate the supremacy of AEC law. An example of this is section 102(1) of Zimbabwe's Customs and Excise Act, which provides that trade agreements concluded by the President under the provisions of the Act 'shall have force and effect notwithstanding anything inconsistent therewith contained elsewhere in this Act or in any other law or instrument having effect by virtue of any law'.

#### **4.4.3 Harmonization of Law**

##### **4.4.3.1 Differences in National Laws**

A key interstate relational issue in economic integration is how to overcome the challenges posed by differences in legal traditions and laws. These differences, which exist in substantive and procedural laws, may even extend to legal culture and mode of legal thought. In Africa, differences in national laws are attributable to the diversity of legal traditions, namely common law, civil law, Roman Dutch law, customary law and Islamic law. The legal traditions of the former colonizers of Africa still prevail in their former colonies.<sup>110</sup>

The extent to which laws vary from country to country in Africa should not be exaggerated. Geographical proximity, common colonial experience, and the legislative draftsman's penchant to copy legislation from neighbouring countries have led to a situation where, as between countries adhering to the same legal tradition, their laws are very similar. A Ghanaian lawyer who moves to Nigeria will not be bewildered by the principles of the Nigerian legal system. Nor will a Namibian

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<sup>110</sup> The former colonizers of Africa include United Kingdom, France, Belgium and Portugal.

lawyer who moves to South Africa. The same cannot be said of a Ghanaian lawyer who moves to South Africa. This presents advantages and challenges for Africa's economic integration. Differences in national laws are manifest in many areas of law. For example, on jurisdiction in international matters, the Roman Dutch law countries<sup>111</sup> have attachment as the basis of jurisdiction. The common law states<sup>112</sup> have service as the foundation of jurisdiction. These differences in national laws will become more significant as economic integration progresses and cross-border economic activities increase. Differences in national laws complicate business decision-making. Persons transacting in many countries may have to seek legal advice on different legal regimes. It may mean they would have to adhere to different national standards. These add to the cost of doing business.

Differences in national laws may lead to the concentration of investments in countries with well-developed legal systems or favourable rules to the detriment of other members of an economic community. For example, in the Roman Dutch law countries, an investor's assets can be attached to found jurisdiction and he will not be able to deal with the assets until the end of the litigation.<sup>113</sup> This is a relevant consideration when investing in those countries, especially if the country is plagued with delays in trials as is the case with many African states. In common law countries, the assets will still be available for the investor's use during the litigation unless specifically prevented from dealing with them through the granting of a pre-trial Mareva injunction.<sup>114</sup> It is no happenstance that the powerhouses of Africa's RECs – South Africa, Kenya

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<sup>111</sup> These are Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe.

<sup>112</sup> These are Gambia, Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda and Zambia. One should also add Liberia, which, although not a British colony, has laws influenced by English law. This is because of its historical association with America.

<sup>113</sup> The plaintiff must show that he has a *prima facie* cause of action against the defendant; that the defendant is a *peregrinus* (not domiciled or resident in the country); and that the defendant has property within the court's jurisdiction or in the country. See *Numil Marketing v. Sitra Wood Products Ltd.* 1994 (3) S.A. 460 at 463. Once these conditions are met, the court has no discretion to refuse the application. See *Longman Distillers Ltd. v. The Drop Inn Group of Liquor Supermarkets Ltd.* 1990 (2) S.A. 906. Zimbabwe has modified the rule by statute. See High Court Act, Chapter 7: 06, s 15. In *Clan Transport Co Ltd v. Government of the Republic of Mozambique* 1993 (3) S.A. 795, the Zimbabwean court held that although under the Roman Dutch law there must be an arrest of the defendant *peregrinus* or an attachment of his property within the territorial jurisdiction of the Court in order to found or confirm jurisdiction, that position has been altered by section 15 of the High Court of Zimbabwe Act 29 of 1981, which confers on the High Court a discretion whether or not such an order should be granted.

<sup>114</sup> In order to obtain a Mareva injunction the claimant must: establish a good arguable case against the defendant on the merits of the case; establish that there is a serious risk that any judgment will go unsatisfied as the defendant is likely to dissipate his assets; establish that, in the circumstances of the case, it is just and convenient to grant the relief and provide undertaking as to damages. Also, the injunction is relief *in personam* and does not operate as an



and Nigeria – have relatively developed legal systems compared with their neighbours. Concentration of investments in specific countries in an economic community breeds jealousy. This can lead to the disintegration of the community,<sup>115</sup> especially if there is no community fund available to offset any losses states may incur from membership of the community. Differences in national laws also do not afford equal legal protection to citizens of a community since legal rights on the same issue may vary between states.

#### 4.4.3.2 The Call for Harmonization

Harmonization or unification of national laws within an economic community overcomes the above problems. Harmonization involves synchronizing the laws in the member countries. It reduces differences in laws to the barest minimum, but it does not eliminate them. Harmonization allows countries to take account of their diverse national needs when implementing the harmonized laws. Unification, on the other hand, provides a single and uniform body of law for the participating countries. In my opinion, with fifty-three countries of diverse legal traditions and laws, harmonization of laws should be the path for African countries.

Harmonization (indeed some may argue unification) of laws is an important part of the legal infrastructure of integrated economies.<sup>116</sup> In my opinion, it should be a key component of Africa's economic integration processes. Harmonization promotes certainty. It subjects trans-boundary transactions to the same, or similar, substantive or procedural laws. It engenders equality of legal treatment, and potentially reduces transaction costs. If law is the cement of society, then it is also arguable that people living under a harmonized system of law will feel more interconnected. Thus, harmonization provides an avenue for social integration, and can be an important

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attachment on property. Accordingly, it allows the defendant to deal with the property in a limited number of cases (it does not give the plaintiff security rights in preference to other creditors and the defendant can usually pay his creditors in the normal course of business). See Lawrence Collins ed., *Dicey, Morris and Collins the Conflict of Laws* (London: Sweet and Maxwell, 2006) at 209-210.

<sup>115</sup> The collapse of the EAC is often cited in this regard. See generally Susan Fitzke, "The Treaty for East African Co-Operation: Can East Africa Successfully Revive One of Africa's most Infamous Economic Groupings?" (1999) 8 *Minn. J. Global Trade* 127; Neil Orloff, "Economic Integration in East Africa: The Treaty for East-African Co-Operation" (1968) 7 *Colum. J. Transnat'l L.* 302.

<sup>116</sup> See e.g. *Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy*, 5 July 2001, 2259 U. N. T. S. I-40269, art. 74(2). It provides that the member states shall harmonize their laws and administrative practices in respect of, *inter alia*: (a) companies or other legal entities; (b) intellectual property rights; (c) standards and technical regulations; (d) labelling of food and drugs; (e) sanitary and phytosanitary measures; (f) competition policy; (g) dumping; (h) subsidies and countervailing measures; and (i) commercial arbitration.

complement to political and economic integration. It is therefore little wonder that harmonization of laws has been suggested as being essential to Africa's economic integration processes. Differences in national laws are seen as an obstacle to economic integration.<sup>117</sup>

As early as 1965, and just two years after the formation of the OAU, Professor Allott concluded that the international harmonization of laws in Africa was a key aspect of the 'pan-African spirit in action'.<sup>118</sup> He anticipated that the rebuilding of regional institutions, such as the East African Community, would make 'a limited contribution to harmonization of laws' in areas which affect trade, taxation and the movement of people. However, this has not happened<sup>119</sup> even though article 2(j) of the Treaty for East African Co-operation, 1967, called for the approximation of the commercial laws of the member states. In recent times, numerous calls, within and outside the context of economic integration, have been made for the harmonization of laws in Africa.<sup>120</sup>

Unlike other African economic integration treaties,<sup>121</sup> the AEC Treaty is not explicit on the importance of states harmonizing their laws. The importance of this issue appears not to have attracted the attention of the drafters of the AEC Treaty. However, the treaty contains references to harmonization of policies.<sup>122</sup> It is suggested that 'policy' should be broadly interpreted to encompass law. Characteristic of the general lack of attention to relational issues in Africa's

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<sup>117</sup> Bankole Thompson, "Legal Problems of Economic Integration in the West African Sub-Region" (1990) 2 Afr. J. Int'l & Comp. L. 85 at 99-100; Bankole Thompson & Richard S. Mukisa, "Legal Integration as a Key Component of African Economic Integration: A Study of Potential Legal Obstacles to the Implementation of the Abuja Treaty" (1994) 20 Commonwealth L. Bull. 1446 at 1454; Yinka Omorogbe, "The Legal Framework for Economic Integration in the ECOWAS Region: An Analysis of the Trade Liberalisation Scheme" (1993) 5 Afr. J. Int'l & Comp. L. 355 at 364-65.

<sup>118</sup> A. N. Allott, "Towards the Unification of Laws in Africa" (1965) 14 Int'l & Comp. L. Q. 366 at 374.

<sup>119</sup> Antony Allott, "The Unification of Laws in Africa" (1968) 16 Am. J. Comp. L. 51 at 85 [Allot, Unification].

<sup>120</sup> See Muna Ndulo, "Harmonization of Trade Laws in the African Economic Community" 42 Int'l & Comp. L. Q. 101; Muna Ndulo, "The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)" (1996) 4 Afr. Y.B. Int'l L. 195; John Ademola Yakubu, *Harmonization of Laws in Africa* (Lagos: Malthouse Press Limited, 1999); 'Gbenga Bamodu, "Transnational Law, Unification and Harmonization of International Commercial Law in Africa" (1994) 38 J. Afr. L. 125; O. Anukpe Ovwah, "Harmonization of Laws Within the Economic Community of West African States (ECOWAS)" (1994) 6 Afr. J. Int'l & Comp. L. 76.

<sup>121</sup> See e.g. ECOWAS Treaty, *supra* note 38 art. 57; *Treaty establishing the Common Market for Eastern and Southern Africa*, 5 November 1993, 33 I.L.M. 1067, art. 4(6)(b) [COMESA Treaty]. It calls on member states to harmonize or approximate their laws to the extent necessary for the proper functioning of the common market. It must also be noted that a degree of harmonization of laws is inherent in all economic integration arrangements in the form of common internal and external tariffs.

<sup>122</sup> See e.g. AEC Treaty, *supra* note 5 arts. 3(c), 4(1)(d), 5(1), 77.

economic integration processes, even for those treaties that make provision for the harmonization of laws, no meaningful efforts have been made in that direction.<sup>123</sup>

However, there is currently one laudable initiative towards the harmonization of substantive laws among some sixteen countries.<sup>124</sup> The initiative is being pursued under the aegis of the Organisation for the Harmonization of Business Laws in Africa (OHADA), which is not an economic integration organization. Most of the members of OHADA are francophone states in West Africa, and they all share a civil law tradition. The objective of the OHADA Treaty<sup>125</sup> is to harmonize the business laws in the contracting states through the elaboration and adoption of simple, modern and common rules adapted to their economies.<sup>126</sup> The states' willingness to abandon their disparate national laws in favour of harmonized rules represents a triumph for international co-operation in Africa. But, so far, it is an isolated example.

From the perspective of using legal harmonization as a means of defining the relations between laws in different legal systems, two principal areas of law for harmonization are recommended for African countries to consider. These are the harmonization of substantive rules and the harmonization of private international law rules. Harmonization of substantive law

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<sup>123</sup> See e.g. EAC Treaty, *supra* note 40 art. 126 which enjoins member states to 'encourage the standardization of judgments of courts with the Community', and 'harmonise all their national laws appertaining to the Community'. In August 2009, the Investment Climate Facility for Africa announced a project in partnership with the member states of the East African Community (EAC) to harmonize commercial laws within the region. The project will be implemented in two phases over a period of 12 to 15 months with the end goal of establishing a common legal system across Burundi, Kenya, Rwanda, Tanzania and Uganda. The project will focus on harmonizing key commercial laws in the region. It will focus on the following nine areas of commercial law: Banking laws; Business transaction laws; Finance and fiscal legislation; Insurance and re-insurance legislation; Investments; Procurement and disposal of assets legislation; Monetary legislation; Standardisation, quality assurance and metrology legislations; and Trading law. See <http://www.icfafra.org/en/news-resources.php>

<sup>124</sup> They are Benin, Burkina Faso, Cameroon, the Central African Republic, the Comoros, Congo-Brazzaville, Cote d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. Liberia, Angola, and the Democratic Republic of Congo are on record as having expressed interest in becoming members. See Sebastien Thouvenot, "News on the Development of the Organisation for the Harmonization of Business Law in Africa (OHBLA)" (2006) 5 Int'l Bus. L.J. 704.

<sup>125</sup> OHADA Treaty, *supra* note 42. Boris Martor *et al.*, *Business Law in Africa: OHADA and the Harmonization Process*, 2nd rev. edition (London: Kogan Page, 2007); Claire M. Dickerson, "Harmonizing Business Laws in Africa: OHADA Case Calls the Tune" (2005) 44 Colum. J. Transnat'l L. 17; Nelson Enonchong, "Harmonization of Business Law in Africa: Is article 42 of the OHADA Treaty and Problem?" (2007) 51 J. Afr. L. 95; Salvatore Mancuso, "Trends on the Harmonization of Contract Law in Africa" (2007) 13 Ann. Surv. Int'l & Comp. L. 157.

<sup>126</sup> OHADA Treaty, *supra* note 42 art. 1.

involves ensuring a degree of similarity in the substantive laws of the countries concerned. Harmonizing private international law rules implies that the substantive laws of the states remain intact, but harmonized choice-of-law, jurisdiction and foreign judgment enforcement rules are provided to ensure that parties transacting across national boundaries can be well-informed of the governing law and the court(s) with jurisdiction in case of disputes.

Harmonizing either area has merits and faults. Substantive harmonization of laws brings certainty because people transacting across national boundaries will be subject to the same substantive law. Indeed, to some, substantive harmonization is preferred to the harmonization or unification of private international law rules.<sup>127</sup> Although substantive harmonization of law reduces the scope for private international law problems, it requires great effort to achieve. Even when successful, ‘private international law will remain of considerable importance in the resolution of cross border disputes’.<sup>128</sup> Accordingly, it is important that both areas are addressed. Harmonizing private international law rules generally entails only a minimal disturbance in national legal systems as private international law addresses only matters involving foreign elements. Consequently, it is more likely to appeal to the politician with an eye for preserving his country’s unique or perceived superior legal system. The process is considered simpler because a whole branch of substantive law may be covered by a few choice-of-law clauses.<sup>129</sup>

Given that no attempt has been made towards continent-wide harmonization of substantive laws, private international law may be the place to start. This is especially so in the area of commercial law, which is of immediate importance to the promotion of regional economic activity in the Africa, and for which national values may not be too diverse. As Allott has perceptively observed, in Africa it is those areas of law with ‘less peculiar local content’ that are more likely to be susceptible to transnational harmonization.<sup>130</sup> As suggested in Chapter Seven, the Institute for

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<sup>127</sup> Peter Hay *et al.*, “Conflict of Laws as a Technique for Legal Integration” in Mauro Cappelletti *et al.* eds., *Integration through Law-Europe and the American Federal Experience*, vol. 1 bk. 2 (Berlin, New York: Walter de Gruyter, 1986) at 256 [Hay].

<sup>128</sup> Roy Goode, “Rule, Practice, and Pragmatism in Transnational Commercial Law” (2005) 54 *Int’l & Comp. L. Q.* 539 at 541.

<sup>129</sup> Hay, *supra* note 127 at 170-74.

<sup>130</sup> Allot, Unification, *supra* note 119 at 86.

Private International Law in Africa,<sup>131</sup> which is part of the University of Johannesburg, could be given a role to play. Also, the efforts of OHADA<sup>132</sup> to harmonize substantive law can be adopted by the AEC and made a continent-wide initiative. This would be consistent with, albeit an extension of the philosophy of using regional economic communities as building blocks of the AEC. Indeed, it is reported that the AU has taken interest in the OHADA initiative, and is studying the approximation of OHADA law and the common law.<sup>133</sup>

Harmonization of either substantive or private international law requires a choice as to the character of the legal instruments to be used. The OHADA approach, which relies on hard law instruments, binding and directly applicable, could be used by the AEC. An alternative to hard law instruments are model laws which will subsequently be adopted with adaptations by national parliaments. At these formative stages of the development of the AEC, model laws may be particularly apposite. Model laws allow for legislation to be made taking into account specific national demands. A limited, albeit useful, addition will be for the AEC to encourage member states to be more active in international initiatives on the unification of private law and for them to be parties to instruments generated from the initiatives.

#### **4.4.3.3 Paths to Harmonization of Laws**

A path to harmonizing laws in Africa is to organize it along legal traditions under what I characterize as a pyramid scheme for harmonization. This scheme takes as its foundation the idea that the legal principles of countries with the same legal tradition are very similar. Accordingly, harmonization should begin among countries belonging to the same legal tradition. With the appropriate institutional support and enthusiastic legal personnel, this should proceed fairly quickly and easily. It should end with the harmonization of the outcomes of the intra-legal traditions harmonization process. This stage should also move fairly quickly since it will entail dealing with small numbers of legal instruments.

Applying the pyramid scheme to the ECOWAS and using contract law as the object, Gambia, Ghana, Liberia, Nigeria and Sierra Leone should constitute one harmonization group

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<sup>131</sup> See Institute for Private International Law in South Africa, University of Johannesburg, <http://general.rau.ac.za/law/English/ipr/ipr.htm>.

<sup>132</sup> See generally Martor, *supra* note 125; Dickerson, *supra* note 125.

<sup>133</sup> Thouvenot, *supra* note 124.

(common law group). Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Guinea, Guinea Bissau, Mali, Niger, Senegal and Togo would constitute another group (civil law group). A similar approach can be adopted for harmonizing laws within the COMESA and EAC. To avoid unnecessary duplication and conflicts resulting from the fact that states are often members of more than one regional community, it is suggested that under the pyramid scheme a country participates in only one community of its choice.

The table below provides a procedural outline for a harmonized law on jurisdiction and the Recognition and enforcement of foreign judgments for members of COMESA, EAC, ECOWAS and SADC using the pyramid scheme for harmonization. Countries which are members of more than one community have been assigned into one community only. The process covers almost all Sub-Saharan African countries.

**Table 2: COMESA, EAC, ECOWAS and SADC: Pyramid Harmonization for Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments**

**Stage One: Intra-community Harmonization**

**COMESA**

<b>GROUP</b>	<b>COUNTRIES</b>
Civil Law	Burundi, Comoros, Democratic Republic of Congo, Madagascar and Rwanda
Islamic/Mixed	Djibouti, Egypt, Eritrea, Ethiopia, Libya and Sudan
Common Law	Malawi, Mauritius, Seychelles and Zambia

**EAC**

<b>GROUP</b>	<b>COUNTRIES</b>
Common Law	Kenya, Uganda and Tanzania

**ECOWAS**

<b>GROUP</b>	<b>COUNTRIES</b>
Common Law	Gambia, Ghana, Liberia, Nigeria and Sierra Leone
Civil Law	Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Guinea, Guinea Bissau, Mali, Niger, Senegal and Togo

**SADC**

<b>GROUP</b>	<b>COUNTRIES</b>
Roman Dutch Law	Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe
Civil Law	Angola, Mozambique, Democratic Republic of Congo

**Stages Two and Three**

<b>Stage Two: inter-community/intra legal tradition</b>	<b>Stage Three</b>	
COMESA, ECOWAS, EAC common law groups	Inter-legal traditions harmonization of outcomes	<i>Harmonized Judgment Enforcement Convention (ready for adoption)</i>
COMESA Mixed Legal Systems group		
COMESA, ECOWAS, SADC civil law groups		
SADC Roman Dutch law group		

It is suggested that, using the pyramid scheme as a model, the AEC should immediately embark upon the task of promoting the harmonization of both the substantive and private international laws in Africa. In this regard, it is significant that the Pan-African Parliament is currently seeking an expansion of its purely advisory role to that of a legislative role with a view to, *inter alia*, aiding the harmonization of national laws across Africa.<sup>134</sup> The Assembly of Heads of State and Government, in exercising powers conferred on it by article 25(2) of the AEC Treaty, should establish a specialized technical committee to look into legal issues involved in integration. This committee would have a specific mandate to look into the implications of these issues for the success of the AEC. Additionally, one of the principal responsibilities of the Committee on Coordination is the co-ordination and harmonization of ‘integration legislation’. This Committee was established by the Protocol on the Relations between the African Union and the Regional Economic Communities [Protocol on Relations].<sup>135</sup> It is suggested that the Committee should interpret this responsibility broadly to include not only legislation but also the impact of existing legal regimes in member states on the success of the AEC.

Another path to harmonization of laws in Africa, which should be explored, is to rely on the courts. I characterize it as the judicial path to harmonization. A radical step on this path is to establish regional courts with jurisdiction to hear appeals from decisions, civil and criminal, of national courts. The jurisdiction of the existing community courts can be expanded to accommodate this role.<sup>136</sup> This step will entail amendments of national constitutions and the founding treaties of the communities. Surely, it will be difficult to achieve. But, such a court is not without precedent in Africa. The East African Court of Appeal and the West African Court of Appeal served as appellate courts for decisions from the British colonies in East and West Africa respectively. Such a court provides a forum from which a ‘common jurisprudence’ – harmonized laws – on legal issues can be fashioned for decisions of national courts. In this way, a slow but appreciable level of harmonization can be achieved.

Admittedly, one may argue that there are so many regional courts in Africa, some largely inactive, that the appetite for another court would be low. However, a strong case exists, even

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<sup>134</sup> <<http://www.pan-africanparliament.org/home.aspx>>.

<sup>135</sup> July 2007, (2010) 18 Afr. J. Int'l & Comp. L. (forthcoming), art. 7.

<sup>136</sup> A regional court currently operating with such jurisdiction is the Court of Justice of the Caribbean Community



outside the harmonization context, for a community court with appellate jurisdiction. Given the character of its jurisdiction – hearing appeals from decisions of national courts – the court is bound to be active. Also, such a court can boost peoples and investors confidence in the communities. It would provide investors with a forum outside the ordinary state judicial structure in which disputes could ultimately be settled. It needs emphasizing that this confidence can materialize only if the independence of the community courts and their processes are guaranteed in a manner that is superior to those existing nationally. A community court with appellate jurisdiction should be impervious to local or national pressures. At present, the idea of reviving the East African Court of Appeal is being discussed.<sup>137</sup>

A less ambitious step on the judicial path to harmonization is through jurisprudential communication. Courts should be more attentive to the jurisprudence of each other in deciding cases with a view to achieving uniformity of outcomes. I explore in Chapter Nine whether this is occurring using some private international law cases.

#### **4.5 CONCLUSION**

The initiative to integrate the economies of African states through the AEC is laudable and must be encouraged. It is one of the surest paths to economic development of Africa. The success of the AEC will depend on its ability to overcome the demands and challenges of integration, be they economic, political, social or legal. This chapter, and indeed the remainder of this thesis, reveal the absence of legalism at community, regional and national levels as an important problem for Africa's integration.

A key legal issue identified in this chapter is that of structuring and managing community-state relations. Unfortunately, the chapter reveals a lack of attention in the AEC Treaty and related instruments to complex relational issues. Unless strong relations are established with member states, the stability of the AEC will be endangered. Such relations can develop only with strong community institutions, including an active judicial branch, supportive national courts, a

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<sup>137</sup> Under article 27(2) of the EAC Treaty, it is provided that the EAC Court of Justice 'shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date'. Member states are enjoined to conclude a protocol to implement the extended jurisdiction. Consultation is currently underway on this issue. See *Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice* (EAC Secretariat, 2005).

bureaucracy committed to the goals of integration, the existence of political will favourable to integration, and an active role for individuals in regional economic integration processes.

It is recommended that that a committee be established by the Assembly to look into relational issues of law affecting Africa's economic integration processes. The committee should be charged with the responsibility of examining, among others: the place of AEC law within member states; areas where there is potential for conflicts between community and national law; how these conflicts may be addressed; and how community law will impact and relate to the legal systems of member states. At the present stage in the development of the AEC, the difficulties arising from the lack of attention to these issues have not been very prominent. But, this by no means suggests they will not arise. The opportunity exists for them to be addressed before they become stumbling blocks on the path to a stable and effective African Economic Community. In Chapter Five, I will examine how some of these issues have actually arisen in the COMESA, ECOWAS, and EAC, and how their courts are addressing them.

## CHAPTER FIVE: RELATIONAL ISSUES, INSTITUTIONAL STRUCTURES AND JURISPRUDENCE OF COMMUNITY COURTS

### 5.1 INTRODUCTION

Relational issues in economic integration take various forms and arise in different forums. A vehicle for addressing relational issues is the founding treaty of an economic integration process. However, given the complexity and continuing character of economic integration, these issues, and the problems resulting from them, may continue to haunt the process. Community courts are legal guardians of an economic integration process, enforcers of the benefits it brings, agents for deciding when a breach has occurred and the remedy for it, and arbiters of the institutional tensions inherent in it.<sup>1</sup> They are often called upon to solve these problems. As Shany has observed, ‘... economic integration/trade liberation courts ... have been created primarily in order to help sustain a very delicate equilibrium between the states parties and other stakeholders participating in a special legal regime, and between the states and other stakeholders and the regime’s institutions’.<sup>2</sup> In addition to dispute settlement, community courts are responsible for norm-advancement and regime maintenance.<sup>3</sup> This chapter assesses how community courts in Africa have been confronted with relational issues and their response.

The chapter uses the founding treaties of the Common Market for Eastern and Southern Africa (COMESA),<sup>4</sup> the Economic Community of West African States (ECOWAS)<sup>5</sup> and the East African Community (EAC),<sup>6</sup> plus the community courts established by them as the focus.<sup>7</sup> A key

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<sup>1</sup> Admittedly, these functions go beyond what one would ordinarily expect of a court. However, it is arguable that community courts have both judicial and ‘political’ functions. Compared with national courts, their role resembles more of a constitutional court than other lower courts.

<sup>2</sup> Yuval Shany, “No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary” (2009) 20 Eur. J. Int’l L. 73 at 82.

<sup>3</sup> *Ibid.* at 81.

<sup>4</sup> *Treaty establishing the Common Market for Eastern and Southern Africa*, 5 November 1993, 33 I.L.M. 1067 [COMESA Treaty].

<sup>5</sup> *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, (1996) 8 Afr. J. Int’l & Comp. L. 187 [ECOWAS Treaty]. In *Frank Ukor v. Alinnor*, Suit No. ECW/CCJ/APP/01/04 (ECOWAS Court of Justice, 2005) at [21] [*Frank Ukor*], the ECOWAS court held that the treaty is ‘the supreme law of the ECOWAS, and it may be called its Constitution’.

<sup>6</sup> *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 U.N.T.S. I-37437 [EAC Treaty].

<sup>7</sup> Another important community court is the Southern African Development Community Tribunal. Its constitutive treaty and jurisprudence will occasionally be referred to. For a comprehensive treatment see Oliver C. Ruppel &

to a community court's ability effectively to address the challenges of economic integration is its jurisdiction and institutional set-up. Accordingly, the chapter begins with a comparative survey of the institutional structures of the COMESA, ECOWAS and EAC courts. This is followed by a descriptive account of some decided cases in which relational issues and the problems resulting from them were articulated or addressed. The jurisprudence from these cases is then critically evaluated.

## 5.2 INSTITUTIONAL STRUCTURES OF THE COMMUNITY COURTS

### 5.2.1 Introduction

Courts are important in studying relational issues in economic integration. Indeed, in a complex regime, such as that generated by economic integration, the presence of a robust court to superintend aspects of the regime through dispute settlement is essential.<sup>8</sup> Dispute settlement is a key aspect of governance in economic integration. It improves the chances of state compliance with their treaty obligations and instils business confidence. However, their potential to restrict governmental discretion, especially as regards domestic policy, conditions the extent of powers entrusted to them by states.<sup>9</sup>

Schneider has categorized, into four groups, the dispute settlement regimes used by international trade organizations.<sup>10</sup> These are the negotiation, investor arbitration, international adjudication and supranational court regimes. She distinguishes these regimes using the criteria of direct effect, supremacy of the institution's law over domestic law, *locus standi*, transparency and enforcement. The choice of regime in a given organization is influenced by a number of socio-economic, political and legal considerations. These include the level of integration desired, political systems in the member states, degree of control they want to exercise over the dispute

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Francoise-X. Bangamwabo, "The SADC Tribunal: A Legal Analysis of its Mandate and Role in Regional Integration" (2008) 8 *Monitoring Regional Integration in Southern Africa Yearbook* 179.

<sup>8</sup> See Alexander Keck & Simon Schropp, "Indisputably Essential: The Economics of Dispute Settlement Institutions in Trade Agreements" (2008) 42 *J. World Trade* 785; Katrin Nyman-Metcalf & Ioannis Papageorgiou, *Regional Integration and Courts of Justice* (Belgium: Intersentia Publishing, 2005).

<sup>9</sup> See James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts" (2000) 54 *Int. Org.* 137.

<sup>10</sup> Andrea Kupfer Schneider, "Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations" (1998-1999) 20 *Mich. J. Int'l L.* 679.

settlement process and legal culture.<sup>11</sup> Smith also classifies dispute settlement institutions along a spectrum that flows from the diplomatic to the legalistic.<sup>12</sup> The later is characterized by automatic third party rulings and review, directly binding and effective decisions, permanent tribunals and standing for individuals, states and institutions of the organization.<sup>13</sup>

The discussion below reveals that the institutional structure of the African community courts under review can be characterized as supranational and legalistic. To use the words of Helfer and Slaughter, the founding treaties contain provisions which allow ‘the tribunals to interact directly with the principal players in national legal systems’.<sup>14</sup> This is remarkable for a continent that is traditionally perceived as having no litigation culture and with a fetishist attachment to state sovereignty. However, it is explainable on the grounds that the levels of economic integration envisaged by the communities demand a supranational and legalistic court regime.<sup>15</sup>

It is worth emphasizing that institutional design is separate from the issue of whether the institution actually functions as envisaged.<sup>16</sup> It is possible for states to design a supranational court on paper, while at the same time be conscious of the fact that existing (but changeable) socio-economic, political and cultural conditions may prevent it from operating as such. These conditions may include overt and covert political interference with the court’s work, underfunding of its work, the prohibitive cost of international litigation, the absence of a supportive domestic constituency, and the absence of a litigation culture. Thus, it is important to look beyond the balance between the quest for treaty compliance and the desire for autonomy in domestic policy making<sup>17</sup> when one tries to account for the choice of a particular regime for dispute settlement in economic integration.

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<sup>11</sup> *Ibid.* at 727-752.

<sup>12</sup> Smith, *supra* note 9.

<sup>13</sup> *Ibid.* at 139-143.

<sup>14</sup> Laurence R. Helfer & Anne-Marie Slaughter, “Toward a Theory of Supranational Adjudication” (1997-1998) 107 *Yale L.J.* 273 at 277.

<sup>15</sup> Smith, *supra* note 9 at 148 (noting that ‘the more ambitious the level of proposed integration, the more willing political leaders should be to endorse legalistic dispute settlement’).

<sup>16</sup> Helfer & Slaughter, *supra* note 14 at 277 (noting that ‘the simple provision of supranational jurisdiction, however, is not a guarantee of effective adjudication’).

<sup>17</sup> Smith, *supra* note 9.

## 5.2.2 Structure of the Community Courts

The COMESA, ECOWAS, and EAC treaties establish courts of justice as one of their principal institutions.<sup>18</sup> Each court is charged with ensuring adherence to law in the interpretation and application of the treaty.<sup>19</sup> The COMESA court became fully operational in 1998. It is located in Lusaka, Zambia, but ultimately, it will have a permanent seat in Khartoum, Sudan. The ECOWAS court was inaugurated in 2001 and sits in Abuja, Nigeria. The EAC court was inaugurated in 2001 and sits in Arusha, Tanzania.<sup>20</sup>

The COMESA, ECOWAS, and EAC courts consist of seven, seven and six judges respectively.<sup>21</sup> Judges for the COMESA and ECOWAS courts hold office for five years and are eligible for reappointment once.<sup>22</sup> Judges for the EAC court hold office for a maximum of seven years.<sup>23</sup> The judges are appointed from among persons recommended by the community institution consisting of Heads of State and Government.<sup>24</sup> This process of appointing judges raises questions as to their independence, and how insulated they are from the influence of their appointing authority.<sup>25</sup> Some economic integration processes outside Africa have explored alternative modes

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<sup>18</sup> COMESA Treaty, *supra* note 4 art. 7; ECOWAS Treaty, *supra* note 5 art. 6(e); EAC Treaty, *supra* note 6 art. 9. The detailed provisions on the ECOWAS court are contained in a protocol which was amended in 2005. See Protocol A/P.1/7/91 on the Community Court of Justice of the High Contracting Parties as amended by Supplementary Protocol A/SP/.1/01/05 Amending the Protocol Relating to the Community Court of Justice [ECOWAS Court Protocol]. In this thesis, I consolidate the two protocols and refer to them as the ECOWAS Court Protocol.

<sup>19</sup> COMESA Treaty, *supra* note 4 art. 19; ECOWAS Court Protocol, *ibid.* art. 9(1); EAC Treaty, *supra* note 6 art. 23.

<sup>20</sup> The judgments from the community courts cited in this chapter reveal an appreciable caseload level given the fact that they were only recently established. Compared with other newly-established community courts, the African community courts are doing relatively well in terms of caseload. For example, the Caribbean Court of Justice, established in 2001, heard its first case which invoked its original jurisdiction (jurisdiction relating to the interpretation and application of the treaty establishing the Caribbean Community) in 2008. See *Trinidad Cement Ltd. v. The Co-operative Republic of Guyana* [2008] C.C.J. 1(OJ) [*Trinidad Cement I*] and *Trinidad Cement Ltd. v. The State of the Co-operative Republic of Guyana* [2009] C.C.J. 1(OJ).

<sup>21</sup> COMESA Treaty, *supra* note 4 art. 20(1); ECOWAS Court Protocol, *supra* note 18 art. 3(2); EAC Treaty, *supra* note 6 art. 24(2).

<sup>22</sup> COMESA Treaty, *ibid.* art. 21(1); ECOWAS Court Protocol, *ibid.* art. 4(1).

<sup>23</sup> EAC Treaty, *supra* note 6 art. 25(1).

<sup>24</sup> COMESA Treaty, *supra* note 4 art. 20(1); ECOWAS Court Protocol, *supra* note 18 art. 3(1); EAC Treaty, *supra* note 6 art. 24(1).

<sup>25</sup> See generally Ruth Mackenzie & Philippe Sands, "International Courts and Tribunals and the Independence of the International Court of Justice" (2004) 44 Harv. Int'l L.J. 271.

of appointing judges with a view to guaranteeing their independence.<sup>26</sup> To insulate community judges from governmental influence, it is suggested that the appointment of judges of the community courts should be entrusted to an independent body consisting of people not representing the member states. This is possible only through an amendment of the treaties and protocols regulating the courts. Membership of the appointing body can be drawn from the respective Bar Associations, Judicial Councils, Law Faculties, Chambers of Commerce, and civil society organizations. Admittedly, this suggestion will be difficult to market. Executive and political domination of the economic integration processes and their institutions is the norm in Africa and, as in other parts of the world the appointment of international judges is an executive privilege.<sup>27</sup> However, independence is a key to ensuring that community courts are able to perform effectively their superintending function in economic integration – something which Africa’s integration processes need.

Under the treaties, judges must be persons of proven integrity, impartiality and independence. They must fulfil the conditions required in their own countries to hold high judicial office or must be jurists of recognized competence.<sup>28</sup> In practice, judges of the community courts are appointed from serving judges of national courts.<sup>29</sup> This provides a linkage between the national and community legal systems. Also, from a relational perspective, it is significant that among the persons qualified to be appointed to the ECOWAS court are ‘jurisconsults of recognized competence in international law’.<sup>30</sup> This lays a foundation for forging a relationship between the ECOWAS and international legal systems. A judge with an international law background is more likely to bring the norms of the international legal system to bear on his or her decisions. Indeed, article 20 of the ECOWAS Court Protocol, unlike the other treaties, specifically enjoins the court to have regard to the body of laws contained in article 38 of the Statutes of the

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<sup>26</sup> Compare *Agreement Establishing the Caribbean Court of Justice*, 2001, online: Caribbean Court of Justice <<http://www.caribbeancourtofjustice.org/legislation.html>>.

<sup>27</sup> See generally Erik Voeten, “The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights” (2007) 61 *Int’l Org.* 669.

<sup>28</sup> COMESA Treaty, *supra* note 4 art. 20(2); ECOWAS Court Protocol, *supra* note 18 art. 3(1); EAC Treaty, *supra* note 6 art. 24(1).

<sup>29</sup> A problem resulting from this approach was revealed in East Africa. Some judges of the EAC court were being investigated in Kenya for corruption. They had been suspended as judges of the Kenyan judiciary, but continued to sit on the EAC court.

<sup>30</sup> ECOWAS Court Protocol, *supra* note 18 art. 3(1).

International Court of Justice in its decision-making.<sup>31</sup> The importance of this was borne out in the jurisprudence of the ECOWAS court in which reliance is often placed on international law.<sup>32</sup> The absence of such a provision in the COMESA and EAC treaties has, however, not prevented their respective courts from relying on international law.

Judges of the COMESA, EAC and ECOWAS courts may be removed by the appointing authority for misconduct or inability to perform the functions of their office due to infirmity of mind or body.<sup>33</sup> The ECOWAS Court Protocol and the EAC Treaty have built in mechanisms to ensure that the process of removing judges is not arbitrary. Under the EAC Treaty, a judge's removal should occur only after an *ad hoc* independent tribunal, set up for the purpose and consisting of three eminent judges drawn from the Commonwealth, has recommended it.<sup>34</sup> A recent amendment has sought, however, to deal a death blow to this pioneering provision for ensuring the independence of judges of the court. Under the new provisions, an '*ad hoc* independent tribunal', appointed by the Summit of Heads of State and Government, would be responsible for recommending a judge's removal from office to the Summit.<sup>35</sup> Under the

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<sup>31</sup> *Ibid.* art. 20(1). The COMESA and EAC treaties are silent on the issue of applicable law for their community courts. Compare the SADC Protocol on Tribunal and the Rules of Procedure Thereof, 7 August 2000, art. 21(1), online: Institute for Security Studies <[http://www.iss.co.za/AF/RegOrg/unity\\_to\\_union/pdfs/sadc/6Protocol\\_on\\_Tribunal.pdf](http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/6Protocol_on_Tribunal.pdf)> [SADC Tribunal Protocol]. It enjoins the Tribunal to 'develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States'. See generally Sunday Babalola Ajulo, "Sources of the Law of the Economic Community of West African States (ECOWAS)" (2001) 45 J. Afr. L. 73; Sunday Babalola Ajulo, "The Economic Community of West African States and International Law" (1989) 27 J. Modern Afr. Stud. 233.

<sup>32</sup> See e.g. *Frank Ukor*, *supra* note 5 at [13]-[15] discussing decisions of the International Court of Justice and the Permanent Court of International Justice on the principle of non-retrospectivity of statutes. *Jerry Ugokwe v. The Federal Republic of Nigeria*, Case No. ECW/CCJ/APP/02/05, (ECOWAS Court of Justice, 2005) at 30-[31] [*Jerry Ugokwe*] referring to article 38 of the Statutes of the International Court of Justice, decisions by the European Court of Justice and the International Court of Justice. *Tokumbo Lijadu-Oyemade v. Executive Secretary of ECOWAS*, Suit No. ECW/CCJ/APP/01/05 (ECOWAS Court of Justice, 2005) at [49] citing a decision of the International Court of Justice on provisional measures.

<sup>33</sup> EAC Treaty, *supra* note 6 art. 26, ECOWAS Court Protocol, *supra* note 18 art. 4, COMESA Treaty, *supra* note 4 art. 22.

<sup>34</sup> EAC Treaty, *ibid.* art. 26(2)(3).

<sup>35</sup> *Amendment of the Treaty for the Establishment of the East African Community*, 14 December 2006, East African Community Gazette Vol. AT 1-No. 006 [EAC Treaty Amendment]. In September 2008, the EAC court held that the processes leading to the amendments were inconsistent with the provisions of the treaty. The court, however, declined to make a declaration to that effect. It rather 'recommended that the said amendments be revisited'. See *East African Law Society v. Attorney General of Kenya*, Reference No. 3 of 2007 (East African Court of Justice, 2008) [*East African Law Society-Amendment*]. As these amendments have already been ratified by the member states, the court's decision leaves us in a perplexing legal situation: What is the legal status of the amendments within the EAC? In this thesis, I have assumed that they remain in force until they are revisited.



ECOWAS Court Protocol, the court must assess, in a plenary session, the grounds of removal and make a recommendation to the Assembly of Heads of State and Government. This provision allows for the removal process to be monitored and controlled by a body consisting of the judge's peers. This is essential to ensuring the independence and impartiality of judges.<sup>36</sup> The COMESA Treaty provides less protection for the judges of the COMESA court. Under article 22(1) of the treaty, they can be removed by the Authority of Heads of State and Government for stated misbehaviour or inability to perform the functions of their offices due to infirmity of mind or body or due to any other specified cause. The treaty is silent on how the Authority should arrive at its determination. Compared with the ECOWAS Court Protocol and EAC treaty's provisions, the COMESA provision represents a threat to the independence of the court and needs to be revisited.

One factor that contributes to judicial independence and, indeed, the integrity of a court as an institution, is financial security. Under article 29 of the ECOWAS Court Protocol, the remuneration, allowances and other benefits of the court's judges are determined by the Assembly of Heads of State and Government.<sup>37</sup> The salary and other conditions of service of the EAC court's judges are determined by the Summit of Heads of State and Governments on the recommendation of the Council of Ministers.<sup>38</sup> The COMESA Treaty is silent on this important issue.<sup>39</sup>

There are two worrying aspects in the financial provisions of the community courts. Firstly, it is uncertain whether the salary and other conditions of service of the judges can be varied to their disadvantage while they are in office. In some African countries, judges are constitutionally protected from adverse variations in their conditions of service.<sup>40</sup> It is submitted that a similar approach in the communities will enhance the independence of their judges. There is no legitimate

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<sup>36</sup> There have been two decided cases where allegations of bias (unrelated to governmental influence) have been leveled against judges of the COMESA and EAC courts. In both cases, the courts rejected the allegation. See *Eastern and Southern African Trade and Development Bank v. Ogang (No. 2)* [2002] 1 East Afr. L.R. 54; and *Attorney General of the Republic of Kenya v. Anyang' Nyong'o*, Application No. 5 of 2007 (East Africa Court of Justice, 2007).

<sup>37</sup> The budget of the ECOWAS court is subject to the approval of the Council of Ministers. See article 30 of the ECOWAS Court Protocol, *supra* note 18 and article 69 of the ECOWAS Treaty, *supra* note 5.

<sup>38</sup> EAC Treaty, *supra* note 6 art. 25(5). The budget of the EAC court is subject to the approval of the Council of Ministers. See article 132 of the EAC Treaty.

<sup>39</sup> It only provides that the terms and conditions of service of the Registrar and other staff of the court shall be determined by the Council of Ministers on the recommendation of the court. See article 41(3) of the COMESA Treaty, *supra* note 4. The Council approves the budget of the court.

<sup>40</sup> See e.g. Constitution of the Republic of Ghana, 1992, art. 127(5); Constitution of the Republic of Malawi, 1994, art. 114(2).

reason why judges of the community courts should be less protected than their counterparts in national courts. Secondly, the fact that the budget of the courts is tied to the communities' budget and subject to the approval of political institutions can undermine the courts' independence. Preferably, a separate fund, independently managed and financed, from which their expenditure is charged, would be more appropriate.<sup>41</sup>

### 5.2.3 Subject Matter Jurisdiction

A community court's jurisdiction influences its ability to guide an economic integration process and to arbitrate tensions inherent in the relations resulting from it.<sup>42</sup> Indeed, as Taylor has observed, 'it is impossible to assess the role played in an economic integration arrangement by a dispute settlement mechanism without review of its jurisdiction'.<sup>43</sup> There is considerable convergence between the treaties on the community courts' jurisdiction. But, there are also some notable differences.

The jurisdiction of the courts falls into four categories. Firstly is the jurisdiction over the interpretation and application of the treaty.<sup>44</sup> Secondly is the jurisdiction to hear and determine disputes between the community and its employees.<sup>45</sup> Thirdly, they have jurisdiction to determine cases referred to them as a result of parties – be they the community, its institutions or natural and legal persons – choosing any of them as a forum for the arbitration of disputes.<sup>46</sup> For the purposes of pushing forward economic integration through law, and allowing individuals to be active participants in the integration processes, this arbitral jurisdiction is welcomed.<sup>47</sup> It allows

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<sup>41</sup> The Caribbean Court of Justice benefits from such a fund. See *Revised Agreement establishing the Caribbean Court of Justice Trust Fund*. Online: Caribbean Court of Justice <<http://www.caribbeancourtsofjustice.org/legislation.html>>.

<sup>42</sup> Equally important are the mechanisms for enforcing the courts' decisions. This issue is addressed in Chapter Seven.

<sup>43</sup> Cherie O'Neal Taylor, "Dispute Resolution as a Catalyst for Economic Integration and as Agent for Deepening Integration: NAFTA and MERCOSUR?" (1996-1997) 17 *Nw. J. Int'l L. & Bus.* 850 at 875.

<sup>44</sup> See EAC Treaty, *supra* note 6 art. 27(1); COMESA Treaty, *supra* note 4 art. 19; ECOWAS Court Protocol, *supra* note 18 art. 9(1)(a).

<sup>45</sup> See EAC Treaty, *ibid.* art. 31; COMESA Treaty, *ibid.* art. 27; ECOWAS Court Protocol, *ibid.* art. 9(1)(f), 10(e).

<sup>46</sup> See EAC Treaty, *ibid.* art. 32 and COMESA Treaty, *ibid.* art. 28. Article 16 of the ECOWAS Treaty establishes an Arbitration Tribunal of the Community. The status, composition, powers, procedure and other issues concerning the Arbitration Tribunal is to be set out in a Protocol. Until that time, article 9(5) of the ECOWAS Court Protocol provides that the court should exercise the powers of the Tribunal.

<sup>47</sup> Compare COMESA Treaty, *ibid.* art. 28. It limits such jurisdiction to contracts and disputes to which the community, its institutions or member states are party. And article 9(6) refers to any agreement where the parties

individuals to access the community courts for the determination of their disputes through arbitration. The subject matter may even be a commercial contract which does not engage community law or community interest in any way.<sup>48</sup> Finally, it is envisaged that the jurisdiction of the EAC court will be extended to include original, appellate, human rights and other jurisdictions as will be determined by the Council of Ministers at a suitable future date.<sup>49</sup>

The member states of the EAC are expected to conclude a protocol to give effect to this extended jurisdiction. But, so far, no such protocol has been concluded. However, as regards jurisdiction over human rights matters, the EAC court has held that, while it will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under article 27(1) merely because the case before it includes allegations of human rights violation.<sup>50</sup> This offers an indirect route by which human rights issues may be brought before the court. For example, article 6(d) of the EAC Treaty stipulates ‘good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights’ as fundamental principles of the community. An action alleging a breach of article 6(d) – which is within the jurisdiction of the court – will in many instances qualify as an action alleging a violation of human rights, which in

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provide that the court shall settle disputes arising from the agreement. The scope and complexity of the jurisdiction to arbitrate is discussed further in Chapter Eight.

<sup>48</sup> These courts can be a viable forum for individuals who seek a neutral forum for dispute settlement. Indeed, this jurisdiction can be used to develop the courts into forums for the resolution of international commercial disputes in Africa. However, the jurisdiction raises a number of issues, which will be explored in Chapter Eight. They include: whether in case of individuals, they should be resident within the community; the law which governs such arbitrations, especially where the parties do not specify a governing law; and enforceability of any subsequent award.

<sup>49</sup> EAC Treaty, *supra* note 6 art. 27(2). No such provision is found in the COMESA Treaty. Under article 9(4) of the ECOWAS Court Protocol, *supra* note 18, the court has jurisdiction over violations of human rights in member states. The ECOWAS Court has heard a number of cases alleging human rights violation in member states. See e.g. In *Jerry Ugokwe*, *supra* note 32 (The applicant alleged a breach of the right to fair hearing. The application was dismissed. The court found that what was at issue was really an electoral dispute over which it had no jurisdiction); *Etim Moses Essien v. Republic of Gambia Judgment*, Case No. ECW/CCJ/APP/05/07 (ECOWAS Court of Justice, 2007) (The applicant alleged a violation of the right to receive equal pay for equal work. The court found no violation of the right); *Frank Ukor*, *supra* note 5 (The plaintiff alleged a violation of the fundamental human rights to free movement of goods. The action was dismissed for lack of standing.); *Alhaji Hammani Tidjani v. Federal Republic of Nigeria*, Suit No. ECW/CCJ/APP/01/06 (ECOWAS Court of Justice, 2007) (The plaintiff alleged a violation of the right to a fair trial, liberty and security of person. The court held that it was incompetent to hear the case since no rights violation had occurred).

<sup>50</sup> *James Katabazi v. Secretary General of the East African Community*, Reference No. 1 of 2007, (East African Court of Justice, 2007).

theory is outside the court's jurisdiction.<sup>51</sup> It is important that, until its jurisdiction is extended to include human rights claims,<sup>52</sup> the court exercises caution in admitting indirectly human right claims. Too many human rights claims are likely to burden the court and distract it from the economic integration agenda. It is also likely to breed tensions between the court and already established forums for vindicating human rights, such as national courts, which should be allies of the court in promoting economic integration.

A jurisdictional issue on which there is significant variation in the approaches of the community treaties relates to actions for damages against the communities. Under the ECOWAS Court Protocol, only the court has authority to determine any non-contractual, and, arguably, contractual liability of ECOWAS.<sup>53</sup> The COMESA and EAC treaties are silent on this issue. However, it appears that their provisions that disputes to which the community is party should not, on that ground alone, be excluded from the jurisdiction of national courts will allow for tortious actions and contractual claims against the community to be instituted in them.<sup>54</sup>

From a private and public international law perspective, these provisions raise difficult issues. Firstly, in non-contractual or contractual litigation before the ECOWAS court, what will be the applicable law? Will it be the national laws of the member states which, owing to the many legal traditions they embrace, are likely to vary? Or, will it be a yet-to-be developed ECOWAS law on contractual and non-contractual liability? The closest one comes to finding a solution to this problem is the reference in article 20 of the ECOWAS Court Protocol to article 38 of the Statute of the International Court of Justice as a potential source of law for decisions of the court. However, it is arguable that given the international character of the sources listed in article 38 they cannot provide the corpus needed to resolve contractual and non-contractual claims. Ultimately, the court

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<sup>51</sup> See e.g. *Mike Campbell (Pvt) Ltd. v. The Republic of Zimbabwe*, SADC (T) Case No. 2/2007 (SADC Tribunal, 2008) [*Mike Campbell 2008*]. The Tribunal held that article 4(c) of the SADC Treaty which provides that SADC and member states are required to act in accordance with 'human rights, democracy and the rule of law' granted it 'jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law'.

<sup>52</sup> I argue that the extension of jurisdiction to include human rights is an unnecessary move and should be avoided. National courts, national human rights commissions, the African Commission on Human and Peoples' Rights and African Court of Justice and Human Rights (when it is operational) have jurisdiction over human rights violations. Aggrieved individuals can resort to one of these forums.

<sup>53</sup> ECOWAS Court Protocol, *supra* note 18 arts. 9(1)(g), 9(2).

<sup>54</sup> COMESA Treaty, *supra* note 4 art. 29(1); EAC Treaty, *supra* note 6 art. 33(1).

will have to fall back on a careful synthesis of national laws.<sup>55</sup> Secondly, if contractual and non-contractual disputes involving the communities are litigated before national courts, as envisaged under the COMESA and EAC treaties, will the communities automatically lose their immunity? If immunity is successfully claimed, from where can an individual seek remedy? From a relational perspective, one can also query the propriety of subjecting a community to what can, potentially, be the application of national law before a national court.

#### 5.2.4 Standing and Preconditions

Access to the community courts is granted to member states, defined community institutions, legal and natural persons, and national courts. A member state may make a reference to the courts alleging breach of an obligation arising under the treaty or an infringement of its provisions.<sup>56</sup> The secretaries of the COMESA, ECOWAS and EAC may also make a similar reference to the courts.<sup>57</sup> Actions by member states and community secretaries are unlikely to be a major source of cases before the courts. Indeed, to date, the judgments of the courts reveal very few instances in which states<sup>58</sup> or community institutions<sup>59</sup> have sued each other.

All the community courts allow for natural and legal persons' (individuals) access.<sup>60</sup> In other words, individuals can bring claims before the courts. In economic integration, direct individual access to community courts is important for a number of reasons: it increases the number of persons that may potentially bring cases; it provides a means for overcoming the traditional reluctance of states to sue each other; it performs the constitutional function of limiting

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<sup>55</sup> Compare *Consolidate version of the Treaty establishing the European Community*, 29 December 2006, [2006] O.J. C 321 E/37 art. 288 [EC Treaty]. It provides that the determination of the non-contractual liability of community organs is to be determined in accordance with the general principles common to the laws of the member states

<sup>56</sup> EAC Treaty, *supra* note 6 art. 28; COMESA Treaty, *supra* note 4 art. 25.

<sup>57</sup> COMESA Treaty, *ibid.* art. 25; ECOWAS Court Protocol *supra* note 18 art. 10; EAC Treaty, *ibid.* art. 29.

<sup>58</sup> See e.g. *Eritrea v. Ethiopia* [1999] LawAfrica L. R. 6.

<sup>59</sup> See e.g. *Parliament of ECOWAS v. Council of Ministers*, Suit No. ECW/CCJ/APP/03/05 (ECOWAS Court of Justice, 2005) [*Parliament of ECOWAS*].

<sup>60</sup> COMESA Treaty, *supra* note 4 art. 26; EAC Treaty, *supra* note 6 art. 30; ECOWAS Court Protocol, *supra* note 18 art. 10. Before the amendment of the ECOWAS Court Protocol, the court had no jurisdiction to hear cases from individuals. See *Olajide Afolabi v. Federal Republic of Nigeria*, 2004/ECW/CCJ/04, (ECOWAS Court of Justice, 2004) [*Olajide Afolabi*]. Even after the amendment the court held in *Frank Ukor*, *supra* note 5 that the amendment was not retrospective. Accordingly, the action, which was instituted before the amendment came into effect, and which alleged a violation of the fundamental right to free movement of goods was declared inadmissible. See generally Adewale Banjo, "The ECOWAS Court and the Politics of Access to Justice in West Africa" (2007) XXXII: 1 Africa Development 69.

the power of governments to decide which disputes warrant litigation; it minimizes governments' control over which claims can be brought; and potentially guarantees greater governmental compliance with community law since governments are aware that breaches will not go uncontested. In other words, individual access provides a layer of private enforcement to complement public enforcement mechanisms such as states' reporting on compliance or enforcement actions by community institutions.

Individual access also enhances the legitimacy of the communities' legal system. It grants them a stake in the evolution of community law and creates a national constituency for community law. Through litigation on issues of community law, they can effect legal change both domestically and at the community level. Also, by sometimes beginning the process of litigation in national courts while exhausting local remedies, they help create to a nexus between national and community legal systems. Through this means, community courts become an 'appellate' forum for judgments of national courts. Generally, individual access provides a mechanism for bridging the disjunction between community and national legal systems.

Although all the community courts allow for individual access, they vary as to the conditions precedent to access. Similar variations exist as regards what, who or which community institution can be challenged in the courts in actions by individuals. Article 27 of the EAC Treaty provides that 'any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty'. Article 26 of the COMESA Treaty has a similar provision, but limits challenges to acts, regulations directives or decisions of 'the Council or of a Member State'. *Prima facie*, this excludes actions of a number of important community institutions from individual challenges.<sup>61</sup> Article 26 severely constrains the scope of actions amenable to challenge by individuals.<sup>62</sup> For example, it insulates from individual challenge, the decisions of the Authority of Heads of State and Government, the highest decision-

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<sup>61</sup> The principal organs of the COMESA are the Authority of Heads of State and Government, Council of Ministers, Court of Justice, Committee of Governors of Central Banks, Intergovernmental Committee, Technical Committee, Secretariat and Consultative Committee. See COMESA Treaty, *supra* note 4 art. 7.

<sup>62</sup> The ECOWAS Court Protocol, *supra* note 18 has a more limiting provision. Under article 10(c) individuals can only bring an action for the determination of whether 'an act or inaction of a community official' violates their rights.

making organ of the COMESA. Additionally, under the COMESA Treaty, where the challenge relates to a member state's action, the individual must first exhaust the local remedies of its national courts or tribunals.<sup>63</sup>

Exhausting local remedies before international litigation poses significant problems for individuals, but, as was argued in Chapter Two, it can be harnessed to promote economic integration.<sup>64</sup> In *Republic of Kenya v. Coastal Aquaculture*,<sup>65</sup> the applicant had, for over eight years, been unsuccessful in completing the domestic legal processes for challenging or seeking compensation for the compulsory acquisition of his land. The COMESA court 'sympathized' with his plight but held that he had not exhausted local remedies and lacked *locus standi*. This was an unfortunate outcome for the applicant.<sup>66</sup> From a relational perspective, exhausting local remedies can be an important avenue for linking national and community legal systems. Individual actions before national courts on matters involving community law are likely to raise questions of treaty or community law interpretation. This raises the prospect of a reference to the COMESA court for a preliminary ruling.<sup>67</sup> Requests for preliminary rulings will facilitate closer co-operation between national courts and the COMESA court. It will ensure that national courts become active players and knowledgeable in community law, and reduce the workload on the COMESA court. References to the COMESA court can also become a source of legitimacy for national courts and their decisions as the latter are 'validated' at community level.

A significant aspect of individual standing under the COMESA and EAC treaties is that individuals do not have to show any personal interest affected by the action being challenged. This

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<sup>63</sup> COMESA Treaty, *supra* note 4 art. 26. The ECOWAS court has held that exhaustion of local remedies is not a prerequisite for actions before it. See *Mme Hadijatou Mani Koraou v. The Republic of Niger*, ECW/CCJ/JUD/06/08 (ECOWAS Court of Justice, 2008) at [36]-[53].

<sup>64</sup> In *Mike Campbell (Pvt) Ltd. v. The Republic of Zimbabwe*, SADC Tribunal Case No. SADCT: 2/07, (SADC Tribunal, 2007) [*Mike Campbell 2007*] the Tribunal held that an individual who seeks an interim measure of protection pending the final determination of a dispute need not exhaust local remedies. In this instance, the fact that an action was pending before the Supreme Court of Zimbabwe did not prevent the court from granting the interim measure requested.

<sup>65</sup> *Republic of Kenya v. Coastal Aquaculture* [2003] 1 East Afr. L.R. 271.

<sup>66</sup> Even if the court concluded that the applicant had *locus standi*, it would still have been debatable whether it had jurisdiction to grant an injunction restraining the Kenyan government from compulsorily acquiring the applicant's land and how that injunction was to be enforced.

<sup>67</sup> COMESA Treaty, *supra* note 4 art. 30.

has subsequently been confirmed in decisions of the EAC court.<sup>68</sup> On this, the ECOWAS Court Protocol parts company with them. Article 10 of the protocol allows individuals and corporate bodies to access the court, but only for the acts or omissions of community officials that violate their rights. This provision prevents what, potentially, could have been public interest litigation by corporations, NGOs and other legal persons. Public interest litigation can boost economic integration.<sup>69</sup> It is hoped that corporations and NGOs will explore alternative means of indirectly accessing the court. For example, they can actively recruit and sponsor people who have standing or lobby governments to bring actions relevant to their cause.<sup>70</sup>

National courts may seek preliminary rulings from the community courts on questions relating to the interpretation or application of their respective community treaties or the validity of community regulations, directives or decisions.<sup>71</sup> National courts within the EAC and ECOWAS have discretion in seeking such rulings. Under the COMESA Treaty, national courts or tribunals, from whose judgment there is no judicial remedy under national law, must seek such a ruling when issues as to the interpretation or validity of community acts are raised.<sup>72</sup> So far, no national court has requested a preliminary ruling from any of the community courts although some have faced issues which merited a reference.<sup>73</sup>

The Summit or Authority of Heads of State and Government, the Council of Ministers or a member state may also request an advisory opinion regarding a question of law arising under their community treaty from their respective community courts.<sup>74</sup> Under the ECOWAS Court Protocol,

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<sup>68</sup> *East African Law Society v. Attorney General of Kenya* [2008] 1 East Afr. L.R. 95.

<sup>69</sup> See generally Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge: Cambridge University Press, 2007).

<sup>70</sup> So far, that has not happened within the ECOWAS. Almost all of the cases decided by the ECOWAS court have been brought by natural persons. Non-governmental Organizations have been actively behind two of the human rights cases heard by the court. See *Chief Ebrimah Manneh v. The Gambia*, ECW/CCJ/JUD/03/08 (ECOWAS Court of Justice, 2008); *Mme Hadijatou Mani Koraou*, *supra* note 63. See generally Gregory C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington D.C: Brookings Institution Press, 2003).

<sup>71</sup> COMESA Treaty, *supra* note 4 art. 30; ECOWAS Court Protocol, *supra* note 18 art. 10(f); EAC Treaty, *supra* note 6 art. 34.

<sup>72</sup> Compare EC Treaty, *supra* note 55 art. 234.

<sup>73</sup> See e.g. *Peter Anyang' Nyongo v. Attorney General* [2007] eKLR (Kenya: High Court, 2007). The issue was whether an amendment to the EAC Treaty should be made in accordance with national or community law.

<sup>74</sup> COMESA Treaty, *supra* note 4 art. 32; EAC Treaty, *supra* note 6 art. 36.



the Executive Secretary or any other community institution can also request advisory opinion.<sup>75</sup> So far, only one advisory opinion has been given.<sup>76</sup>

The examination in this section portrays the COMESA, EAC and ECOWAS courts as supranational and legalistic court regimes. Whether they have actually operated and will operate as such is difficult to judge. For example, there have been instances where decisions affecting member states have been complied with. Other decisions have been met with resistance. What is certain is that the courts appreciate their role in economic integration and, as discussed below, they have responded to its challenges through their jurisprudence. The above examination also reveals the extent to which ECOWAS, COMESA, and EAC treaties have been attentive to relational issues in designing their judicial institutions. Among these issues were the courts' jurisdiction, their relations with national courts, their sources of law and whether and how individuals can access the courts.<sup>77</sup> In general, the treaties provide largely similar responses to these issues.

### **5.3 RELATIONAL ISSUES BEFORE THE COMMUNITY COURTS**

#### **5.3.1 Introduction**

There have been cases before the community courts in which relational issues in integration have been raised and discussed. The jurisprudence of the COMESA, ECOWAS and EAC courts reflects the myriad of legal problems associated with economic integration. This part provides a mainly descriptive account of a selection of the cases that address issues directly affecting

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<sup>75</sup> ECOWAS Court Protocol, *supra* note 18 art. 11.

<sup>76</sup> In 2008, the Council of Ministers of the EAC has directed the Secretariat to seek an advisory opinion of the EAC court on the application of the principle of variable geometry. See East African Community, *Report on the 16th Meeting of the Council of Ministers*, 13 September 2008 (AICC: Arusha, 2008) at 40-42. The rationale for the request is that the EAC Treaty provides as an operational principle the 'principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds'. To the Council, this provision, read together with the relevant interpretation of this principle in the treaty, suggests: (a) flexibility in the progression of integration activities, projects and programmes; and (b) progression of such activities, projects and programmes in co-operation by some of the member states as opposed to the entire member states simultaneously. However, to the Council, this interpretation is contestable on the basis of the fundamental requirement, under the treaty and relevant annexes, for consensus as a basis for decision-making by the Summit of Heads of State and the Council of Ministers. For the opinion of the court see *In the Matter of a Request by the Council of Minister of the East African Community for an Advisory Opinion*, Application No. 1 of 2008 (East African Court of Justice, 2009).

<sup>77</sup> Two other issues which fall within this area are the enforcement of community court judgments and judicial cooperation between community and national courts. Both issues are examined in Chapter Eight.

economic integration.<sup>78</sup> The cases reveal the potential place of community law in member states, the proper role of national courts in giving meaning to community law and the important, albeit sometimes constrained, role of community courts as guardians of community law and legality.

### 5.3.2 The Community Courts – Selected Cases

#### 5.3.2.1 Calist Andrew Mwatela v. East Africa Community

The EAC court's decision in *Calist Andrew Mwatela v. East Africa Community*<sup>79</sup> was a reference under article 30 of the EAC Treaty by three members of the East African Legislative Assembly (EALA). The applicants challenged the validity of a meeting of the Sectoral Council on Legal and Judicial Affairs (Sectoral Council)<sup>80</sup> held 13-16 September 2005 and the decision taken at the meeting to withdraw four private member bills that were pending before the EALA.<sup>81</sup> The Council of Ministers (Council) acting on the Sectoral Council's report and in the light of its earlier decision<sup>82</sup> decided that protocols rather than legislation enacted by the EALA were more

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<sup>78</sup> A sizable proportion of the cases from these courts, especially the ECOWAS and COMESA courts, were either staff cases or cases alleging violations of human rights with no direct bearing on economic integration. See e.g. *Muleya v. Common Market for Eastern and Southern Africa (No. 3)* [2004] 1 East Afr. L.R. 173; *Muleya v. Common Market for Eastern and Southern Africa (No. 2)* [2003] 2 East Afr. L.R. 623; *Muleya v. Common Market for Eastern and Southern Africa* [2003] 1 East Afr. L.R. 173; *Ogang v. Eastern and Southern African Trade and Development Bank* [2003] 1 East Afr. L.R. 217; *Eastern and Southern African Trade and Development Bank v. Ogang* [2001] 1 East Afr. L.R. 46; *Eastern and Southern African Trade and Development Bank v. Ogang (No. 2)* [2002] 1 East Afr. L.R. 54; *Tokunbo Lijadu Oyemade v. Executive Secretary of ECOWAS*, Suit No. ECW/CCJ/APP/01/04 (ECOWAS Court of Justice, 2006); *Executive Secretary of ECOWAS v. Tokunbo Lijadu Oyemade*, Suit No. ECW/CCJ/APP/01/05 (ECOWAS Court of Justice, 2006); *Executive Secretary of ECOWAS v. Tokunbo Lijadu Oyemade*, Suit No. ECW/CCJ/APP/04/06 (ECOWAS Court of Justice, 2006); *Chief Ebrimah Manneh*, *supra* note 70; *Mme Hadijatou Mani Koraou*, *supra* note 63. From the Southern African Development Community Tribunal, see *Ernest Francis Mtingwi v. The SADC Secretariat*, SADC (T) Case No. 1/2007 (SADC Tribunal, 2008). The number of staff cases (and the tenacity with which they appear to have been pursued) lends some credence to Rasul's thesis that economic integration has become a job-generating venture for Africa's educated elite. Rasul Shams, "The Drive towards Economic Integration in Africa" (Hamburg Inst. Of Int'l Econ., Discussion Paper No. 316, 2005) at 6-7. For a commentary on the human rights related jurisprudence of the courts, see Solomon T. Ebobrah, "A Rights Protection Goldmine or a Waiting Volcanic Eruption? Competence of, and Access to the Human Rights Jurisdiction of the ECOWAS Community Court of Justice" (2007) 7 Afr. Hum. Rts. L.J. 307; Solomon T. Ebobrah, "Litigating Human Rights before Sub-regional Courts in Africa: Prospects and Challenges" (2009) 17 Afr. J. Int'l & Comp. L. 79; Helen Duffy, "*Hadijatou Mani Koroua v. Niger*: Slavery Unveiled by the ECOWAS Court" (2009) 9 Hum. Rts. L. Rev. 151.

<sup>79</sup> [2007] 1 East Afr. L.R. 237 [*Calist*].

<sup>80</sup> The council was established by the Council of Ministers from among its members under Article 14 of the EAC Treaty to deal with specific issues. The Sectoral Council on Legal and Judicial Affairs was created at a meeting on the Council of Ministers in 2001.

<sup>81</sup> Private Member Bills are allowed under article 59 of the EAC Treaty. The Bills were the East African Community Trade Negotiations Bill, the East Africa Community Budget Bill, the East African Immunities and Privilege Bill, and the Inter-University Council for East Africa Bill.

<sup>82</sup> In November 2004, the Council decided that policy oriented bills, such as those with implications for the member states' sovereign interests and on the budgetary aspects of the community, ought to be submitted to the EALA by the

appropriate for two of the bills and that they should accordingly be withdrawn.<sup>83</sup> For the remaining bills, a request was made using a Ministerial Statement for a stay of their consideration by the EALA to enable consultation with the member states.

The applicants sought an order declaring that the report of the Sectoral Council upon which these decisions were made was void *ab initio*, and that all decisions, directives and actions taken under it were similarly void. The court considered three issues namely, (a) the establishment of the Sectoral Council and its meeting; (b) the status of the contentious Bills; (c) and the relations between the Council and the EALA as regards legislation.

The court held that the Sectoral Council had not been properly constituted from its inception in that it comprised people not qualified under the treaty. Under the treaty, the Council was to establish sectoral councils from among its members. But the Sectoral Council at issue consisted of the partner states' Attorneys General who were not qualified members of the Council. Consequently, the meeting and the decisions taken were unlawful. The court, however, applied the doctrine of prospective annulment and saved the decisions which the Sectoral Council had taken from its inception.

It was further held that a Ministerial Statement was an ineffective means of withdrawing the bills from the EALA. At the time of the statement, the bills had become the EALA's property and could be withdrawn only by a motion under the EALA's rules. Although the decision to withdraw the bills was ultimately a Council decision (in some instances, decisions of the Council bind the EALA), the court held that, under the treaty, regarding matters in the Assembly's area of jurisdiction,<sup>84</sup> the decisions of the Council had no precedence. According to the court, 'the Assembly is a representative organ in the Community set up to enhance a people-centred co-operation' and therefore its independence should be preserved.<sup>85</sup> The court reaffirmed the rights of private members to introduce bills subject to limits defined in the treaty. In this instance, the character of the limitations meant that to determine whether the bills fell outside the limitations

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Council under article 14(3)(b) of the EAC Treaty as opposed to being submitted as Private Members Bills under article 59 of the Treaty.

<sup>83</sup> These bills were the East African Immunities and Privilege Bill and the Inter-University Council for East Africa Bill.

<sup>84</sup> See EAC Treaty, *supra* note 6 arts. 14 and 16.

<sup>85</sup> *Calist*, *supra* note 79 at 249.

would have required the court to delve into their provisions in great detail. Given that the bills were pending before the EALA, the court deemed it unwise to undertake such an exercise for fear of encroaching on the EALA's jurisdiction.

### **5.3.2.2 Peter Anyang' Nyong'o v. Attorney General of the Republic Kenya (I & II)**

In *Peter Anyang' Nyong'o v. A.G. of the Republic of Kenya*,<sup>86</sup> the applicants contended that the process by which Kenya's representatives to the EALA were nominated contravened article 50 of the EAC Treaty because no elections were held to elect the representatives. They sought *inter alia* an interpretation of article 50 and a declaration that the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules, 2001 (Kenya election rules) applied by the Kenya National Assembly contravened article 50 and, hence, that they should be declared void. Pending the determination of the substantive issues, they sought an injunction restraining the respondents from recognizing and inducting the representatives into office.

The respondents raised preliminary objections to the court's jurisdiction. They argued that the court's jurisdiction under article 27(1) of the treaty was restricted to the interpretation and application of the treaty. It did not extend to determining questions arising from the election of EALA members. In their view, that jurisdiction was reserved under article 52(1) of the treaty for an appropriate national institution, in this instance, the Kenya National Assembly and, in cases of dispute, the High Court of Kenya.<sup>87</sup> To the respondent, it was in the High Court that the applicant should have sought remedy, at least in the first instance.

The court swiftly rejected the objections. It held that the combined effect of articles 27 and 30 of the treaty was that the court had jurisdiction to determine the legality of any act, regulation, directive, decision or action of a partner state or community institution on the ground that it infringed a provision of the treaty. Accordingly, since the applicants were challenging the validity

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<sup>86</sup> [2007] 1 East Afr. L. R. 5.

<sup>87</sup> See article 44 of the Constitution of the Republic of Kenya. Currently, there exists no right of appeal from a decision of a national court to the EAC court.

of the Kenya election rules in the light of the provisions of the treaty, the matter fell squarely within its jurisdiction.<sup>88</sup> The court granted the injunction.<sup>89</sup>

The substantive determination of the case came in March 2007. In *Peter Anyang' Nyong'o v. A.G. of the Republic of Kenya [Anyang II]*,<sup>90</sup> the court identified three issues for determination. These were: (1) Does the complaint disclose any cause of action within the meaning of article 30 of the EAC Treaty? (2) Was an election undertaken within the meaning of article 50 of the treaty? (3) Do the Kenyan election rules comply with article 50 of the treaty?

The court held that article 30 of the treaty conferred jurisdiction on it. Additionally, although article 33(2) also envisaged interpretation of treaty provisions by national courts, this jurisdiction should only be incidental to the determination of cases before them. Thus, contrary to the respondent's position, an individual could not directly refer a question of treaty interpretation to national courts. This decision is important from a relational perspective. Treaty interpretation by national courts is likely to result in varying national interpretations and thus undermine the unity of community law and its meaning. The court further held that article 30 created a special cause of action which did not require the claimant to show a right or interest that was infringed, damaged or suffered as a result of the matter complained of; an allegation of infringement was enough. Article 30 granted the individual the right of direct access to the court. There was no requirement to exhaust local remedies; there was no such remedy to exhaust.

Finally, the court held that elections under article 50 of the treaty should involve a voting procedure. This might be accomplished through secret ballot, show of hands or acclamation. It may also involve campaigns, primaries and/or nomination. But, ultimately, the decision to elect should be that of the national assemblies of the partner states. In this instance, the court held that

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<sup>88</sup> This decision has been reversed by an amendment to the Treaty. The amendment provides that, the court's jurisdiction to interpret the treaty under article 27(1) 'shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States'. Also, the court shall have no jurisdiction under article 30 'where an Act, regulation, directive or action has been reserved under this Treaty to an institution of a Partner State'. See EAC Treaty Amendment, *supra* note 35 arts. 5 and 6.

<sup>89</sup> The court applied the dual test of a *prima facie* case with a probability of success and likelihood of irreparable damage or injury. It held that there was a *prima facie* case with a probability of success and the current state of the law was such that, unless restrained from taking office, the alleged illegality was likely to continue even after a favourable decision for the applicants was made. Such a state of affairs would cause irreparable damage to the applicants, the EALA and the Community.

<sup>90</sup> [2008] 3 K.L.R. 397, [2007] 2 East Afr. L.R. 5.

the circumstances surrounding the sending of the list of Kenya's representatives was not an election within the meaning of article 50 of the treaty. The court held that the purpose of article 50 was to constitute each national assembly into an electoral college as a deliberate step to ensure the constitution of an EALA comprising the peoples' representatives. The national assemblies, as institutions of peoples' representatives were, second to the peoples, the next best alternative for electing representatives to the EALA. To the court such an approach to electing representatives was consistent with the fundamental principle of good governance including adherence to the principle of democracy that underlies the treaty.<sup>91</sup>

The court concluded that Kenya's election rules infringed article 50 of the treaty since they did not provide that the National Assembly should elect members to the EALA. Rather, it provided that a list of nominated candidates should be submitted to the House Business Committee. The committee ensured that the requirements of article 50 were fulfilled and then tabled the names of the nominees before the National Assembly. The nominees so tabled were 'deemed elected' to the EALA. According to the court, this legal fiction circumvented the express provisions of article 50. Kenya has amended its election rules to bring them into line with the court's ruling.<sup>92</sup> Kenya's expeditious compliance with the decision of the court is commendable.<sup>93</sup>

### **5.3.2.3 Eastern and Southern African Trade and Development Bank v. Ogang**

In *Eastern and Southern African Trade and Development Bank v. Ogang*<sup>94</sup> the COMESA court affirmed its role as the guardian of the limits of institutional competence under the COMESA Treaty. The respondent, an employee of the Preferential Trade Area Bank, sought, in an application, an order suspending a decision of the bank's board of directors. The bank raised a preliminary objection against the application on the grounds that the court had no jurisdiction over it. The bank was established under the 1982 Treaty establishing the Preferential Trade Area for

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<sup>91</sup> EAC Treaty, *supra* note 6 art. 6(d).

<sup>92</sup> Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules, 2007. Under the new rules, nine representatives were elected to the EALA. See Treaty for the establishment of the East African Community (Election of Members of the Assembly) Rules, 2007: Election of Members of the East African Legislative Assembly, 30 May 2007, Kenya Government Gazette Notice No. 4873.

<sup>93</sup> But see *Mike Campbell 2007*, *supra* note 64. An interim injunction granted by the SADC Tribunal which restrained the respondent from seizing the applicant's land was ignored. The Tribunal established the respondent's failure to comply and reported its findings to the Summit of Heads of State and Government pursuant to article 32(5) of the Protocol regulating the court.

<sup>94</sup> [2001] East Afr. L.R. 46.

Eastern and Southern African States and continued in existence under article 174 of the COMESA Treaty. To the bank, it was an autonomous institution, not an organ of COMESA, and hence not answerable to COMESA's laws and regulations.

The court rejected this argument. It held that under article 174 of the COMESA Treaty, the bank was one of the constituent institutions of COMESA. The court was entrusted with the function of ensuring that the organs and institutions of COMESA adhered to law in the interpretation and application of the treaty. Accordingly, as the bank was an organ of COMESA, the court had jurisdiction over it.

The court further held that article 7(4) of the COMESA treaty, which provides that the organs of the COMESA shall perform their functions and act within the limits of the powers conferred on them by or under the treaty, would be superfluous without the superintending jurisdiction of the court or national courts.<sup>95</sup> The courts define and enforce the limits on those powers. It is significant that a supervisory role for national courts is envisioned by the COMESA court as a possibility, even on an issue as delicate as superintending the conduct of community organs. However, to maintain the vertical relations between community and national legal systems, this supervisory jurisdiction should be exercised with great care.

#### **5.3.2.4 Olajide Afolabi v. Federal Republic of Nigeria**

In *Olajide Afolabi v. Federal Republic of Nigeria*,<sup>96</sup> the applicant, a Nigerian businessman, was to purchase and take delivery of some goods in the Republic of Benin. He was prevented from doing so due to the closure of the Nigeria-Benin border by the Nigerian government. He alleged that he had suffered loss as a result of the border closure. He brought an application before the ECOWAS court for declarations that the unilateral closing of the border breached articles 3(2)(d)(iii)<sup>97</sup> and 4(g)<sup>98</sup> of the ECOWAS Treaty, and violated the fundamental rights to freedom of

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<sup>95</sup> [2001] East Afr. L.R. 46 at 51.

<sup>96</sup> 2004/ECW/CCJ/04 (ECOWAS Court of Justice, 2004).

<sup>97</sup> ECOWAS is to ensure the establishment of a common market through the removal of obstacles to the free movement of persons, goods, service and capital, and the right of residence and establishment.

<sup>98</sup> One of the guiding principles of ECOWAS 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.

movement of persons and goods guaranteed by the ECOWAS Treaty and the African Charter on Human and Peoples' Rights.<sup>99</sup>

The respondent successfully raised a preliminary objection to the applicant's standing. The respondent argued that under article 9 of the protocol on the ECOWAS court, only states can be parties before the court.<sup>100</sup> The court rejected counsel for the applicant's argument that it should emulate the activist judicial stance of the European Court of Justice (ECJ) and admit claims by individuals. The court reasoned that the ECJ's approach of filling gaps in the European Community Treaty has attracted criticism and it 'do[es] not want to toe the same line'.<sup>101</sup> In this case, the court was right in declining to go down the route advocated by counsel for the applicant; the jurisdiction of a court, especially an international court, must be conferred by legislation. The court's dictum should, however, be confined to the facts of the case. An important function for the community courts will be to fill the gaps in the treaties and other laws of the communities. This function derives from their jurisdiction over the interpretation and application of the treaties. It will not serve the cause of economic integration in Africa well if, for fear of being criticized, the courts backtrack from this role.

### **5.3.3 Community Courts - Analysis of their Jurisprudence**

#### **5.3.3.1 Introduction**

The jurisprudence of the community courts, which is reflected in their judgments,<sup>102</sup> represents important first steps as they fulfil their mandate and define their role in Africa's economic integration processes.<sup>103</sup> It is a novel engagement for them; there are no precedents in Africa for their role. Comparatively, the African community courts are not alone in dealing with the challenges thrown at them by economic integration.<sup>104</sup> Happily, they have the rich experiences

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<sup>99</sup> 27 June 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58.

<sup>100</sup> This provision has been amended to give individuals standing before the ECOWAS court.

<sup>101</sup> *Afolabi Olajide*, *supra* note 60 at [56].

<sup>102</sup> So far, unlike judges of other international courts, the African judges have largely not taken the advantage of publishing their vision of the communities and their role in books and journals. Doing this would be an important way of increasing knowledge about the courts and should be encouraged.

<sup>103</sup> See generally John H. Jackson, "The Varied Policies of International Juridical Bodies-Reflections on Theory and Practice" (2003-2004) 25 Mich. J. Int'l L. 869.

<sup>104</sup> See e.g. *Trinidad Cement-I*, *supra* note 20 at [1]-[2]. The court noted that: These proceedings are historic as this is the first matter in which the Caribbean Court of Justice has been called upon to exercise its original jurisdiction. The



of other courts working on issues of regional and international economic law, such as the ECJ and the WTO panels and Appellate Body bodies, to draw on, but always bearing in mind their own unique regional contexts.

For any court, its initial jurisprudence sets the stage or tone for its future work, and provides a glimpse into its approaches, goals and challenges. As the first ‘active’ community courts in Africa operating on economic integration issues, their jurisprudence can also provide a source of comparative law for the African Court of Justice.<sup>105</sup> It is in this light that the courts’ jurisprudence is important. They address difficult, sometimes politically-sensitive, issues in Africa’s economic integration processes, but they still leave unanswered potentially troubling questions.

### **5.3.3.2 Individuals’ Roles in Economic Integration**

Individuals have a crucial role to play in economic integration. Indeed, there can be no economic community or successful regional trade without involving them. They are the vessels through which trade is pursued and economic integration enhanced. As liberal international relations theorists suggest, individuals influence states’ choices and their voices and actions can condition the extent to which a state becomes actively involved in economic integration.<sup>106</sup> They are the human medium that links the multiple legal systems operating in the context of economic integration. An economic integration process pursued by politicians without their active involvement suffers from inertia. It becomes an institutional edifice without meaningful impact on their lives, save, perhaps, those employed by community institutions. A key to enhancing

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court accordingly has no precedents to follow in its interpretation and application of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy although, over time, the decisions of the court will generate a body of precedents upon which it shall rely. In the exercise of this jurisdiction, the court is mandated by article XVII of the Agreement Establishing the Court and article 217 of the treaty to apply such rules of international law as may be applicable. This requires an expertise from counsel that is entirely different from that to which one is accustomed in municipal law proceedings.

<sup>105</sup> See *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008, (2010) 18 Afr. J. Int’l & Comp. L. (forthcoming) [Protocol on African Court of Justice].

<sup>106</sup> See generally Andrew Moravcsik, “Taking Preferences Seriously: A Liberal Theory of International Politics” (1997) 51 Int’l Org. 513.

individuals' roles in economic integration is to grant them direct or indirect access to community institutions, including the courts.<sup>107</sup>

Historically, individuals have not been granted access to community courts under Africa's economic integration treaties. They have also seldom relied on community law before national courts. Indeed, generally, Africa's early attempts at economic integration did not make provision for judicial institutions, or the institutions provided were never established.<sup>108</sup> The recent wave of economic integration treaties, including the COMESA, ECOWAS and EAC treaties, remedy this defect.<sup>109</sup> There is also an emerging body of national cases, albeit mainly in east and southern Africa, in which individuals have actively relied on community law or national courts have made use of community law.<sup>110</sup>

The wisdom of providing for individual access is revealed in the community courts' judgments. Almost all their judgments resulted from actions instituted by individuals alleging breaches of community law. Only one of the cases I have examined involved interstate litigation.<sup>111</sup> Another involved inter-institutional litigation.<sup>112</sup> Indeed, counsel's arguments in some of the cases indicated that, left to the affected governments, the actions would not have been instituted. The Attorney General of Kenya's argument that the issues involved in the *Anyang* cases were of public interest and, therefore, should have been instituted by the Attorney General as guardian of the public interest is an instance of this. The Attorney General's discretion to institute

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<sup>107</sup> At the international level, a manifestation of this is the persistent, albeit contested, calls for non-state actors to be given active roles in the WTO processes, including granting them *locus standi* before the WTO panels and Appellate Body.

<sup>108</sup> See e.g. *Treaty establishing the Economic Community of West African States*, 28 May 1975, 1010 U.N.T.S. I-14843; 14 I.L.M. 1200; *Treaty establishing a Central African Economic and Customs Union*, 8 December 1964, 4 I.L.M. 699; *Charter of the Organization of African Unity*, 25 May 1963, 2 I.L.M. 766. But see *Treaty for East African Co-operation*, 6 June 1963, 6 I.L.M. 932. It provided for a Common Market Tribunal, but it appears no case was ever heard by the tribunal. *The Eastern and Southern African States: Treaty for the Establishment of a Preferential Trade Area*, 21 December 1981, 21 I.L.M. 479 also had a Tribunal as one of its institutions, but it never became operational.

<sup>109</sup> See also SADC Tribunal Protocol, *supra* note 31 art. 15(1)(2).

<sup>110</sup> See e.g. *Hoffmann v. South African Airways* 2001 (1) S.A. 1. The South African Constitutional Court referred to the 1997 Code of Conduct on HIV/AIDS and Employment in the Southern African Development Community. This issue is discussed further in Chapter Seven.

<sup>111</sup> *Eritrea v. Ethiopia*, *supra* note 58. Ethiopia sought, from the Government of Eritrea, release of goods, belonging to Ethiopians, which had been detained at the Eritrean Ports of Assab and Massawa, contrary to the provisions of the COMESA Treaty, and for damages arising from the detention. The case was settled out of court.

<sup>112</sup> *Parliament of ECOWAS*, *supra* note 59.

actions is seldom reviewable. Accordingly, a great blow would have been dealt to economic integration in East Africa had this argument prevailed. The community courts' judgments represent a triumph for individual rights in Africa's economic integration, and a vindication of the treaty drafters' wisdom.

From a relational perspective, individual access to community courts affects inter-institutional relations, the balance of power within communities, as well as community-state legal relations. It also provides an avenue through which a community court can effect normative change in member states. The combination of a proactive court with individuals willing to enforce rights inuring to them under community law is a fundamental challenge to executive and legislative powers. In theory, this combination gives a court the final word. It makes it a powerful 'political' actor in the sense that, although absent from the decision-making table, its jurisprudence exerts a subtle influence on outcomes. States and community institutions bargain in the shadow of the court's jurisprudence. In Africa's economic integration processes, this judicial power could be an important complement to the work of the communities' secretariats which have been relegated to performing mainly administrative functions with few enforcement powers.<sup>113</sup> In other words, the community courts could provide a counterbalance to executive domination of the economic integration processes.<sup>114</sup> They could complement the minimal enforcement powers of the administrative branches. To be able to do this, their independence should be guaranteed in community law, and respected in practice by other community institutions and the member states.

The community courts' judgments reflect the above issues. For example, the EAC court has upheld individual right of action, but has not clearly articulating any limitations on such right. This shifts the balance of power within the EAC heavily in the court's favour. As long as individuals are prepared to litigate, member states and other community institutions will no longer have the final say, the court will. The fact that under article 30 of the EAC Treaty, as confirmed by the court, individuals do not have to exhaust local remedies, or show any personal interest affected by the challenged action, makes for a frightening prospect for member states and other community

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<sup>113</sup> The lack of strong independent institutions which could counterbalance political inertia to integration, is a major reason for the slow pace of economic integration in Africa. See Richard F. Oppong, "Observing the Legal System of the Community: The Relationship between Community and National Legal Systems under the African Economic Community Treaty" (2006) 15 Tul. J. Int'l & Comp. L. 41 at 72-73.

<sup>114</sup> There are legislative organs within some African communities such as the EAC and ECOWAS. However, their legislative powers are very weak. On the role of community parliaments in integration see Chapter Six.

institutions.<sup>115</sup> Quite unsurprisingly, the political reaction to this judgment – which came in the form of amendments to the treaty - was swift and, arguably, aimed in part at curtailing the court's powers.<sup>116</sup> The ECOWAS court has also held that exhaustion of local remedies has no relationship to the procedures for accessing it.<sup>117</sup> By holding in *Anyang II* that the Kenya's election rules did not comply with EAC Treaty provisions, the EAC court provided the foundation for developing a new national rule or regime for elections in Kenya. Through the judgment, the court became a messenger calling for electoral law reform within Kenya's legal systems. As noted above, Kenya subsequently amended its legislation to bring it into line with the judgment.<sup>118</sup>

A worrying aspect of the EAC court's jurisprudence, as far as individual access is concerned, relates to standing. The extremely liberal standing rules will pose fundamental challenges for the court.<sup>119</sup> It may potentially be overwhelmed by cases in a manner that will tax its administrative capabilities. Additionally, where individuals bypass national courts and run to the EAC court invoking article 30, it is likely to antagonize national courts who should be its close allies. Tensions between national and community courts may impact negatively on community-states relations. Admittedly, in the initial stages of integration, liberal standing for individuals should be encouraged to ensure people's involvement in the integration processes and for the courts also to be engaged.

Already, the possibility of tensions between national and community courts is reflected in some cases. But, so far, the latter have been careful not to collide with the former. The COMESA court resisted a potential source of tension when it rejected an application which sought to reverse a decision of the Kenya Court of Appeal.<sup>120</sup> In *Alhaji Hammani Tidjani v. Federal Republic of*

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<sup>115</sup> Compare COMESA Treaty, *supra* note 4 art. 26. It provides that '...unless he has first exhausted local remedies in the national court or tribunal of the Member State'. SADC Tribunal Protocol, *supra* note 31 art. 15(1)(2): '...unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction'.

<sup>116</sup> EAC Treaty Amendment, *supra* note 35.

<sup>117</sup> *Etim Moses Essien v. Republic of Gambia*, Judgment No. ECW/CCJ/APP/05/07, (ECOWAS Court of Justice, 2007) at 13.

<sup>118</sup> *Supra* note 92.

<sup>119</sup> A two months limitation period has been placed on actions instituted under article 30 of the EAC Treaty by article 6 of EAC Treaty Amendment, *supra* note 35.

<sup>120</sup> *Standard Chartered Financial Services, A.D. Gregory and COMESA. Cahill v. Court of Appeal for the Republic of Kenya*, Reference No. 4/2002 (COMESA Court of Justice, 2002).

Nigeria,<sup>121</sup> the ECOWAS court held it had no power to act as an appeal court for decisions of national courts, nor would it embark on such a venture for the sake of judicial comity. The EAC court also held that an action seeking a declaration that two persons were improperly elected and that they were not members of the Tanzania Legislative Assembly was within the remit of the High Court of Tanzania.<sup>122</sup> Given the conditions for individual standing in the community courts, they will increasingly be faced with cases that require great sensitivity to the jurisdiction of national courts. In instances of potential tension, the community courts may have to show deference to national courts, with a view to strengthening their relations with national courts. This is especially important in these initial stages of the development of the community courts. They should, however, be always mindful of their duty as guardians of the community treaties and laws.

It is important for the EAC court (and for the COMESA and ECOWAS courts in dealing with standing) to define the limits of article 30 in a manner that balances the competing interests of member states, national courts, individuals, the court and the ultimate goals of the community. This is a delicate task for which the comparative experiences of other international courts will be useful. The legitimacy of the community courts' role will depend on the political sensitivity they show in the face of the multiple, and often conflicting, interests of the member states, national institutions, the communities, community institutions and individuals.

Except for a recent action instituted before the EAC court by the law societies in East Africa,<sup>123</sup> all the cases involved natural persons. What has been absent, both at national and community levels, are actions instituted by legal persons (e.g. companies) and interest groups to champion the cause of economic integration.<sup>124</sup> Generally, interest groups' participation in and

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<sup>121</sup> Suit No. ECW/CCJ/APP/01/06 (ECOWAS Court of Justice, 2007) at 14.

<sup>122</sup> *Christopher Mtikila v. Attorney General of the United Republic of Tanzania*, Application No. 8 of 2007 (East African Court of Justice, 2007). See also *Jerry Ugokwe*, *supra* note 32. The ECOWAS court declined jurisdiction in a Nigeria electoral dispute which had already being judicially determined by the Nigerian Court of Appeal.

<sup>123</sup> See *East African Law Society v. Attorney General of the Republic of Kenya* [2007] 1 East Afr. L.R. 5, where the applicants challenged the legality of amendments to the EAC Treaty. The court held that the applicants had standing

<sup>124</sup> The first case before the SADC Tribunal involved a company as an applicant. See *Mike Campbell 2007*, *supra* note 64; *Mike Campbell 2008*, *supra* note 51. In 2009, a company also unsuccessfully brought an application before the EAC Court against the Kenya Ports Authority for damages for losses the applicant incurred as a result of the respondent's delay in clearing the applicant's containers of fruit juices and mineral water. The court dismissed the application for lack of jurisdiction. It reasoned that the Kenya Ports Authority was neither a member of the EAC nor one of its institutions. See *Modern Holdings (EA) Ltd. v. Kenya Ports Authority*, Reference No. 1 of 2008 (East African Court of Justice, 2009).

influence on Africa's economic integration has been minimal,<sup>125</sup> especially when it comes to using litigation to promote economic integration. Happily, the community treaties define person as any natural or legal person,<sup>126</sup> and also envisage a role for civil society.<sup>127</sup> As already noted, in litigating before the EAC court, a person does not have to show personal interest affected by an alleged breach of the treaty. This opens up the prospect that, under article 30 of the EAC Treaty, legal persons who are resident in the EAC can bring actions directly before the EAC court without facing very restrictive standing rules.

The huge cost of international litigation may prevent natural persons from directly litigating before the community courts. But, so far, there is no empirical study which suggests that this is the case. Legal persons, especially companies and businesses, can benefit greatly from the community courts' jurisprudence and the realization of the goals of economic integration in the form of improved market access and expanded investment opportunities. It is suggested that they should become more actively involved in the economic integration processes, including making use of the standing granted them by the community treaties. They should challenge national measures that hinder intra-community trade before the community courts.

Apart from direct litigation, another avenue for legal persons and interest groups' participation is through the submission of *amicus curiae* briefs. Through these briefs, they can shape the community courts' jurisprudence. In this regard, it is significant that the East African Law Society appeared as *amicus curiae* in the *Calist* and *Anyang* cases. Indeed, article 40 of the EAC Treaty allows a resident of a member state to intervene in a case before the court with the leave of the court. However, the submission of an intervening party should be limited to evidence supporting or opposing the arguments of a party to the case.

The minimal participation of interest groups in Africa's economic integration processes is troubling. They have devoted considerable attention to human rights issues and human rights

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<sup>125</sup> Mariama Deen-Swarray & Klaus Schade, "Perception of Business People and Non-State Actors on Regional Integration-A SADC-wide Survey" (2006) 6 *Monitoring Regional Integration in Southern Africa Yearbook* 51. Wilbert Kaahwa, "Involvement of Civil Society in the EAC Integration Process" [2005] 3 *The Community (Magazine of the East African Community)* at 16-17, where he notes that the member states are convinced that for the purposes of realizing a fast and balanced regional development there should be an enabling environment 'to allow the private sector and civil society' to play a 'leading role in the socioeconomic development activities'.

<sup>126</sup> EAC Treaty, *supra* note 6 art. 1. See also COMESA Treaty, *supra* note 4 art. 1.

<sup>127</sup> See e.g. chapter twenty five of the EAC Treaty, *ibid.*, which is devoted to the private sector and civil society.

litigation in Africa. But, they have spent little on the economic integration agenda. It can be argued that this is so because, while the importance of human rights and good governance have been ‘sold’ to domestic and foreign donors and attract huge funding for interest groups, Africa’s economic integration has not been similarly marketed. Nor does economic integration appear to be a priority for donor funds. Even where interest groups have taken an interest in economic integration issues, they have emphasized mainly the human rights dimensions. For example, their involvement in advocating an amendment to the protocol of the ECOWAS court to allow for individual standing was motivated largely by a desire to litigate, in the court, states’ violations of human rights. A similar movement is underway to extend the jurisdiction of the EAC court to cover human rights issues. It is suggested that the vigour and passion with which interest groups have championed the human rights cause should equally be made available to that of economic integration. The links between economic development and human rights are obvious. Indeed, there is a human right to development. Successful economic integration and the concomitant prosperity it brings may be the panacea to many of Africa’s human rights ills.

### **5.3.3.3 National Courts’ Roles in Economic Integration**

Like individuals, national courts have a crucial role to play in Africa’s economic integration.<sup>128</sup> They provide an institutional medium through which community norms can be translated into domestic benefits for individuals. They are an essential complement to the communities’ law-enforcement mechanisms. Historically, national courts’ role in economic integration has not been recognized in Africa’s economic integration treaties.<sup>129</sup> At present, this is being remedied. As noted above, the COMESA, ECOWAS and EAC treaties envisage a role for national courts. They can seek preliminary rulings from the community courts on questions of interpretation or application of the treaties, or the validity of community regulations, directives or decisions.<sup>130</sup> Although to date national courts have not made use of the preliminary rulings procedure, the fact that it has been provided for represents a remarkable shift in approach to economic integration in Africa.

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<sup>128</sup> See generally Meinhard Hilf, “The Role of National Courts in International Trade Relations” in Ernst-Ulrich Petersmann ed., *International Trade Law and GATT/WTO Dispute Settlement System* (Kluwer Law International, 1997).

<sup>129</sup> See treaties cited in footnote 108.

<sup>130</sup> COMESA Treaty, *supra* note 4 art. 30; ECOWAS Court Protocol, *supra* note 18 art. 10(f); EAC Treaty, *supra* note 6 art. 34.

Bebr has identified some factors in the European context which made national courts initially reluctant to seek preliminary rulings.<sup>131</sup> They included uncertainty as to the legal nature of the European Court of Justice, especially as regards its place in the hierarchy of national judicial structures, the novelty of the procedure, and the lack of a national equivalent. These reasons are equally relevant in Africa. Procedures for reference exist in some African states, especially on issues of constitutional interpretation.<sup>132</sup> However, the procedure of reference to a court outside the ordinary national judicial structure is unknown. Accordingly for the procedure to work in Africa, the jurisdiction of national courts should be expanded. But, so far, I am unaware of any state that has done that. Put differently, the national legal infrastructure for the community-decreed procedure to ‘take off’ is non-existent.

It is inevitable that, as part of exercising jurisdiction, national courts may have to address issues which engage community law. As the body of community law expands and individuals become more aware of it, they will seek to rely on it before national courts and these issues will increase. There may be parallels between this anticipated development and the current resolve of individuals to invoke international human rights norms in domestic claims. Individuals will lay claim to and enforce a law, whatever its source, which confers a personal advantage on them as long as they are aware of it and the legal system allows effect to be given to that law. Indeed, there are, currently, emerging cases in which individuals have relied, sometimes unsuccessfully, on community law before national courts.<sup>133</sup> For example, in *Movement for Democratic Change v. President of the Republic of Zimbabwe*,<sup>134</sup> the applicant sought a declaration that Zimbabwe’s Electoral Commission Act and the Electoral Act did not incorporate sections of the SADC Principles and Guidelines adopted in Mauritius in 2004. Also, sections of the Public Order and Security Act, the Access to Information and Protection of Privacy Act, and the Broadcasting Act

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<sup>131</sup> Gerhard Bebr, “Article 177 of the EEC Treaty in the Practice of National Courts” (1977) 26 Int’l & Comp. L.Q. 241 at 241-243.

<sup>132</sup> See e.g. Constitution of the Republic of Ghana, 1992, art. 130(2); Constitution of the Republic of Sierra Leone, 1991, art. 124(2).

<sup>133</sup> See e.g. *Healthwise Pharmaceuticals Ltd. v. Smithkline Beecham Consumer Healthcare Ltd.* [2001] LawAfrica L.R. 1279; *Shah v. Manurama Ltd.* [2003] 1 East Afr. L.R. 294; *Peter Anyang’ Nyong’o v. Attorney General of the Republic of Kenya* [2007] eKLR (High Court, Kenya, March 2007); *Peter Anyang’ Nyong’o v. Attorney General* [2007] eKLR (High Court, Kenya, February 2007).

<sup>134</sup> HC 1291/05 (High Court, Zimbabwe, 2007).



were incompatible with the provisions of the SADC Principles and Guidelines. The court rejected both requests.

The court held that the applicant appeared to have elevated the SADC Principles and Guidelines to a law and placed that law in a position superior to domestic law. To the court there was no legal principle that made a regional instrument in the nature of the SADC Principles and Guidelines binding on member states. They were model rules with no binding force. In addition, the SADC Principles and Guidelines had not been incorporated into domestic law and were, accordingly, not enforceable by the court. To the court, the SADC Principles and Guidelines were not a source of domestic law. Although these pronouncements are legally correct, they are nonetheless remarkable. Earlier in the judgment, the court found that subsequent to and following the summit at which the principles were adopted and signed by the Zimbabwean government, the government initiated, and piloted through Parliament, two specific pieces of legislation aimed at regulating the conduct of elections in Zimbabwe in accordance with the SADC Principles and Guidelines. These were the Zimbabwe Electoral Commission Act and the Electoral Act, the very legislation at issue in the case. The case demonstrates the importance of national laws and institutions for the effective implementation of community law; it is not enough to adopt community law if national legal systems have not been conditioned for its reception.

In the Kenyan case of *Republic v. Kenya Revenue Authority, ex parte Aberdare Freight Services Ltd.*,<sup>135</sup> the applicant argued that the respondent's decision to detain its sugar consignment was illegal and contrary to the COMESA Free Trade Area Rules and the COMESA Treaty to which Kenya is party. The consignment had been detained with a view to imposing duties which the applicant wanted to avoid. An issue the court had to determine was whether section 27 of Kenya's Sugar Act, No. 10/2001, which vested power in the Kenya Sugar Board to control imports in order to safeguard national interests concerning the importation of sugar, was consistent with the COMESA Treaty. The court held that the treaty applied to the quota that had been imposed on the applicant's import. It considered the relevant treaty provisions, namely articles 3(a), 45, 49(1)(2) and 61 and held that the Sugar Act did not contravene them. The court reasoned that the measures taken by the respondent were an articulation of the national interest in the allocation of quota for

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<sup>135</sup> [2004] 2 K.L.R. 530 at 539-540.

sugar imports, and were safeguards aimed at protecting local industry. In the court's opinion, such measures did not violate the COMESA Treaty.<sup>136</sup>

The reliance on community law within member states by individuals is a welcome development. Admittedly, the response of national courts has been varied and, indeed, sometimes unfavourable. Nevertheless, it is important that this development is encouraged with a view to strengthening economic integration in Africa through the integration of community law into member states' laws. National courts are forums through which individuals can seek the benefits of integration and community laws. The reliance on community law in states offers the prospect of a preliminary reference to the community courts. The ability of the community courts to forge a link with national courts will be essential to the former's development.

The cases also demonstrate a level of awareness of the potentially beneficial impact of community law. However, we cannot be over-enthusiastic about their numbers. They are relatively few compared with the number of years economic integration has been going on in Africa and the significant (albeit still relatively small) number of laws it has produced.<sup>137</sup> It is troubling that after years of economic integration, many more of the benefits it brings and the challenges it poses have not found their way into national courts. The potential cost of litigation, a lack of awareness of the economic integration processes and the rights existing as a result, low intra-African trade, the fact that lawyers have neither integrated community law into their practice nor developed it as a specialized area of practice, and a perceived absence of a litigation culture in Africa may together account for this. In addition, member states have not provided the legal infrastructure necessary for individuals to rely on and give legal effect to community laws.

In this regard, and as discussed in Chapter Seven, there are formidable constraints on individuals' reliance on community law before African national courts. The constraints can affect the participation of both individuals and national courts in the economic integration processes. At the community level, the constraints take the form of the absence of direct effect and direct

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<sup>136</sup> *Ibid.* at 543.

<sup>137</sup> See e.g. ECOWAS Protocols on the Free Movement of Persons, the Right of Residence and Establishment; SADC Protocol on the Facilitation of Free Movement of Persons; and East African Community Customs and Management Act.

applicability provisions in the community treaties. At the national level, they take the form of inimical constitutional provisions and unfavourable judicial precedents. If proper community-state relations are to exist, and domestic effect given to community law, it will demand rethinking the existing constitutional laws and jurisprudence of national courts.

From a relational perspective, and against the background of the importance of the inter-system jurisprudential communication discussed in Chapter Two, an interesting aspect of the community courts' judgments is the fair amount of jurisprudential borrowing and judicial dialogue between community and national courts. The ECOWAS court has confirmed that it can rely on decisions from 'member states' courts and regional courts' in deciding cases.<sup>138</sup> The community courts' judgments contain references to numerous decisions of national courts.<sup>139</sup> This provides another avenue for forging mutually beneficial reciprocal relations. The reputation of a court depends in part on the reach of its jurisprudence and the respect accorded it by other courts. As decisions of national courts are used by community courts, the former's position within their national legal systems is enhanced through the community affirmation of the quality of their jurisprudence. National courts may equally reciprocate by drawing on the jurisprudence of the community courts and giving effect to their judgments.

It is, however, imperative that jurisprudential borrowing is done with circumspection. Where it is possible, community courts should draw on cases from all the member states and not only a few.<sup>140</sup> Unless this is so, they risk alienating some states. The fact that judges of the community courts are drawn from member states, and must be persons who fulfil the conditions required in their own countries to hold high judicial office, may facilitate judicial dialogue and jurisprudential borrowing between community and national courts.<sup>141</sup>

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<sup>138</sup> *Executive Secretary of ECOWAS v. Tokunbo Lijadu Oyemade*, Suit No. ECW/CCJ/APP/01/05, (ECOWAS Court of Justice, 2006) at [3.03]

<sup>139</sup> See e.g. *Common Market for Eastern and Southern Africa v. Kabeta Muleya* [2002] COMESACJ 2003 (16 October 2003) quoting decisions from Kenya and Uganda.

<sup>140</sup> For example, the ECOWAS court judgments I examined contain copious references to decisions of Nigerian courts, one reference to a Ghanaian judgment and none from any other member state.

<sup>141</sup> COMESA Treaty, *supra* note 4 art. 20(2); ECOWAS Court Protocol, *supra* note 18 art. 3(1); EAC Treaty, *supra* note 6 art. 24(1).

The community courts have also found useful the jurisprudence of other more experienced international and regional courts outside Africa. As noted above, given the novelty of the mandate entrusted to them, they must seek the benefit of the decades-long experiences of these courts. The jurisprudence of the ECJ has been a fertile source of comparative law for the community courts. In *Muleya v. Common Market for Eastern and Southern Africa*,<sup>142</sup> Justice Ogoola sought guidance from ‘the rich jurisprudence’<sup>143</sup> of the ECJ on an ambiguous point on pleadings. He noted that decisions of the ECJ did not bind the COMESA court, but are nonetheless of ‘enormous persuasive value’.<sup>144</sup> With its rich experience on issues of economic integration, the jurisprudence of the ECJ can be highly relevant in the settlement of disputes before the community courts.

Regrettably, it appears the community courts have been unaware of each other’s jurisprudence or at least have not been borrowing from each other’s jurisprudence.<sup>145</sup> The judgments examined did not contain a reference to decisions of other African community courts or legal developments or laws in other communities. This is unfortunate. Attentions to each other’s judgments would have enriched some of the judgments, even if it might not have changed their outcome. For example, in *Afolabi*,<sup>146</sup> the ECOWAS court could have used other African economic integration treaties to demonstrate how ECOWAS stood alone on the question of individual access to community courts, and how, given that the communities were the building blocks of the AEC, such an isolationist stance was unacceptable.

Indeed, since the communities are building blocks of the AEC, one expects that judicial dialogue among their courts would be an important part of ‘building’ the AEC. Also, the fact that there are considerable similarities across the communities’ constitutive treaties and objectives should encourage more dialogue. As Mistry has observed, ‘it appears as if the drafting of all these arrangements across Africa was done from the same template’.<sup>147</sup> At present, the difficulty of

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<sup>142</sup> [2003] 1 East Afr. L.R. 173.

<sup>143</sup> *Ibid.* at 175.

<sup>144</sup> *Ibid.*

<sup>145</sup> See generally Nathan Miller, “An International Jurisprudence? The Operation of “Precedent” Across International Tribunals” (2002) 15 *Leiden J. Int’l L.* 483.

<sup>146</sup> *Olajide Afolabi*, *supra* note 60.

<sup>147</sup> Percy S. Mistry, “Africa’s Record of Regional Co-operation and Integration” (2000) 99 *African Affairs* 553 at 564-565.

accessing each other's judgments owing to the absence of systematic law reporting may account for lack of judicial dialogue among the community courts. It is suggested that jurisprudential borrowing among them should be encouraged to facilitate the gradual development of a continental jurisprudence on economic integration.

This can be done by facilitating access to their judgments and fostering regular interactions between their officers. It is recommended that each court should approach councils for law reporting in member states about officially publishing its judgments. Publication of the judgments should be considered a public good, aimed at promoting economic integration in Africa and the effectiveness of the courts. Publication of judgments enhances the international and domestic visibility of the community courts. With limited access to judgments, it is little wonder that some writers perceive the courts as existing 'mostly on paper'.<sup>148</sup> Kenya's National Council for Law Reporting has published one judgment of the EAC court.<sup>149</sup> It would also be possible for an academic institution to take up this task on a continental scale.<sup>150</sup> It is unlikely that, at this stage, and given the volume of cases, a law report devoted solely to the courts judgments will be commercially viable such that it can attract a private commercial publisher.<sup>151</sup> A continental jurisprudence on economic integration will immensely benefit Africa.

### **5.3.3.4 International Law's Role in Economic Integration**

Regional economic integration processes operate within the context of an overarching international legal system.<sup>152</sup> It is therefore not surprising that international law is often deployed in the settlement of disputes by judicial institutions, such as the WTO panels and Appellate Body

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<sup>148</sup> Karen J. Alter, "Delegating to International Courts: Self-Binding vs. Other-Binding Delegation" (2008) 71 *Law & Contemp. Probs.* 37 at 57.

<sup>149</sup> See *Anyang II*, *supra* note 90, which is reported in the Kenya Law Reports.

<sup>150</sup> For example, the African Human Rights Law Report is published by the Center for Human Rights, University of Pretoria and reports decisions from the African Commission on Human and People's Rights. The Southern African Legal Information Institute ([www.saflii.org](http://www.saflii.org)) publishes online versions of judgments from the EAC and COMESA courts and the SADC Tribunal.

<sup>151</sup> LawAfrica, a private commercial publisher, publishes some judgments of the COMESA and EAC courts as part of the East African Law Reports.

<sup>152</sup> The foundation of some regional economic integration processes and the source of their validity is in international law, more specifically article XXIV of the General Agreement on Tariffs and Trade or the Enabling Clause. Among the African regional trade agreements notified under the GATT or Enabling Clause are: Common Market for Eastern and Southern Africa; East African Community; Economic and Monetary Community of Central Africa; Economic Community of West African States; Southern African Development Community; West African Economic and Monetary Union.

and the ECJ, working in the field of international economic law. This field of learning, although epistemologically distinct, still maintains its international law foundations. Accordingly, the WTO's Appellate Body has held that the WTO agreements cannot be read in clinical isolation from public international law.<sup>153</sup> Reliance on international law in adjudication before the WTO panels and Appellate Body has been contentious. However, it is generally recognized that it is beneficial.<sup>154</sup> When a community court relies on international law, it makes the community and international legal systems interact.

As noted above, of the community treaties under review, only the ECOWAS Treaty makes a direct reference to international law as a source of law for the court.<sup>155</sup> Also, one of the principal qualifications for appointment to the ECOWAS court is to be a jurisconsult 'of recognized competence in international law'.<sup>156</sup> It was suggested that this offers a greater prospect that international law would be brought to bear on the court's decisions. Indeed, the judgments of the ECOWAS court, with their constant reference to the decisions of the international courts, provide evidence that this may be true. Unlike the ECOWAS Treaty, there is only one reference to international law in the EAC Treaty. It is in the preamble, and provides that the countries resolve to adhere to the principles of international law governing relationships between sovereign states. Notwithstanding this absence of an express reference to international law as a source of law, both applicants and respondents in the *Anyang* case relied on it in their arguments and so did the court in its judgment. Indeed, a recent judgment of the EAC court on the consistency of amendments to the treaty with the procedures for amendment laid down in the treaty reveals, once again, the court's heavy reliance on international law.<sup>157</sup>

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<sup>153</sup> *United States – Standards for Reformulated and Conventional Gasoline* (1996), WTO Doc. WT/DS2/AB/R at 17 (Appellate Body Report).

<sup>154</sup> See Joe McMahon & Margaret A. Young, "The WTO's use of Relevant Rules of International Law: An Analysis of the Biotech Case" (2007) 56 *Int'l & Comp. L. Q.* 907; Jiaxiang Hu, "The Role of International Law in the Development of WTO Law (2004) 7 *J. Int'l Econ. L.* 143; James Cameron & Kevin Gray, "Principles of International Law in the WTO Dispute Settlement Body" (2001) 50 *Int'l & Comp. L. Q.* 248.

<sup>155</sup> Compare SADC Tribunal Protocol, *supra* note 31 art. 21. It provides that, 'the Tribunal shall: ... (b) develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States'. Protocol on the establishment of the East African Customs Union, art. 39(1)(f), which provides that the customs law of the community shall consist of: '... relevant principles of international law.'

<sup>156</sup> ECOWAS Court Protocol, *supra* note 18 art. 3(1).

<sup>157</sup> *East Africa Law Society-Amendment*, *supra* note 35.

To date, reliance on international law by the community courts appears uncontested. However, with time, more fundamental questions as to the relations between international law, international law commitments of member states, and the community treaties will become issues for determination. One problematic issue will be conflicts between the obligations of member states under the community treaties and their obligations under the WTO agreements or other trade agreements. Admittedly, a state may not invoke its internal law as justification for the non-fulfilment of its international treaty obligation.<sup>158</sup> But, it is arguable whether it can invoke before a community court its international obligations as an excuse for the non-fulfilment of its regional treaty obligations, or, before an international court, its regional obligations as a justification for not fulfilling its international obligations.<sup>159</sup> As regards WTO law, the response to this question before a community court will, in part, depend on the extent to which WTO law will be considered an applicable law in disputes before the community courts. So far, no such issue has arisen before the community courts.<sup>160</sup>

Although the present reliance on international law by the community courts has not been contested, we must caution against unthinking invocation of international law in the interpretation of the community treaties. An instance of this is the EAC court's ruling in *Anyang II* that the EAC Treaty did not provide an explicit solution to the issue of conflicts between community treaty provisions and national laws.<sup>161</sup> This ruling was given without regard to the clear provisions of article 8(4) of the treaty which provides that, 'community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty'. This provision obviously implies that, in cases of such conflicts, community law should prevail

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<sup>158</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 27.

<sup>159</sup> See *Brazil-Measures Affecting the Importation of Retreaded Tyres* (2007), WT/DS332/AB/R at [213]-[234] (Appellate Body Report). Brazil exempted MERCOSUR countries from restrictions it had imposed on the importation of retreaded tyres. This was done to comply with a ruling issued by a MERCOSUR arbitral tribunal. The Appellate Body assessed whether this explanation provided an acceptable justification for discrimination between MERCOSUR and non-MERCOSUR countries. It held that the MERCOSUR arbitral tribunal's ruling did not justify the discrimination because it bore no relationship to the legitimate objective of protecting human, animal or plant life and health pursued by the restrictions.

<sup>160</sup> See generally *Progress Office Machines v. South African Revenue Services* 2008 (2) S.A. 13. The court adopted an interpretation that was consistent with the duration for which an anti-dumping duty can remain in force under article 11 of the WTO Anti-Dumping Agreement. However, it noted that although the WTO Agreement had been approved by South Africa's Parliament, and is thus binding on South Africa in international law, it had not been enacted into municipal law. To the court 'no rights are therefore derived from the international agreements themselves'.

<sup>161</sup> *Anyang II*, *supra* note 90 at 31-32.

over national law. Thus, contrary to the court's suggestion, the solution did not lie in a basic principle of international law,<sup>162</sup> or the persuasive jurisprudence of the ECJ.<sup>163</sup> The solution lay in article 8(4) of the EAC Treaty! The fact that the court glossed over this important provision is particularly troubling given that, as noted in Chapter Four, the article appears to have been introduced<sup>164</sup> as a direct reaction to previous judicial decisions such as *Okunda v. Republic*, which rejected the subordination of national law to community law.<sup>165</sup> The EAC court and, indeed, the national courts within the EAC, must recognize the revolutionary nature of this supremacy provision and use it to strengthen community law.

Another issue the community courts will ultimately have to address is the problem of overlapping jurisdictions among themselves, and, internationally, with the WTO dispute settlement bodies or other dispute settlement systems in which member states are parties.<sup>166</sup> Multiple-state membership of communities is a key feature of Africa's economic integration processes. Countries are often members of more than one community in addition to being members of the WTO. For example, Burundi, Kenya, Uganda and Rwanda, all members of the EAC, are also members of COMESA and the WTO. What happens if, in a hypothetical scenario, Kenya sues Uganda before the EAC court, Uganda sues Kenya before the COMESA court, and Egypt petitions for a WTO panel to be set up over what is, essentially, the same dispute? Currently, and unlike other agreements outside Africa,<sup>167</sup> there are no community treaty provisions for resolving the issue of conflicting jurisdictions and forum shopping. As will be discussed in Chapter Eight, in the absence of such provisions, the community courts will have to work out doctrines and rules to regulate the issue of conflicting jurisdictions. In doing so, private international law principles may be useful.

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<sup>162</sup> The court cited the principle that a state cannot rely on its internal law as justification for its failure to perform its treaty obligation.

<sup>163</sup> The court referred to *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, [1963] E.C.R. 1; *Flaminio Costa v. ENEL*, C-6/64 [1964] E.C.R. 585 and *Amministrazione delle Finanze dello Stato v. Simmenthal*, C-106/77 [1978] E.C.R. 629.

<sup>164</sup> No such provision existed in its predecessor, the *Treaty for East African Co-Operation*, 6 June 1967, 6 I.L.M. 932.

<sup>165</sup> [1970] East Afr. L. R. 453; *Okunda v. Republic* [1970] East Afr. L. R. 457. See Richard F. Opong, "Re-imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa" (2007) 30 *Fordham Int'l L.J.* 297 (discussing an emerging trend of subordinating national law to international law).

<sup>166</sup> See generally Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003).

<sup>167</sup> See e.g. *North American Free Trade Agreement*, 17 December 1992, 32 I.L.M. 296 art. 2005.



### 5.3.3.5 Sovereignty and Inter-Institutional Relational Problems

In the formative stages of the development of an international organization, its institutions try to define their roles within it and protect their prerogatives. Accordingly, inter-institutional relational problems are prominent at these formative stages. A classic illustration of this is the case of *Parliament of ECOWAS v. Council of Ministers of ECOWAS*,<sup>168</sup> in which the applicant unsuccessfully challenged decisions of the Council of Ministers which, according to the applicant, violated the independence and financial autonomy it enjoyed.<sup>169</sup> A less direct instance is the *Calist* case which, although not instituted by the EALA, was aimed in part at maintaining its right to have a voice in the EAC's law-making process.<sup>170</sup> Concomitant with inter-institutional relational problems, when member states begin to experience the practical national impact of what they have agreed, their enthusiasm in joining the international organization becomes tempered by a growing unwillingness to surrender sovereignty to it. This reluctance is particularly strong where decisions made by the organization have significant national impacts. Accordingly, a defining challenge for the court of the organization is how to mediate the relational problems between the organization's institutions, as well as between member states and the organization.<sup>171</sup> The court becomes the arbiter of inter-institutional problems and a moderator of the relations between the organization and member states.

The judgments of the community courts reveal an attempt to address some of these problems. The proper resolution of these problems is important for the effective development of the communities. A significant source of the problems between member states and the communities was the scope of national prerogatives in economic integration; what can states continue to do and what are they prevented from doing as a result of becoming parties to the community treaties? In *Anyang II*, the EAC court characterizes this as the hurdle of 'balancing

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<sup>168</sup> Parliament of ECOWAS, *supra* note 18.

<sup>169</sup> The court found that the applicant did not comply with article 76 of the ECOWAS Treaty which enjoins parties to have recourse to amicable settlement of any dispute regarding the interpretation or application of the Treaty before referring the dispute to the court.

<sup>170</sup> *Calist*, *supra* note 79.

<sup>171</sup> See generally Bruno De Witte, "The Role of Institutional Principles in the Judicial Development of the European Union Legal Order" in Francis Snyder ed., *The Europeanisation of Law: The Legal Effects of European Integration* (Oxford: Hart Publishing, 2000) at 83.

individual state sovereignty with integration'.<sup>172</sup> It is a hurdle which all economic integration processes struggle with. Indeed, as noted in Chapters Two and Four, state sovereignty challenges the very idea and existence of a community legal system. In Africa, striking the right balance is likely to be more challenging since the community treaties do not clearly lay out the communities' competences *vis-à-vis* those of member states: What matters, if any, are within the exclusive competence of the communities? What matters are within the exclusive competence of member states? Are there any areas of shared competence? In case there is a dispute, who decides whether a community or member state is competent as regards a defined issue? The ability of the community courts to strike the right balance in overcoming this hurdle will be fundamental to the success of Africa's economic integration processes.

Sovereignty-based arguments are used by states in their attempt to constrain the decision-making powers of community courts. Such arguments aim at shaping a court's jurisprudence in a manner perceived to be more in line with states' interests and cut back the extent of a community's competences. However, as the EAC court held in *Anyang II*, 'while the [EAC Treaty] upholds the principle of sovereign equality ... by the very nature of the objectives they set out to achieve, each partner state is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role'.<sup>173</sup> In *Calist*, the court had earlier noted that 'the competence of the Community is restricted to matters which are within its jurisdiction. Any matter which is still under the exclusive sovereignty of the Partner States is beyond the legislative competence of the Community'.<sup>174</sup> Definitely, this will not be the last time the sovereignty argument will be put before the community courts. The ultimate test for them is how, tactfully, to push back the threats of sovereignty and, at the same time, maintain the trust and confidence of the member states in the economic integration processes and the jurisprudence of the courts.

Concomitant with the relational problems between the communities and the member states are similar problems between community institutions. A number of inter-institutional relational problems are revealed in the community courts' judgments. We have already noted how the liberal individual *locus standi* rules affect the balance of power within the communities and can be

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<sup>172</sup> *Anyang II*, *supra* note 90 at 32.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Calist*, *supra* note 79 at 251.

potentially problematic. Another example was the issue of the sufficiency or otherwise of protocols as the legislative medium for the purposes which the private members' bills sought to achieve in *Calist*.<sup>175</sup> We should also recall the bank's argument in *Ogang*<sup>176</sup> that the COMESA court lacked jurisdiction over it because it was an autonomous institution, not an organ of COMESA, and, accordingly, not answerable to the laws and regulations of COMESA. All these are manifestations of inter-institutional relational problems. They are very weighty problems which merit careful scrutiny. They often aim at bolstering certain institutional interests at the expense of the interests of other institutions.

For example, the issue of the appropriate legislative instrument in the *Calist* case was not an insignificant one. At the heart of that issue was the question of which community institutions may participate in the EAC's law-making processes. As in states, the choice of legal instrument (e.g. executive instrument, constitutional instrument, Act, Order etc.), defines the law-making procedure and the participating institutions. Protocols and Acts are the two main modes of legislating within the EAC. Protocols supplement, amend or qualify the EAC Treaty.<sup>177</sup> They are legislation pursuant to the treaty. The member states conclude protocols as may be necessary in each area of co-operation and spell out the objectives and scope of institutional mechanisms for co-operation and integration. They are approved by the Summit of Heads of States and Government on the recommendation of the Council of Ministers.<sup>178</sup> Unlike Acts of the community,<sup>179</sup> the EALA is clearly excluded from the negotiation and adoption of protocols.

This shows that, beneath the argument that protocols were best suited for the purposes for which the private members' bills in *Calist* were directed, there was a careful and subtle attempt to exclude the EALA altogether from the issues addressed in the bills. It is arguable that this attempt was informed by the culture of executive domination of Africa's economic integration processes. While the EAC Treaty stipulates a number of defined areas where a protocol must be adopted, it

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<sup>175</sup> *Ibid.*

<sup>176</sup> *Eastern and Southern African Trade and Development Bank v. Ogang* [2001] East Afr. L.R. 46.

<sup>177</sup> EAC Treaty, *supra* note 6 art. 1.

<sup>178</sup> *Ibid.* art. 152.

<sup>179</sup> Article 62(1) provides that the enactment of legislation of the Community shall be effected by means of Bills passed by the Assembly and assented to by the Heads of State, and every Bill that has been duly passed and assented to shall be styled an Act of the Community.

does not set those areas as the limit. Thus, theoretically, the scope of matters over which protocols can be adopted is undefined. The thought that the EALA, which consists of the people's representatives, can be excluded from participating in community law-making simply through the use of protocols represents a frightening prospect for good governance within the EAC, an ideal which is espoused as a fundamental principle of the organization.<sup>180</sup>

One troubling aspect of this prospect is that under the EAC Treaty, and unlike other organs of the community, the EALA is not one of the institutions which can challenge other institutions before the EAC court.<sup>181</sup> The member states<sup>182</sup> and individuals<sup>183</sup> may sue the EALA as a community institution. But, there is no equivalent power in the EAC Treaty for the EALA to sue a member state or other community institution to protect its prerogatives in areas such as law-making<sup>184</sup> and control over the community budget.<sup>185</sup> Unless this limitation is circumvented or remedied, the possibility of the EALA being consigned to irrelevance in the face of unbridled 'protocolism' is real. The ability of individual members of the EALA to bring actions to challenge other institutions before the court, as happened in *Calist*, is one, albeit inadequate, means of addressing this limitation. In this area, the interpretive approaches of the court will be crucial in protecting the prerogatives and competence of the EALA.<sup>186</sup> Whether the EAC court will be able to do this, or we will have to wait for a treaty amendment, remains to be seen.

The doctrine of prospective annulment has become an important balancing tool for the EAC court. It has been used authoritatively to state the law to guide future decisions and, at the same time, ensure that past unlawful decisions of community institutions and member states are not sanctioned in a manner that adversely affects the EAC's work. In two instances, the court

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<sup>180</sup> EAC Treaty, *supra* note 6 art. 6(d).

<sup>181</sup> But see ECOWAS Court Protocol, *supra* note 15 art. 10(b). It grants the ECOWAS Parliament standing to challenge 'the legality of an action in relation to any Community text'.

<sup>182</sup> EAC Treaty, *supra* note 6 art. 28.

<sup>183</sup> *Ibid.* art. 30.

<sup>184</sup> *Ibid.* art. 49(1).

<sup>185</sup> *Ibid.* art. 49(2)(b).

<sup>186</sup> For comparative purposes, it is worth noting that, historically, the European Parliament did not have standing to bring actions before the ECJ for annulment of EC laws. However, the court remedied this defect after a period of hesitation. See *Parliament v. Council*, C-302/87 [1988] E.C.R. 5616; *Parliament v. Council*, C-70/88 [1990] E.C.R. I-2041.

invoked the doctrine to save decisions which would otherwise have been void *ab initio*.<sup>187</sup> This balancing tool is important to maintaining harmonious inter-institutional and community-state relations in the formative stages of the communities' development. But, community courts must be more circumspect in invoking and applying it. It could send a wrong signal to community institutions and member states that breaches of community law would be 'condoned' by the courts.

It is essential that inter-institutional and community-state relational problems are appreciated as part of the evolutionary process in the growth of an international organization. The responses to these problems should be measured and well thought through to ensure that they do not generate more problems or lead to institutional paralysis. It is in this regard that the recent amendment to the EAC Treaty, ostensibly a response to the EAC court's 'anti-government' jurisprudence, is worrying. The amendments have: restructured the Court into two divisions, i.e. a First Instance Division and an Appellate Division; expanded the grounds for removing judges from office; provided for suspension of a judge who is under investigation for removal or is charged with an offence; limited the court's jurisdiction so as not to apply to jurisdiction conferred by the treaty on institutions of member states; provided time limits within which a reference to the court by individuals may be instituted; provided grounds on which appeal may be made; and deemed past decisions of the court and existing judges to be decisions and judges of the First Instance Division respectively.<sup>188</sup>

#### 5.4 CONCLUSION

The above discussion reveals the importance of strong judicial institutions in economic integration processes. They act as guardians of the processes and arbiters of inter-institutional and community-state relational problems inherent in them. A court has a crucial role to play in advancing economic integration through law. It has to evolve its own jurisprudence which ensures compliance with treaty obligations, checks excesses on the part of community institutions, engenders investor confidence, and nurtures a sense of judicial discipline and legitimacy among national courts.<sup>189</sup> Indeed, an activist community court with broad subject matter and personal

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<sup>187</sup> See *Calist*, *supra* note 79 and *East African Law Society-Amendment*, *supra* note 35.

<sup>188</sup> See EAC Treaty Amendment, *supra* note 35 and accompanying text.

<sup>189</sup> P. Kenneth Kiplagat, "Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience" (1995) 15 *Nw. J. Int'l L. & Bus.* 437 at 449-450.

jurisdiction can sometimes push forward integration in the face of political inertia. Nowhere has this been truer than within the European Community. The jurisprudence of the ECJ has been critical to the community's development. The character of a community court reflects the depth of integration desired and how much of a role is given to law in the integration process. A limited role for courts reflects an unwillingness to relinquish sovereignty, and may hamper the attainment of deeper integration.

This chapter has argued that the COMESA, EAC and ECOWAS courts have a crucial role in nurturing and managing the various relations that result from the economic integration processes of their respective sub-regions. However, without the active support of national courts and individuals, they cannot effectively perform this role. The chapter suggests that a trilateral relation among individuals, national courts and community courts is important to ensure the effectiveness of Africa's economic integration processes. The jurisprudence of COMESA, EAC and ECOWAS courts points to the importance of this trilateral relation. Their jurisprudence offers useful lessons to the African Court of Justice when it becomes operational. But, it is doubtful whether the African Court of Justice is equipped to address effectively the issues faced by the COMESA, EAC and ECOWAS courts. It will be argued in the next chapter that there are provisions in the Protocol on the Statute to the African Court of Justice and Human Rights which require amendment before the court can truly develop this trilateral relation. This will enable the African Court of Justice perform effectively its role in Africa's economic integration.

## **CHAPTER SIX: ENFORCEMENT OF COMMUNITY LAW THROUGH STRUCTURED RELATIONS: THE CASE OF THE AFRICAN ECONOMIC COMMUNITY**

### **6.1 INTRODUCTION**

An integral part of any legal system, and a key to its effectiveness, are the enforcement mechanisms provided to ensure compliance with its laws. From a relational perspective, enforcement mechanisms are avenues through which community and national legal systems are linked. In the context of economic integration, enforcement of community law strengthens a community's legal system at both community and national levels. It allows individuals to benefit from the integration process. This enhances the legitimacy of the community legal system, creates a national constituency with interest in community law, and provides a focal point of interaction between national and community legal systems.

Enforcement of community law occurs at both national and community levels. Indeed, unless there is effective enforcement at both levels and a high level of co-ordination between them, community law will become ineffective. A disjunction will be created between community and national legal systems, and the success of the community will be endangered. A key feature of an enforcement mechanism that is likely to ensure the effective implementation of community law is its ability to take advantage of pre-existing law enforcement regimes in member states. As Shaw has observed, '...it is precisely because of the inadequate enforcement facilities that lie at the disposal of international law [community law] that one must consider the relationship with municipal law as more than of marginal importance'.<sup>1</sup>

This chapter takes as its premise the idea that structured relations between a community and pre-existing national law-enforcement mechanisms are important for community law's effectiveness. It examines the extent to which this idea is reflected in the design of institutions responsible for the enforcement of the laws of the African Economic Community.<sup>2</sup> It assesses how the mechanisms established by the AEC Treaty for the enforcement of its laws may fail in ensuring their effectiveness.

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<sup>1</sup> Malcolm Shaw, *International Law* (Cambridge: Cambridge University Press, 2005) at 161.

<sup>2</sup> See *Treaty establishing the African Economic Community*, 3 June 1991, 30 I.L.M. 1241 [AEC Treaty].

## 6.2 INSTITUTIONS FOR ENFORCEMENT OF AEC LAW

### 6.2.1 Executive Institutions

Under the AEC Treaty, the Assembly of Heads of State and Government (Assembly) is the supreme institution of the community.<sup>3</sup> It is responsible for implementing the community's objectives.<sup>4</sup> From the perspective of making available to the AEC the enforcement mechanisms existing in member states, entrusting this function to the Assembly appears to be a good approach. As heads of the executive in their respective states, they may be able easily invoke the mandate of national institutions such as the police, customs and immigration to enforce community law, or propose the enactment of laws giving effect to community law. However, there are disadvantages in this approach.

As regards decision-making at the community level, because the Assembly comprises politicians who represent individual member states' interests, it is probable that political considerations, rather than the ultimate success of the AEC, will be paramount in their deliberations. This is especially so since the success of the AEC may lie in adopting domestically unpalatable decisions, which must be enforced in member states. A similar arrangement under the Treaty for East African Co-operation, 1967, was described as 'negative' since it defeated the aim of achieving a 'vigorous Community'.<sup>5</sup> Under the current Treaty establishing the East African Community,<sup>6</sup> the Summit of Heads of State and Government is responsible for giving 'general directions and impetus as to the development and achievement of the objectives of the Community'.<sup>7</sup> An assembly of politicians may seek political compromises rather than the strict

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<sup>3</sup> *Ibid.* art. 8(1).

<sup>4</sup> *Ibid.* art. 8(2).

<sup>5</sup> Yash P. Ghai, *Reflections on Law and Economic Integration in East Africa* (Scandinavian Institute of African Studies, Research Report No. 36, 1976) at 24. Under articles 46-48 of the Treaty for East African Co-operation, 6 June 1967, 6 I.L.M. 932, the East African Authority was the 'principal executive authority of the Community'. It was responsible for, and had the general direction and control of, the performance of the executive functions of the Community.

<sup>6</sup> See *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 U. N. T. S. I-37437 [EAC Treaty].

<sup>7</sup> *Ibid.* art. 11(1). The powers of the Authority of Heads of State and Government, which is declared as the 'supreme' institution responsible for the 'general direction and control' of the community under the COMESA and ECOWAS Treaty are more extensive. See *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, 35 I.L.M. 660, (1996) 8 Afr. J. Int'l & Comp. L. 187 art. 7 [ECOWAS Treaty]; and *Treaty establishing the Common Market for Eastern and Southern Africa*, 5 November 1993, 33 I.L.M. 1067, art. 8 [COMESA Treaty].



enforcement of laws. With their heavy national and international schedules, and numerous domestic socio-economic and political problems, it is unlikely heads of state and government can forcefully implement the AEC's objectives. This ultimately dilutes or slows down the economic integration process.<sup>8</sup> Indeed, the current state of inertia in the development of the AEC may be evidence of this.

At the national level, political pressure from domestic constituencies, coupled with a personal motivation to maintain political power, may undercut the willingness or ability of the executive to implement community law. For example, there have been instances where governments have bowed to domestic pressure and closed their national borders or expelled foreigners, thus hindering trade and free movement of persons as agreed under various ECOWAS protocols.<sup>9</sup> Recently, Ghana closed its border with Togo two days prior to the country's 28 December 2008 general elections. This decision, which was roundly condemned by the ECOWAS,<sup>10</sup> appeared to have been directed at preventing non-nationals voting in the Volta region, which is traditionally an opposition (now government in power) stronghold.

Also, an overbearing Assembly may dominate the agenda of other community institutions such as the council of ministers and the secretariat.<sup>11</sup> This is especially likely as, apart from the Court of Justice, none of the major decision-making institutions is guaranteed independence under the AEC Treaty. The Council of Ministers is responsible for the 'functioning and development of

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<sup>8</sup> Kofi Oteng Kufour, "Law, Power, Politics and Economic: Critical Issues arising out of the ECOWAS Treaty" (1994) 6 Afr. J. Int'l. Comp. L. 429.

<sup>9</sup> See M. Leann Brown, "Nigeria and the ECOWAS Protocol on Free Movement and Residence" (1989) 27 J. Modern Afr. Stud. 251.

<sup>10</sup> See Ghana News Agency, "ECOWAS Regrets Closure of Ghana's Borders", 27 December 2008. Online: Myjoyonline, <<http://topics.myjoyonline.com/news/200812/24368.asp>>. In a release by the community, quoted in this article, the community drew 'the attention of the Government of Ghana to the consequences that the closure would have and the livelihood of the border communities and on the ECOWAS protocol on the free movement of persons, rights of residents and establishment'.

<sup>11</sup> As far back as 1972, Sundström noted that 'in most African organisations the conference of heads of state dominates to the extent that ministerial committees often may be reduced to acting as preparatory bodies'. G. O. Z. Sundström, "The Legal Procedures and Techniques of Economic Co-operation" (1972) 16 J. Afr. L. 229 at 229. See also Louis S. Sohn, "Organs of Economic Co-Operation in Africa" (1972) 16 J. Afr. L. 212 at 217 where he notes that 'the distinctive characteristic of many African regional organizations is their reliance on Conferences of Heads of State and Government. ... Councils of Ministers, on the other hand, which dominate most non-African regional organizations, play a less important role in Africa.

the Community'.<sup>12</sup> It is composed of ministers of state who hold their positions at the pleasure of their respective president, prime minister or king. Although the Secretary General and the staff of the Secretariat are 'accountable only to the Community', the Secretariat is not a decision-making institution and cannot push the economic integration agenda on its own.<sup>13</sup>

The absence of an independent institution to push the agenda of economic integration leaves the process entirely in the hands of politicians. This may delay the integration process, especially given the history of politics in Africa. Both the Assembly and the Council are comprised of members who lack the expertise and security of tenure needed to take or propose bold measures. Although great advances are being made, politics in Africa is still characterized by the personalization of power, abrupt changes in government, personal and ideological differences among leaders, and decisions made on the bases of immediate and short-term objectives. These adversely affect the rigorousness of decision-making and the stability in governance which the AEC needs to progress. Within the European Community (EC), the European Commission has been described as the 'single most important political force for integration, ever seeking to press forward to attain the Community's objectives'.<sup>14</sup> It is the EC's motor of integration. It is able to do this not only because it consists of technocrats, but also because members are required to be persons whose 'independence is beyond doubt', and who neither 'seek nor take instructions from any government or from any other body'.<sup>15</sup> It is the European Commission's sole responsibility to 'ensure that the provisions of [the EC Treaty] and measures taken by the institutions pursuant thereto are applied'.<sup>16</sup> It can be argued that its decision-making powers are minimal compared to the EC's Council of Ministers. But that understates the European Commission's role in shaping and developing the community. The executive, legislative, judicial and administrative functions of the European Commission are not matched by any of the AEC's institutions.

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<sup>12</sup> AEC Treaty, *supra* note 2 art. 11.

<sup>13</sup> *Ibid.* art. 24.

<sup>14</sup> Paul Craig & Gráinne de Búrca, *EU Law: Text Cases and Materials*, 3rd. ed (Oxford: Oxford University Press, 2006) at 64.

<sup>15</sup> *Consolidated Version of the Treaty Establishing the European Community*, 24 December 2002, 2002 O. J. (C 325) 33, art. 213 [EC Treaty].

<sup>16</sup> *Ibid.* art. 211.

In contrast to the approach under the AEC Treaty, the European Council, which consists of the European Union (EU) countries' Heads of State and Government, only recently became a formal part of the institutional structure of the European Union. It is responsible for providing the EU, of which the EC is an integral part, with 'the necessary impetus for its development and shall define the general political guidelines thereof'.<sup>17</sup> But, it is ultimately the members of the Council of Ministers that commit their governments in decisions taken within the EC, and the European Commission that sees to the implementation of those decisions. The effective combination of independent technocrats with wide enforcement powers and politicians partly account for the EC's success. These technocrats have wide powers to propose policies and enforce decisions taken on those proposals by the Council of Ministers and the European Parliament.

The role strong institutions play in the success of economic integration should not be underestimated. The absence of strong, independent institutions to counterbalance political inertia is, no doubt, a major reason behind the slow pace of economic integration in Africa.<sup>18</sup> Personal differences between leaders of the East African Community led to a situation whereby there was no meeting of the East African Authority, the supreme organ of the community, between 1971 and 1977. The collapse of the former East African Community has, in part, been attributed to this institutional paralysis.<sup>19</sup> As far back as 1991, Johnson suggested that for the success of economic integration in Africa, 'major operational decisions of a union should not be taken by organs which contain the top political leadership of the member-states'.<sup>20</sup>

### **6.2.2 The Pan-African Parliament**

Legislative institutions are not often thought of as principal agents when it comes to the enforcement of law; they make law, and its implementation resides with the executive. An emerging feature of Africa's economic integration processes is the use of community

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<sup>17</sup> *Consolidated Version of the Treaty on European Union*, 12 December 2002, 2002 O. J. (C325) 5, art. 4.

<sup>18</sup> In addition to strong institutions, there is a need for sound domestic economic policies, political stability, good governance and respect for fundamental rights. See generally 'Dejo Olowu, "Regional Integration, Development, and the African Union Agenda: Challenges, Gaps and Opportunities" (2003) 13 *Transnat'l L. & Contemp. Probs.* 211.

<sup>19</sup> Omotunde E.G. Johnson, "Economic Integration in Africa: Enhancing Prospects for Success" (1991) 29 *J. Modern Afr. Stud.* 1 at 13.

<sup>20</sup> *Ibid.* at 12.

parliamentary institutions.<sup>21</sup> In the context of economic integration, community parliaments offer two channels that aid implementation of community law. Firstly, they can ensure people's participation in their legislative processes. This enhances the legitimacy of laws enacted and improves the prospects of compliance. Secondly, they can engage with national parliaments, who may be the ultimate decision-makers on the issue of nationally implementing community law.

The Pan-African Parliament was envisaged under article 14 of the AEC Treaty and, subsequently, under article 17 of the Constitutive Act of the African Union.<sup>22</sup> The full details on the Parliament are, however, contained in the Protocol to the Treaty establishing the African Economic Community relating to the Pan-African Parliament.<sup>23</sup> The Pan-African Parliament was inaugurated in 2004 and is fully operational.<sup>24</sup> It is currently an advisory and consultative body.<sup>25</sup> Members are drawn from national parliaments.<sup>26</sup> It is ultimately to evolve into an institution with full legislative powers. Members will be elected through universal adult suffrage. The fact that Pan-African parliamentarians are drawn from national parliaments provides an opportunity for creating a relationship between the AEC and member states. Indeed, the Pan-African Parliament is enjoined to work in 'close co-operation' with national parliaments.<sup>27</sup> The knowledge Pan-African parliamentarians have about the AEC and its legislative processes may be used to influence their national colleagues, when it comes to implementing AEC law at the national level.

The absence of universal adult suffrage limits the extent to which the Pan-African Parliament engages with Africans. However, one of the objectives of the Pan-African Parliament is to familiarize Africans with the objectives and policies aimed at integrating the African

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<sup>21</sup> In addition to the Pan-African Parliament, the following regional parliamentary institutions are currently operating: East African Legislative Assembly; Economic Community of West African States Parliament; Network of Parliamentarians of the Economic Community of Central African States; Parliament de l'Union Économique et Monétaire Ouest Africaine; Southern African Development Community Parliamentary Forum; and Inter-Parliamentary Union of the Intergovernmental Authority on Development, which is not yet operational. See Barney Karuombe, "The Role of Parliament in Regional Integration – the Missing Link" (2008) 8 *Monitoring Regional Integration in Southern Africa Yearbook* 222.

<sup>22</sup> 11 July 2000, 15 *Afr. J. Int'l & Comp. L.* 25.

<sup>23</sup> 2 March 2001, 15 *Afr. J. Int'l & Comp. L.* 86 [Protocol on Pan-African Parliament].

<sup>24</sup> <http://www.pan-africanparliament.org/>

<sup>25</sup> Protocol on Pan-African Parliament, *supra* note 23 art. 2(3)(i).

<sup>26</sup> *Ibid.* arts. 4 and 5.

<sup>27</sup> *Ibid.* art. 18.

continent.<sup>28</sup> This can be done through educational campaigns, workshops, lectures and seminars. As has already been argued, the presence of a domestic constituency with interest in Africa's economic integration is one of the surest ways of ensuring the implementation and effectiveness of community law. Interested individuals, including businesses, can lobby governments to implement community law, report breaches to community institutions, and try to remedy those breaches through litigation at both national and community levels. It is important that in the Pan-African Parliament's engagement with Africans, these roles are stressed. This should be in line with its objective to facilitate the implementation of the policies and objectives of the AEC.<sup>29</sup>

### **6.2.3 The African Court of Justice**

#### **6.2.3.1 Composition and Independence**

The Court of Justice of the AEC<sup>30</sup> is an important institution for the enforcement of AEC law. It is independent of all other community institutions. Its mandate is to 'ensure the adherence to law in the interpretation and application of [the AEC Treaty] and shall decide on disputes submitted thereto pursuant to [the AEC Treaty].'<sup>31</sup> The detailed law regulating the court was to be set out in a protocol. But, as was argued in Chapter One, its functions will now be performed by the African Court of Justice and Human Rights [African Court of Justice].<sup>32</sup> The African Court of Justice consists of sixteen judges who must all be nationals of states that are parties to the Protocol on the African Court of Justice.<sup>33</sup> This is a practical way of ensuring that the community court

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<sup>28</sup> *Ibid.* art. 3(4).

<sup>29</sup> *Ibid.* art. 3(1).

<sup>30</sup> A.O. Obilade, "The African Court of Justice: Jurisdictional, Procedural and Enforcement Problems" in M.A. Ajomo & Omobolaji Adewale eds., *African Economic Community Treaty, Issues, Problems and Prospects* (Lagos: Nigerian Institute of Advanced Legal Studies, 1993) at 312.

<sup>31</sup> AEC Treaty, *supra* note 2 art. 18(2). This provision bears striking resemblance to article 220 of the EC Treaty, *supra* note 15, which enjoins the European Court of Justice (ECJ) to ensure that, in its interpretation and application of the EC Treaty, the law is observed. The ECJ has used this provision to extend the scope of its judicial review powers to matters not expressly listed in the EC Treaty. It remains to be seen how the African Court of Justice will utilise this power.

<sup>32</sup> Protocol on the Statute of the African Court of Justice and Human Rights, 01 July 2008, (2009) 17 Afr. J. Int'l & Comp. L. (forthcoming) [Protocol on the African Court of Justice]. Annexed to the protocol is the Statute of the African Court of Justice and Human Rights [Statute of the African Court of Justice]

<sup>33</sup> Statute of the African Court of Justice, *ibid.* art. 3(1).

relates with national judicial systems. Some of the court's members might already have held positions in the superior courts of their respective countries.<sup>34</sup>

As was discussed in Chapter Five, the structure, independence and jurisdiction of courts are significant factors in enhancing their ability to meet the challenges of economic integration. There are provisions in the Protocol on the African Court of Justice that seek to secure the independence and effectiveness of the court. Under article 12 of the Statute of the African Court of Justice, the independence of judges shall be fully ensured in accordance with international law. Judges are enjoined to act impartially, fairly and justly, and they are not subject to the direction or control of any person in the performance of their duties.

Judges are elected by the Council of Ministers from a list of nominees submitted by state parties to the Protocol on the African Court of Justice,<sup>35</sup> and appointed by the Assembly of Heads of State and Government for a period of six years.<sup>36</sup> They cannot be removed from office except by a two-thirds majority decision of the judges of the court that the affected judge no longer fulfils the requisite conditions of the position.<sup>37</sup> The Assembly gives final approval to any recommendation to remove a judge.<sup>38</sup> Judges enjoy diplomatic immunity in accordance with international law.<sup>39</sup> They are immune from legal proceedings both during and after their term of service for acts performed in the discharge of their judicial functions.<sup>40</sup>

The Assembly determines the salaries, allowances and compensation of judges on the recommendation of the Council of Ministers.<sup>41</sup> These payments cannot be decreased during terms

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<sup>34</sup> *Ibid.* art. 4. It requires that one of the qualifying criteria to be a judge of the African Court of Justice is to 'possess the qualifications required in their respective countries for appointment to the highest judicial office'. The practice in the existing community courts is to appoint or second judges from national courts to the community courts.

<sup>35</sup> *Ibid.* art. 7(1).

<sup>36</sup> *Ibid.* art. 8(1)

<sup>37</sup> *Ibid.* art. 9(2). Under article 11(2) of the earlier Protocol on the Court of Justice of the African Union, 11 July 2003, 13 Afr. J. Int'l & Comp. L. 115 [AU Court Protocol], a unanimous recommendation from the judges was required before a judge could be removed.

<sup>38</sup> *Ibid.* art. 9(4).

<sup>39</sup> *Ibid.* art. 15(1).

<sup>40</sup> *Ibid.* art. 15(2)(3).

<sup>41</sup> *Ibid.* art. 23(3).

of office of a judge.<sup>42</sup> The court prepares its own budget and submits it to the Assembly through the Council of Ministers.<sup>43</sup> The budget of the court is borne by the African Union.<sup>44</sup> The Protocol on the Court of Justice is silent on whether the Assembly can reduce the court's budget. The Assembly's control over the court's budget is a potential threat to the independence of the court.

It is open to question whether the above provisions on the appointment, removal, independence and remuneration of judges are adequate to guarantee a strong and independent court that will be up to the challenges of promoting economic integration in Africa. These provisions are very similar to those relating to the COMESA, EAC and ECOWAS courts of justice, which were discussed in Chapter Five. To an extent, and without purporting to diminish the importance of institutional guarantees of independence, the strength of a court depends on the character and intellectual strength of its judges.<sup>45</sup> We noted in Chapter Five a number of decisions from the EAC court of justice that demonstrated remarkable independence of judgment, and an ability tactfully to balance competing interests in their jurisprudence. Whether the African Court of Justice will follow a similar trajectory remains to be seen.

The Caribbean Court of Justice, which is established under the Agreement establishing the Caribbean Court of Justice,<sup>46</sup> provides an interesting comparative alternative on how to structure an international court with a view to facilitating its work and guaranteeing its independence. The appointment of the judges of the court and the determination of their remuneration are entrusted to the Regional Judicial and Legal Services Commission (Regional Commission) and not member states.<sup>47</sup> To insulate the Regional Commission from government interference, no government

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<sup>42</sup> *Ibid.* art. 23(1).

<sup>43</sup> *Ibid.* art. 26(1).

<sup>44</sup> *Ibid.* art. 26(2).

<sup>45</sup> Laurence R. Helfer & Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997-1998) 107 *Yale L.J.* 273 at 318-323.

<sup>46</sup> *Agreement Establishing the Caribbean Court of Justice*, 2001, online: Caribbean Court of Justice <<http://www.caribbeancourtofjustice.org/legislation.html>>. [Caribbean Court Agreement]. See Sheldon A. McDonald, "The Caribbean Court of Justice: Enhancing the Law of International Organizations" (2004) 27 *Fordham Int'l L.J.* 930 at 970-1015. For an introduction to the operation and institutional dimension of CARICOM, see Karen E. Bravo, "CARICOM, the Myth of Sovereignty, and Aspirational Economic Integration" (2005) 31 *N. C. J. Int'l L. & Com. Reg.* 145; P.K. Menon, "Regional Integration: A Case Study of the Caribbean Community [CARICOM]" (1996) 24 *Korean J. Comp. L.* 197.

<sup>47</sup> Caribbean Court Agreement, *ibid.* art. 4(7).

representative is a member, and the members of the commission are not appointed by governments. Rather, the Regional Commission consists of representatives of the bar, Judicial Services Commission, Public Service Commission, civil society and specified faculties of law.<sup>48</sup> The commission is also responsible for exercising ‘disciplinary control over Judges of the Court’.<sup>49</sup>

Additionally, the Revised Agreement establishing the Caribbean Court of Justice Trust Fund<sup>50</sup> has created a trust fund to insulate the court from political interference or manipulation of its finances. The purpose of the fund is to provide the resources necessary to finance the capital and operating budget of the court and the Regional Commission in perpetuity.<sup>51</sup> The fund is financed by contributions of member states, income accruing to the fund, and third party contributions.<sup>52</sup> It is expressly provided that third party contributions should not prejudice the independence or integrity of the court.<sup>53</sup> Also, the fund shall not solicit or accept any grant, gift or other material benefit from any source except with the consent of all the member states.<sup>54</sup> A board of trustees, on which there are no government representatives, manages the fund.<sup>55</sup>

This Caribbean model is still developing and its efficacy appears so far not to have been adequately tested. However, it represents a unique and interesting innovation in structuring international courts. The model merits close study by the AEC. It presents novel solutions to the problems of interference and underfunding, which are perennial challenges to African courts.

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<sup>48</sup> *Ibid.* art. 5.

<sup>49</sup> *Ibid.* art. 5(3)(2). This compares favourably with the former provision in the EAC Treaty (currently amended) which left the decision of removing judges of the EAC Court to a three-member independent committee drawn from the Commonwealth.

<sup>50</sup> *Revised Agreement Establishing the Caribbean Court of Justice Trust Fund*, 12 January 2004, online: Caribbean Court of Justice <<http://www.caribbeancourtofjustice.org/legislation.html>>.

<sup>51</sup> *Ibid.* art. 3.

<sup>52</sup> *Ibid.* art. (4)(1).

<sup>53</sup> *Ibid.* art. (4)(1)(c).

<sup>54</sup> *Ibid.* art. 4(2).

<sup>55</sup> *Ibid.* arts. 5-8.



### 6.2.3.2 Subject Matter Jurisdiction and Applicable Law

The subject matter jurisdiction of the African Court of Justice is broad. In theory, it covers, potentially, any international dispute arising between states which are parties to the Protocol on the African Court of Justice. Under article 28 of the Statute of the African Court of Justice:

The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to: (a) the interpretation and application of the Constitutive Act; (b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity; (c) the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned; (d) any question of international law; (e) all acts, decisions, regulations and directives of the organs of the Union; (f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court; (g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; (h) the nature or extent of the reparation to be made for the breach of an international obligation.

The scope of article 28 brings within the jurisdiction of the African Court of Justice the AEC Treaty and any laws adopted by the AEC. In carrying out its functions, the court is enjoined to have regard to: the Constitutive Act of the African Union; international treaties which have been ratified by the contesting States; international custom, as evidence of a general practice accepted as law; the general principles of law recognized universally or by African States; judicial decisions and writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the African Union, as subsidiary means for the determination of the rules of law; any other law relevant to the determination of the case.<sup>56</sup> If the parties agree, the court may also to decide a case *ex aequo et bono*.<sup>57</sup>

An issue arising from the list of applicable laws in article 31 is the status of judgments of the court. In other words, what is the precedential value of the court's judgments to the court itself?

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<sup>56</sup> Statute of the African Court of Justice, *supra* note 32 art. 31.

<sup>57</sup> *Ibid.* art. 31(2).

Do judicial decisions in article 31(e) include decisions of the court? In discussing this issue, one must distinguish between judgment as remedy and judgment as principle. The former is the redress provided for the parties such as an injunction, damages or a declaration. The latter is the legal foundation of the remedy. It will definitely serve the AEC legal system well, by providing certainty and predictability in outcomes, if there is internal coherence in the jurisprudence of the African Court of Justice. This partly results from following previous decisions, albeit not slavishly. Indeed, other international courts, faced with similar provisions have not found it limiting. They strive towards achieving an internally coherent body of jurisprudence by following previous case law.<sup>58</sup> But, perhaps, the treaty could have been more explicit on the precedential value of judgments of the court.<sup>59</sup>

In this respect, it is significant that an earlier provision in the Protocol on the Court of Justice of African Union that ‘judgments of the Court shall be binding on the parties and in respect of that particular case’ was dropped in the Statute of the African Court. The provision appears to have been borrowed from article 59 of the Statute of the International Court of Justice which provides, ‘the decision of the Court has no binding force except as between the parties and in respect of that particular case’. The International Court of Justice has held that, ‘the object of [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding on other States or in other disputes’.<sup>60</sup> Admittedly, in practice, the International Court of Justice has not applied strictly this understanding of article 59 and it was unlikely the Court of Justice of the African Union would have done so either.

### **6.2.3.3 Personal Jurisdiction**

The strength of a court depends not only on its independence but also on the scope of its subject matter and personal jurisdiction. Under article 29 of the Statute of the African Court of

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<sup>58</sup> For example, there is no principle of binding precedent in WTO dispute settlement. Nonetheless, the panels and Appellate Body consistently refer to their previous decisions and seldom depart from them.

<sup>59</sup> Compare Caribbean Court Agreement, *supra* note 46 art. 22. It provides that the judgments of the Court of Justice, CARICOM, shall be legally binding precedents for parties in proceedings before the court.

<sup>60</sup> *German Interests in Polish Upper Silesia* (Permanent Court of International Justice, 1926) cited in Ian Brownlie, *Principles of Public International Law*, 6th ed.(Oxford: Oxford University Press) at 20-21.

Justice, the following entities are entitled to submit cases to the court on ‘any issue or dispute’<sup>61</sup> provided for in article 28: states that are parties to the Protocol on the African Court of Justice; the Assembly; the Parliament and other organs of the AU authorized by the Assembly; and a staff member of the AU. A state that is not party to the protocol may not submit a case to the African Court of Justice;<sup>62</sup> the court has no jurisdiction to hear a dispute involving such a party.

The fact that the court has no jurisdiction over states that are not parties to the protocol, even though they may be parties to the AEC Treaty, poses a challenge to judicial enforcement of the treaty.<sup>63</sup> Surely, in international law, states, as an attribute of their sovereignty, cannot be dragged to an international tribunal without their consent.<sup>64</sup> But, in the context of economic integration,<sup>65</sup> this jurisdictional gap will not aid the uniform application and enforcement of community law in member states. This jurisdictional gap is a reflection of a lack of attention to the importance of relational issues in integration. A foundation for instability is laid where uneven obligations, in terms of the enforcement and enforceability of community law, are imposed on member states. It is difficult to conceive of a stable community where community law is not uniformly applicable within and enforceable against member states. Indeed, the very essence of integration is defeated; ‘uniformity in the meaning of law is part of the constitutional glue that holds the Community together’.<sup>66</sup>

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<sup>61</sup> On human rights related disputes, the list of entities that can bring actions before the African Court of Justice to include: the African Commission on Human and Peoples’ Rights; the African Committee of Experts on the Rights and Welfare of the Child; African Intergovernmental Organizations accredited to the Union or its organs; African National Human Rights Institutions; and, for states that specifically agree to this, individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs. See Statute of the African Court of Justice, *supra* note 21 art. 30.

<sup>62</sup> *Ibid.* art. 18.

<sup>63</sup> See generally James McCall Smith, “The Politics of Dispute Settlement Design” (2000) 54 *Int’l Org.* 137.

<sup>64</sup> See generally Cesare P.R. Romano, “The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent” (2007) 39 *New York J. Int’l L. & Pol.* 791.

<sup>65</sup> Such a jurisdictional gap might work in a purely political context. For example, except with their express consent, the International Court of Justice has no jurisdiction over states which do not consent to its jurisdiction although they are members of the United Nations and, *ipso facto*, parties to the Statute of the International Court of Justice. The case of the African Court of Justice represents an inappropriate extension of an approach developed and workable in a purely political context to economic integration.

<sup>66</sup> Stephen Weatherill, *Law and Integration in the European Union* (Oxford: Clarendon Press, 1995) at 135.

### 6.2.3.4 Limitations on Personal Jurisdiction

In Chapter Five, we discussed the importance of individuals as a medium through which community and national legal systems interact. We saw that the COMESA, EAC and ECOWAS treaties provide fairly liberal rules on individuals' participation in the communities' judicial processes. Individuals have been responsible for almost all the disputes settled by the courts to date. The Statute of the African Court of Justice adopts a radically different approach. Except for human rights claims, individuals have no standing before the African Court of Justice. On matters relating to the interpretation, enforcement and validity of AEC laws, individuals cannot bring an action in the African Court of Justice. A provision in the earlier Protocol on the Court of Justice of the African Union,<sup>67</sup> which allowed individuals to access the court under conditions determined by the Assembly and with the consent of the state concerned, has been omitted from the Statute on the African Court of Justice. With this approach, the African Court of Justices resembles the international adjudication regime category in Schneider's typology of dispute settlement systems.<sup>68</sup> Such a regime is ill-suited to the level of integration envisaged under the AEC Treaty, although it may adequately serve the needs of the AU – the political organization.<sup>69</sup>

This absence of *locus standi* for individuals restricts the number of potential disputes that may be brought before the African Court of Justice. It makes the dispute settlement process unavailable to some of the most important players in the integration process including consumers, traders, corporate bodies and investors. It fails to utilize a principal medium through which community-state relationship is strengthened in economic integration. A plausible alternative, which is still more restrictive compared to the standing rules of the COMESA, EAC and ECOWAS courts, would be to allow individuals to litigate before the African Court of Justice with special leave of the court,<sup>70</sup> or after exhausting local remedies. Another alternative is to create a

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<sup>67</sup> AU Court Protocol, *supra* note 37 art. 18.

<sup>68</sup> Andrea Kupfer Schneider, "Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations" (1998-1999) 20 Mich. J. Int'l L. 679.

<sup>69</sup> *Ibid.* at 761 where she notes that the international adjudicatory regime 'is best used when the goals of integration are limited'.

<sup>70</sup> Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, 2001, art. 222, online: CARICOM <[http://www.caricom.org/jsp/secretariat/legal\\_instruments.jsp?menu=secretariat](http://www.caricom.org/jsp/secretariat/legal_instruments.jsp?menu=secretariat)>. This provision has been interpreted and applied by the court in *Trinidad Cement Ltd. v. The State of the Co-operative Republic of Guyana* [2009] C.C.J. 1 (OJ); *Trinidad Cement Ltd. v. The Caribbean Community* [2009] C.C.J. 2 (OJ). In both cases, the court granted the applicant leave to bring an action.

reference procedure between national courts and the African Court of Justice. This alternative would provide individuals with indirect access to the African Court of Justice.

Admittedly, no legal system grants individuals unlimited access to its courts. However, every advanced legal system recognizes the important role private litigation plays, not only in sustaining the system but also in its development. Legal systems have two principal means of enforcing norms. These are public enforcement through the state and its institutions, and private enforcement by individuals. The combination of these two enforcement mechanisms ensures a legal system's effectiveness. In economic integration, private enforcement complements public enforcement by community institutions. It appears, however, that under the Statute on the African Court of Justice this complementing role is constrained by the unduly restrictive standing rules for individuals. The above should not be read to mean that the African Court of Justice will be useless because it does not provide for individual standing. What is being suggested here is that, to the extent that the court is expected to perform a role which will aid economic integration in Africa, its ability to do that will be constrained by the lack of standing for individuals who could have been its principal source of cases. Surely, there are international courts like the International Court of Justice (ICJ) before which individuals have no standing. However, it is important to note that the ICJ is not superintending the enforcement of an economic integration treaty and its works and jurisprudence is not meant to facilitate an economic integration process.

In general, governments are reluctant to submit to binding interstate dispute resolution processes.<sup>71</sup> Indeed, in Chapter Five, we noted that, of all the cases so far brought before the COMESA, EAC and ECOWAS courts, only one was interstate.<sup>72</sup> In the absence of a private right of action, the African Court of Justice might be underused and may be consigned to 'abject inactivity and irrelevance'.<sup>73</sup> One can only imagine what would have happened to the COMESA, ECOWAS and EAC courts if there were no individual standing rights before them. Granting private right of action will ensure the use of the African Court of Justice, and prevent its descent into inactivity and irrelevance.

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<sup>71</sup> See generally Andrew T. Guzman, "The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms" (2002) 31 J. Legal Stud. 303.

<sup>72</sup> See *Eritrea v. Ethiopia* [1999] LawAfrica L. R. 6.

<sup>73</sup> Tiyanjana Maluwa, "The Peaceful Settlement of Disputes among African States, 1963-1983: Some Conceptual Issues and Practical Trends" (1989) 38 Int'l Comp. L. Q. 299 at 307.

Arguably, the absence of individual rights of action reflects a desire of states to dominate the African Court of Justice, even if only indirectly, and cut it off from any relations with those most affected by economic integration. It may also be an indirect attempt to shape the court's jurisprudence and reduce its potential role as a legislator of community norms; 'control over litigation entails a degree of control over the type of law that is made'.<sup>74</sup> States can do this by shaping the type of arguments that come before the court to suit particular ends. As noted already, the absence of individual rights of action is inconsistent with the position in other African regional economic treaties.<sup>75</sup> It also defies recommendations of scholars.<sup>76</sup> It is recommended that any revisions of the Statute of the African Court of Justice should provide for individual rights of action either directly, through special leave of the court or after exhausting local remedies, or indirectly through reference from national courts.<sup>77</sup>

Another medium for enhancing community-states relations is national courts. They provide an avenue for giving domestic effect to community law apart from executive and parliamentary acts such as ratification, publication of community instruments, and administrative action.<sup>78</sup> Using national courts to enforce community law has advantages. It is cheaper for litigants as they are more widely and easily accessible than community courts. As forums of first resort, their work could also reduce significantly the workload of community courts. In Chapter Five, we noted that they have been given a significant role to play under the COMESA, EAC and ECOWAS treaties through the procedure of preliminary reference. But, so far, the procedure has not been used. As will be discussed in Chapter Eight, national courts also have a role in the enforcement of judgments of the COMESA, EAC and ECOWAS courts. This is not the case with the African Court of Justice; there is no express provision in the AEC Treaty or the Statute of the African

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<sup>74</sup> Joel P. Trachtman & Philip M. Moremen, "Cost and Benefit of Private Participation in WTO Dispute Settlement: Whose Right is it Anyway?" (2003) 44 Harv. Int'l L.J. 221 at 223.

<sup>75</sup> See e.g. COMESA Treaty, *supra* note 7 art. 26; and EAC Treaty, *supra* note 7 art. 30

<sup>76</sup> Nsongurua J. Udombana, "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?" (2002-2003) 28 Brook. J. Int'l L. 811 at 842.

<sup>77</sup> Initially, the ECOWAS Court of Justice did not have jurisdiction to hear cases from individuals. It was granted that jurisdiction through an amendment to its protocol. See *Protocol A/P.1/1/91 on the Economic Community of West African States Court of Justice* (as amended Supplementary Protocol A/SP.1/11/04), online: ECOWAS Court <<http://www.ecowascourt.org/site24.html>> See also *Olajide Afolabi v. Federal Republic of Nigeria*, ECW/CCJ/APP/01/03 (ECOWAS Court of Justice, 2004) in which the court dismissed the application for lack of standing.

<sup>78</sup> This issue is fully discussed in Chapter Seven.

Court of Justice for relations between national courts and the African Court of Justice. There is no preliminary reference procedure between the African Court of Justice and national courts. Nor is it envisaged that they will aid the enforcement of judgments of the African Court of Justice. This disjunction between both courts may seriously hamper the effectiveness of the African Court of Justice.

The absence of some form of relations between the African Court of Justice and national courts is particularly ironic since, as already noted, a number of African regional economic integration treaties envisage a role for national courts.<sup>79</sup> One would have expected that the drafters of the Protocol on the African Court of Justice would have been inspired by these treaties. This is because the communities created by these treaties are the building blocks of the African Economic Community. As the AEC develops and community law expands into member states, national courts will definitely be faced with cases that engage aspects of community law and for which a reference to the African Court of Justice for interpretation would be helpful. The fact that it is not envisaged that national courts will aid the enforcement of judgments of the African Court of Justice is explainable on the grounds of the very limited rights of access individuals have to the court. In the absence of cases from individuals, it is unlikely that many judgments will be for pecuniary compensation,<sup>80</sup> the kind of judgments national courts are best suited to enforce.

The absence of relations between national courts and the African Court of Justice will pose a challenge for the uniform application of AEC law, and hence its effectiveness. Through incorporation, treaties become part of member states' laws. National courts may resort to them in adjudication, and private parties may rely on them in litigation. The absence of relations between the African Court of Justice and national courts implies that there may not be uniform interpretation of AEC laws in member states. Nothing could be more destabilizing for the AEC's legal system than varied application of its laws. The goals of free movement of persons, capital and services, the right of establishment, taxation, transport and communication, which are envisaged by the AEC Treaty,<sup>81</sup> are intrinsically bound to national legal systems. The absence of defined

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<sup>79</sup> See e.g. COMESA Treaty, *supra* note 7 art. 30; and EAC Treaty, *supra* note 6 art. 34

<sup>80</sup> Cases brought by staff of the community are likely to result in judgments for pecuniary compensation, but these are unlikely to be enforced at the national level.

<sup>81</sup> AEC Treaty, *supra* note 2 art. 4(2).

relations between the African Court of Justice and national courts may undermine the realization of these goals.

Even more destabilising will be the fact that judgments of the African Court of Justice do not appear to be binding on national courts.<sup>82</sup> This creates the prospect of conflicting judgments between national courts and the African Court of Justice. It also opens up the possibility that governments will avoid, at the national level, their international obligations. Developments surrounding recent judgments of the Southern African Development Community Tribunal and the Supreme Court of Zimbabwe illustrate this prospect. In *Mike Campbell (Pvt) Ltd. v. Republic of Zimbabwe*,<sup>83</sup> the SADC Tribunal restrained the Zimbabwean government from compulsorily acquiring the agricultural land of the applicant. At the time of this decision, an action relating to the same land was pending before the Supreme Court of Zimbabwe. The Supreme Court, in apparent disregard of the SADC Tribunal's injunction, ruled in favour of the government,<sup>84</sup> and the government has declared its intention to go ahead with the seizure of the applicant's land.<sup>85</sup> While Zimbabwe will incur responsibility at the community level if it goes ahead with the seizure, this offers no hope at the national level for the applicant whose right was vindicated at the community level.

It is recommended that a role for national courts, including a procedure of reference for preliminary rulings, similar to article 234 of the EC Treaty, be adopted by the AEC.<sup>86</sup> Indeed, as

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<sup>82</sup> See Statute of the African Court of Justice, *supra* note 21 art. 46(1). It provides that 'the decisions of the Court shall be binding on the parties'.

<sup>83</sup> SADC Tribunal Case No. SADCT: 2/07 (SADC Tribunal, 2007) [*Mike Campbell- 2007*]. For the judgment in the substantive issues in this case see *Mike Campbell (Pvt) Ltd. v. The Republic of Zimbabwe*, SADC (T) Case No. 20/2007 (SADC Tribunal, 2008) [*Mike Campbell – 2008*].

<sup>84</sup> *Mike Campbell (Private) Ltd. v. Minister of National Security Responsible for Land, Land Reform and Resettlement*, Judgment No. SC 49/07 (Zimbabwe Supreme Court, 2008).

<sup>85</sup> Gerhard Erasmus & George Coleman, "Regional Dispute Resolution: The SADC Tribunal's First Test" online: Trade Law Centre of Southern Africa <<http://www.tralac.org/scripts/content.php?id=7320>>.

<sup>86</sup> EC Treaty, *supra* note 15 art. 234, provides:

[T]he Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers it that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.



noted already, some African economic integration treaties allow national courts to seek preliminary rulings from their respective community courts.<sup>87</sup> As noted above, as far as economic integration issues are concerned, individuals have no standing in the African Court of Justice. In such a situation, allowing national courts to seek preliminary rulings will provide a substitute. Individuals can litigate at the national level in the hope that community law issues arising from their action may be resolved at the community level. This system of reference should be matched by appropriate restrictions on the type of courts which can make a reference so as to reduce the judicial workload. Currently, the African treaties that allow for preliminary rulings have no such limitation. For the AEC, this limitation would be important due to its size and the fact that resolving human rights disputes is part of African Court of Justice's competence.<sup>88</sup>

In addition to formal procedures, it is also important that the African Court of Justice cultivates healthy 'personal' relations with national courts through consultations and workshops to help national judges familiarize themselves with community law. As already noted, judges of the African Court of Justice may, potentially, be drawn from national courts. This should become an important means for forging relations with national judges.<sup>89</sup> The African Court of Justice can also draw on the jurisprudence of member states' courts. International courts often make use of general principles of law developed in national courts. In Chapter Five, we noted how the COMESA, EAC and ECOWAS courts use national jurisprudence in deciding disputes. In this regard, it is significant that the Statute of the African Court of Justice lists general principles of law recognized universally or by African states, as well as judicial decisions as sources of law for the court.<sup>90</sup> Arguably, a cautious reliance on general principles of law and decisions of national courts may

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Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

<sup>87</sup> For example, EAC Treaty, *supra* note 6 art. 34. It provides:

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

Under article 35 of the EAC Treaty, the judgment is 'final, binding and conclusive', subject to the possibility of review. Under article 33, the judgment has 'precedence over decisions of national courts'.

<sup>88</sup> Statute of the African Court of Justice, *supra* note 32 art. 28(c).

<sup>89</sup> *Ibid.* art. 14.

<sup>90</sup> *Ibid.* art. 31(d)(e).

encourage national courts to ‘reciprocate’ by borrowing from or applying the jurisprudence of the African Court of Justice.

To be sure, the adjudicatory approach of relying on decisions of foreign courts as persuasive authority, especially prevalent in common law countries is, ordinarily, not extended to international courts given their unique character and often specific mandates. It is not often that a national court will make reference to a decision of, for example, the International Court of Justice. However, it is increasingly advocated that there must be interaction, dialogue, or transjudicial communication between national and international courts.<sup>91</sup> Indeed, already, some African national courts demonstrate a willingness to rely on decisions of international courts in deciding cases.<sup>92</sup> Hopefully, they will extend this jurisprudential outlook to decisions of the African Court of Justice. This will provide an indirect means of enforcing community law. A court expands its authority by expanding the reach of its jurisprudence; national courts’ reliance on decisions of the African Court of Justice will enhance the latter’s effectiveness.

The Ugandan case of *Shah v. Manurama Ltd.*<sup>93</sup> illustrates concretely the instrumental role national courts can play in securing the benefits of community law for individuals and, at the same time, act as a medium through which community law influences national legal systems. In *Shah*, the defendant brought an application seeking an order requiring the plaintiff to pay security for the defendant’s costs. The plaintiff was a resident in Kenya, and thus outside of the jurisdiction of the Uganda High Court. The defendant argued that the plaintiff was resident abroad and this was ‘a *prima facie* ground for ordering payment of costs’.<sup>94</sup> The defendant relied on well-established

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<sup>91</sup> See generally Jenny S. Martinez, “Towards an International Judicial System” (2003) 56 *Stan. L. Rev.* 429; Symposium, “The Interaction between National Courts and International Tribunals” (1995-1996) 28 *N.Y.U. J. Int’l L. & Pol.* 1.

<sup>92</sup> For example, an examination of the *Case Annotation: Foreign Cases* section of the South African Law Reports between 2000 and August 2005 reveals about fifty cases in which South African courts made use of decisions of international tribunals such as the International Court of Justice, the Permanent Court of International Justice, the European Court of Human Rights, the European Court of Justice, the Inter-American Court of Human Rights, and the International Criminal Tribunal for the Former Yugoslavia. This usage ranged from mere reference to direct application. One case made reference to decisions of the African Human Rights Commission, which is not a court. Within the same period there were two reported cases of the Zimbabwe Supreme Court that relied on decisions of international tribunals. The absence of a reliance on African international tribunal decisions is disheartening. Tribunals such as the COMESA Court of Justice, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, or the African Commission have provided some instructive human rights jurisprudence.

<sup>93</sup> [2003] 1 *East Afr. L. R.* 294.

<sup>94</sup> *Ibid.* at 296.

domestic common law principles to support this claim. In reply, the plaintiff argued that, given the re-establishment of the EAC and the legal regime it had created, the question of residence for the purpose of ordering security for costs should be re-examined.<sup>95</sup> The court denied the application. It held that in East Africa, ‘there can no longer be an automatic and inflexible presumption for the courts to order payment of security for costs with regard to a plaintiff who is a resident in the East African Community’.<sup>96</sup> The court stated that the establishment of the EAC ‘beg[ged] for a fresh re-evaluation of our judicial thinking’ as regards the law requiring plaintiffs to pay security for costs.<sup>97</sup> Among the factors that influenced the court in its decision were the following:

- All three countries, Uganda, Kenya and Tanzania, are partner states in the East African Community (‘EAC’).
- The East African Community Treaty (like the European Community Treaty) seeks to establish a customs union, a common market, and a monetary union – as integral pillars of the community – and, ultimately, a political union among the partner states. In particular, the East African Community Treaty makes express provision for the unification and harmonization of the laws of the partner states, including the ‘standardization of the judgments of courts within the community’ (article 126), and establishment of a common bar (cross-border legal practice)
- The underlying objective of undertaking all the initiatives described above – and many more not discussed in this ruling – are stated in article 5 of the East African Community Treaty as being the need to develop policies and programmes aimed at widening and deepening cooperation among the partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit
- Article 104 of the East African Community Treaty provides for the free movement of persons, labour, services, and the right of establishment and residence. The partner states are under an obligation to ensure the enjoyment of these rights by their citizens within the community. In this regard, the court is mindful of the fact that the East African Community Treaty has the

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.* at 298.

<sup>97</sup> *Ibid.* at 297.

force of law in each partner state (article 8(2) (b)) and that this treaty law has precedence over national law (article 8(5)).<sup>98</sup>

This case demonstrates an appreciation of the importance of community law and its impact on national law. It shows how national courts can become a medium for giving effect to community law and the community's objects.<sup>99</sup> The case also provides a refreshing example of how individuals can domestically enforce their right to the benefits of community law. It is suggested that the AEC should make individuals and national courts its allies.

As was the case in *Shah*, the existence and objects of the AEC should begin to elicit a re-evaluation of national judicial thinking with regard to matters in which AEC law and community goals may be involved. Admittedly, the AEC is still in its formative stages and has not developed an appreciable amount of substantive law. However, as in *Shah*, national courts can still draw on its goals and broad principles and advance them through their judgments. A number of decisions at the community level have also made use of broad principles in adjudication.<sup>100</sup> Indeed, in Chapter Seven, cases in which national courts have made use of the goals and principles of communities in Africa are discussed.

As discussed further in Chapter Seven, as regards national courts drawing on the goals and principles of the AEC and advancing them, comparative lessons can also be drawn from the willingness of African courts to rely on unincorporated international human rights conventions.<sup>101</sup> Through this, an aspect of the international legal system, that is international human rights law, is made relevant in states. It is suggested that in cases where community issues are engaged, national

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<sup>98</sup> *Ibid.* at 298.

<sup>99</sup> The Kenyan case of *Healthwise Pharmaceuticals Ltd. v. Smithkline Beecham Consumer Healthcare Ltd.* [2001] LawAfrica L.R. 1279 adopted a different approach. In *Healthwise*, the Kenyan court rejected the applicant's argument that it was a resident of the EAC and therefore the defendant would have no difficulties in recovering any costs that may be awarded in the suit.

<sup>100</sup> Principles such as the rule of law, good governance and people-centred development have all shaped decisions of community courts. See e.g. *Mike Campbell – 2008*, *supra* note 83; *East African Law Society v. Attorney General of the Republic of Kenya*, Ref. No. 3 of 2007 (East African Court of Justice, 2008)

<sup>101</sup> See e.g. *Unity Dow v. Attorney General* (1991) Misc 124/90 (High Court, Botswana, 1991), reprinted in (1991) 13 Hum. Rts Q. 614, interpreting the relevant legislation by considering the fact that Botswana was a signatory to the OAU Convention on Non-Discrimination, even though Botswana had not ratified it; *Dow v. Attorney General* 103 I.L.R. 128, 159-62 (Court of Appeal, Botswana, 1992) (affirming the High Court's reliance on international conventions which had not been ratified by Botswana); *New Patriotic Party v. Inspector General of Police* [1993-94] G.L.R. 459 at 466 (holding that the fact that Ghana had not passed specific legislation to give effect to the African Charter on Human and Peoples' Rights did not mean it could not be relied upon).

courts should interpret statutes in the light of community principles and goals. This may entail interpreting domestic law to promote rather than undermine community goals, affording remedies that enhance or facilitate rights envisaged by community objectives such as the free movement of persons, goods and services and refraining from actions that may hinder the objectives of the community.<sup>102</sup>

From a comparative perspective, the ECJ's ruling that national courts are also responsible for the fulfilment of the obligation imposed on member states by article 10 of the EC Treaty to take measures necessary to attain the objectives of the European Community is relevant here.<sup>103</sup> It is significant that article 10 of the EC Treaty is strikingly similar in language and substance to article 5 of the AEC Treaty.<sup>104</sup> If Africa's economic integration processes are to succeed, then there is a need for more engagement among the communities, national courts and individuals. The AEC Treaty and the Statute of the African Court fail to satisfy this need.

### **6.3 AU INSTITUTIONS DOUBLING AS AEC INSTITUTIONS**

The above exposition raises a fundamental question: why have Africans structured institutions to address the challenges of economic integration in a manner which ill-equips them for the challenges? In my opinion, this is because there has been a convolution of the economic integration agenda with the political integration agenda under a nebulous idea variously described as 'African Union', 'African Unity', 'Union Government for Africa', and 'United States of Africa'.

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<sup>102</sup> AEC Treaty, *supra* note 2 arts. 3(e) and 5(1).

<sup>103</sup> *Von Colson v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891. This ruling has been an effective means of enforcing non-implemented or mis-implemented directives. See generally Sara Drake, "Twenty Years after Van Colson: The Impact of "Indirect Effect" on the Protection of Individual's Community Rights" (2005) 30 Eur. L. Rev. 329.

<sup>104</sup> EC Treaty, *supra* note 15 art. 10, provides: 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty'.

AEC Treaty, *supra* note 2 art. 5 provides: 'Member States undertake to create favourable conditions for the development of the Community and the attainment of its objectives, particularly by harmonizing their strategies and policies. They shall refrain from any unilateral action that may hinder the attainment of the said objectives'. See generally John Temple Lang, "Community Constitutional Law: Article 5 EEC Treaty" (1990) 27 Common Mkt. L. Rev. 645.

For the AEC, the problem began when its founding treaty declared in article 98(1) that ‘the Community shall form an integral part of the [Organisation of African Unity]’.<sup>105</sup> Article 99 went on to declare that the treaty and protocols adopted under it shall form an integral part of the OAU Charter. With these provisions, it appears the drafters thought it unnecessary to expressly give the AEC a separate legal personality; accordingly, the treaty is silent on this issue.<sup>106</sup> The immediate understanding and effect of these provisions was that the institutions of the OAU were co-opted to perform the functions of the institutions of the AEC. There appears to have been no careful thought as to whether, as then structured, the OAU institutions suited the needs of economic integration. The Constitutive Act of the African Union<sup>107</sup> did not address this problem. After passing references to the African Economic Community in the preamble, it simply provided that the ‘Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community’.

Historically and comparatively, it is worth recalling that the Treaty for East African Co-operation<sup>108</sup> which established the East African Community had ‘as an integral part of the Community’<sup>109</sup> the East African Common Market. However, unlike the situation with the AEC, the Treaty for East African Co-operation established at least two institutions devoted specifically to the East African Common Market, namely the Common Market Council and Common Market Tribunal.<sup>110</sup> More recently, Asante decried the use of the organs of the OAU (now AU) as the basic organs of the AEC.<sup>111</sup> These organs are ill-equipped to meet the challenges of integration. The effect has been the loss of identity of the AEC. Indeed, as Asante graphically puts it, the AEC has no ‘letterhead of its own’, it ‘has, in fact, become just a division, albeit an important one, of a

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<sup>105</sup> AEC Treaty, *ibid.*

<sup>106</sup> However, in his capacity as the legal representative of the Community, the Secretary-General is given power to, on behalf of the Community, enter into contracts and be a party to judicial and other legal proceedings. See AEC Treaty, *ibid.* art. 98(2).

<sup>107</sup> *Constitutive Act of the African Union*, 11 July 2000, (2005) 13 Afr. J. Int’l & Comp. L. 25.

<sup>108</sup> 6 June 1967, 6 I.L.M. 932.

<sup>109</sup> *Ibid.* art. 1(1)

<sup>110</sup> *Ibid.* arts. 3, 30-31 and 32-42.

<sup>111</sup> S.K.B. Asante, “Towards an African Economic Community” in S.K.B. Asante *et al.* eds., *Towards an African Economic Community* (Pretoria: African Institute of South Africa, 2001).

continental political institution'.<sup>112</sup> In his view, which I endorse, 'the AEC surely requires distinct and separate institutional arrangements'.<sup>113</sup> Or, at worst, in my opinion, there should be clear institutional role splitting.

The African Court of Justice is, perhaps, the best example of the inappropriateness of the convolution of institutional roles. As a court for the political organization, the African Union, it is unproblematic; its structure and jurisdiction closely resembles the International Court of Justice of the United Nations Organization. But, as a court which also has jurisdiction over economic integration issues, its structure and jurisdiction are highly inadequate. To my knowledge, it is the only court with jurisdiction over an economic integration agreement whose jurisdiction is not compulsory; a party to the AEC Treaty which has not ratified the Protocol of the African Court of Justice is not subject to the jurisdiction of the court.<sup>114</sup> As has been argued above, this will seriously affect the application and enforcement of AEC law. Also, individuals and national courts, key players in the success of any economic integration process, have no direct or indirect relations with the court.

#### **6.4 LOOKING BEYOND INSTITUTIONS**

In seeking to enhance community-state relations with a view to ensuring a community's effectiveness, there is a need to complement law and legal approaches with other non-law mechanisms.<sup>115</sup> There is a need for greater co-ordination between national institutions such as parliaments, the ministries of trade and foreign affairs, and AEC institutions. The AEC must build strong relations with these institutions by ensuring a mutual flow of information between them.

An important first step is identifying these institutions, as they may vary, not only from country to country, but also in regard to particular policies or issues. Already, in some countries, there are ministries whose specific mandate relates to economic integration.<sup>116</sup> Many more of these

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<sup>112</sup> *Ibid.* at 8-9.

<sup>113</sup> *Ibid.* at 16.

<sup>114</sup> Statute of the African Court of Justice, *supra* note 17 art. 29(2).

<sup>115</sup> Peter Van den Bossche, "In Search of Remedies for Non-Compliance: The Experience of the European Community" (1996) 3 Maastricht J. Eur. & Comp. L. 371.

<sup>116</sup> See e.g. Ghana: Ministry of Foreign Affairs and Regional Co-operation; Rwanda: Ministry of East African Community Affairs; Tanzania: Ministry of East African Co-operation; Uganda: Ministry of East African Community

national executive institutions will be needed to ensure the effective implementation of the goals of the AEC. The presence of community consciousness and an awareness of community law on the part of these institutions can further the implementation of community law.

Community consciousness must also exist among residents of the AEC. Individuals are the direct beneficiaries of community law. They serve as an effective means for monitoring compliance with community law through their vigilance and reporting of breaches. Education on the role of the AEC and creating an accessible means for filing complaints would strengthen their monitoring role. In the absence of individual rights to bring actions before the African Court of Justice, the AEC can establish a well-designed, publicized and accessible compliant procedure. The Secretariat of the African Union, which serves as the Secretariat of the AEC could be the forum for this procedure. Implementation of community law would also be greatly enhanced when community law is accessible, ‘comprehensible, clear and coherent’.<sup>117</sup> Complex rules create difficulties for implementation and raise difficult interpretation questions. This may result in non-compliance or varied application of community law. To ensure the effectiveness of the AEC, it is important for it to actively engage the people who are the beneficiaries of its activities.

An important means to foster community consciousness among individuals is to enhance and ensure access to information on the community. At present, it is very difficult accessing information on the AEC and, indeed, other African economic communities. While the founding treaties are easily accessible online, other community laws and judgments of their respective community courts are not. In this present age, the effective deployment of modern technology, including use of the Internet, should be part of the communities’ information dissemination arsenal.

## **6.5 CONCLUSION**

Institutions matter for effective economic integration. The extent to which they are able to facilitate economic integration depends in part on how they relate to institutions in member states. This chapter reveals that although the institutional link between the Assembly of the AEC and the

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Affairs; Kenya: Ministry of East African Community; Burundi: Ministry for Regional Integration and East African Community.

<sup>117</sup> Bossche, *supra* note 115 at 383.



executive in member states is useful, it can have an adverse impact on decision-making at the community level and decision-implementation at the national level. An independent institution with powers to propose policies and ultimately implement the decisions of the AEC would have been preferable. The African Court of Justice is even less equipped for the challenges of integration. The fact that its jurisdiction is not compulsory, that individuals have no standing before it as far as economic integration issues are concerned, and that it has no formal relations with national courts are profound shortfalls in its structure. Successful economic integration of Africa will surely demand a restructuring of the court.

Also, there is the need to clearly isolate Africa's economic integration processes from the political integration agenda (not the same as politics). With Africa's fifty-three sovereign states, the political integration agenda is manifestly unachievable; sovereign states break up, they seldom join up to form another state. The record of pre-existing internationally recognized sovereign states voluntarily coming together to form a political union is almost non-existent.<sup>118</sup> I argue that when the economic integration processes are isolated from the political integration agenda, Africans would be better able to focus on the former and achieve remarkable success.

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<sup>118</sup> The (re)unification of West Germany and East Germany to form the Federal Republic of Germany and the unification of North Yemen and South Yemen to form the Republic of Yemen are the closest examples I am aware of.

## CHAPTER SEVEN: IMPLEMENTING COMMUNITY LAW WITHIN AFRICAN STATES: CONSTITUTIONAL AND JUDICIAL CHALLENGES

### 7.1 INTRODUCTION

The success of economic integration depends largely on how it is received and implemented within member states. It is through this that the divide between the community and national legal systems is bridged. As far back as 1971, Akiwumi noted that ‘where economic integration is established, the relationship between the rules that shall govern its activities and the domestic laws of the member states is quite crucial to its development’.<sup>1</sup> Residents in a community and national institutions should be receptive to the objectives of economic integration and prepared to champion them. How economic integration is received nationally depends on a number of factors, of which the legal infrastructure is only one.

A principal challenge in economic integration is ensuring the implementation of community law in member states. Community law takes the form of treaty provisions, protocols, regulations and judicial decisions.<sup>2</sup> Various mechanisms exist that render non-domestic laws enforceable or applicable within states. Examples of these mechanisms are national incorporation of international law, the use of foreign laws as aids to construction, the use of foreign laws as the applicable law under the rules of private international law, and taking judicial notice of foreign laws. The use of these mechanisms to implement community law aims to enhance the effectiveness of the economic integration process. They decentralize a community’s law enforcement machinery and make it accessible to residents in the community. Administratively, these mechanisms reduce the burden on the institutions set up to monitor and seek remedy for violations of community law. The absence or under-utilization of these mechanisms to implement community law leads to a disjunction between community and member states and the alienation of individuals from the economic integration process. In general, it undermines a community’s effectiveness.

A number of factors influence the extent to which community laws can be effectively implemented in member states. They include constitutional laws, judicial philosophy and legal

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<sup>1</sup> A.M. Akiwumi, “Judicial Aspects of Economic Integration Treaties in Africa” in Hague Academy of International Law ed., *Legal aspects of Economic Integration Colloquium 1971* (Leiden: Sijthoff, 1972) 27 at 79.

<sup>2</sup> Although not laws as such, the objectives, principles and undertakings of member states as outlined in the communities treaties are of legal consequence. Like laws, they are meant to guide conduct and enforceable.

culture.<sup>3</sup> This chapter examines, from constitutional<sup>4</sup> and case-law perspectives, how the challenge of implementing community law is approached in Africa's economic integration processes. It draws on materials from East, Southern and West African countries, and the founding treaties of the Economic Community of West African States (ECOWAS), the Common Market of Eastern and Southern Africa (COMESA) and the East African Community (EAC). More broadly, the chapter examines how the founding treaties of COMESA, EAC and ECOWAS, as well as national constitutions and judicial philosophy, address the issue of the relations between community and national laws. It argues that, on the whole, the community treaties, national constitutions and case law are not conducive to facilitating the implementation of community law in member states. The chapter recommends a number of things that can be done to ensure the implementation of community law at the national level. Key aspects of these recommendations are the need to rethink existing national constitutions and the judicial philosophy which informs judicial determination of cases in which community issues are involved.

## **7.2 COMMUNITY TREATIES AND LAW IMPLEMENTATION**

### **7.2.1 Community Treaties and Law Implementation in Member States**

#### **7.2.1.1 Introduction**

The founding treaties of regional economic communities (RECs) often contain provisions which define the relations between community and national law, and how the former can be made effective in member states. In the absence of these provisions, one must look for answers in national constitutions and the jurisprudence of the courts. Indeed, even where these provisions

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<sup>3</sup> As regards the implementation of community law, an important issue which is not investigated in this chapter is the existence and capacity of national executive institutions responsible for integration matters. Except for ECOWAS, there does not appear to be community-wide studies on this issue. See Jeggan C. Senghor, "Institutional Architecture for Managing Integration in the ECOWAS Region: An Empirical Investigation" in Jeggan C. Senghor & Nana K. Poku eds., *Towards Africa's Renewal* (Aldershot: Ashgate Publishing Ltd., 2007) at 143. The paper draws on a more comprehensive study, *Study on National Focal Points for ECOWAS and NEPAD Programmes* (ECOWAS Secretariat, 2004). Its overall observation is that, the state of affairs in many of the member countries is unsatisfactory: understaffing; lack of expert staff; inadequate training; frequent personnel movements; inadequate funding and resources – these have all been noted as issues of concern. Some countries have fully-fledged ministries on integration, others have departments or units within ministries and yet in some, like Gambia, 'ECOWAS is more of a dossier'. *Ibid.* at 162. The paper also suggests that the interface or relations between the national units responsible for ECOWAS matters and the ECOWAS Secretariat is very poor, indeed, it appears 'not to be of the highest priority' within the Secretariat. *Ibid.* at 170. See also Chukwuma Agu, "Obstacles to Regional Integration: The Human Factor Challenge to Trade Facilitation and Port Reforms in Nigeria" (2009) 2 Int'l J. Priv. L. 445.

<sup>4</sup> A number of national constitutions are cited in this chapter. They can all be sourced from Gisbert H. Flanz ed., *Constitutions of Countries of the World* (Dobbs Ferry, NY: Oceana Publications Inc.).

exist,<sup>5</sup> one still has to look to national constitutional laws and jurisprudence to determine whether the approach adopted by the treaty can be accommodated by member states. This is because states are sovereign and, for the ‘intrusion’ of foreign laws into their legal systems to be accommodated, it must have the imprimatur of the sovereign state. For example, a provision in a community’s treaty that individuals have rights under it cannot be effective nationally unless national laws and judicial decisions allow for the enforcement of such an internationally created right.

### **7.2.1.2 The Principles of Direct Applicability of Community Law**

As discussed in Chapter Two, the principle of direct applicability of community law enables community law to become part of national law without intervening national implementation measures. The European Court of Justice (ECJ) defines it to mean that the entry into force of community law is ‘independent of any measure of reception into national law’.<sup>6</sup> The measure of reception can be a resolution or Act of parliament or an executive act such as cabinet approval.<sup>7</sup> From a constitutional law perspective, the character of the measure of reception determines the domestic application or enforceability of the relevant international law. In general, and especially in common law countries, an Act of Parliament is required before international treaties<sup>8</sup> become enforceable in a state;<sup>9</sup> mere ratification by parliament is not enough.<sup>10</sup>

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<sup>5</sup> See e.g. *Consolidated Version of the Treaty establishing the European Community*, 25 March 1957, [2002] O. J. C 325/33, art. 249 [EC Treaty]. It provides that ‘a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States’.

<sup>6</sup> *Amsterdam Bulb v. Produktschap voor Siergewassen*, Case 50/76, [1976] E.C.R. 137 at 146.

<sup>7</sup> See e.g. Uganda: Ratification of Treaties Act 1998, Chapter 204, sec. 2(a). It allows cabinet to ratify defined treaties without resort to parliament. See also Constitution of the Republic of South Africa, 1996, art. 231(3) [South Africa Constitution].

<sup>8</sup> Customary international law is often treated differently. Subject to the proof that it exists, it is automatically considered part of national law. See e.g. South Africa Constitution, art. 232; Constitution of the Republic of Malawi, 1994, art. 211(3) [Malawi Constitution]; Constitution of the Republic of Namibia, 1990, art. 144 [Namibia Constitution]. Community law is principally treaty-based. Therefore, it is unlikely to benefit from this treatment of customary international law.

<sup>9</sup> See e.g. South Africa Constitution, art. 231(4). It provides that ‘any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’.

<sup>10</sup> See e.g. Malawi Constitution, art. 211(1). It provides that ‘any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement’.

Direct applicability maintains the specificity of community laws within member states. This renders issues involving community law more visible.<sup>11</sup> Direct applicability circumvents a consequence of the traditional international law modes for giving effect to international law in states, which is subjecting the international law to national hierarchy of laws. Within a state's sources of law, internal conflict of laws is resolved using national rules such as 'this source (e.g. the constitution) trumps all others' and *lex posterior derogat priori*.

In the context of economic integration, the application of, for example, the *lex posterior derogat priori* rule to community law will upset the vertical relations between a community and its member states, hinder the uniform application of community law, and generally make community law ineffective. This is because the rule implies that a subsequent Act of Parliament can render ineffective a community law that has been incorporated into national law by a prior Act while that community law remains in force in another member state. For example, article 39(2) of the Protocol on the establishment of the East African Customs Union, which provides that 'the customs law of the Community shall apply uniformly in the Customs Union' is unlikely to be effective when conflicts between an 'incorporated customs law' and national laws are resolved using the *lex posterior derogat priori* rule.<sup>12</sup> Happily, unlike the COMESA<sup>13</sup> and ECOWAS treaties,<sup>14</sup> the EAC Treaty provides for the principle of supremacy of the laws of the community.<sup>15</sup> This principle should be applied to prioritize an 'incorporated customs law' when it conflicts with a national law.

The prospect of community law losing its specificity when it is not directly applicable and the resulting dangers for it is illustrated in the South African case of *Moolla Group Ltd. v.*

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<sup>11</sup> It is not uncommon for a state to introduce international law into a statute without explicitly saying so. For example, sections 15, 16 and 17 of Ghana's Wills Act, 1971, Act 370, are based on provisions in the Hague Convention on the Conflict of Laws relating to the Form of Testamentary Disposition. Ghana is not party to the convention.

<sup>12</sup> See also *Treaty of the Southern African Development Community*, 17 August 1992, 32 I.L.M. 116, art. 6(4) [SADC Treaty]. It provides that 'member states shall take all steps necessary to ensure the uniform application of this Treaty'.

<sup>13</sup> *Treaty establishing the Common Market for Eastern and Southern Africa*, 5 November 1993, 33 I.L.M. 1067 [COMESA Treaty].

<sup>14</sup> *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, 35 I.L.M. 660, (1996) 8 Afr. J. Int'l & Comp. L. 187 [ECOWAS Treaty].

<sup>15</sup> See *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 U. N. T. S. I-37437, art. 8(4) [EAC Treaty].

*Commissioner, South African Revenue Service*.<sup>16</sup> The case involved a conflict between a South African statute incorporating a bilateral trade agreement between South Africa and Malawi and the bilateral agreement itself. It was held that, in cases of such conflict, the national legislation should prevail. In the words of the court:

If there were to be an apparent conflict between general provisions of the statute and particular provisions of an agreement, difficulties of interpretation might indeed arise. The Act must, of course, prevail in such a case: the agreement once promulgated is by definition part of the Act.<sup>17</sup>

The dictum seems to suggest wrongly that, by incorporation, international law loses its independent existence.<sup>18</sup> It shows a danger inherent in ‘nationalizing’ international agreements.

Some economic integration treaties provide for direct applicability of community law,<sup>19</sup> but none of the African communities examined here provides for it. This does not imply that the importance of the principle is not appreciated. Indeed, in his commentary on the draft treaty establishing the East African Community, Mvungi advocated the introduction of a provision for the ‘direct application of community law and decisions in the domestic jurisdiction of the Partner States’.<sup>20</sup> Unfortunately, this call was not heeded by drafters of the EAC Treaty. Rather, what exist are provisions that leave it to member states to resort to their respective constitutional procedures to give effect to community law.<sup>21</sup> For example, under article 5(2) of the COMESA Treaty:

Each Member State shall take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular: ...

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<sup>16</sup> 2003 (6) S.A. 244 [*Moolla Group*]. For a critical comment on the case, see Gerhard Erasmus, “The Incorporation of Trade Agreements and Rules of Origin: The Extent of Constitutional Guidance” (2003) 28 *South Afr. Yearbook Int’l L.* 157.

<sup>17</sup> *Moolla Group*, *ibid.* at [15].

<sup>18</sup> Compare *Peter Anyang’ Nyong’o v. Attorney General* [2007] eKLR (19 March, 2007) at 9 where the Kenya court held that the fact that the Treaty establishing the East African Community Act gives the force of law to the Treaty establishing the East African Community does not make the treaty lose its ‘independent existence’.

<sup>19</sup> See e.g. EC Treaty, *supra* note 5 art. 249; *Agreement on the European Economic Area*, 17 March 1993, 1793 U. N. T. S. I-31121, art. 7(a).

<sup>20</sup> See Sengondo Mvungi, “Legal Analysis of the Draft Treaty for the Establishment of the East African Community” in Sengondo Mvungi eds., *The Draft Treaty for the Establishment of the EAC: A Critical Review* (Dar es Salaam: Dar es Salaam University Press, 2002) at 89.

<sup>21</sup> See EAC Treaty, *supra* note 15 art. 8(2); COMESA Treaty, *supra* note 13 art. 5(2); ECOWAS Treaty, *supra* note 14 art. 5(2); SADC Treaty, *supra* note 12 art. 6(5).

(b) to confer upon the regulations of the Council the force of law and the necessary legal effect within its territory.

This provision, without a defined time frame for enacting the legislation or a sanction for non-compliance, is susceptible to breach.<sup>22</sup> To my knowledge, it is only within the EAC, that all the founding-member states have enacted legislation giving ‘the force of law’ to ‘the provisions of any Act of the Community ... from the date of the publication of the Act in the Gazette’.<sup>23</sup> Indeed, although the principle of direct applicability is not expressly provided for in the EAC Treaty, it appears that it was adopted in implementing the East African Community Customs and Management Act, 2004. This Act, together with the EAC Treaty and the East African Community Customs Union Protocol form the legal framework for the East African Customs Union, which became operational from January 2005. The Act applies to all member states<sup>24</sup> and commenced 1 January 2005, a date appointed by the Council of Ministers.<sup>25</sup> Consistent with article 8(4) of the EAC Treaty, article 253 of the Act provides that it ‘shall take precedence over the Partner States’ laws with respect to any matter to which its provisions relate’.

In general, member states of the other communities have been remarkably coy about implementing or giving the force of law to community laws. For example, Bethlehem has noted that ‘in most instances, the trade, financial and economic agreements to which South Africa is a party have not been enacted into municipal law’.<sup>26</sup> Within ECOWAS, of the five protocols on free movement of persons, residence and establishment,<sup>27</sup> only one, which provides for a visa-free entry

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<sup>22</sup> Compare EAC Treaty, *ibid.* art. 8(2). It provides that ‘each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular -

...

(b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory’.

<sup>23</sup> See Kenya: Treaty for the Establishment of East African Community Act 2000, art. 8(1); Uganda: East African Community Act 2002. Tanzania: Treaty for the Establishment of East African Community Act 2001.

<sup>24</sup> East African Community Customs and Management Act, 2004, art. 1(2).

<sup>25</sup> *Ibid.* art. 1(3).

<sup>26</sup> Daniel Bethlehem, “International Economic Relations” in John Dugard, *International Law: A South African Perspective* (Lansdowne: Juta & Co Ltd., 2005) at 434.

<sup>27</sup> 1979 Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment; 1985 Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment; 1986 Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment; 1989

for up to ninety days for citizens of member states, has been completely implemented in all member states. The lack of implementation of community law creates a disjunction between community and national legal systems in Africa's economic integration processes.

The reliance on national constitutional measures to give effect to community law is a principal reason for the failure of Africa's economic integration process, at least to the extent that the community law is not immediately implemented at the national level. Firstly, the provisions that mandate reliance on national constitutional measures are too broad and do not discriminate between various types of community laws. For the reason discussed below, it is appropriate to subject the founding treaty to national constitutional procedures. But, there is no reason why some defined laws emanating from duly-constituted community institutions that have followed the laid down legislative procedures should not be immediately or directly applicable in member states. This is especially so if the states have already given legal effect to the founding treaty – the foundation of subsequent community laws. This approach is worth exploring by Africa's RECs to overcome the perennial problem of states not giving, or delaying giving, effect to community law.

Relying on national constitutional measures to implement community law is not wholly disadvantageous. It can be used to boost Africa's integration if extensive national debates and people's involvement are made key aspects of the process. Economic integration has serious national implications. Accordingly, membership in a community and the implementation of some community laws should not be sanctioned casually in parliament or by the executive. People should be involved in the process through organized debates and, perhaps, referenda. Indeed, it is arguable that some constitutions demand a referendum before treaties such as economic integration treaties can be implemented nationally.<sup>28</sup> But, so far, no referendum on the community treaties has been held in any country. Involving people directly in matters relating to economic integration is important for its ultimate success.

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Supplementary Protocol A/SP.1/6/89 amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment; and 1990 Supplementary Protocol A/SP.2/5/90 on the implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment. These protocols are reproduced in ECOWAS Secretariat, *An ECOWAS Compendium on Free Movement, Right of Residence and Establishment* (Abuja, ECOWAS Secretariat, 1999).

<sup>28</sup> See e.g. Constitution of the Central African Republic, 1994, art. 70 [Central Africa Constitution]; Constitution of Republic of The Gambia, 1997, art. 79(2) [The Gambia Constitution].



To be sure, there are provisions in the community treaties that may be interpreted as implying the direct applicability of community law. For example, article 9(6) of the ECOWAS Treaty provides that decisions of the Authority of Heads of State and Government ‘shall automatically enter into force sixty days after the date of their publication in the Official Journal of the Community’.<sup>29</sup> Almost identical provisions are contained in the EAC<sup>30</sup> and COMESA treaties.<sup>31</sup> In the light of the fact that the treaties already envisage the use of national constitutional measures to give the ‘force of law’ to community law, it can hardly be argued that these provisions were meant to enshrine the principle of direct applicability.<sup>32</sup> In other words, these provisions give the force of law to community law at the international and not the national level. This view is supported by the fact that publication of the relevant law is envisaged at the community level – in the Official Journal or Gazette – and not the national level. Indeed, a cursory reading of article 10 of the COMESA Treaty, which was obviously borrowed from article 249 of the Treaty establishing the European Community, reveals that the phrase ‘directly applicable’ was deliberately omitted by drafters.<sup>33</sup>

### **7.2.1.3 The Principle of Direct Effect of Community Law**

As discussed in Chapter Two, the principle of direct effect enables individuals to invoke community law before national courts.<sup>34</sup> It allows national courts to use community law as an independent, direct and autonomous basis of decisions. It turns national courts and individuals into private enforcers of community law. In sum, direct effect ‘nationalizes’ rights created at the community level. The COMESA, EAC and ECOWAS treaties are silent on the issue of whether

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<sup>29</sup> The same rule applies to regulations adopted by the council of ministers. See ECOWAS Treaty, *supra* note 14 art. 12(4).

<sup>30</sup> See article 14(5) which provides that ‘the Council of Ministers shall cause all regulations and directives made or given by it under this Treaty to be published in the Gazette; and such regulations or directives shall come into force on the date of publication unless otherwise provided therein’.

<sup>31</sup> See article 12(1) which provides that ‘Regulations shall be published in the Official Gazette of the Common Market and shall enter into force on the date of their publication or such later date as may be specified in the Regulations’.

<sup>32</sup> See COMESA Treaty, *supra* note 13 art. 5(2)(b); EAC Treaty, *supra* note 15 art. 8(2)(b); ECOWAS Treaty, *supra* note 14 art. 5(2).

<sup>33</sup> Article 249 of the EC Treaty, *supra* note 5 provides that ‘a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States’. But, article 10(2) of the COMESA Treaty, *supra* note 13 provides that ‘a regulation shall be binding on all the Member States in its entirety’. The other paragraphs in the two articles on directives, decisions, recommendations and opinions are similarly worded.

<sup>34</sup> See generally P.P. Craig, “Once upon a Time in the West: Direct Effect and the Federalization of EEC Law” (1992) 12 Ox. J. L. Stud. 453.

they or laws generated under them have direct effect. This is despite the fact that they all envisage, through various mechanisms or principles, a role for individuals in their economic integration processes. An example is the preliminary reference procedure, which allows national courts to refer questions of community law to the community courts for binding answers.<sup>35</sup> Implicit in this procedure is an assumption that issues of community law can arise before national courts through means which include the direct invocation of community law by parties to a dispute.

To date, the jurisprudence of the community courts has not dealt with the issue of direct effect of community laws. However, unlike in other trade agreements, the principle of direct effect is not explicitly denied.<sup>36</sup> Accordingly, if the community courts adopt a teleological or purposive approach to interpreting the community treaties, they can make direct effect part of their respective community's legal system.<sup>37</sup> This will be realized if the courts' interpretation of the treaties is informed by the goal of facilitating national implementation of community law. Already, the purposive approach to interpretation is the dominant approach to interpretation in national courts<sup>38</sup> from where most community court judges are usually drawn. Hopefully, the judges will bring to bear on their work the purposive approach when interpreting the community treaties. Indeed,

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<sup>35</sup> See COMESA Treaty, *supra* note 13 art. 30; EAC Treaty, *supra* note 15 art. 34; *Protocol of the Economic Community of West African States Community Court of Justice* (as amended), art. 10(f) [ECOWAS Court Protocol]; *Protocol to the Southern African Development Community Tribunal and Rules Thereof*, art. 16 [SADC Tribunal Protocol].

<sup>36</sup> See e.g. *North American Free Trade Agreement between the United States of America, Canada and Mexico*, 17 December 1992, 32 I.L.M. 296, art. 2021 [NAFTA]. It explicitly prohibits state parties from allowing any private right of action under the treaty in national courts. It provides that 'no Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement'. In *US-Section 301-310 of the Trade Act of 1974*, WT/DS/152, (Panel Report) at [7.72], it was held that 'neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect'.

<sup>37</sup> It is worth remembering that, like the COMESA, ECOWAS and EAC treaties, the EC Treaty was also silent on the issue of direct effect. It was through the jurisprudence of the European Court of Justice in the celebrated case of *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62 [1963] E.C.R. 1 that the principle became part of EC law.

<sup>38</sup> See e.g. *In re: the question of Crossing the Floor by Members of Parliament*, Presidential Referral No. 2 of 2005 (High Court, Malawi, 2006); S.K. Asare, "Plain Meaning v Purposive Interpretation: Ghana's Constitutional Jurisprudence at a Crossroad" (2006) 3 U. Botswana L.J. 93.

article 31 of the Vienna Convention on the Law of Treaties,<sup>39</sup> which has already been invoked by some community courts, enjoins this approach to interpretation.<sup>40</sup>

Another means for direct effect to be given to community law is for member states to legislate that a cause of action can be directly based on community law. An example of this is the Uganda Law Reform Commission's proposed WTO (Implementation) Agreement Bill.<sup>41</sup> Article 12 of the bill allows for private actions on WTO Agreements with the consent of the Attorney General.<sup>42</sup>

#### **7.2.1.4 'Automatically Enforceable': Direct Applicability, Direct Effect or Both?**

The Treaty establishing the African Economic Community (AEC Treaty)<sup>43</sup> contains a unique provision which, with a view to ensuring the effective implementation of community law at the national level, may be interpreted as entailing both direct applicability and direct effect. Article 10 of the treaty provides that decisions of the Assembly of Heads of State and Government are 'automatically enforceable' thirty days after they are signed by the Chairman of the Assembly. Similarly, article 13 provides that regulations of the Council of Ministers must be approved by the Assembly and are also 'enforceable automatically' thirty days after they are signed by the Chairman of the Council.

The concept of 'automatically enforceable' is unique to the AEC Treaty. The COMESA, EAC and ECOWAS treaties, all of which were adopted after the AEC treaty, contain provisions akin to articles 10 and 13 of the AEC Treaty, but it appears that they consciously avoided the

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<sup>39</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 [Vienna Convention].

<sup>40</sup> See e.g. *East African Law Society v. Attorney General of the Republic of Kenya*, Reference No. 3 of 2007 (East African Court of Justice, 2008) in which the court held that '...we think that we have to interpret the terms of the Treaty not only in accordance with their ordinary meaning but also in their context and in light of their objective and purpose. Primarily we have to take objective of the Treaty as a whole, but without losing sight of the objective or purpose of a particular provision'.

<sup>41</sup> Uganda Law Reform Commission [ULRC], *Report on the Background Study on the Legal Implementation of the World Trade Organization Agreements* (Law Commission Publication No. 32 of 2004), online: ULRC <[http://www.ulrc.go.ug/refs&pubs/refs\\_&Bills.php](http://www.ulrc.go.ug/refs&pubs/refs_&Bills.php)>.

<sup>42</sup> Compare Canada: World Trade Organization Agreement Implementation Act, S.C 1994, C.47, sec. 5 and 6.

<sup>43</sup> *Treaty establishing the African Economic Community*, 3 June 1991, 30 I.L.M. 1241 [AEC Treaty].

phrase ‘automatically enforceable’.<sup>44</sup> The AEC Treaty is silent on where the enforceability is envisaged. Is it at the community level or within member states? The treaty is also silent on who can enforce the relevant decision or regulation at the locus of enforcement. Is it only the community, its institutions and states, or does it include individuals? A purposive interpretation of the provisions suggests that automatic enforceability should not be limited to enforcement at the community level. Decisions and regulations of the Assembly and Council are likely to be of national significance or have impact on member states. For the decisions or regulations to be enforceable only at the community level, and not within member states, will run counter to member states’ duty to ‘observe the legal system of the community’<sup>45</sup> and potentially undermine the effectiveness of community law. Accordingly, I argue that automatic enforceable envisages enforcement at both the community and national levels.

This still leaves unanswered the question as to what automatic enforceability of regulations and decisions entails at the national level. The concept of automatic enforceability could mean directly applicable, that is, no national implementing or incorporating measures are necessary to implement the decision or regulation at the national level. It could also mean directly effective, that is, the decision or regulation creates rights which individuals can invoke in national courts. This uncertainty surrounding the concept is further deepened by the fact that under article 5(2) of the AEC Treaty, member states are obliged to take all necessary measures to ensure the enactment and dissemination of such legislation as may be necessary for the implementation of the provisions of the AEC Treaty. To enact legislation to implement a decision or regulation is inconsistent with the principle of direct applicability.

At present, there is no community jurisprudence on the meaning and effect of the concept of automatic enforceability. I argue for an interpretation that entails both direct effect and direct applicability of decisions and regulations of the AEC. The treaty uses the concepts of ‘automatic’ and ‘enforceable.’ If the drafters intended to limit it only to incorporation, they could definitely have used a more limiting concept such as ‘automatically incorporated’. Enforceability suggests that rights can accrue under the relevant decision or regulation. No individual rights accrue under

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<sup>44</sup> The ECOWAS Treaty uses the phrase ‘automatically enter into force’. The COMESA and EAC treaties adopt the phrase ‘come into force’. As discussed, in my opinion these provisions envisage the relevant law entering into force at the international level and not at the national level.

<sup>45</sup> AEC Treaty, *supra* note 43 art. 3(e).

an international law at the national level unless it becomes (in this instance automatically) part of state law. I argue that, by using automatic enforceability, the drafters sought to achieve the two ends of direct effect and direct applicability.

This view is strengthened by what could be considered an elaboration on the full meaning of articles 10 and 13 of the AEC Treaty in the Rules of Procedure of the Assembly of the African Union (AU) [Assembly Rules],<sup>46</sup> and the Rule of Procedure of the Executive Council [Executive Council Rules].<sup>47</sup> As subsequent agreements by parties to the AEC Treaty, which were adopted under the aegis the African Union of which the AEC is an integral part, they could shed light on the meaning of the AEC Treaty.<sup>48</sup> Under rule 33 of the Assembly Rules, decisions of the Assembly can be in the form of Regulations, Directives, Recommendations, Declarations, Resolutions and Opinions. Regulations are applicable in all member states which shall take all necessary measures to implement them.<sup>49</sup> Directives are addressed to any or all member states, to undertakings or to individuals. They bind member states to the objectives to be achieved while leaving national authorities with the power to determine the form and the means to be used for their implementation.<sup>50</sup> Recommendations, Declarations, Resolutions and Opinions are not binding and are intended to guide and harmonize the viewpoints of member states.<sup>51</sup> Regulations and Directives shall be automatically enforceable thirty days after the date of the publication in the Official Journal of the African Union or as specified in the decision.<sup>52</sup> Regulations and Directives shall be binding on member states, Organs of the African Union and RECs.<sup>53</sup> All these provisions are also contained in the Executive Council Rules. But there is one significant clarification or addition, which is, as regards Regulations of the Executive Council, not only are they ‘binding and applicable in all Member States’, but also ‘national laws shall, where appropriate, be aligned

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<sup>46</sup> (2005) 13 Afr. J. Int'l & Comp. L. 41.

<sup>47</sup> (2005) 13 Afr. J. Int'l & Comp. L. 55.

<sup>48</sup> Vienna Convention, *supra* note 39 art. 31.

<sup>49</sup> Assembly Rules, *supra* note 46 Rule 33(1)(a).

<sup>50</sup> *Ibid.* Rule 33(1)(b).

<sup>51</sup> *Ibid.* Rule 33 (1)(c).

<sup>52</sup> *Ibid.* Rule 34(1)(a).

<sup>53</sup> *Ibid.* Rule 34(b).

accordingly'.<sup>54</sup> From these provisions, it is evident that community law will be applied in member states and may create rights and obligations for individuals.

From the perspective of enabling the implementation of community law in member states, these forms of AU decisions are useful, especially the Regulations and Directives. However, my examination of Assembly and Executive Council decisions, 2002-2009, does not reveal any attention to these categories of decisions.<sup>55</sup> Decisions taken by the Assembly and Executive Council are still labelled “decision” on...’. There is no attempt to distinguish between decisions using the stipulated categories. Occasionally, there are Declarations and Resolutions, but, so far, there appear to be no Directives or Regulations, or, at least, they have not been so described. Surely, this is worrying. It casts real doubt on whether these forms of decisions are meant to have a meaningful legal impact on the mode of implementing decisions of the AU.

Apart from this worrying trend, it must be admitted that the above view on the meaning of automatically enforceable will be difficult to sell to member states of the AEC. Automatic enforceability, if interpreted and applied as advocated here, will represent a serious limitation on member states’ sovereignty. The idea of a legal system existing independently of a state, yet having its norms directly applicable and effective within the state’s legal system, is a radical departure from the traditional legal approach in many states to the implementation of international law. As will be discussed below, African states have varying constitutional procedures for implementing international law. In some states, before the suggested interpretation of automatic enforceability can be applied, a constitutional amendment will be needed.

From a comparative perspective, the principle of automatic enforceability captures the essence of the principles of direct applicability and direct effect in EC law, and the concept of self-executing treaties used in the United States of America and other states.<sup>56</sup> A self-executing treaty does not require specific implementing legislation. It may create rights inuring directly to individuals without implementing legislation. In other words, no legislation is needed to give the treaty the force of law within the state. In this regard, it can be argued that, if direct effect and

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<sup>54</sup> Executive Council Rules, *supra* note 47 Rule 34(1)(a).

<sup>55</sup> These decisions are available at <<http://www.africa-union.org/root/au/Documents/Decisions/decisions.htm>>.

<sup>56</sup> See e.g. South Africa Constitution, art. 231(3)(4); Elias M. Ngolele, “The Content of the Doctrine of Self-execution and its limited Effect in South African Law” (2006) 31 South Afr. Yearbk. Int’l L. 141.

direct applicability are European doctrines, and self-execution is an American doctrine, then automatic enforceability is Africa's contribution to the perennial problem of how to bridge the gap between international and national law.

The experience of Europe and America with direct effect, direct applicability and self-execution indicates that their effectiveness depends on the complementing role of national courts and, in Europe, the procedure of preliminary reference to the European Court of Justice. Under the AEC Treaty and the Protocol on the Statute of the African Court of Justice and Human Rights [Protocol on African Court of Justice],<sup>57</sup> these complementing factors are absent. As discussed in Chapter Six, neither the treaty nor the protocol envisages any direct role for national courts and there is no procedure for reference from national courts to the African Court of Justice. Accordingly, the concept of automatic enforceability, which could have provided a versatile means for implementing decisions and regulations of the AEC in member states, is likely to be ineffective.

Ultimately, it will be left to the African Court of Justice to work out the full meaning and effect of automatic enforceability. It also remains to be seen whether and how national courts will accommodate automatic enforceability in light of the fact that they are given no express role in the enforcement of community law under the AEC Treaty or the Protocol on the African Court of Justice. Unless there is a direct or indirect means for individuals to access the African Court of Justice,<sup>58</sup> and national courts are involved in the enforcement of AEC law, an otherwise potent concept for enforcing AEC law in member states may be rendered useless.

### **7.2.1.5 Protecting Implemented Community Laws**

An economic community has an interest in ensuring and facilitating the implementation of its laws in member states. This interest should be matched by mechanisms and principles aimed at protecting nationally implemented community laws from inimical treatment, which may render them ineffective. As noted above, the ECOWAS, COMESA and EAC treaties have adopted what

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<sup>57</sup> 1 July 2008, (2009) 17 Afr. J. Int'l & Comp. L. (forthcoming). Annexed to the Protocol is the Statute on the African Court of Justice and Human Rights [Statute on the African Court of Justice].

<sup>58</sup> Under article 30 of the Statute on the African Court of Justice, *ibid.*, individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs can bring cases to the court on human rights related matters.

is arguably a less effective, but perhaps politically expedient, means for implementing community laws in member states. Their founding treaties rely on national constitutional procedures instead of the principle of direct applicability. The treaties are also silent on the issue of direct effect of community law and, accordingly, have rendered uncertain the issue of whether an individual can invoke community law before a national court and argue that the law creates enforceable rights.

Notwithstanding the above, the treaties contain principles and mechanisms that can be characterized as aiming to protect implemented community laws from inimical treatment in member states. Firstly, the principle of supremacy of community law, which is enshrined in only the EAC Treaty,<sup>59</sup> envisages that conflicts between community and national law will be resolved in favour of the former. Secondly, the preliminary reference procedure<sup>60</sup> anticipates that, ultimately, questions of community law arising before national courts will be authoritatively decided at the community level. Through this, the interests of the community will be protected and conflicting national interpretations will be avoided. The preliminary reference procedure is a means for diffusing into member states a uniform understanding of community law. However, this can be achieved only when national courts are prepared to make references to the community courts. The procedure is mandatory under the COMESA and EAC Treaty, but a national court has first to make a determination whether a ruling from the community court on the issue at stake is ‘necessary to enable it give judgment’.<sup>61</sup> Unless national courts approach this condition liberally, the utility of the reference procedure will be hampered. Finally, the direct access individuals have to the community courts<sup>62</sup> will ensure that breaches of community law occurring within member states are brought to the communities’ attention for remedy. Without this, some breaches might escape the attention of the communities whose institutional presence within member states is minimal.<sup>63</sup>

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<sup>59</sup> EAC Treaty, *supra* note 15 art. 8(4).

<sup>60</sup> See COMESA Treaty, *supra* note 13 art. 30; ECOWAS Court Protocol, *supra* note 35, art. 10(f); EAC Treaty, *ibid.* art. 34; SADC Tribunal Protocol, *supra* note 35 art. 16.

<sup>61</sup> COMESA Treaty, *ibid.* art. 30, EAC Treaty, *ibid.* article 34.

<sup>62</sup> See e.g. COMESA Treaty, *ibid.* art. 26; SADC Tribunal Protocol, *supra* note 35 art. 15(1)(2); EAC Treaty, *ibid.* art. 30; ECOWAS Court Protocol, *supra* note 35 art. 10.

<sup>63</sup> See *Protocol on Relations between the African Union and the Regional Economic Communities*, July 2007, (2009) 17 Afr. J. Int’l L. (forthcoming), art. 21(2). It provides that each REC is to establish a ‘national integration structure in each of its Member States’.



These mechanisms and principles would be useful elements to look at when the community courts are faced with an issue relating to the member states' implementation of community law, especially the extent to which the treaties envisage the integration of community law into member states' legal systems. It can be argued that these mechanisms and principles envision a stronger place for community law in member states than the treaties *prima facie* suggests. With the active involvement and cooperation of national courts such a vision can be realized.

A mechanism for protecting the interests of a community in ensuring adherence to and proper interpretation of its laws will be to grant it the right to join, intervene, or appear as *amicus curiae* in national judicial proceedings in which community law becomes an issue. Put differently, instead of making a preliminary reference to a community court, a national court can, on its own motion or at the request of a party, notify the community of the issue and invite submissions from it. This procedure will be important where national courts are reluctant to make references to the community courts. It is also important because, at present, there is no national legislation which gives national courts the jurisdiction to seek preliminary rulings from the community courts. The community treaties endow the communities with international legal personality.<sup>64</sup> The COMESA and EAC Treaties also provide that 'disputes to which the Community is a party shall not, on that ground alone, be excluded from the jurisdiction of the national courts'.<sup>65</sup> Thus, the treaties anticipate that the communities may become parties to national judicial proceedings.

As with the jurisdiction to seek preliminary rulings, the right to join, intervene, or appear as *amicus curiae* should be provided for in member states. The Kenya courts have held that where artificial legal personality is conferred on or denied to an entity by a foreign legal system, it will be recognized for the purposes of deciding whether that entity should be allowed to sue in Kenya.<sup>66</sup> This decision is sound and is likely to be followed in other African countries. It implies that the

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<sup>64</sup> COMESA Treaty, *supra* note 13 art. 186(1); EAC Treaty, *supra* note 15 art. 138(1); ECOWAS Treaty, *supra* note 14 art. 88(1).

<sup>65</sup> See e.g. EAC Treaty, *ibid.* art. 33(1); COMESA Treaty, *ibid.* art. 29(1). These provisions which, in principle, operate as a waiver of immunity, will allow individuals to bring claims against the community in matters such as contractual disputes over which the community courts lack jurisdiction. For a commentary on a similar provision in the EC Treaty see Fernando Castillo de la Torre, "TEC, Article 240 on National Courts Jurisdiction" in Hans Smit *et al.* eds., *Smit and Herzog on the Law of the European Union* (LexisNexis, 2005).

<sup>66</sup> *Shah v. Aperit Investment S.A.* [2002] K.L.R. 1. It was held that, where a foreign company has gone into voluntary winding up or has been dissolved or wound up by the law of its domicile, Kenyan courts do not recognize it as an existing entity and it cannot sue or be sued in Kenya.

legal personality conferred on the communities by their founding treaties will be recognized nationally so as to allow them to sue, be sued, join or intervene in proceedings.<sup>67</sup> Currently, the law in some countries allows a person to intervene in defined proceedings to protect that person's interests.<sup>68</sup> To be able to intervene, one must have a direct and substantial interest in the judgment.<sup>69</sup> At any stage in proceedings in Ghana, the court, on its own motion, can order any person 'whose presence before the Court is necessary to ensure that all matters in dispute in the proceedings are effectively and completely determined and adjudicated upon to be added as a party'.<sup>70</sup> Similar rule exists in other countries.<sup>71</sup> All these suggest that the legal infrastructure already exists in member states for the procedure advocated here.

What is left is to attune the existing national rules and procedures to the specific demands of community law. Among the issues which must be addressed are: the procedure to be followed by a community; the time frames within which a community must act; whether the original parties to the action can oppose the joinder, intervention or admission of a community's *amicus curiae* brief; and the effect of the judgment given in the case for the community which intervened and other member states, especially as regards the court's interpretation of the relevant community law. In terms of protecting community law from diverse interpretation and application in member states, the right to intervene or submit an *amicus curiae* brief is the second best option to the preliminary reference procedure; it is unlikely to lead to the uniform interpretation of community law. However, it is an important procedure which can complement the preliminary reference procedure. It is suggested that the communities should work with member states in designing this procedure which, as far as possible, should be uniform in all member states.

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<sup>67</sup> See August Reinisch, *International Organizations before National Courts* (Cambridge: Cambridge University Press, 2000) at 37-70 on the recognition of the legal personality of international organizations by national courts.

<sup>68</sup> See e.g. Sierra Leone: High Court Civil Procedure Rules, Order 12 rule 13, Order 55 rule 11 (probate intervention) Order 56 rule 17 (intervention in admiralty proceedings). Ghana: High Court (Civil Procedure) Rules, 2004, Order 66 rule 34 (probate intervention), Order 62 rule 14 (intervention in maritime actions)

<sup>69</sup> See e.g. *United Watch & Diamond Co (Pty) Ltd. v. Disa Hotels Ltd.* 1972 (4) S.A. 409 at 415-417; *Burdock Investment v. Time Bank of Zimbabwe Ltd.*, HH 194/03 HC 9038/02 (High Court, Zimbabwe, 2003).

<sup>70</sup> High Court (Civil Procedure) Rules, 2004, Order 4 rule 5(2)(b).

<sup>71</sup> See Sierra Leone: High Court Civil Procedure Rules, Order 18 rule 6(2)(b)(i); Uganda: Civil Procedure Rules, 1964, Order 1 rule 10(2); Tanzania: Civil Procedure Code, 1966, Order 1 rule 10(2); Kenya: Civil Procedure Rules, Cap 21, Order 1 rule 10(2).

## 7.3 CONSTITUTIONS, JURISPRUDENCE AND IMPLEMENTATION ISSUES

### 7.3.1 Community Law and National Constitutions

#### 7.3.1.1 Acknowledging the Communities' Existence

The implementation of community law in member states is greatly influenced by national constitutions<sup>72</sup> and the judicial philosophy on the relations between international and national law.<sup>73</sup> Because states are sovereign, giving effect to or enforcing a non-domestic law should often have the express or tacit approval of that state. Where the judiciary enforces or uses foreign laws without this approval, it can be accused of inappropriate judicial activism and of blurring the lines between executive, judicial and legislative functions. This is especially the case where foreign laws are used to create rights which were hitherto non-existent in member states.

A discussion on how African constitutions may influence the implementation of community law should begin with an examination of the extent to which they acknowledge the existence of the communities. In some constitutions, there are passing references to the communities (here one should include the Organisation of African Unity, the African Union) and a constitutional commitment to abide by their principles, or work towards the achievement of their goals. For example, article 40 of the Constitution of the Republic of Ghana provides that:

In its dealings with other nations, the Government shall adhere to the principles enshrined in or, as the case may be, the aims and ideals of .... (ii) the Charter of the Organisation of African Unity; ... (iv) the Treaty of the Economic Community of West African States.<sup>74</sup>

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<sup>72</sup> See generally Meinhard Hilf & Ernst-Ulrich Petersmann eds., *National Constitutions and International Economic Law* (Deventer, Boston: Kluwer Law and Taxation Publishers, 1993).

<sup>73</sup> This does not discount the importance of non-legal factors such as the political climate of the country. For example, post-Apartheid South Africa has shed its hostility to international law and become more international-law friendly as reflected in, especially, articles 231-233 of its Constitution.

<sup>74</sup> See also Constitution of the Kingdom of Swaziland, 2005, art. 236(1)(d) [Swaziland Constitution]. It provides that 'in its dealing with other nations, Swaziland shall ... (d) endeavour to uphold the principles, aims and ideals of ... the African Union, the Southern African Development Community...' In the preamble to the Constitution of the Republic of Burundi, 2004, [Burundi Constitution] the people expressed their 'commitment to the cause of African unity in accordance with the Constitutive Act of the African Union of May 25, 2002'. The preamble to the Constitution of the Republic of Chad, 1996, [Chad Constitution] proclaims their 'attachment to the cause of African unity and our commitment to work in every way toward the realization of sub-regional and regional integration'. It is worth remembering that the AEC is an integral part of the African Union. Constitution of the Republic of Niger, 1999, [Niger Constitution] preamble, in which they proclaim their 'attachment to African Unity and undertake to do all that is possible to perform regional and sub-regional integration'.

Other constitutions include foreign policy objectives such as ‘promoting sub-regional, regional and inter-African co-operation and unity’,<sup>75</sup> ‘promotion of African integration and support for African unity’,<sup>76</sup> and ‘respect for international law and treaty obligations’.<sup>77</sup>

Although very superficial, these provisions are useful. They demonstrate sensitivity to the existence and ideals of African economic integration processes. However, as channels for integrating community law into member states’ laws, they are of limited use. They mainly relate to the conduct of interstate relations, a view reflected in the fact that they are often contained in the ‘foreign policy’ provisions of the constitutions. They do not purport to make community law part of national law. It will take a great deal of stressful legal arguments and convoluted judicial reasoning before effect can be given to community law on the basis of these provisions. In other words, they are unlikely to be bases on which individuals can claim, before national courts, the enforcement of community laws that have not been made part of national law using the laid down constitutional procedures. Notwithstanding these observations, courts can have regard to the provisions in the interpretation and enforcement of national law *vis-à-vis* community law.

### **7.3.1.2 Constitutions’ Visions of National-Community Law Relations**

The fact that the constitutions acknowledge the existence of the communities and the objectives of economic integration is important. But, even more salient, are the constitutions’ visions of the relations between national and international law.<sup>78</sup> This vision directly affects the implementation of community law in member states. Traditionally, the relationship between national and international is discussed from monist-dualist perspectives.<sup>79</sup> Monism has its root in

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<sup>75</sup> See Constitution of the Republic of Sierra Leone, 1991, art. 10(b) [Sierra Leone Constitution]. The preamble to the Constitution of the Republic of Cote d’Ivoire, 2000, expresses the peoples’ ‘commitment to the promotion of regional and sub-regional integration, in view of the constitution of African unity’. [Cote d’Ivoire Constitution].

<sup>76</sup> See Constitution of the Federal Republic of Nigeria, 1999, art. 19(b) [Nigeria Constitution]; Constitution of the Republic of Angola, 1975, art. 14, [Angola Constitution]; Interim National Constitution of the Republic of Sudan, 2005, art. 17(b) [Sudan Constitution].

<sup>77</sup> See Namibia Constitution, art. 96(d).

<sup>78</sup> See generally Tom Ginsburg *et al.*, “Commitment and Diffusion: How and Why National Constitutions Incorporate International Law” (2008) *Uni. Illinois L. Rev.* 201.

<sup>79</sup> See generally Andre Nollkaemper & Janne Nijman, *New Perspectives on the Divide between National and International Law* (Oxford: Oxford University Press, 2007) [Nollkaemper & Nijman]; Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003) at 31-53; Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge: Cambridge University Press, 2007) at 178-199.

natural law theories which see all law as the product of reason. It envisions international law as being automatically part of national legal systems. The foundation of dualism is in legal positivism. It posits that international and national laws operate on separate legal planes: international law governs relations between states; and national law regulates relations between individuals and the state. Under dualism, international law can play no role in the national legal systems except in so far as it has been received or adopted by them. The monism-dualist paradigm has been a target for trenchant academic criticism, but it is still useful for understanding how states implement international law, especially treaties.<sup>80</sup>

African constitutions reflect the monist-dualist perspectives.<sup>81</sup> There are other constitutional provisions that appear to merge aspects of both perspectives.<sup>82</sup> Generally, the former British colonies have provisions that tend towards dualism; international law does not have the force of law in the Commonwealth countries unless it has been expressly given that force by a national measure, usually an Act of Parliament.<sup>83</sup> Many other African countries, most of them former French colonies, have constitutional provisions that adopt the monist perspective. Their provisions are modelled on article 55 of the French Constitution of 1958. In general, they provide that treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of domestic legislation, subject, for each agreement or treaty, to application by the

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<sup>80</sup> Nollkaemper & Nijman, *ibid.*

<sup>81</sup> See Richard F. Opong, “Reimagining International Law: An Examination of recent Trends in the Reception of International Law into National Legal Systems in Africa” (2007) 30 *Fordham Int’l L. J.* 296; Tiyanjana Maluwa, “The Incorporation of International Law and its Interpretational Role in Municipal Legal Systems in Africa” (1998) 23 *South Afr. Yearbk. Int’l L.* 45; A.O. Adede, “Constitutionalism, Culture and Tradition: African Experiences on the Incorporation of Treaties into Domestic Law” (1999) 7 *Afr. Yearbk. Int’l L.* 239 at 245.

<sup>82</sup> See e.g. Burundi Constitution, art. 292. It provides that ‘treaties take effect only after having been duly ratified and subject to their application by the other party in the case of bilateral treaties and the fulfilment of the conditions for entry into force specified by them in the case of multilateral treaties’; Constitution of the Republic of Cape Verde, 1992, art. 11 [Cape Verde Constitution]. It provides among others that ‘rules, principles of international law, validly approved and ratified internationally and internally, and in force, shall take precedence all laws and regulations below the constitutional level’. Constitution of the Federal Democratic Republic of Ethiopia, 1995, art. 9(4) [Ethiopia Constitution]. It provides that ‘all international agreements ratified by Ethiopia are an integral part of the law of the land’. Constitution of the Republic of Gabon, 1991 art. 114 [Gabon Constitution]. It simply provides that ‘treaties take effect only after having been ratified and published’. Namibia Constitution, art. 144, which provides that ‘unless otherwise provided in this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia’.

<sup>83</sup> See e.g. Constitution of the Republic of Ghana, 1992, art. 75 [Ghana Constitution]; South Africa Constitution art. 231; Malawi Constitution, art. 211; Constitution of the Republic of Uganda, 1995, art. 123 [Uganda Constitution]; Nigeria Constitution, art. 12; Constitution of the Republic of Zimbabwe, 1979, art. 111B [Zimbabwe Constitution]; Swaziland Constitution, art. 238(4); Namibia Constitution, arts. 32(3)(e) and 63(2)(e); Constitution of the Republic of Seychelles, 1993, art. 64(3)(4)(5) [Seychelles Constitution].

other party.<sup>84</sup> These provisions give the force of law to international law, and also determine its status within the national hierarchy of laws. Under these provisions, as soon as an international treaty or agreement is signed, it has precedence over national laws, subject to implementation by the other parties to the treaty or agreement. The international treaty becomes applicable as law in those monist states as soon as it is ratified. It may be invoked directly in national courts.

Although the constitutional provisions in the francophone countries make treaties superior to domestic law, there are conditions that must be satisfied for this to happen.<sup>85</sup> Firstly, the agreement has to be duly ratified or approved, and published. Due ratification usually entails ensuring legislative, and sometimes judicial, approval or participation.<sup>86</sup> This contrasts with the approach in the anglophone countries where the executive negotiates and concludes treaties that must subsequently be approved by the legislature; the judiciary rarely has a role in the treaty-making process.<sup>87</sup> The second requirement is that of reciprocity in the application of the treaty.<sup>88</sup> This requirement does not exist for the common law jurisdictions. Indeed, in the context of economic integration, making the domestic application of community law contingent on its

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<sup>84</sup> See e.g. Constitution of Burkina Faso, 1991, art. 151 [Burkina Faso Constitution]; Constitution of Cameroon, 1996, art. 45 [Cameroon Constitution]; Constitution of Mali, 1992, art. 116 [Mali Constitution]; Constitution of the Republic of Benin, art. 147 [Benin Constitution]; Constitution of the Republic of Algeria, art. 132 [Algeria Constitution]; Central African Republic Constitution, 2004, art. 72; Chad Constitution, 1996, art. 222; Constitution of the Federal Islamic Republic of the Comoros, 1996, art. 18 [Comoros Constitution]; Constitution of the Democratic Republic of the Congo, 2005, art. 215 [D.R. Congo Constitution]; Constitution of the Republic of the Congo, 2002, art. 185; Cote d'Ivoire Constitution, art. 87; Constitution of the Republic of Guinea, 1990, art. 79; Constitution of Republic of Madagascar, 1998, art. 82.3(VIII) [Madagascar Constitution]; Constitution of the Islamic Republic of Mauritania, 1991, art. 80; Niger Constitution, art. 132; Constitution of the Republic of Senegal, 2001, art. 98 [Senegal Constitution]; Constitution of the Republic of Rwanda, 2003, art. 190 [Rwanda Constitution].

<sup>85</sup> See generally Vincent Kronenberger, "A new Approach to the Interpretation of the French Constitution in Respect of International Conventions: From Hierarchy of Norms to Conflict of Competence" (2000) 47 *Netherlands Int'l L. Rev.* 323.

<sup>86</sup> See e.g. Madagascar Constitution, art 82.3(VII). It provides that 'prior to any ratification, treaties shall be submitted by the President of the Republic to the Constitutional Court. In case of non-conformity with the Constitution, ratification may take place only after constitutional revision'. In *Case concerning the law 2007-009 that authorizes the ratification of the adherence to the SADC protocol against corruption*, Decision number 07-HCC/D1 (July 2007, Madagascar Constitutional Court), the court held that the Southern African Development Community Protocol against Corruption did not contain any provision that is contrary to the Constitution.

<sup>87</sup> See e.g. Ghana Constitution, art. 75; South Africa Constitution, art. 231.

<sup>88</sup> For a critique of the reciprocity requirement see A. Cassese, "Modern Constitutions and International Law" (1985) 192(3) *Recueil des Cours* 341 at 405-408.

reciprocal application by another state can be inimical to the coherent development of a community's legal system.<sup>89</sup>

### 7.3.1.3 The Status of Community Law

The implementation of community law in member states using the constitutional provisions above still leaves unanswered the question of the status of community law and the community itself within member states' legal systems. This is especially the case in the dualist countries. What is the position of community law within national hierarchies of laws? Will community law trump national law in case of conflict? Will all national courts have jurisdiction to adjudicate matters in which community law or a community is engaged?<sup>90</sup> These are weighty issues, and, for answers, one must look again at existing national constitutions.

A feature of many African constitutions, especially those of the Commonwealth countries, is provisions which self-proclaim the constitution as the supreme law of the land.<sup>91</sup> Article 1(2) of the Constitution of the Republic of Ghana captures this feature. It provides that 'this Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void'.<sup>92</sup> Other constitutions are less flamboyant; they shy away from spelling out the consequence of the constitution being supreme. For example, article 1(6) of the Constitution of the Republic of Namibia, 1990, tersely provides

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<sup>89</sup> In this respect, it is significant that one of the principal arguments used for denying direct effect to WTO law is that other countries do not provide for it. See generally Gary Eisenberg, "The GATT and WTO Agreements: Comments on their Applicability to the RSA" (1993-94) 19 South Afr. Yearbk. Int'l L. 127; E.C. Schlemmer, "South African and the WTO Ten Years into Democracy" (2004) 29 South Afr. Yearbk. Int'l L. 125.

<sup>90</sup> For example, EAC Treaty, *supra* note 15 art. 33(1) and COMESA Treaty, *supra* note 13 art. 29(1) provide that 'disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts'. The ECOWAS Treaty, *supra* note 14 does not contain a similar provision. Which national court will have jurisdiction in an action brought on the basis of these provisions is unclear, but is likely to be determined under national law.

<sup>91</sup> The Constitution of the Republic of Botswana, 1966, [Botswana Constitution] appears to be an exception to this. There is no express provision in the constitution proclaiming it as the supreme law of the land, although it cannot be denied that it indeed is the supreme law.

<sup>92</sup> See also Malawi Constitution, art. 1(5); Sierra Leone Constitution, art. 171(15); South Africa Constitution, art. 2; Nigeria Constitution, art. 1(3); Gambia Constitution, art. 4; Constitution of the Republic of Zambia, 1991, art. 1(3); Constitution of Republic of Kenya, 1963, art. 3; Uganda Constitution, art. 2(2); Constitution of the United Republic of Tanzania, 1977, art. 64(5); Zimbabwe Constitution, art. 3; Constitution of the Republic of Lesotho, 1993, art. 2; Swaziland Constitution, art. 2(1); Constitution of the Republic of Eritrea, 1997, art. 2(3); Ethiopia Constitution, 1995, art. 9(1); Constitution of the Republic of Mauritius, 1968, art. 1(2); Seychelles Constitution, art. 5; Rwanda Constitution, 2003, art. 200; Sudan Constitution, art. 3.

that ‘this Constitution shall be the Supreme Law of Namibia’.<sup>93</sup> Whatever the phraseology adopted, the import is the same: the constitution is the *grundnorm* of the national legal system from which all laws derive their legal validity.

The proper implementation of community law within states demands that the *grundnorm* validates community law. Also, the *grundnorm* should, in some instances, allow itself or a national law to be displaced by community law. Given the current structure of the constitutions, these will not be possible without a constitutional amendment. To make room for these may be politically unpalatable; it may be deemed as surrendering sovereignty, a key component of statehood. However, unbridled adherence to sovereignty may be an obstacle to an effective economic integration process. In this respect, it is noteworthy that in the preamble to the ECOWAS Treaty member states were ‘convinced that the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will’. It is suggested that an additional demand is for member states to create a favourable constitutional climate for the implementation of community law.

In the absence of a constitutional amendment allowing for community law to prevail over conflicting national constitutional provisions, domestic courts may have no choice other than to obey the dictates of the constitution. As Peters has observed, the position of many international courts is that international law takes precedence over all national laws, including the constitution. But, national courts have not come to this conclusion, especially as regards the relations between international law and the constitution.<sup>94</sup> This is because the jurisdiction of courts is constrained by specific constitutional provisions, such as those declaring the constitution as the supreme law, as well as broader principles such as separation of powers, which allocates the functions of national institutions in treaty making and implementation.

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<sup>93</sup> In *Sikunda v. Government of the Republic of Namibia* 2001 N.R. 86 at 95, the Namibia High Court held that a United Nations Security Council resolution, even if part of Namibia’s domestic law ‘would still be subservient to the Constitution which is the supreme law of this country’. See also Benin Constitution, art. 3.

<sup>94</sup> Anne Peters, “The Globalization of State Constitutions” in Andre Nollkaemper & Janne E. Nijman eds., *New Perspectives on the Divide between National and International Law* (Oxford: Oxford University Press, 2007) 251 at 259-269.



What is significant from the above exposition is the fact that, so far, it appears African governments have not appreciated that economic integration makes constitutional demands and, on some issues, requires a rethink or amendment of existing constitutional or legislative provisions to accommodate community law and the community itself within their respective states.<sup>95</sup> The fact that there appear to be no national laws which address the many challenges created by economic integration is testament to the lack of appreciation of the legal demands for successful integration. The non-appreciation of the legal demands of integration is, in part, attributable to the fact that the rates of ratification and national implementation of community laws have been slow. This hinders integration at the community level, and minimizes the interaction between community and national law. It is this interaction that generates many of the constitutional challenges or questions raised above. This is borne out by the fact that, within the EAC, where the EAC Treaty has been given the force of law in member states,<sup>96</sup> and a number of community laws have been implemented,<sup>97</sup> a body of case law is emerging on issues related to the interaction between community and national law at the national level.<sup>98</sup> But, even within the EAC, the ratification and national implementation of community laws have not been perfect. For example, at its September 2008 meeting, the Council of Ministers noted five protocols which were concluded in 2006 and 2007 that had not yet been ratified by member states, and suggested that the belated ratification hampers ‘the enactment of legislation based on them’.<sup>99</sup>

#### **7.3.1.4 Community Law in Constitutions: Looking back and comparatively**

Comparatively, it is worth noting that many European countries have effected significant constitutional amendments in response to the legal demands of European integration.<sup>100</sup> In the

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<sup>95</sup> See generally *Southern African Development Community Protocol on Immunities and Privileges*, online: <[http://www.iss.co.za/af/regorg/unity\\_to\\_union/pdfs/sadc/protocols/immune.pdf](http://www.iss.co.za/af/regorg/unity_to_union/pdfs/sadc/protocols/immune.pdf)>.

<sup>96</sup> See Kenya: Treaty for the Establishment of East African Community Act 2000, art. 8(1). See also Uganda: East African Community Act 2002. Tanzania: Treaty for the Establishment of East African Community Act 2001.

<sup>97</sup> See e.g. East African Community Customs Management Act, 2004.

<sup>98</sup> See e.g. *Shah v. Manurama Ltd.* [2003] 1 East Afr. L.R. 294.

<sup>99</sup> East African Community, *Report of 16th Meeting of the Council of Ministers*, Ref. EAC/CM 16/2008, (AICC, Arusha, Tanzania, 2008) at 28-29.

<sup>100</sup> See e.g. Basic Law for the Federal Republic of Germany, art. 23; Constitution of Belgium, art. 34; Constitution of Luxembourg, art. 49*bis*, Constitution of the Netherlands, art. 92-94. United Kingdom, European Communities Act 1972; Constitution of Poland, art. 91(3). See generally Ingolf Pernice, “Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and ‘Multilevel Constitutionalism’” in E.

words of Vereshchetin, ‘European integration had a serious impact on several Western European constitutions ... [and] required the adoption of special constitutional provisions in a number of States’.<sup>101</sup> Article 148 of the Constitution of Romania, a recent new member of the European Union, is an example in this respect. It provides:

(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.

(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

(3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union.

(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.

Presently, this level of constitutional accommodation, which definitely facilitates the implementation of community law, has no parallels in African constitutions. Admittedly, the stage of development of the European Community makes constitutional demands on member states very different from those that apply at the present stage in Africa’s economic integration processes. Given the jurisprudence of the European Community on the interaction between community and member states’ laws, it is impossible to become a member of that community without the prospective member taking a critical look at its constitution. Indeed, in Europe, the interactions between community law and national constitutions did not become a dominant issue until the

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Riedel ed., *German Reports on Public Law Presented to the XV International Congress on Comparative Law* (Baden-Baden: Nomos, 1998) at 40.

<sup>101</sup> Vladen S. Vereshchetin, “New Constitutions and the old Problem of the Relationship between International Law and National Law” (1996) 7 *Eur. J. Int’l L.* 29 at 31.

period immediately before the Maastricht Treaty in 1992.<sup>102</sup> Notwithstanding these admissions, it is undeniable that African constitutions have remained largely ambivalent towards community law. After decades of a professed commitment to economic integration, one would have expected significant provisions in national constitutions on the subject.

Historically, there existed in Africa constitutional provisions that anticipated the strengthening of integration and were prepared to accommodate that. The immediate post-independence constitutions were imbued with preambles that extolled the virtues of African unity and Africans uniting. They also contained specific and legally binding provisions that envisaged the ultimate surrender of national sovereignty to aid African unity. In article 13 of the Constitution of the Republic of Ghana, 1960, it was provided that ‘the independence of Ghana should not be surrendered or diminished on any ground other than the furtherance of African unity’. In article 2, Ghanaians ‘in the confident expectation of an early surrender of sovereignty to a union of African states and territories’ conferred on Parliament ‘the power to provide for the surrender of the whole or any part of the sovereignty of Ghana’. Article 34 of the Constitution of the Republic of Guinea, 1958, had earlier provided that ‘the Republic may conclude with any African State agreements providing for association or the establishment of a community and involving partial or total relinquishment of Sovereignty with a view to the achievement of African Unity’. Similar provisions in other African countries have been chronicled by Schwelb.<sup>103</sup> The speed with which the Organization of African Unity (OAU) was formed is a testament to the importance of these constitutional provisions that encapsulated a consciousness favourable to uniting Africa.

It is, however, ironic that, contrary to these provisions, when the Charter of the Organization of African Unity<sup>104</sup> came to be drafted and the organization was formed in 1963, ‘sovereign equality of all Member States’, ‘non-interference in the internal affairs of States’ and ‘respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence’, were entrenched as cardinal guiding (ultimately, debilitating) principles.<sup>105</sup>

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<sup>102</sup> Didier Maus, “The Influence of Contemporary International Law on the Exercise of Constituent Power” in Antero Jyranki ed., *National Constitutions in the Era of Integration* (The Hague: Kluwer Law International, 1999) 45 at 47-49.

<sup>103</sup> Egon Schwelb, “Republican Constitution of Ghana” (1960) 9 Am. J. Comp. L. 634 at 640-642.

<sup>104</sup> *Charter of the Organization of Africa Unity*, 25 May 1963, 2 I.L.M 766.

<sup>105</sup> *Ibid.* art. III (1)(2)(3).

The OAU never purported to be an economic integration organization or, at least, did not set out a clear economic integration agenda. Accordingly, the effect the post-independence constitutional provisions could have had on any economic integration process and, especially, on the implementation of community law in member states, remains uncertain.

What is certain is that these constitutional provisions did not make their way into subsequent constitutional revisions in many states. However, a few countries, all non-anglophone countries, still retain constitutional provisions that envisage relinquishing national sovereignty to promote African unity.<sup>106</sup> Article 133 of the Constitution of the Republic of Niger, 1999, is perhaps the most detailed on this subject. It provides that:

The Republic of Niger may conclude with any African State agreements of association or community bringing partial or total abandonment of sovereignty with the view to realizing African unity.

The Republic of Niger may conclude agreements of cooperation and of association with other States on the basis of reciprocal and advantageous rights.

It accepts to create with these State intergovernmental organisms of common management, of coordination and of free cooperation.

These organisms may in particular have as objectives: the harmonization of economic, finance and monetary policy; the establishment of union endeavoured to the economic integration through promotion of production and exchanges; the cooperation in judicial matters.

The fact that such constitutional provisions have largely disappeared from African constitutions says a lot about the national legal commitment to Africa's economic integration processes. Indeed, one recent constitution severely constrains the possibility of the state surrendering sovereignty – a key requisite for integration - to aid economic integration.<sup>107</sup> It is

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<sup>106</sup> See e.g. Central Africa Republic Constitution, art. 70. It provides that 'the Republic may, after referendum, conclude agreements with any African States association or merger agreements, including partial or total abandonment of sovereignty in view of realizing African unity'. Apart from the need for a referendum, similar provisions are found in: Burkina Faso Constitution, art. 146; D.R. Congo Constitution, art. 217; Mali Constitution, art. 117; Senegal Constitution, art. 96. See also article 149 of Benin Constitution which provides that the Republic of Benin, 'anxious to realize African unity', may conclude any agreement of sub-regional or regional integration.

<sup>107</sup> See Gambia Constitution, art. 79(2). It provides that 'the Gambia shall not- (a) enter into any engagement with any other country which causes it to lose its sovereignty without the matter first being put to a referendum and passed by such majority as may be prescribed by an Act of the National assembly; (b) become a member of any international

worth noting that these constitutions, which seem to pay very little attention to the legal demands of economic integration, were promulgated after the signing of the Treaty establishing the African Economic Community in 1991.

### **7.3.2 National Constitutions in the Community Legal System**

The interaction between community and national law is not unidimensional. As community law is implemented at the national level, so must a community take account of existing national laws when making community law. The latter is important for the effective implementation of community law. It also reflects the fact that membership of a community entails only a partial surrender of sovereignty; in making laws, a community should not lose sight of the areas still within the competence of member states. Through a number of provisions, community treaties acknowledge the existence of national constitutions, adopt conclusions legitimized by them, or utilize their procedures for the implementation of community law.<sup>108</sup> One area noted above where this is visible is that of giving effect to the treaties or other community laws. Under article 5(2) of the ECOWAS Treaty, ‘each Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty’. Although the COMESA and EAC treaties do not make reference to constitutional procedures, this can be inferred from reading the relevant provisions.<sup>109</sup>

Community institutions also draw on existing national institutions for their make-up. The composition of the Assembly of Heads of State and Government, Council of Ministers and community parliaments is contingent on national institutions. Indeed, article 1 of the EAC Treaty defines a Head of State and Head of Government as ‘a person designated as such by a Partner State’s Constitution’. Similarly, under article 50(2)(b), a person shall be qualified to be elected a member of the Assembly of the EAC by the National Assembly of a Partner State if such a person

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organisation unless the National assembly is satisfied that it is in the interest of The Gambia and that membership does not derogate from its sovereignty’.

<sup>108</sup> In one provision, the community treaty seems to dictate to national constitutions. Article 145 of the EAC Treaty, *supra* note 15 provides that ‘a Partner State may withdraw from the Community provided: (a) the National Assembly of the Partner State so resolves by resolution supported by not less than two-thirds majority of all the members entitled to vote’. Member states of the EAC have their own constitutional provisions which dictate the number of votes needed on any particular issue.

<sup>109</sup> EAC Treaty, *ibid.* art. 8(2); COMESA Treaty, *supra* note 13 art. 5(2).

is, among others, ‘qualified to be elected a member of the National Assembly of that Partner State under its Constitution’.

Community law also sometimes reflects values already entrenched in national constitutions. This is so on issues such as human rights, the rule of law and democracy. At first sight, this may appear superfluous when these values are already entrenched, at least on paper, at the national level. However, that is not so. Firstly, compliance with these provisions within member states creates the necessary democratic and rule of law oriented environment in which economic integration thrives. Secondly, community law becomes an added layer of legality by which the conduct of national governments may be tested. This becomes important in instances where governments act in violation of their own national constitutional values. For example, in the Ugandan case of *Katabazi v. Attorney General of Uganda*,<sup>110</sup> the applicants, who were being tried for treason, were granted bail by the High Court of Uganda. However, armed security agents surrounded the court premises and prevented the execution of bail. They re-arrested the applicants, re-incarcerated them and re-charged them to appear before a court martial. They were not released even after the Constitutional Court of Uganda so ordered. This conduct was held to be a violation of the rule of law enshrined in article 6(d) of the EAC Treaty.<sup>111</sup> It is worth remembering that the Constitution of the Republic of Uganda contains a bill of rights.<sup>112</sup>

From the above, it is evident that relations between community law and national constitutions go beyond issues bordering on giving effect to community law or resolving conflicts between community law and national law.<sup>113</sup> Community law may influence national constitutional values on issues such as democracy, the rule of law and human rights. Indeed, the community treaties contain provisions stipulating democracy, respect for the rule of law and human rights as

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<sup>110</sup> Reference No. 1 of 2007 (East African Court of Justice, 2007).

<sup>111</sup> It provides that the fundamental principles that shall govern the achievement of the objectives of the Community by the member states shall include: good governance including adherence to the principles of democracy, the rule of law, accountability; transparency, social justice, equal opportunities, 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.

<sup>112</sup> Uganda Constitution, chapter four.

<sup>113</sup> Jan Wouters, “National Constitutions and the European Union” (2000) 27 *Legal Issues of Economic Integration* 25-27.

guiding principles.<sup>114</sup> These principles can inform constitutional design and interpretation at the national level. Adewoye has rightly observed that, there is a strong positive correlation between constitutionalism at the national level and the effectiveness of economic integration processes.<sup>115</sup> The community treaty provisions can also be useful in adjudicating, at the community level, the legality of conduct at the national level.

The interactions between community and national law go beyond national constitutions; the constitutions provide only the initial platform for receiving community law. Equally important are the existing statutory laws. Often, community law defers to national courts on certain matters, or allows member states to escape from the full breadth of their community obligations. For example, the East African Community Customs Management Act, 2004, contains over fifteen direct references to the law in force in member states. Deference to national law is important; it recognizes state sovereignty and allows law to be adapted to local circumstances. But, it could sometimes affect the effective implementation of community law. For example, under article 4 of the ECOWAS Protocol Relating to the Free Movement of Persons, Residence and Establishment, 1979, member states reserved the right to ‘refuse admission into their territory any Community citizen who comes within the category of inadmissible immigrants under its laws’. Studies on national laws, most of which predate the protocol, suggest that they often conflict with the letter and spirit of the protocol and its supplements, and have been used to exclude community citizens without explanation or process for review.<sup>116</sup>

To overcome the challenge deference to national law poses for the effective implementation of community law, the communities must be attentive to national laws in their legislative processes. They should also keep abreast of changes to national laws on an ongoing basis through mechanisms such as annual reporting. These will help avoid potential conflicts between community and national laws, and also ensure that exceptions provided by community law do not become a national refuge for denying effect to it.

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<sup>114</sup> See e.g. ECOWAS Treaty, *supra* note 14 art. 4(g)(j); EAC Treaty, *supra* note 15 art. 3(3)(b), 6(d), 7(2); COMESA Treaty, *supra* note 13 art. 6(e)(g)(h).

<sup>115</sup> Ominiyi Adewoye, “Constitutionalism and Economic Integration” in R. Lavergne ed., *Regional Integration and Cooperation in West Africa-A Multidimensional Perspective* (Dakar, Senegal: IDRC/Africa World Press, 1997).

<sup>116</sup> Aderanti Adepoju *et al.*, “Promoting Integration through Mobility: Free Movement and the ECOWAS Protocol” (United Nations Refugee Agency: New Issues in Refugee Research, Research Paper No. 150, 2007) at 11.

### **7.3.3 Community Law and National Judicial Philosophy**

#### **7.3.3.1 Introduction**

It was argued in Chapter Five that, as an institution, national courts are important for economic integration.<sup>117</sup> Equally important is the judicial philosophy that informs their decisions, especially in disputes in which community law is involved. Judicial philosophy has a direct impact on the implementation of community law. This is especially so in instances where community law has not been incorporated into national law or is not directly applicable. Judicial philosophy that is attuned to the goals and demands of economic integration, but is nonetheless sensitive to national constitutional limits on the exercise of judicial power, especially on issues of foreign policy, is important for ensuring the effectiveness of community law in member states. A state's external economic relations or policies may fall into the domain of foreign policy. Courts should act with restraint in intervening or judicially reviewing the direction of such relations or policies. However, in appropriate cases, especially where individual rights are involved, judicial intervention, including a criticism of the direction of such relations or policies may be appropriate.<sup>118</sup> Apart from criticizing government policies inimical to economic integration, judicial philosophy, which takes account of the goals of economic integration, can be relevant in courts' approaches to the principle of consistent interpretation, general reliance on foreign laws, taking of judicial notice, and application of the rules on proof of foreign law. These can also be utilized to enhance the role of community law in member states.

#### **7.3.3.2 International (Community) Law as an Aid to Interpretation**

As noted above, in African countries, some executive or parliamentary act is required for international law to have the force of law. However, it is legally possible for courts to give domestic effect to a treaty, and hence community law, even though it has not been incorporated

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<sup>117</sup> See generally C. J. Mann, *The Function of Judicial Decision in European Economic Integration* (The Hague: Nijhoff, 1972).

<sup>118</sup> See e.g. *Von Abo v. The Government of the Republic of South Africa* 2009 (2) S.A. 526. The applicant's lands had been seized in Zimbabwe by the government. He sought, among others, an order directing the respondent to join the Convention on the Settlement of Investment Disputes between States and Nationals of other States, but abandoned arguing for this relief in the proceedings. However, the court extensively discussed (in a manner amounting to rebuke of the government) the merits of becoming a party to the convention. The issue was whether the respondent had acted inconsistently with the South African Constitution in failing to provide diplomatic protection for the applicant. In deciding this issue, the court considered the respondent's failure to become a party to the convention a relevant consideration.



into national law. The extent to which a court can do this depends on the character of the relevant law, what the government has already done in relation to that law, the state of the existing law, and the court's approach to the doctrine of separation of powers. In Africa, courts' reliance on unincorporated treaties has been very visible in cases involving human rights issues. In a number of cases, courts have relied on unincorporated human rights treaties.

For example, in *Unity Dow v. Attorney General*,<sup>119</sup> the Botswana court's interpretation of a statute was 'strengthened' by the fact that Botswana was a signatory to the OAU Convention on Non-Discrimination even though Botswana had not ratified it, a fact which the judge expressly acknowledged. On appeal, the Attorney General specifically took issue with the court's reliance on unincorporated treaties, but the Court of Appeal affirmed the trial court's use of unincorporated treaties.<sup>120</sup> It held that, even if treaties and conventions do not confer enforceable rights on individuals within the state until parliament gave them the force of law, they could still be used as aids to interpretation. In Ghana, Justice Archer in *New Patriotic Party v. Inspector General of Police*<sup>121</sup> held that the fact that Ghana had not passed specific legislation to give effect to the African Charter on Human and Peoples' Rights did not mean it could not be relied upon in adjudication.<sup>122</sup> In Kenya, the Court of Appeal has held that, even though Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated, current thinking on the common law theory is that both international customary law

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<sup>119</sup> (1991) 13 Hum. Rts. Q. 614 at 623 (High Court Botswana, Misc. 124/90).

<sup>120</sup> *Dow v. Attorney General* (1996) 103 I.L.R. 128 at 159-162, 175-179 (Court of Appeal Botswana, 3 July 1992). In this case the applicant challenged the constitutionality of provisions of the Citizenship Act of 1984 as being discriminatory and an infringement on her constitutional rights and freedoms. These provisions, in essence, denied citizenship to children born to female citizens of Botswana who were married to foreign men.

<sup>121</sup> [1993-94] 2 G.L.R. 459 at 466. Compare *Chihana v. Republic*, M.S.C A Criminal Appeal No. 9 of 1992, where the Supreme Court of Malawi held that the United Nations Universal Declaration of Human Rights is part of the law of Malawi, but the African Charter on Human and People's Rights is not and added, 'Malawi may well be a signatory to the Charter and as such is expected to respect the provisions of the Charter but until Malawi takes legislative measures to adopt it, the Charter is not part of the municipal law of Malawi and we doubt whether in the absence of any local statute incorporating its provision the Charter would be enforceable in our Courts'. This reasoning of the court should be approached with caution. Article 211(3) of the Malawi Constitution allows for the continued application of customary international law, and it can be argued that the Universal Declaration or at least some of its principles are customary international laws.

<sup>122</sup> See Neville Botha & Michele Olivier, "Ten Years of International Law in South African Courts: Reviewing the Past and Assessing the Future" (2004) 29 South Afr. Yearbk. Int'l L. 42 for other cases in South Africa where courts have relied on various unincorporated treaties in adjudication. In these cases, unlike the Ghana and Botswana cases, the reliance had a constitutional foundation since South African courts are constitutionally mandated to consider international law in adjudication.

and treaty law can be ‘applied by state courts where there is no conflict with existing state law, even in the absence of an implementing legislation’.<sup>123</sup>

The judicial philosophy that gives effect to unincorporated treaties has also been felt in other areas. In Ghana, Justice Ocran was influenced in *Products (GH) Ltd. v. Delmas America Africa Line Inc.*<sup>124</sup> by the United Nations Convention on the Carriage of Goods by Sea. He found article 5 on the liability of carriers ‘highly relevant’ even at a time when the convention had not been incorporated into Ghanaian law. In South Africa, the Supreme Court of Appeal in *De Gree v. Webb* was influenced by the principles of the Hague Convention on the Protection of Children and Co-operation in respect of Inter-Country Adoption which, although ratified by South Africa, had not been implemented domestically at the time.<sup>125</sup> Similarly, in *Roger Parry v. Astral Operations Ltd.*,<sup>126</sup> the South African Labour Court was prepared to be ‘guided by’ article 6 of the European Community’s Rome Convention on the Law Applicable to Contractual Obligations.<sup>127</sup>

All these cases suggest that it is possible for courts to give effect to community law even when it has not been expressly incorporated into national law. Indeed, this should be encouraged. The extent to which this can be done will vary from case to case. It will also depend on the ability of counsel, at times, to draw the court’s attention to the relevant community law. As discussed below, there are cases emerging in which this has been done.

### **7.3.3.3 Community Law as Creator of Rights and Guide to Remedies**

Apart from using community law as an aid to interpretations with a view to enhancing its effectiveness in member states, judicial philosophy may also be used to allow community law to confer rights on individuals under the doctrine of legitimate expectation. The doctrine of legitimate expectation is well accepted in the public law of many common law jurisdictions, including those

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<sup>123</sup> *Rono v. Rono* [2005] K.L.R. 538 at 550. This principle was affirmed in *Kenya Airways Corporation v. Tobias Oganya Auma* [2007] eKLR.

<sup>124</sup> Civil Appeal No. J4/28/2005 (Supreme Court of Justice, Ghana, 2004).

<sup>125</sup> *De Gree v. Webb* 2007 (5) S.A. 184 at [11], [17], [47]-[55], [85]-[94]. See also *K v. K* 1999 (4) S.A. 691 on the application of the Hague Abduction Convention at a time when it had not been incorporated into South Africa law.

<sup>126</sup> 2005 (10) B.L.L.R. 989.

<sup>127</sup> The court noted that South Africa was not bound by the Convention. However, it found it relevant to consider it since article 39(1) of the South African Constitution mandates the consideration of international law in the determination of cases.

in Africa.<sup>128</sup> It began its life as a doctrine aimed at safeguarding procedural fairness and legal certainty, but it is now well accepted that it can, albeit rarely, create substantive rights for individuals. The doctrine extends to ratified unincorporated treaties<sup>129</sup> but, in Africa, decided cases on this issue are scant.

In *Abacha v. Fawehinmi*,<sup>130</sup> the Nigerian Supreme Court accepted that an unincorporated treaty might give rise to a legitimate expectation that the government would observe the terms of the treaty.<sup>131</sup> But, in the Zimbabwean case of *Movement for Democratic Change v. The President of the Republic of Zimbabwe*,<sup>132</sup> the court rejected this possibility. The applicant argued that, although Southern African Development Community Principles and Guidelines Governing Democratic Elections (SADC Guidelines) had not been incorporated into domestic law, the court could use the doctrine of legitimate expectation to hold that the provisions of the SADC Guidelines are relevant and applicable in the court.<sup>133</sup> The court rejected this argument. It held that although the SADC Guidelines had been approved by the Zimbabwean government, they were not a direct source of rights and obligations under Zimbabwean law. In the court's view, by assenting to the SADC Guidelines, the government indicated to the national and to the international community that it subscribed to the minimum standards set out in the guidelines.<sup>134</sup> But, it did not give the applicant or any other citizen of Zimbabwe a cause of action that was enforceable in a domestic

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<sup>128</sup> See e.g. *Administrator, Transvaal v. Traub* 1989 (4) S.A. 731 at 761; *Lisse v. The Minister of Health and Social Services* 2004 N.R. 107; *Republic v. Kenya Revenue Authority, ex parte Aberdare Freight Services Ltd.* [2004] 2 K.L.R. 530 at 545-546. See generally C. Forsyth, "The Protection of Legitimate Expectations: Some Pitfalls for Botswana to Avoid" (2006) 3 *Uni. Botswana L.J.* 5.

<sup>129</sup> See *Minister of Immigration and Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273 [*Teoh*]

<sup>130</sup> [2000] 6 N.W.L.R. 228. In the *Abacha* case the respondent sought a declaration that his arrest and detention without charge contravened provisions of the 1979 Constitution of Nigeria and the African Charter of Human and Peoples' Rights (Ratification and Enforcement) Act of 1983.

<sup>131</sup> *Ibid.* at para [12]-[13] Ogunbare JSC delivering the lead judgment, and subsequently Achike JSC cited with approval the Privy Council opinion in *Higgs v. Minister of National Security* [2000] 2 W.L.R. 1368 at 1375 to the effect that an unincorporated treaty '...may have an indirect effect upon the construction of statutes... Or may give rise to a legitimate expectation on the part of the citizens that the government, in its acts affecting them, would observe the terms of the treaty', and added that this 'represents the correct position of the law, not only in England but in Nigeria as well'.

<sup>132</sup> HC 1291/05 (High Court, Zimbabwe, 2007).

<sup>133</sup> Counsel referred the court to the celebrated Australian case on the subject, *Teoh*, *supra* note 129.

<sup>134</sup> Indeed, the court noted that after approving the SADC Guidelines, government 'initiated and piloted through Parliament, two specific pieces of legislation aimed at regulating the conduct of elections in accordance with the SADC Principles and Guidelines'.

law court. Admittedly, this is the correct position in law. However, the failure of the court to investigate whether at least some procedural rights could have been indirectly founded on the SADC Guidelines can be criticized.

In seeking a foundation for a decision based on legitimate expectation arising out of an unincorporated community law, a national court will have to pay attention to the conduct of its executive at both the international and national levels. The fact that the relevant community law has been signed or ratified, pronouncements of the government during the negotiations on the law, and the government's action on the law since signing may all be relevant considerations.

From the above, it can be argued that, apart from instances where community law has been directly incorporated into national law or made a source of domestic law,<sup>135</sup> the doctrine of legitimate expectation, the principle that legislation should be interpreted consistently with international law, and a judicial philosophy that generally allows courts to be guided by non-domestic norms, may be used to give some effect to community law in member states. In other words, they can provide an avenue through which unincorporated community laws can be implemented in member states. This will be advantageous to the community, individuals and, indeed, government officials. For example, an administrative decision founded on international law is more likely to withstand judicial scrutiny than one which is not.<sup>136</sup>

It remains to be seen whether and how African courts will help implement community law, especially in the light of the fact that, generally, governments have been reluctant to implement community laws through incorporation. There have been a few cases in which reliance has been placed on the objects or goals of the communities. Although they are not laws as such, the objects and goals of the communities can shape courts' jurisprudence and the remedies they provide in a manner that enhances economic integration. In *R v. Obert Sithembiso Chikane*,<sup>137</sup> the Swaziland court held that 'in cases where cross-border criminals are convicted, the Courts must [through the sentence] express the displeasure of the Southern African Development Community that serious

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<sup>135</sup> See Proposed New Constitution of Kenya, 2005. Article 3 listed the laws of the East African Community as part of the laws of Kenya. But for the rejection of this constitution in a referendum in November 2005, this provision would have transformed the place of EAC law in Kenya's legal system.

<sup>136</sup> *Chairman, Board of Trade and Tariffs v. Branco* 2001 (4) S.A. 511 at 528-529.

<sup>137</sup> Crim. Case No. 41/2000 (High Court, Swaziland, 2003).

cross-border crime shall not be tolerated'. And, in *Shah v. Manurama Ltd*,<sup>138</sup> the Uganda court held that, in East Africa, there could no longer be an automatic and inflexible presumption for the courts to order security for costs against a plaintiff resident in the East African Community. One factor which influenced the court in its decision was the fact that, among the objects of the community, as outlined in article 5 of the EAC Treaty, was the need to develop policies and programmes aimed at widening and deepening cooperation among the member states in legal and judicial affairs for their mutual benefit.

Judicial reliance on community objects when deciding cases is important at the present stage of the communities' development in which the body of community law is not enormous, and states have been slow in incorporating community law. By paying attention to the objects of the communities, courts can fashion remedies or produce judgments that ultimately strengthen integration. Areas where this could be useful include the enforcement of judgments from other African countries, national restrictions on cross-border commerce,<sup>139</sup> rights of migrant workers and treatment of assets of foreigners.

In addition to relying on community objects, there have been instances where courts drew on substantive community laws to bolster their decisions. For example, in *Friday Anderson Jumbe v. Humphrey Chimpano*,<sup>140</sup> the Malawian court relied on the Southern African Development Protocol against Corruption for guidance on principles relating to corruption.<sup>141</sup> In *Chloride Batteries Ltd. v. Viscosity*,<sup>142</sup> the Malawian court took judicial notice of article 55 of the COMESA Treaty, which deals with competition, in granting an injunction restraining the defendant, from marketing in Malawi, alleged counterfeit batteries imported from Kenya.<sup>143</sup> In *Hoffman v. South*

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<sup>138</sup> [2003] 1 East Afr. L.R. 294.

<sup>139</sup> Kofi Oteng Kufour, "Ban on the Importation of Tomato Paste and Concentrate in Ghana" (2008) 16 Afr. J. Int'l & Comp. L. 100 at 110-113 where he discusses the potential role of Ghana's judiciary trade policy, including helping to reverse anti-competitive legislation or practices. I suggested that, in doing this, courts pay attention to the goals of the ECOWAS.

<sup>140</sup> Constitutional Case Nos. 1 and 2 of 2005 (High Court, Malawi, 2005).

<sup>141</sup> See also *S v. Shaik* 2008 (5) S.A. 354 at 384 where the South African Constitutional Court cited an article in the African Union Convention on Preventing and Combating Corruption as evidence of the seriousness of corruption as a crime and its potential to undermine important constitutional values.

<sup>142</sup> Civil Cause No. 1896 of 2006 (High Court, Malawi 2006).

<sup>143</sup> Article 55(1) provides that: The Member States agree that any practice which negates the objective of free and liberalised trade shall be prohibited. To this end, the Member States agree to prohibit any agreement between

*African Airways*,<sup>144</sup> which dealt with the constitutionality of South African Airways' practice of refusing to employ as cabin attendants people who are living with HIV, the South African Constitutional Court referred to the Code of Conduct on HIV/AIDS and Employment in the Southern African Development Community, 1997. The court took cognizance of the fact that, under the Code: HIV status should not be a factor in job status, promotion or transfer; pre-employment testing for HIV is discouraged and no compulsory workplace testing for HIV is required. Finally, in the Lesotho case of *Molifi v. Independent Electoral Commission*,<sup>145</sup> the male applicant challenged the constitutionality of legislation that designated particular electoral divisions as reserved for women candidates only, including the one in which he wanted to stand for election into the local assembly. One of the international instruments the court found useful in rejecting the applicant's challenge was the Southern African Development Community Declaration on Gender and Development, 1997.

In many of the above cases, the courts did not engage in depth with the community laws or objects they used. Had this been done, one would have had a better sense of the courts' attitude towards community law and the goals of economic integration. One would also have been able to predict better the extent to which future legal submissions based on community law, even if unincorporated, would be received. Notwithstanding this limitation, the cases are important first steps. They demonstrate a level of awareness on the part of lawyers and judges of the existence and relevance of community law. It is hoped that, with time, this awareness will translate into more rigorous judicial and legal engagement with community law and its place in member states. In furtherance of this, academics and institutions have a crucial role to play. They must sow the seeds of community law in the minds of future generations of lawyers and judges. This can be done through specific courses on economic integration in Africa or integrating relevant aspects of community law into already existing courses such as international law and commercial law. Economic integration studies should not be confined to postgraduate students. The presence of a strong juristic community with interest in community law is one of the surest ways of ensuring the effective implementation of community law in member states.

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undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market.

<sup>144</sup> 2001 (1) S.A. 1.

<sup>145</sup> Civil No. 11/05, CC: 135/05 (Court of Appeal, Lesotho, 2005).

Admittedly, in the absence of specific national legislation implementing community law, the role courts can play is limited. Courts are constrained by constitutional arrangements on the separation of powers. Equally important is the degree to which judges and lawyers are aware of community laws and are willing to deploy them in adjudication and litigation. Also, the role of courts is contingent on litigation in which community law is engaged and legal arguments in which community issues are raised.<sup>146</sup> Where, perhaps due to a lack of awareness, there is a culture of settling disputes out of court or of not invoking community law in litigation, there is not much courts can do through their jurisprudence to facilitate the implementation of community law.

### 7.3.4 Community Law and National Legal Culture

A discussion of the implementation of law is incomplete without an assessment of the effect of factors outside the ‘formal’ structures of institutions, judicial decisions, statutes and constitutions which make up the legal system. Legal culture is such a factor. Friedman’s work on the concept of legal culture emphasizes the fact that law is best understood and described as a system that is a product of social forces. Social forces shape the evolution, content, enforcement and efficacy of law.<sup>147</sup> Unlike legal principles, legal culture which is an aspect of culture – the way of life of a people – is largely country-specific, diverse and evolutionary.<sup>148</sup> Indeed, legal culture may vary across different branches of law and, even, within parts of the same country. Thus, it may not be entirely accurate or appropriate to talk about an African legal culture as if there were a homogenous ‘African’ way of life as regards the law.

Notwithstanding these caveats, there are a number of factors about African legal systems that could potentially affect the implementation of community law. These factors include the under-developed nature of the legal systems, legal pluralism, and the minimal use of litigation as a channel for addressing disputes. Griffiths defines legal pluralism as ‘the state of affairs, for any

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<sup>146</sup> The court may also take judicial notice of community law. However, it is difficult to argue that community law can be considered as a notorious fact or of common knowledge to merit such treatment.

<sup>147</sup> Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975). Earlier, Friedman described legal culture as ‘the network of values and attitudes relating to law’. See Lawrence M. Friedman, “Legal Culture and Social Development” (1969) 4 *Law & Society Rev.* 29 at 34 [Legal Culture]. For a critique of Friedman’s approach to the concept of legal culture see Roger Cotterrell, “The Concept of Legal Culture” in David Nelken ed., *Comparing Legal Cultures* (Aldershot: Dartmouth Publishing Company, 1997) at 13.

<sup>148</sup> David Nelken, “Using the Concept of Legal Culture” (2004) 29 *Austl. J. Leg. Phil.* 1.

social field, in which behaviour pursuant to more than one legal order occurs'.<sup>149</sup> So defined, it can be said that most, if not all, states are pluralistic. What is distinct in Africa is that the existence of multiple legal orders is statutorily recognized, and laws and conduct founded on those legal orders are legitimized by the state.<sup>150</sup>

Legal pluralism in Africa provides for multiple legal regimes and avenues for legal redress. In some countries, native courts administering customary (and sharia) law co-exist with the national courts.<sup>151</sup> In others, the national courts administer both customary law and the general law. The making and implementation of community law will have to take these into account. The existence of multiple legal orders implies multiple demands on people's commitment to law; some may feel more attached to customary law, some to the general state law, and others possibly to community law. A pluralistic tradition can be adaptable to specific situations and problems. However, it also suggests the need for a robust conflict of laws regime which can offer certainty for foreign investors and economic transactions. Unfortunately, as I have argued elsewhere, the current regime in most African legal systems is underdeveloped and may not be able adequately to cope with the challenges of integration.<sup>152</sup>

To be sure, the potential adverse impact legal pluralism can have on the implementation of community law and, generally, on economic integration in Africa should not be exaggerated. In many African countries, legal pluralism is mostly manifest in family, succession and property law related issues.<sup>153</sup> Family law and succession may not be directly relevant for economic transactions at the present stage of economic integration in Africa. But, they will become relevant as the communities start the process of integrating the 'social and cultural'<sup>154</sup> dimensions of life in

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<sup>149</sup> John Griffiths, "What is Legal Pluralism" (1986) 24 J. Legal Pluralism & Unofficial L. 1 at 2.

<sup>150</sup> See e.g. Ghana Constitution, art. 11. It lists customary law as a source of Ghana law and defines it as rules of law which by custom are applicable to particular communities in Ghana. The Gambia Constitution, art. 7(e)(f), which lists customary law and sharia (as regards matters of marriage, divorce and inheritance) as sources of The Gambia law. Constitution of the Republic of Malawi, art. 200.

<sup>151</sup> See e.g. Zimbabwe: Customary Law and Local Courts Act, Chapter 7: 05.

<sup>152</sup> Richard Frimpong Oppong, "Private International Law and the African Economic Community: A Plea for Greater Attention" (2006) 55 Int'l & Comp. L. Q. 911.

<sup>153</sup> The areas of commercial law, torts, finance, insurance etc. are regulated mainly by general and uniform state laws.

<sup>154</sup> AEC Treaty, *supra* note 43, art. 6(2)(f)(ii) which envisage the integration of the 'social and cultural sectors' at the final stage in the establishment of the African Economic Community. The EAC aims at deepening co-operation among



member states. Although there are similarities in the rules, customary law is, of course, not uniform in Africa.<sup>155</sup>

When people move freely within the communities, and form personal relationships with people subject to different customs, questions on the content and application of customary law will emerge. What happens when community law provides for rights not recognized under the customary law of a group? What happens when community law conflicts with customary law? Will community law prevail in such instances? Will customary law be deemed of such importance to the lives of its adherents that it will remain unaffected by community law? Will traditional private international law rules be appropriate in this context? Surely, social issues addressed by customary law also have economic dimensions and the communities cannot remain neutral or ambivalent towards them. Thus, it is not surprising that the European Community has legislated in the area of family law,<sup>156</sup> and is currently working on wills and succession.<sup>157</sup> In Africa, these issues will also have to be addressed, with customary law being a complicating factor. This complication is made more difficult by the fact that customary laws are diverse across the continent and are largely unwritten. Accordingly, there is no written law to ‘look up’, but there are many laws that one may have to investigate on site, rather than in the comfort of a library.

The impact on economic integration of legal pluralism in property law is, however, more immediate and can be adverse. Multiple regimes for the transfer and ownership of property as well as customary law restrictions on alienation of property can be a disincentive to establishing

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the member states in ‘social and cultural fields’. See EAC Treaty, *supra* note 15 art. 5(1). The ECOWAS aims at adopting common policies in the ‘social and cultural sectors’. See ECOWAS Treaty, *supra* note 14 art. 3(2)(e).

<sup>155</sup> Abiodun has argued that a “United African Customary Law” will be instrumental to the proposed project for a “United African States” by the African Union’. Balogun Oladele Abiodun, “Towards an African Concept of Law” (2007) 1 Afr. J. Legal Theory 71 at 80. Historically, an attempt in this direction, namely the Restatement of African Law Project which was began under the direction of Professor Allot of the School of Oriental and African Studies, was eventually abandoned.

<sup>156</sup> See Council Regulation (EC) No. 2201/2003 of Nov. 23, 2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) 1347/2000.

<sup>157</sup> Green Paper on Wills and Succession. COM (2005) 65 Final. The European Parliament accepted this Paper in Nov. 2006, and a legislative proposal was due to be presented by the Commission to the Parliament on 24 March 2009.

business and undertaking commercial activities.<sup>158</sup> For example, the land tenure system in Ghana, which mixes customary law with state law, has been noted as a major obstacle to foreign investment.<sup>159</sup> In general, legal pluralism in Africa has economic significance since it will ultimately increase transaction costs for businesses to investigate multiple sources of law. One writer has also noted legal pluralism as a potential source of conflict, a state of affairs which undermines commerce.<sup>160</sup>

Another feature of African legal culture that is likely to impact on the implementation of community law is the minimal use of law and litigation as channels for redressing wrongs. Friedman has observed that legal culture ‘determines when and why and where people turn to law or government, or turn away’.<sup>161</sup> African legal culture emphasizes reconciliatory and non-adversarial modes of settling disputes. Adjudication is ‘guided negotiation’ for a settlement.<sup>162</sup> For example, customary arbitration is a key aspect of dispute settlement in most African countries. Dispute settlement in traditional African societies also made minimal use, if at all, of specialist legal professionals. The rise of lawyers, the emergence of a neutral, ignorant of the facts and disinterested adjudicator, and their role in settling disputes appears to be the product of colonization.<sup>163</sup> These features of African legal culture can be problematic for community law.

In this thesis, I have consistently emphasized the role of law, lawyers, litigation and the courts as mechanisms for promoting the development of community law in member states. In a setting where these mechanisms are not frequently resorted to, this can be problematic. For example, the ECOWAS protocols on free movement of persons have been implemented in member

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<sup>158</sup> Kwame Akuffo, “The Conception of Land Ownership in African Customary Law and its Implications for Development” (2009) 17 Afr. J. Int’l & Comp. L. 57. T.A.T. Yagba, “Legal Pluralism and Economic Integration in Africa: Policy and Research Imperatives” (1996) Nigerian Current L. Rev. 100.

<sup>159</sup> Nicolas Amponsah, “Institutional and Economic Performance: Ghana’s Experience under the Fourth Republic, 1992-2002” in Kwame Boafo-Arthur ed., *Ghana one Decade of the Liberal State* (London: Zed Books, 2007) 106 at 122.

<sup>160</sup> Ulrike Schmid, “Legal Pluralism as a Source of Conflict in Multi-ethnic Societies: The Case of Ghana” (2001) 46 J. Legal Pluralism & Unofficial L. 1.

<sup>161</sup> Friedman, Legal Culture, *supra* note 147 at 34.

<sup>162</sup> A.N. Allott, “African Law” in J. Duncan M. Derrett ed., *An Introduction to Legal Systems* (New York: Frederick A. Praeger, 1968) at 144.

<sup>163</sup> Werner Menski, *Comparative Law in Global Context – the Legal Systems of Asia and Africa*, 2nd ed. (Cambridge: Cambridge University Press, 2006) at 435-444.

states for over thirty years. But, I have been unable to locate a single decided case in the principal law reports of the English-speaking member states dealing with this issue or invoking the protocols. National borders have been arbitrarily closed, illegal fees have been levied at border posts, and nationals have been deported from member states, but, to my knowledge, none of these issues have been challenged judicially.<sup>164</sup> We have already noted that, notwithstanding many years of economic integration processes in Africa, reliance on community law before national courts has been minimal. Indeed, law reporting is itself something that is not approached seriously in most African countries; law reports often do not keep pace with current judgments or may even be non-existent.<sup>165</sup>

To an extent, the above state of affairs reflects the realities in Africa and cannot be wholly attributed to a deep-seated and immutable cultural bias. Indeed, historical accounts of African legal culture reveal deep attachment to the law. This was due to the fact that there was popular participation in lawmaking and the administration of justice was highly localized rather than remote.<sup>166</sup> Also, contrary to perceptions today, in the past, Africans have been labeled as ‘naturally and typically litigious, ready to resort to law at the slightest opportunity’.<sup>167</sup> Allott has argued that this claim was borne out by judicial statistics at the time, but it could be explained on the ground of the traditional availability of courts of law. In his words, ‘the judicial arena was not something strange and forbidden; it was rather like a football pitch, to which everyone might resort for entertainment and excitement and to challenge’.<sup>168</sup> Surely, this is not the case today. Among the factors contributing to this are: litigation cost; poverty; physical inaccessibility of legal and judicial institutions; mistrust in the ability and independence of judges to deliver justice; political instability and politicization of the judicial process; ignorance of individual rights; and illiteracy. These could be overcome through the provision of legal aid, education, greater protection of the

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<sup>164</sup> There is only one reported case from the ECOWAS Court of Justice in which the applicant challenged Nigeria’s closure of its border with Benin as a breach of the ECOWAS Treaty. See *Afolabi Olajide v. Federal Republic of Nigeria*, 2004/ECW/CCJ/04 (ECOWAS Court of Justice, 2004)

<sup>165</sup> For example, my research found that the latest-issued law report in Tanzania is the 1997 Tanzania Law Reports!

<sup>166</sup> Allot, *supra* note 162 at 135.

<sup>167</sup> *Ibid.* at 147. On litigation and legal culture see generally Erhard Blankenburg, “Civil Litigation as Indicator of Legal Cultures” in David Nelken ed., *Comparing Legal Cultures* (Aldershot: Dartmouth Publishing Company, 1997) at 41.

<sup>168</sup> *Ibid.*

integrity and independence of the judicial process, and improving people's physical access to legal and judicial institutions.

An important lesson from African legal culture that is relevant in the implementation of community law is the fact that customary law is inextricably linked with the societies in which it operates. In other words, there is an intimate linkage between customary law and the socio-cultural environment; customary law evolves from within and is not imposed from above.<sup>169</sup> The intimate linkage between customary law and society is the basis for the continued endurance of customary law, even on matters on which attempts have been made by states (and formerly by colonial powers) to impose uniform law. This suggests that a top-down approach as regards community lawmaking and implementation may not always be appropriate. In some instances, communities should leave decision-making and implementation to the member states so that policies will be localized and not seen as imposed from above and, accordingly, ignored. Surely, the communities would like to avoid the experiences of the former colonial powers in Africa who imposed so much law from above only to have them ignored by the colonized.

#### **7.4 CONCLUSION**

This chapter reveals difficult challenges to the implementation of community law in African states. The approach of the economic integration treaties to the issue has left uncertainties in their wake. Member states have not implemented fully obligations assumed at the community level. National laws have not systematically dealt with the issue of implementing community law. This is reflected in the constitutions and the jurisprudence of the courts. Indeed, it has been revealed that, in some instances, existing constitutional provisions may be inimical to effectively implementing community law. Currently, community law does not enjoy any preferential legal status in member states. It is treated like any other international law. Admittedly, community law's genesis in international law cannot be denied. But, the effective implementation of community law will demand an approach very different from that accorded by international law.

After many years of economic integration, the above state of affairs on the implementation of community law in member states is difficult to fathom. The lack of attention to the issue of implementing community law creates a disjunction between community and national legal

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<sup>169</sup> Menski, *supra* note 163 at 407.

systems, and works against the effectiveness of economic integration. It is suggested that because the communities envision progression through the various stages of integration – from free trade areas into customs unions, common markets and economic communities – they should become more attentive to this issue. Implementation issues will become increasingly more important as economic integration progresses; the farther economic integration moves through the stages, the more intensive the interactions between community and national law will become. The communities will have to provide a more robust and defined legal framework for these interactions.

Similarly, member states should analyze the challenges their laws and jurisprudence pose for implementing community law and, where necessary, effect amendments or legislate to overcome the challenges. This task for member states should be founded on their undertakings in the communities' treaties to create conditions favourable for the development and achievement of the goals of the communities, abstaining, at the same time, from measures likely to jeopardize the achievement of their aims.<sup>170</sup> The traditional explanation of the lack of political will as the main obstacle to progress of economic integration in Africa is inadequate. This chapter reveals that, even if governments were willing to implement community law, serious legal limitations exist that must be addressed first.

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<sup>170</sup> COMESA Treaty, *supra* note 13 art. 5(1); EAC Treaty, *supra* note 15 art. 8(1)(a)(c); ECOWAS Treaty, *supra* note 14 art. 5(1).

## **CHAPTER EIGHT: STRENGTHENING INTER-INSTITUTIONAL RELATIONS: SELECTED PUBLIC-PRIVATE INTERNATIONAL LAW ISSUES**

### **8.1 INTRODUCTION**

For centuries, private international law has been used to address legal problems generated by interactions among legal systems. It deals with problems that arise when transactions or legal claims involve a foreign element. Private international law issues are most frequent in settings that allow for the growth of international relationships or activities with transnational implications. Economic integration provides this setting: it compels interaction among multiple legal systems; allows for the free movement of persons, goods, services and capital across national boundaries; and fosters the intensification of transnational economic activity. These generate problems which private international law can help resolve.

Accordingly, a developed private international law regime is an indispensable part of economic integration. Private international law impacts on the free movement of persons, goods, services and capital. It affects economic transactions within a community and, therefore, merits attention in any economic integration process. An economic community does not, and cannot, function solely on the basis of substantive rules. The procedural rules for resolving issues arising in cross-border transactions are equally important. These rules may be useful in dispute settlement at both the community and national levels. In other words, true integration should aim not only at the removal of barriers to the movement of persons, goods, services and capital, but also the strengthening of the legal infrastructure for settling cross-border disputes. A developed private international law regime is a key aspect of this infrastructure.

From a relational perspective, private international law provides a means through which the horizontal and vertical relations between the multiple legal systems in the community can be structured and managed. It creates linkages between legal systems without necessarily unifying them. For example, the rules on recognition and enforcement of foreign judgments allow effect to be given to the judicial acts of foreign states. International civil procedure rules enable states to work together for the smooth and effective administration of justice in transnational disputes. Choice of law rules allow parties to choose which legal system will govern their transactions. These rules often operate outside the context of economic integration. But their true foundation is in the interactions of legal systems which result from the transnational activities of their inhabitants. As Foote has noted, 'if society of each legislating State was entirely isolated, so that

the individuals composing it were cut off from intercourse with all but their fellow subjects, the law of each State would have full operation within its own domain, and could claim to extend itself no further'.<sup>1</sup> Transactions between people subject to different legal systems, which is made more prevalent by community economic integration, provides the *raison d'être* for private international law.

But the utility of private international law in economic integration is not limited to (as discussed in Chapter Nine) its impact on individual economic transactions or interstate relations. Its principles can also be important in how community institutions relate to each other as well as to national institutions. I characterize this as inter-institutional relational issues. Admittedly, these issues would ordinarily be the domain of public international law or the internal relationships between the relevant institutions. Private international law may, however, be relevant in addressing some of the issues. Indeed, increasingly, scholars are exploring the interactions between public and private international law problems, including interactions between international institutions.<sup>2</sup>

Inter-institutional relational issues are the focus of this chapter. It assesses how community institutions in Africa interact with each other as well as with national institutions through the lens of public-private international law principles. Some writers have, albeit cursorily, identified a role for private international law in Africa's economic integration.<sup>3</sup> But their focus has been on how private international law impacts on individual economic transactions. This chapter advances the discourse in this area by examining how private international law is equally important for community institutional arrangements.

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<sup>1</sup> John Alderson Foote, *Foreign and Domestic Law: A Concise Treatise on Private International Jurisprudence, Based on the Decisions in the English Courts* (London: Stevens and Haynes, 1904) at 23.

<sup>2</sup> Alex Mills, "The Private History of International Law" (2006) 55 *Int'l & Comp. L.Q.* 1; Lucy Reed, "Mixed Private and Public International Law Solutions to International Crisis" (2003) 306 *Recueil des Cours* 177 at 199-240; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003).

<sup>3</sup> See Bankole Thompson, "Legal Problems of Economic Integration in the West African Sub-Region" (1990) 2 *Afr. J. Int'l & Comp. L.* 85 at 99-100; Bankole Thompson & Richard S. Mukisa, "Legal Integration as a Key Component of African Economic Integration: A Study of Potential Obstacles to the Implementation of the Abuja Treaty" (1994) 20 *Commonwealth L. Bull.* 1446 at 1454; Yinka Omorogbe, "The Legal Framework for Economic Integration in the ECOWAS: An Analysis of the Trade Liberalisation Scheme" (1993) 5 *Afr. J. Int'l & Comp. L.* 355 at 364; Muna Ndulo, "The Promotion of Intra-African Trade and the Harmonisation of Laws in the African Economic Community: Prospects and Problems" in M.A. Ajomo & Omobolaji Adewale eds., *African Economic Community Treaty, Issues Problems and Prospects* (Lagos: Nigerian Institute of Advanced Legal Studies, 1993) 107 at 111-112; Fredrick S. Ringo, "The Recognition and Enforcement of Foreign Arbitral Awards in the COMESA/SADC Region: Analysis of Legal Development" (1993) 9 *Lesotho L. J.* 185.

## 8.2 PRIVATE INTERNATIONAL LAW AND AFRICA'S ECONOMIC INTEGRATION LAWS

### 8.2.1 Introduction

Palpably missing from the discourse on economic integration under the Treaty establishing the African Economic Community [AEC Treaty]<sup>4</sup> is any discussion of the role of private international law.<sup>5</sup> The various laws for the pursuit of integration in Africa are also silent on this. Ignoring reciprocal agreements for the recognition and enforcement of judgments in national statutes, there is no private international law international convention negotiated by African states.<sup>6</sup> This state of affairs is troubling. As discussed in Chapter Nine, the under-developed nature of private international law in Africa is a key obstacle to economic transactions. It may equally handicap its utility in addressing inter-institutional relational issues.

Africa's economic integration treaties have been inattentive to potential private international law issues arising from their design of community institutions, especially in cases where it is envisaged that community and national institutions will interact. This may hamper the effective operation of community institutions and undermine their relations with national institutions. Consistent with the thesis that effective economic integration results from properly structuring and managing relational issues, this section examines how the effective operation of one community institution, the community courts, can be enhanced or constrained by private international law. It will be argued that, although developed for individual cross-border transactions, attention to private international law rules can enhance institutional effectiveness. However, it will be shown that these rules may not be wholly appropriate in the context of inter-institutional relational issues.

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<sup>4</sup> *Treaty establishing the African Economic Community*, 3 June 1991, 30 I.L.M. 1241 [AEC Treaty].

<sup>5</sup> But see Richard F. Opong "Private International Law and the African Economic Community: A Plea for Greater Attention" (2006) 55 *Int'l & Comp. L. Q.* 911.

<sup>6</sup> African countries are parties to a number of private international law conventions which are binding among themselves. See generally Richard F. Opong "The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation" (2006) 8 *Yearbook of Priv. Int'l L.* 189.



## 8.2.2 Arbitral Jurisdiction of the Community Courts

### 8.2.2.1 Introduction

The community courts of the communities under review, namely COMESA, EAC and ECOWAS, have jurisdiction to determine cases which are referred to them by persons (the community, its institutions or individuals) who choose them (not the individual judges in their personal capacity) as forums for the arbitration of disputes.<sup>7</sup> Judges sitting on such arbitration sit as the court and not as *persona designata*. The arbitral jurisdiction is conferred on the court, not on individual judges. In other words, when the community courts arbitrate a dispute, it sits as a ‘court of arbitration’.<sup>8</sup> The judges do not sit in their personal capacity. Individual judges are designated to sit on this court of arbitration<sup>9</sup> just as they are when the court sits to settle a dispute through litigation. Like in any arbitration proceedings, the parties retain a measure of control over the process on issues such as the judges who are to sit as arbitrators,<sup>10</sup> the place of arbitration,<sup>11</sup> and the applicable law.<sup>12</sup>

As a marked departure from what is assumed, traditionally, to be the preference for the settlement of disputes in Africa,<sup>13</sup> neither the AEC Treaty<sup>14</sup> nor the Protocol on the Statute of the

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<sup>7</sup> *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 U. N. T. S. I-37437 [EAC Treaty], art. 32; *Treaty establishing the Common Market for Eastern and Southern Africa*, 5 November 1993, 33 I.L.M. 1067 [COMESA Treaty], art. 28; Article 16 of the *Revised Treaty establishing the Economic Community of West African States*, 24 July, 1993, 35 I.L.M. 660, (1996) 8 Afr. J. Int’l & Comp. L. 187 [ECOWAS Treaty] establishes an Arbitration Tribunal of the Community. The status, composition, powers, procedure and other issues concerning the Arbitration Tribunal are to be set out in a Protocol relating to it. Until that time, article 9(5) of the Protocol A/P.1/7/91 on the Community Court of Justice of the High Contracting Parties as amended by Supplementary Protocol A/SP.1/01/05 Amending the Protocol Relating to the Community Court of Justice [ECOWAS Court Protocol] provides that the court of justice should exercise the powers of the Tribunal. See generally Pearlie M.C. Koh, “Enhancing Economic Co-Operation: A Community Arbitration Centre for ASEAN?” (2000) 49 Int’l & Comp. L. Q. 390.

<sup>8</sup> Common Market for Eastern and Southern Africa Court of Justice Arbitration Rules, 2002, online: COMESA <[http://www.comesa.int/institutions/court\\_of\\_justice/arbitration\\_rules/ARBITRATION%20RULES/en](http://www.comesa.int/institutions/court_of_justice/arbitration_rules/ARBITRATION%20RULES/en)>. Rule 6(1) [COMESA Arbitration Rules].

<sup>9</sup> COMESA Arbitration Rules, *ibid.* Rule 6(2).

<sup>10</sup> *Ibid.* Rule 6(2).

<sup>11</sup> *Ibid.* Rule 7.

<sup>12</sup> *Ibid.* Rule 24.

<sup>13</sup> At the continental level, the preference for arbitration was reflected in the establishment of a Commission on Mediation, Conciliation and Arbitration as the ‘judicial’ organ of the Organization of African Unity (OAU). The OAU did not have a court of justice. See *Charter of the Organization of African Unity*, 25 May 1963, 3 I.L.M. 766; *Protocol on the Commission of Mediation, Conciliation and Arbitration*, 21 July 1964, 3 I.L.M. 1116 [Protocol on the Commission of Mediation]. The commission’s jurisdiction was not compulsory and it had jurisdiction over disputes

African Court of Justice and Human Rights<sup>15</sup> contains any provision conferring arbitral jurisdiction on the African Court of Justice and Human Rights [African Court of Justice]. Comparatively, it appears that the combination of an adversarial and arbitral jurisdiction in the same community court is largely unique to Africa.<sup>16</sup> Indeed, it appears to be a recent phenomenon; the first generation of African economic integration treaties did not provide for any such dual jurisdiction in their respective community courts.<sup>17</sup>

I have been unable to identify the specific rationale for the inclusion of the dual jurisdiction provisions; the treaties have no explanatory memoranda to them and academic writings do not address this issue. However, I speculate that they reflect the preference for arbitration as a mode of settling disputes in Africa,<sup>18</sup> the general rise of arbitration as a means of dispute settlement, and a consolidation of existing practice.<sup>19</sup> Historically, there had also been calls for the establishment of

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between only states. See articles xii-xiv of the Protocol on the Commission of Mediation. Article 56 of the 1975 Treaty establishing the Economic Community of West African States, 28 May 1975, 1010 U.N.T.S. I-4843 [ECOWAS Treaty-1975] made an attempt at the amicable settlement of disputes by direct agreement a prerequisite for submission of the dispute to the Tribunal established for the Community. This provision is repeated in the article 76 of the ECOWAS Treaty, *supra* note 7. It applied to any dispute that may arise among the member states regarding the interpretation or application of the Treaty. Article 40 of the *Treaty for the establishment of the Preferential Trade Area for Eastern and South African States*, 21 December 1981, 21 I.L.M. 479 [PTA Treaty]. A principal issue unaddressed by these provisions is whether all member states were (or will be) bound by the outcome of an amicable settlement between disputing states on an issue of interpretation of the treaty. For a commentary on the PTA Treaty, see Hawa Sinare, “The Treaty for the establishment of the Preferential Trade Area for Eastern and Southern African States and its Relevance to Economic Integration” (1989) 5 Lesotho L.J. 77.

<sup>14</sup> *Supra* note 4.

<sup>15</sup> 1 July 2008, (2009) 17 Afr. J. Int’l & Comp. L. (forthcoming). Annexed to the protocol is the Statute on the African Court of Justice and Human Rights [Statute on the African Court].

<sup>16</sup> The Court of Justice of the Andean Community, the Court of Justice of the European Free Trade Area, and the Court of Justice of the Caribbean Community do not have arbitral jurisdiction. However, article XXIII of the Agreement establishing the Caribbean Court of Justice enjoins member states to ‘encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes’ by providing appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.

<sup>17</sup> See e.g. ECOWAS Treaty-1975, *supra* note 13; Treaty for East African Co-operation, 6 June 1967, 6 I.L.M. 932; PTA Treaty, *supra* note 13.

<sup>18</sup> One writer has observed that arbitration is ‘the norm’ in most sub-Saharan African countries, but this is mainly the case for inter-tribal and personal disputes. As a system for resolving international commercial disputes, arbitration is a relatively recent phenomenon. Samson L. Sempasa, “Obstacles to International Commercial Arbitration in African Countries” (1992) 41 Int’l & Comp. L. Q. 387 at 407. See generally Andrew Chukwuemerie, “The Internationalisation of African Customary Law Arbitration” (2006) 14 Afr. J. Int’l & Comp. L. 143.

<sup>19</sup> The Preferential Trade Area for Eastern and Southern African States had a tribunal established under the PTA Treaty and an independent Centre for Commercial Arbitration, which was responsible for facilitating international arbitration of private commercial disputes. It appears the dual jurisdiction of the current COMESA Court of Justice merges the jurisdiction of both bodies.

permanent arbitration centres in Africa.<sup>20</sup> Indeed, one organization to respond early to this call was the Preferential Trade Area for Eastern and Southern African States (PTA) which helped in establishing the PTA Center for Commercial Arbitration in Djibouti. It is also possible that these provisions were inspired by the Treaty establishing the European Community [EC Treaty], but, as will be noticed below, their wording and scope are very different. Article 238 of the EC Treaty confers an arbitral jurisdiction on the European Court of Justice (ECJ)<sup>21</sup> However, as one author has accurately noted, article 238 of the EC Treaty does not make the ECJ ‘simply an arbitrator in the normal sense of that term’.<sup>22</sup> It can accordingly be argued that the arbitral jurisdiction of community courts is novel and, apparently, African.

### **8.2.2.2 Jurisdiction and Choice of Law**

As noted above, in addition to hearing cases through contentious litigation, the COMESA, EAC and ECOWAS courts have jurisdiction to hear cases through arbitration. Both arbitration in interstate disputes and commercial arbitration are covered. Indeed, the EAC Treaty provision, which is cited below, specifically refers to an arbitration clause in ‘a commercial contract or agreement’. Article 28 of the COMESA Treaty provides that:

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

- (a) arising from an arbitration clause contained in a contract which confers such jurisdiction to which the Common Market or any of its institutions is a party; and
- (b) arising from a dispute between the Member States regarding this Treaty if the dispute is submitted to it under a special agreement between the Member States concerned.

Article 32 of the EAC Treaty is wider in scope. It provides:

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

- (a) arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a

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<sup>20</sup> S. Azadon Tiewul & Francis A. Tsegah, “Arbitration and the Settlement of Commercial Disputes: A Survey of African Practice” (1975) 24 Int’l & Comp. L. Q. 393 at 418 where they proposed the establishment of a ‘continental arbitral body’. Sempasa, *supra* note 18 at 412 where he notes that ‘in the context of regional integration, extending the use of arbitration through a centralised framework is clearly an attractive way...’.

<sup>21</sup> Article 238 of the *Treaty establishing the European Community* [2006] O. J. C 321/37 provides that ‘the Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law’.

<sup>22</sup> Paul Craig & Gráinne de Búrca, *EU Law, Text Cases and Materials*, 2d ed. (Oxford: Oxford University Press, 2003) at 577.

party; or (b) arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or (c) arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.

Article 16 of the ECOWAS Treaty is less definite. It provides that:

1. There is hereby established an Arbitration Tribunal of the Community. 2. The status, composition, powers, procedure and other issues concerning the Arbitration Tribunal shall be as set out in a Protocol relating thereto.

At present, the arbitral jurisdiction of the court is seldom invoked.<sup>23</sup> In the case of *Building Design Enterprise v. Common Market for Eastern and Southern Africa*,<sup>24</sup> the COMESA court sat as a court of arbitration. However the parties settled and the arbitral proceedings were discontinued. Notwithstanding its current minimal invocation, the arbitral jurisdiction is important. It creates an avenue for individuals to become active participants in the economic integration processes by providing forums for the settlement of disputes that may be generated by their transactions within communities. For people transacting commercially in Africa, who seek a neutral, expedited, and ‘party controlled’ forum for dispute settlement, the arbitral jurisdiction may be equally useful.

Indeed, the community courts can be developed into forums for the resolution of inter-African commercial and political disputes through arbitration. The arbitral jurisdiction may serve to ensure harmonious interstate relations within the communities by providing a non-adversarial means of settling interstate disputes. This is important for the development of the communities; harmonious interstate relations will allow the communities to focus on economic integration. African governments are reluctant to choose international litigation as a means of settling disputes

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<sup>23</sup> In 2006, the Registrar of the East African Court of Justice observed that: ‘Although the East African Court of Justice as arbitrator has many advantages against other arbitrators, no one has appointed it and if any has there has not been any dispute to lead the parties to the Court for arbitration. Even the three Governments [Kenya, Tanzania and Uganda] have not been able to utilise the free services of the Court as far as arbitration is concerned but find it easier to go to France and London for exorbitant arbitration and leave out an institution of their own creation’. See John Eudes Ruhangisa, “Litigation in the East African Court of Justice” (2006) 65 *The African Executive*. Online: African Executive <<http://www.africanexecutive.com/modules/magazine/articles.php?article=807>>.

<sup>24</sup> Application No. 1 of 2002 (COMESA Court of Justice, 2002).

*inter se*. Indeed, as already noted, of all the cases so far brought before the COMESA, EAC, ECOWAS courts as well as the Southern African Development Community Tribunal, only one involved interstate parties.<sup>25</sup> It appears African governments give preference to non-adversarial means of settling disputes.<sup>26</sup> The arbitral jurisdiction injects a measure of rule orientation into the processes of amicably settling interstate disputes.

Despite the importance of the arbitral jurisdiction and its apparent novelty, the relevant provisions in the treaties are scant. Left on their own, they could not provide meaningful guidance for the community courts when exercising that jurisdiction.<sup>27</sup> Happily, both the COMESA and EAC courts have adopted detailed rules on arbitration.<sup>28</sup> However, the rules leave complex issues unaddressed. If the issues are not addressed, they could undermine the utility of the jurisdiction. Among the issues are: the role that the goals or objects of economic integration should play in the arbitral process; the administrative costs of the community courts' dual jurisdiction; the competence of the judges to perform the dual role; whether the community courts lose their 'community' character and become private international commercial arbitration centres when they are exercising their arbitral jurisdiction; and the extent to which principles developed in the context of international commercial arbitration could be extended to arbitration in the context of economic integration.

From a public-private international law perspective, other issues emerge. Firstly, what substantive law governs arbitral proceedings before the community courts? Secondly, will arbitral proceedings before the community courts be subject to the supervisory jurisdiction of national courts of the place of arbitration? Presumably parties to arbitration could specify the governing law.<sup>29</sup> In cases where they do not, the issue becomes more difficult. Should the court apply

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<sup>25</sup> See *Eritrea v. Ethiopia* [1999] LawAfrica L.R. 6.

<sup>26</sup> The first continental instrument for the settlement of disputes between independent African states emphasized 'mediation, conciliation and arbitration' as the modes of settling disputes. See Protocol on the Commission of Mediation, *supra* note 13 art. XIX.

<sup>27</sup> EAC Treaty, *supra* note 7 art. 32, COMESA Treaty, *supra* note 7 art. 28, ECOWAS Treaty, *supra* note 7 art. 16.

<sup>28</sup> See East African Court of Justice Arbitration Rules, 2002, online: EAC <[http://www.eac.int/EACJ\\_Arbitration\\_Rules.pdf](http://www.eac.int/EACJ_Arbitration_Rules.pdf)> [EAC Arbitration Rules]; COMESA Arbitration Rules, *supra* note 8]. There appears to be no such rules out yet by the ECOWAS court.

<sup>29</sup> Under article XXIX: 2 of the Protocol of the Commission of Mediation *supra* note 13, the parties could specify which law was to be applied by the Arbitral Tribunal. In the absence of an agreement of the applicable law, the

community law, if there is any, on the issue in dispute, international law, the laws of the member states, or the law of a non-member state? The arbitration rules of the COMESA and EAC courts address these issues. Under Rule 6 of the EAC Arbitration Rules:

- (1) The Tribunal shall decide the dispute in accordance with the law chosen by the parties. But if the parties expressly authorise it to do so, the Tribunal shall decide on the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law.
- (2) The choice of the law or legal system of a designated state shall be construed, unless otherwise agreed by the parties, as directly referring to the substantive law of that state and not its rules of conflict of laws.
- (3) Failing a choice of the law by the parties, the Tribunal shall apply the rules of law it considers to be appropriate given all the circumstances of the dispute.
- (4) In all cases, the Tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction.<sup>30</sup>

Under Rule 24 of the COMESA Arbitration Rules:

1. (a) The Court shall apply the law designated by the parties as applicable to the substance of the dispute.  
  
(b) Failing such designation by the parties, the Court shall apply the law determined by the conflict of law rules, which it considers applicable.
2. The Court shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the Court to do so and if the law applicable to the arbitral procedure permits such arbitration.
3. In all cases, the Court shall decide in accordance with the terms of the contract and shall take into account the usage's of the trade applicable to the transaction.<sup>31</sup>

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Tribunal was to decide the dispute according to treaties concluded between the parties, international law, the Charter of the Organization of African Unity, the Charter of the United Nations and, if the parties agree, *ex aequo et bono*.

<sup>30</sup> This rule appears to have been borrowed from article 29 Kenya's Arbitration Act 1995, Chapter 4 of 1995 which has a similarly worded provision.

<sup>31</sup> This section appears to have been borrowed from section 28 of UNCITRAL Model Law on International Commercial Arbitration, which has a similarly worded provision. The Model Law's provision that 'any designation of

An issue unaddressed by either the treaty provisions or the Arbitration Rules of the courts is the extent to which community goals should or would inform the choice of law processes when the courts are exercising their arbitral jurisdiction. Party autonomy is upheld under the rules. However, they are silent on what limitations could or should be placed on parties' choice of the applicable law. It is now generally recognized that the choice of law process is not a neutral or disinterested exercise. Substantive and policy considerations underlie or may even compel the choice of the applicable law.<sup>32</sup> The communities definitely have an interest in ensuring that their laws are not circumvented through ingenious choice of law agreements by parties who conduct business within them.<sup>33</sup> An illustration of how parties' choice of the applicable law can be used to circumvent community law and how this may be judicially overcome is the ECJ's case of *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*<sup>34</sup>

Ingmar GB Ltd. (Ingmar) was a company established in the United Kingdom, and Eaton Leonard Technologies Inc. (Eaton) was a company established in California. They concluded a contract under which Ingmar was appointed as Eaton's commercial agent in the United Kingdom. The contract was governed by the law of the State of California. The contract was terminated in 1996. Ingmar instituted proceedings in England seeking, pursuant to Regulation 17 of Commercial Agents (Council Directive) Regulations 1993, compensation for damage suffered as a result of the termination of the contract. The regulation implemented Council Directive 86/653/EEC of 18 December 1986 on the Co-ordination of the Laws of the Member States relating to Self-employed Commercial Agents.<sup>35</sup> The directive was intended to harmonize the laws of member states.

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the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules' was omitted.

<sup>32</sup> Michael G. Martinek, "Look back before you Leap? Fateful Tendencies of Materialization and of Parallelism in Modern Private International Law Theory" [2007] 2 J. South Afr. L. 277; Christa Roodt, "The Integration of Substantive Interests and Material Justice in South African Choice of Law" (2003) 36 Comp. Int'l L.J. Southern Afr. 1; Lea Brilmayer, "The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules" (1995) 252 Recueil des Cours 9.

<sup>33</sup> On how parties can use the choice of law process to escape the state laws see Robert Wai, "Transnational Liftoff and Transnational Touchdown: The Regulatory Function of Private International Law in an Era of Globalization" (2002) 40 Colum. J. Transnat'l L. 209.

<sup>34</sup> *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, Case C-381/98, [2000] E.C.R. I-9305.

<sup>35</sup> [1986] O. J. L382/17.

The English Court of Appeal made a preliminary reference to the ECJ, and asked whether articles 17 and 18 of the directive must be applied where the commercial agent carried on his activity in a member state although the principal is established in a non-member state and a clause of the parties' contract stipulates that it is to be governed by the law of the non-member state. The court reasoned that articles 17 and 18 were mandatory. They were to protect, for all commercial agents, the freedom of establishment and the operation of undistorted competition in the internal market, and must be observed throughout the EC to achieve the objectives of the EC Treaty. The court held that it is essential for the community legal order that a principal established in a non-member state, whose commercial agent carries on his activity within the community, cannot evade those provisions by the simple expedient of a choice of law clause. To the court, the purpose served by the articles requires that they be applied where the situation is closely connected with the community, in particular where the commercial agent carries on his activity in the territory of a member state, irrespective of the law by which the parties intended the contract to be governed.

Rule 6(3) of the EAC court's arbitration rules provides a basis on which the interests of the EAC can be made to influence the choice of law process. In the absence of the parties' choice, the court can apply 'the rules of law it considers to be appropriate given all the circumstances of the dispute'. I argue that the interest of the EAC will be one such circumstance. Even in the absence of this provision, it can still be argued that the court should have and indeed has the inherent power to protect community interest. It should refuse recognition to a choice of law agreement which would undermine essential community objectives or laws. In addition to being forums for the settlement of disputes, the community courts should also see themselves as being entrusted with a mandate for serving as an engine for economic integration through their decisions.

An equally difficult issue is whether the community courts, when exercising their arbitral jurisdiction, would be subject to the supervisory jurisdiction of the courts of the place of arbitration. Naturally, these courts are located and sit in a specific country. But, unlike other arbitral tribunals, they are not governed by the procedural laws of the country in which they sit or, at least, this issue is unsettled. Nor is it settled whether, as in international commercial arbitration, arbitral proceedings before the community courts may be regulated by the national courts of the states in which they sit. Can national courts exercise supervisory jurisdiction over the community courts? Can national courts restrain arbitral proceedings before the community courts? Can national courts grant remedies in aid of the arbitration proceedings? The possibility of subjecting



the arbitral proceedings of the community courts to national laws and the supervisory jurisdiction of national courts will upset the balance of relations between community and national legal systems. Writing from the perspective of article 238 of the EC Treaty, Hartley has rightly observed that ‘...in many countries the activities of arbitrators are subject to the supervision of the court. There cannot, of course, be any question of this with regard to the European Court [of Justice]...’<sup>36</sup> In the case of the community courts, the issue remains open and needs to be clarified.

### 8.2.2.3 Enforcement of Community Arbitration Awards

Another issue arising from the arbitral jurisdiction of the community courts is the enforceability of their awards. As will be discussed below, it is envisaged that national courts will be used to enforce judgments of the community courts.<sup>37</sup> The same procedure is anticipated for the awards of the community courts.<sup>38</sup> Accordingly, it is to national laws on the enforcement of foreign arbitral awards that we must turn to examine whether community awards can be effectively enforced, and how the national laws might impact on the relations between community and national legal systems.

In Africa, the enforcement of foreign arbitral awards is regulated mainly by statute.<sup>39</sup> If an award does not qualify for enforcement under statute, many of which operate on the basis of reciprocity,<sup>40</sup> it is possible that it may be enforced at common law.<sup>41</sup> As of March 2009, thirty-one African countries were parties to the United Nations Convention on the Recognition and

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<sup>36</sup> Trevor Hartley, *The Foundations of European Community Law* (Oxford: Oxford University Press, 2003) at 443.

<sup>37</sup> See EAC Treaty, *supra* note 7 art. 44; COMESA Treaty, *supra* note 7 art. 40; ECOWAS Court Protocol, *supra* note 7 art. 24. See also *Southern African Development Community Protocol on Tribunal and Rules of Procedure Thereof*, 7 August 2000, online: SADC, <[www.sadc.int](http://www.sadc.int)> art 32(1)(2)(3) [SADC Tribunal Protocol].

<sup>38</sup> Rule 27(3) of the EAC Arbitration Rules, *supra* note 28 provides that ‘enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought’. Rule 22(1) of the COMESA Arbitration Rules, *supra* note 8 also provides that the arbitration award ‘shall be in the form of a judgment and shall be enforceable in terms of article 40 of the [COMESA] Treaty’.

<sup>39</sup> See e.g. Kenya: Arbitration Act, 1995, sec. 36-37; Zimbabwe: Arbitration Act, 1996, First Schedule, art. 35-36; Uganda: Arbitration and Conciliation Act, 2000, sec. 39-47; Zambia: Arbitration Act, 2000, sec. 30-31; Nigeria: Arbitration and Conciliation Act, 1990, sec. 51-52.

<sup>40</sup> With the exception of Djibouti and Rwanda, all African countries that are parties to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards have entered a reservation that they will apply the convention only to recognition and enforcement of awards made in the territory of another contracting state.

<sup>41</sup> James Fawcett & Janeen M. Carruthers, *Cheshire, North & Fawcett Private International Law*, 14th ed. (Oxford: Oxford University Press, 2008) at 652-654.

Enforcement of Foreign Arbitral Awards.<sup>42</sup> Therefore, the convention may also be important in the enforcement of awards in these countries. Subject to specified limitations, even under the convention, the enforcement of an arbitral award should be ‘in accordance with the rules of procedure of the territory where the award is relied upon...’.<sup>43</sup> Equally important for the enforcement of community awards may be the UNCITRAL Model Law on International Commercial Arbitration.<sup>44</sup> Its award enforcement provisions are very similar to those of the convention. As of March 2009, nine African countries - Egypt, Kenya, Madagascar, Mauritius, Nigeria, Tunisia, Uganda, Zambia, and Zimbabwe - had enacted legislation based on the model law.<sup>45</sup>

A perennial issue concerning the enforcement of foreign arbitral awards is the extent to which the enforcing court can or may review, set aside or modify an award. This power exists under the statutes of various African states which deal with the enforcement of foreign awards. For example, under sections 35 and 36 of Kenya’s Arbitration Act, 1995, the court may, on application of a party or *suo motu*, set aside or refuse to enforce an arbitral award.<sup>46</sup> To my knowledge, no exceptions have been made for awards from the community courts. In other words, an award from the EAC or COMESA court enjoys no privileged position as regards enforcement in Kenya and, indeed, in other African countries where such provisions exist.<sup>47</sup> In the context of economic integration, and with a view to ensuring the vertical community-state relations, this is an important issue. If national courts can review, set aside or modify a community court’s award that upsets the vertical relations which should exist between community and national courts. Generally, it will undermine the utility of the community arbitration process.

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<sup>42</sup> 10 June 1958, 330 U.N.T.S. 3 [New York Arbitration Convention]. As of March 2009, the following countries are parties to it: Algeria, Benin, Botswana, Burkina Faso, Cameroon, Central African Republic, Côte d’Ivoire, Djibouti, Egypt, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Mali, Mauritania, Mauritius, Morocco, Mozambique, Niger, Nigeria, Rwanda, Senegal, South Africa, Tunisia, Uganda, United Republic of Tanzania, Zambia, and Zimbabwe.

<sup>43</sup> *Ibid.* art. III.

<sup>44</sup> 21 June 1985, 24 I.L.M. 1302 [UNCITRAL Model Law].

<sup>45</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)

<sup>46</sup> Section 2 of the Act provides that it applies to both domestic and international arbitration.

<sup>47</sup> See e.g. Uganda, Arbitration and Conciliation Act, sec. 34.

The national statutes on the enforcement of foreign awards usually codify the grounds of non-enforcement contained in international conventions. The conventions provide grounds for non-enforcement which must be decided under ‘the law of the country where the award was made’ or ‘in accordance with the law of the country where the arbitration took place’.<sup>48</sup> From a relational perspective and in the context of economic integration, this raises two difficulties. The first, as noted above, is the possibility that the award may be denied recognition with the consequence that a judicial act of a community – an arbitration award - is rendered ineffective within a member state. The second is that a community judicial act will be validated in a member state using a national law instead of community law. The non-enforcement of a community award on grounds of non-compliance with the laws of the state in which the community court sat will upset vertical community-state relations. Let us assume, for example, the High Court of Kenya refuses to enforce an award from the EAC court because the court did not comply with Tanzanian law – the law of the place where the court is currently located. Such a position will mean the Kenyan court privileges the law of another member state rather than a judicial act of the EAC.

Perhaps, with a view to maintaining vertical community-state relations, a solution to these enforcement issues would be for communities to adopt a rule comparable to article 53 of the International Centre for the Settlement of Investments Disputes Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention).<sup>49</sup> It provides:

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

This provision prevents national courts from modifying or setting aside an award from the Centre. In other words, there can be no external review of an ICSID award. The ICSID Convention has its own self-contained procedures for reviewing awards. A party to an ICSID proceeding cannot initiate action before a national court to set aside or review the award; the court of a state

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<sup>48</sup> See UNCITRAL Model Law, *supra* note 44 sec. 36(a)(i)(iv)(v); New York Arbitration Convention, *supra* note 42 sec. V(a)(d)(e).

<sup>49</sup> 18 March 1965, 575 U.N.T.S. 159.

which is party to the convention is under an obligation to dismiss any such action. This distinct feature of the convention is important for the finality of ICSID awards. It provides a clear advantage over other international arbitration forums.<sup>50</sup>

As of November 2007, forty-five African countries were parties to the ICSID Convention.<sup>51</sup> Indeed, some have enacted legislation implementing the convention. Examples are Zimbabwe's Arbitration (International Investment) Act,<sup>52</sup> Zambia's Investment Dispute Convention Act,<sup>53</sup> and Kenya's Investment Dispute Convention Act.<sup>54</sup> Significantly, and compared with other statutes for the enforcement of foreign awards, none of the ICSID Convention-implementing statutes contain a provision which allows the court enforcing an award from the Centre to refuse to enforce it on any ground. Consistent with the provisions of the convention, what is provided is that the enforcing court should stay the enforcement proceedings for the parties to return to the Centre to settle their differences as regards the award.

I argue that if African governments are willing to privilege awards from an institution which is not of their creation and which sits in far away Washington D.C. USA, they should be more willing, or at least less reluctant, to extend similar privileges to awards emanating from a community court of their own creation, which sits on their doorstep, and whose judges are chosen by them. A national or community enactment comparable to article 53 of the ICSID Convention has the advantage of ensuring that an award from a community court will not be subject to national law in a manner that will undermine its effectiveness or enforceability, or upset vertical community-state relations. A privileged status for community awards might improve the chances of individuals choosing the community courts as the place to settle their disputes.

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<sup>50</sup> See Christopher H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001) at 1082-1084.

<sup>51</sup> Recently, the South African High Court criticized the fact that South Africa was not party to the Convention. See *Crawford Lindsay von Abo v. The Government of the Republic of South Africa*, Case No. 3106/2007 (High Court, South Africa, 2008).

<sup>52</sup> Laws of Zimbabwe, Chapter 7: 03.

<sup>53</sup> Laws of Zambia, Chapter 42.

<sup>54</sup> Laws of Kenya, Cap 522. See also Botswana: Settlement of Investment Disputes (Convention) Act, 1970, Act No. 65 of 1970; Lesotho: Arbitration International Investment (Disputes) Act, Act 23 of 1974; Malawi: Investment Disputes (Enforcement of Awards) Act, 1966, Act 46 of 1966; Nigeria: International Centre for Settlement of Investment Disputes (Enforcement of Awards) Decree, Decree No. 49 of 1967. For a survey of statutes implementing the ICSID Convention see Amazu A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge: Cambridge University Press, 2001) at 370-378.

Another issue worth noting relates to the position of states and community institutions in arbitral proceedings before the community courts. Because arbitration is consensual, a claim of immunity by a state or community institution from the jurisdiction of the community courts is unlikely to be made, let alone accepted. That may not be so when it comes to enforcing the award. This issue is left unaddressed in the treaties as well as the existing rules of the community courts on arbitration. It is submitted that the public policy considerations, which underlie the doctrine of sovereign immunity from execution,<sup>55</sup> can be consistently maintained even for awards emanating from community courts in the context of economic integration. Unlike the non-recognition of a community arbitral award on the basis of non-compliance with a national law, restrictions on the scope of assets available to satisfy a community arbitral award do not adversely affect the balance of the relations between community and national legal systems.

On the whole, the above exposition reveals that, for the effective implementation of the arbitral jurisdiction of the community courts, a number of issues must be addressed. This will ensure that the arbitral jurisdiction aids economic integration and also avoids unnecessary tensions between community and national legal systems. Perhaps the fact that, at present, the arbitral jurisdiction is seldom invoked has made these issues less immediate and concrete. Even so, these issues are important, and will become increasingly so as individuals become aware of the jurisdiction and utilize it to settle their disputes.

### **8.2.3 Enforcing Judgments of Community Courts**

#### **8.2.3.1 Introduction**

There has been a proliferation of community or international courts in recent decades. Currently, Africa is host to at least five active community courts.<sup>56</sup> The proliferation of international courts has been matched by an improvement in the legal status of individuals appearing before them. Historically, individuals have been granted no or restricted standing rights

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<sup>55</sup> See *Republic of Angola v. Springbok Investment Ltd.* 2005 (2) B.L.R. 159. It was held that a judgment obtained in a process arising under a commercial transaction could be executed only on some defined properties of a foreign sovereign state.

<sup>56</sup> Examples are: the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa; COMESA Court of Justice; ECOWAS Court of Justice; EAC Court of Justice; and SADC Tribunal.

before international courts.<sup>57</sup> The traditional view prevailed: only states are subjects of public international law. Recently, individuals have been granted *locus standi* to litigate before some international courts. What was essentially the preserve of states has witnessed a fundamental shift. Individuals can now bring action against states, international organizations and their institutions under various treaties.<sup>58</sup> In this context, individuals include all non-state entities such as natural persons, companies, associations and non-governmental organizations.

The granting of individual right of action has not been matched by a clear articulation, in the realm of private and public international law, of how successful individuals may enforce judgments secured from these courts. This is especially so when an individual wants to enforce the judgment before a national court. For example, how does an individual in whose favour a pecuniary award has been made against a community institution or a state go about enforcing the judgment? Should he rely on the goodwill of the community to pay? Can he rely on his country to diplomatically assist him secure the judgment debt? Can he proceed to a national court and enforce the judgment debt as a foreign judgment? What about a judgment which orders a state or community institution to do something, for example, an order to release goods unlawfully seized in breach of community law?

### **8.2.3.2 National Courts as Enforcers of Community Judgments**

Historically, various mechanisms have been used to enforce judgments of international courts. They include the use of international non-judicial institutions, self-help, and diplomatic negotiations. Generally, these mechanisms were devised at a time when the individual had no *locus standi* before international courts.<sup>59</sup> It was reasoned that ‘the function of enforcing a decision of an international tribunal is an executive function, and as such should be confined, in the ordinary case at any rate, to a body which is invested with executive powers. It becomes in any event, *a political*

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<sup>57</sup> See e.g. Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1055, art. 34(1). It must, however, be remembered that as far back as 1907, individuals had standing before the Central American Court of Justice.

<sup>58</sup> See e.g. COMESA Treaty, *supra* note 7 art. 26; SADC Tribunal Protocol, *supra* note 37, art. 15(1)(2); EAC Treaty, *supra* note 7 art. 30; ECOWAS Court Protocol, *supra* note 6, art. 10; Agreement establishing the Caribbean Court of Justice, 14 February 2001, art. XXIV; Agreement on the Statute of the Central American Court of Justice, 10 December 1992, 34 I.L.M. 921, art. 22(g).

<sup>59</sup> It is not being suggested here that these mechanisms have been ineffective in securing compliance with decisions of international courts. See generally Colter Paulson, “Compliance with Final Judgments of the International Court of Justice since 1987” (2004) 98 Am. J. Int’l L. 434; Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford: Oxford University Press, 2004).

as distinguished from a judicial matter'.<sup>60</sup> To Rosenne, 'in international law the separation of the adjudicative from the post-adjudicative phase is a fundamental postulate of the whole theory of judicial settlement ... this leads to the consequence that enforcement partakes of the quality of an entirely new dispute to be regulated by *political means*'.<sup>61</sup>

These observations suggest that international law did not contemplate direct enforcement of the decisions of international courts by national courts. Rather, it contemplates enforcement through diplomatic means. As between states, such an enforcement mechanism, which is power-oriented, is unproblematic. As between an individual and a state or international institution judgment debtor, the absence of a rule-orientated enforcement mechanism can be disadvantageous.

Historically, in the few cases which exist on the subject, national courts have been reluctant to recognize and/or enforce judgments of international courts at the instance of individuals who are directly or indirectly affected by the judgments. In *Socobel v. Greek State*,<sup>62</sup> a company sought to enforce a judgment of the Permanent Court of International Justice before a Belgian national court. The action failed because the company was not, and indeed, could not have been, a party to the action before the Permanent Court. To the Belgian court, it was inconceivable that, 'a party which, by definition, was not admitted to the bar of an international court should be able to rely on a decision in a case to which it was not a party'.<sup>63</sup> More recently, the Supreme Court of the USA held that a judgment of the International Court of Justice (ICJ) was not directly enforceable as domestic law and could therefore not prevail over state procedural rules.<sup>64</sup> Like *Socobel*, this action was instituted by an individual who was not party to the ICJ proceedings. It is open to question

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<sup>60</sup> Manley O. Hudson, *International Tribunals, Past and Future* (Washington, Carnegie Endowment International Peace and Brookings Institute, 1944) at 128 [emphasis added].

<sup>61</sup> Shabtai Rosenne, *The International Court of Justice: An Essay in Political and Legal Theory* (Leyden: AW Sijthoff, 1957) at 102 [emphasis added].

<sup>62</sup> *Socobel v. Greek State* (1951) 18 Int'l L. Rep. 3.

<sup>63</sup> *Ibid.* at 5. See also *Committee of United States Citizens Living in Nicaragua v. Ronald Wilson Reagan*, 859 F.2d 929, 934, 938 in which the court dismissed the plaintiff's claims on the ground that private parties have no cause of action to enforce in a US court an International Court of Justice (ICJ) decision given as a result of a claim brought by the government of Nicaragua against the US. In the opinion of the court, because only nations can be parties before the ICJ, the plaintiffs were not 'parties' within the meaning of this article 94(2) of the UN Charter and that article did not contemplate that individuals, having no relationship to the ICJ case, should enjoy a private right to enforce ICJ decisions.

<sup>64</sup> *Jose Ernesto Medellin v. Texas* 128 S. Ct 1346 (2008).

whether both judgments would have been different had the international judgments been issues as a result of actions instituted directly by the affected individuals.

Notwithstanding this judicial reluctance, it has long been recognized that diplomatic protection is ineffective or often inaccessible to individuals who seek to rely on or enforce judgments of international courts. Some commentators advocate using national courts to enforce judgments of international courts.<sup>65</sup> For example, Reisman advocated an enhanced role for national courts in enforcing the judgments of the ICJ.<sup>66</sup> He proposed a ‘*Draft Protocol for the Enforcement of I.C.J. Judgments*’. Signatories to this protocol were to undertake ‘to enact such internal legislation as is necessary to require domestic courts and tribunals to enforce international judgments, and rights arising thereon, solely and exclusively upon certification of the authenticity of said judgment’.<sup>67</sup> Schachter had earlier suggested that there seemed to be ‘good reasons’ for national courts to recognize international awards.<sup>68</sup> Nantwi left open the possibility of using national courts to enforce judgments of international courts, and noted that ‘the special circumstances of any particular case’ may merit this.<sup>69</sup> Jenks also discussed the possibility that specific judgments of international courts may be treated as equivalent to a foreign judgment and enforceable by municipal procedures available for the enforcement of such foreign judgments.<sup>70</sup>

These suggestions by commentators have now found their way into treaties.<sup>71</sup> Some of Africa’s economic integration treaties contain provisions that seek to use national courts to enforce

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<sup>65</sup> See generally M.E. O’Connell, “The Prospect for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua’s Judgment against the United States” (1990) 30 *Virginia J. Int’l L.* 891; D.M. Reilly & S. Ordonez, “Effect of the Jurisprudence of the International Court of Justice on National Courts” (1995-1996) 28 *New York Uni. J. Int’l L. & Politics* 435; Roger P. Alford, “Federal Courts, International Tribunals and the Continuum of Deference” (2003) 43 *Va. J. Int’l L.* 676 at 715-731.

<sup>66</sup> W.M. Reisman, “The Enforcement of International Judgments” (1969) 63 *Am. J. Int’l L.* 1 at 25.

<sup>67</sup> *Ibid.* at 27.

<sup>68</sup> Oscar Schachter, “Enforcement of International Judicial and Arbitral Decisions” (1960) 54 *Am. J. Int’l L.* 1 at 13.

<sup>69</sup> E.K. Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law* (A.W. Sijthoff Leyden, 1966) at 145.

<sup>70</sup> C. Wilfred Jenks, *The Prospect of International Adjudication* (London: Stevenson & Sons, 1964) at 681-682, 706-715.

<sup>71</sup> It must be noted that, even before these suggestions, the use of national courts to enforce international judgments - in this case decisions of the Council of Ministers and the European Commission of the European Economic Community - had been provided for in article 192 (now 256 of the EC Treaty) of the Treaty establishing the European Economic Community.



judgments of community courts. Article 44 of the EAC Treaty provides that ‘the execution of a judgment of the [EAC court] which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Partner State in which the execution is to take place’. Similar provisions are found in the ECOWAS and COMESA treaties.<sup>72</sup> There are two notable differences in the provisions. Firstly, while the EAC and COMESA provisions refer to judgments which impose ‘a pecuniary obligation’, the ECOWAS Court Protocol refers to ‘any judgments’.<sup>73</sup> For individuals litigating before community courts, this is significant as some of the courts’ judgments are likely to be for non-pecuniary relief. Secondly, it appears that national courts in COMESA and the EAC have the discretion to enforce such judgments. Under the ECOWAS Court Protocol, enforcement, which is to be made by a designated competent national authority, is mandatory.

The Statute on the African Court of Justice and Human Rights<sup>74</sup> adopts a different approach to enforcing judgments of the court. The statute does not envisage using national courts to enforce its judgments. Under article 46(3) parties ‘guarantee’ execution of judgments. Non-compliance may be referred by the court to the Assembly of Heads of State and Government, which shall decide on measures to be taken to give effect to the judgment. There is also a general undertaking by the contracting parties to refrain from measures that will hinder the attainment of the objectives of the AEC.<sup>75</sup> This expectation has been described as ‘naive’ given past experience with the enforcement of judgments from international courts in Africa.<sup>76</sup>

The provisions, which seek to adopt national rules for enforcing foreign judgments to enforce the judgments of community courts, provide a means of linking community and national legal systems. They aim at integrating community and national judicial structures, and offer an opportunity for co-operation and dialogue between them. This opportunity should be explored to

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<sup>72</sup> See also SADC Tribunal Protocol, *supra* note 37, art. 32(1)(2)(3); Treaty establishing the Organisation for the Harmonisation of Business Laws in Africa, art. 25; Agreement establishing the Caribbean Court of Justice, *supra* note 58 art 26; Statute of the Central American Court of Justice, *supra* note 58 art 39; EC Treaty, *supra* note 21 art. 256.

<sup>73</sup> COMESA Treaty, *supra* note 7 art. 40; ECOWAS Court Protocol, *supra* note 7 art. 24(2); EAC Treaty, *supra* note 7 art. 44.

<sup>74</sup> *Supra* note 15.

<sup>75</sup> AEC Treaty, *supra* note 4 art. 5.

<sup>76</sup> Gino J. Naldi & Konstantinos D. Magliveras, “The African Economic Community: Emancipation for African States or Yet another Glorious Failure?” (1999) 24 N.C. J. Int’l L. & Comm. Reg. 601 at 614.

enhance integration in their respective sub-regions. For individuals, these provisions represent a positive change in the direction of international law. The post-adjudicative phase of litigation before international courts is often politicized. There is inherent in the traditional international law enforcement mechanisms elements of power relations that weigh heavily against individual judgment creditors. Although it has its own challenges, enforcement through national courts is rule-oriented, and can therefore be beneficial to individuals.

The provisions which seek to use national courts to enforce community judgments are yet to be tested. However, there have been a few instances in which the community courts have made pecuniary awards in favour of individuals. For example, in *Muleya v. Common Market for Eastern and Southern Africa (No. 3)*,<sup>77</sup> the COMESA court awarded damages of \$2000 against the respondent for publishing defamatory matter about the applicant. More recently, the ECOWAS court award damages of \$100,000 in favour of an applicant, a journalist who was unlawfully detained by the Gambian government,<sup>78</sup> and compensation of CFA Francs 100,000 in favour of an applicant who was adjudged to have been enslaved in Niger.<sup>79</sup> These cases make an examination of the issue of using national courts to enforce community judgments more than one of theoretical importance. Can these individual judgment creditors use national courts within COMESA and ECOWAS to enforce the judgments as envisaged under the laws of both communities? It is suggested that, these individual judgment creditors are likely to face a number of challenges which, so far, have not been addressed in the literature on the community courts.

### 8.2.3.3 Challenges of using National Courts

There are a number of challenges in trying to use national courts to enforce community judgments. Among the challenges are the following. Firstly, can the existing national common law and statute law regimes for the enforcement of foreign judgments be suitably adapted for the purpose of enforcing community judgments?<sup>80</sup> Secondly, if they can be suitably adapted, can national courts review community judgments? Thirdly, will the use of civil procedure rules, which

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<sup>77</sup> [2004] 1 East Afr. L.R. 173.

<sup>78</sup> *Manneh v. The Gambia*, ECW/CCJ/JUD/03/08 (ECOWAS Court of Justice, 2008).

<sup>79</sup> *Mme Hadijatou Mani Koraou v. The Republic of Niger*, ECW/CCJ/JUD/06/08 (ECOWAS Court of Justice, 2008).

<sup>80</sup> See e.g. the United Kingdom's European Communities (Enforcement of Community Judgments) Order, SI 1972/1590, which provides a distinct regime for the enforcement of community judgments, including judgments of the European Court of Justice.

differ from country to country, afford equal or adequate protection to individual judgment creditors? If these challenges are not addressed, then they may deny individuals the benefits of the judgments, and could also undermine the relations between national and community courts. In general, I argue that, given the demands of economic integration, the extant national regimes for the enforcement of foreign state court judgments cannot, unthinkingly, be extended to community judgments.

The effective enforcement of community judgments will demand review of national laws. For example, it is envisaged, under Rule 41(4) of the Rules of the Court of Justice of the Common Market for Eastern and Southern Africa [COMESA Court Rules]<sup>81</sup>, that penalties imposed on non-attending witnesses will be enforced by national courts under the provision of article 40 of the COMESA Treaty. This may, however, not be possible in some COMESA countries. Under both the common law and statute law, the court will not enforce a judgment which is a penalty.<sup>82</sup> Thus, the effective implementation of this Rule, which is essential for the administration of justice within the COMESA, will demand changes in the laws of some member states.

The use of national courts to enforce community judgments also raises constitutional questions as to the relations between community and national courts: what limitations exist on the constitutionally-conferred jurisdictional powers of national courts when it comes to enforcing community judgments? Can national courts review those judgments, set them aside or modify them? So far, there appear to be no answers to these questions. National courts are slow to review foreign state judgments. However, the power to review remains, especially where there is allegation of fraud. If national courts review community judgments, it will undermine the administration of justice within the community, and render the community's legal system subject to the varying demands of member states' laws. I propose that, firstly, in the context of economic integration, national courts should not have the power to review or invalidate community judgments.<sup>83</sup> Secondly, national courts should not have jurisdiction to decline to enforce

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<sup>81</sup> COMESA Legal Notice No. 6 of 2003, 8 April 2003, online: COMESA <[http://www.comesa.int/institutions/court\\_of\\_justice/rules/view](http://www.comesa.int/institutions/court_of_justice/rules/view)>.

<sup>82</sup> See e.g. Kenya: Foreign Judgment (Reciprocal Enforcement) Act, Cap 43, sec. 3(b); Zimbabwe: Civil Matters (Mutual Assistance) Act 14 of 1995, sec 6(h)(ii).

<sup>83</sup> See generally Michael W. Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (New Haven: Yale University Press, 1971).

community judgments. This is especially so when the applicable law for such a decision will be national law.

The former proposition finds support in international law. In the *Chorzow Factory* case,<sup>84</sup> the Permanent Court of International Justice held that a national court did not have the power to invalidate an international judgment. Both propositions are consistent with the view that the community legal system should not be subjected to national legal systems. Admittedly, both propositions offend the long-established discretion in national courts to enforce foreign judgments. They also challenge national constitutions which make the judiciary the ultimate source of judicial power. To grant community judgments this privileged status will require amendment of national laws. At the community level, the acceptance of these propositions demands greater responsibility from community courts to ensure the integrity of the processes that result in their judgments. This will make up for the proposed absence of discretion in national courts to decline to enforce them.

Another drawback in using the existing national regimes to enforce community judgments is that some do not provide for the enforcement of non-monetary judgments. However, in the context of economic integration, non-monetary judgments are more likely to be a major component of community judgments.<sup>85</sup> There is a movement in some countries towards enforcing foreign non-monetary judgments.<sup>86</sup> With the exception of South Africa, which is currently considering proposals to enforce non-monetary judgments, Africa remains largely insulated from this movement.<sup>87</sup>

Most community judgments are likely to be against sovereign states. It is thus troubling that the treaties are silent on the issue of state immunity from enforcement actions at the national

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<sup>84</sup> (1928) Permanent Court of International Justice Series A/No. 17 at 33.

<sup>85</sup> For a discussion of the various kinds of judgments given by international courts and their implications for enforcement see Jenks, *supra* note 70 at 667-688.

<sup>86</sup> Examples are Australia, New Zealand, Singapore, Canada and the European Community. See Richard F. Oppong, "Enforcing Foreign Non-Money Judgments: Some Recent Developments in Canada and Beyond" (2006) 39 U.B.C. L. Rev. 257 at 276-282; Richard F. Oppong, "Canadian Courts Enforce Foreign Non-Money Judgments" (2007) 70 Modern L. Rev. 670; Stephen G.A. Pitel, Enforcement of Foreign Non-monetary Judgments in Canada (And Beyond) (2007) 3 J. Priv. Int'l L. 241.

<sup>87</sup> See South African Law Reform Commission [SALRC], *Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters-Project 121* (2006) at [4.2.17]-[4.2.25], online: SALRC <[http://www.doj.gov.za/salrc/reports/r\\_prj121\\_2006dec.pdf](http://www.doj.gov.za/salrc/reports/r_prj121_2006dec.pdf)>.

level. States often enjoy exemption from execution against their assets in their own territory or elsewhere.<sup>88</sup> Thus, national law on this issue will be highly relevant regarding enforcement actions brought by individual judgment creditors. A successful claim of immunity from execution will rob individuals of the benefits of a community judgment. Although there has been a perceptible trend towards restrictive state immunity, it still remains a formidable challenge.<sup>89</sup>

The above has assumed that the provisions in the community treaties which seek to use national courts to enforce community judgments are binding on national courts. However, the absence of domestic legislation, especially in dualist countries, implementing the community treaties<sup>90</sup> raises questions as to the binding effect of the provisions. A treaty is not effective within a state unless implemented by domestic legislation.<sup>91</sup> Without domestic legislation, courts may be incompetent to give effect to the provisions and use them as the basis to enforce community judgments. From a comparative perspective, this problem appears to have been explicitly acknowledged by the drafters of article 26 of the Agreement establishing the Caribbean Court of Justice.<sup>92</sup> Accordingly, they provided: ‘The Contracting Parties agree to take all the necessary steps, *including the enactment of legislation* to ensure that ... any judgment, decree, order or sentence of the Court given in the exercise of its jurisdiction shall be enforced by all courts and authorities in any territory of the Contracting Parties as if it were a judgment, decree, order or sentence of a superior court of that Contracting Party’. Reisman’s *Draft Protocol for the Enforcement of I.C.J. Judgments* also suggested the need to enact ‘internal legislation’. It is unfortunate that the community treaties do not recognize, or at least are silent, on the need for domestic legislation, especially on this issue. To my knowledge, no African country has as yet enacted legislation on the enforcement of community judgments.

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<sup>88</sup> See *Republic of Angola v. Springbok Investment*, *supra* note 54; *Emmanuel Bitwire v. The Republic of Zaire* [1998] I Kampala L.R. 21.

<sup>89</sup> See generally Jeremy Ostrander, “The Last Bastion of Sovereign Immunity: A Comparative look at Immunity from Execution of Judgments” (2004) 22 Berkeley J. Int’l L. 540; James Crawford, “Execution of Judgments and Foreign Sovereign Immunity” (1981) 75 Am. J. Int’l L. 820.

<sup>90</sup> The exception is the EAC Treaty which has been given the force of law in Kenya, Uganda and Tanzania. See Tanzania: Treaty for the Establishment of East African Community Act, 2001, (Act No. 4); Kenya: Treaty for the Establishment of East African Community Act, 2000, (Act No. 2); Uganda: East African Community Act, 2002.

<sup>91</sup> *The Parlement Belge* (1879) 4 P.D. 129; *A-G of Canada v. A-G of Ontario* [1937] A.C. 326 at 347.

<sup>92</sup> *Supra* note 58.

Legislation is particularly important for a community judgment raises issues which are not present with a foreign state judgment for which the existing national regimes have been designed. For example, unlike a foreign state judgment, which has its sole source in a foreign state, a judgment from a community court may actually be a ‘review’ of an earlier decision of a court of the country in which the enforcement is now sought. Ordinarily, this would be a conflicting judgment and, therefore, unenforceable.<sup>93</sup> Let’s assume, after exhausting local remedies, an individual proceeds to a community court.<sup>94</sup> He obtains a judgment contrary to that of national courts that the individual had ‘exhausted’. His attempt to enforce the community judgments may meet significant challenges. Firstly, a national court will be reluctant to enforce a judgment which contradicts its own judgment, and, even more so, if the first judgment was from a superior court in that country. It is worth pointing out that, at present, there are no constitutionally-mandated hierarchical relations between national and community courts. The community courts exist outside national judicial structures. Accordingly, without legislation, a national court is not bound by decisions of any community court no matter how exalted the community court is.

Secondly, from the above illustration, the community judgment will, in principle, be a review of earlier decisions of national courts. In some countries, this will raise a constitutional question as to the *locus* of final judicial power.<sup>95</sup> For example, under article 125(3) of the Constitution of the Republic of Ghana, the judicial power of Ghana shall be vested in the Judiciary and neither ‘the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power’.<sup>96</sup> Ordinarily, this is a classic separation of powers provision. However, when read in the context of international adjudication and its effect on states, it is debatable whether it would be constitutional to give the ECOWAS court final judicial power in Ghana, even if that power was restricted to defined matters. In the absence of a specific constitutional provision, which makes community law supreme over domestic law, transfers some

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<sup>93</sup> Various solutions to the enforcement of conflicting foreign judgments have been suggested. See Wolff, M, *Private International Law* (Oxford: Clarendon Press, 1962) at 263; *Showlag v. Mansour* [1995] 1 A.C. 431 Council Regulation (EC) No. 44/2001 Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, sec. 34(4), [2001] O. J. L 012/1; and American Law Institute, *Restatement of the Law, Second: Conflict of Laws* (St. Paul Minnesota, 1971) section 114.

<sup>94</sup> See e.g. COMESA Treaty, *supra* note 7 art. 26.

<sup>95</sup> Julian G. Ku, “International Delegation and the New World Court Order” (2006) 81 *Was L. Rev.* 1.

<sup>96</sup> See also Constitution of the Republic of Sierra Leone, 1991, art. 120; Constitution of the Republic of South Africa, art. 165.

state powers to the community, or legislation to regulate enforcement in such cases, enforcing a community judgment could amount to an unconstitutional subjection of Ghana's legal systems to the community legal system.<sup>97</sup>

The above exposition reveals that, as in the case of community arbitral awards, the proposed use of national courts to enforce community judgments is riddled with problems. So far, these problems have not been carefully thought through, let alone resolved. Member states of the communities should examine these problems and legislate to resolve them. There is the need for community input here to ensure that community judgments are not subjected to varying national laws, which might result in accordingly dissimilar effect to community judgments. For example, as regards pecuniary judgments, national law may vary on issues such as prescription, the currency in which the obligation may be discharged, and the mode of calculating interest on the judgment. Indeed, what is needed is detailed and well-considered community law setting out the legal framework for the enforcement of community judgments in member states. Simply providing that the execution of community judgments shall be governed by the rules of civil procedure in force in the member state in which enforcement is sought is not enough. Various reasons have been given for non-compliance with community judgments, including arguments about national sovereignty, absence of strong economic interdependence among African countries, and a preference for negotiation instead of adjudication.<sup>98</sup> Whether the use of national courts to enforce community judgments will assist individuals overcome or bypass these argument remains to be seen.

#### **8.2.4 Conflict of Jurisdictions between Community Courts**

Recent decades have witnessed a proliferation of international and community courts. This has brought up the issue of conflict of jurisdictions and how it affects the effective administration of justice. Conflict of jurisdiction exists when the same issue between the same parties is pending before two or more courts.<sup>99</sup> A feature of Africa's economic integration is the multiplicity of

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<sup>97</sup> Similar concern has been raised in the USA about the possibility of North American Free Trade Agreement's Chapter 11 Tribunals reviewing decisions of USA courts. See generally *Loewen Group Inc. v. United States*, 42 I.L.M. 811; *Mondev International Ltd. v. United States*, 42 ILM 85; Pieter H.F. Bekker, "The Use of Non-domestic Courts for obtaining Domestic Relief: Jurisdictional Conflicts between NAFTA Tribunals and U.S. Courts?" (2004-2005) 11 ILSA J. Int'l & Comp. L. 331.

<sup>98</sup> Kofi Oteng Kufour, "Securing Compliance with the Judgments of the ECOWAS Court of Justice" (1996) 8 Afr. J. Int'l & Comp. L. 1 at 6-11.

<sup>99</sup> Shany, *supra* note 2 at 24-28.

communities and their respective courts with potentially overlapping jurisdictions.<sup>100</sup> Overlapping jurisdictions result from the fact that states are often members of more than one community and the subject matter jurisdiction of community courts is primarily identical, namely, to interpret and apply the often similarly-worded treaties of the communities. States and individuals may have standing before multiple community courts on the same subject matter. This is especially so since it does not appear that the jurisdiction of the community courts is exclusive to the jurisdiction of other courts and, thus, parties may forum shop in a manner which is currently unregulated. This state of affairs may lead to conflict of jurisdictions and other related problems, such as parallel proceedings and conflicting judgments.<sup>101</sup>

The issue of conflicting jurisdictions between international courts and how to approach or resolve them is not an ‘African problem’.<sup>102</sup> Nor will such conflicts be limited to inter-African community courts. They can take the form of a conflict between the jurisdiction of an African community court and another international court. For example, article 28(d) of the Statute on the African Court of Justice and Human Rights<sup>103</sup> gives the African Court of Justice jurisdiction over ‘any question of international law’. This sets up a potential direct conflict with the jurisdiction of the ICJ,<sup>104</sup> and the WTO dispute-settlement institutions. In principle, there is nothing which prevents two African states from submitting a trade dispute arising under a WTO agreement – which is ‘international law’ – to the African Court of Justice. Similarly, conflict may exist between the jurisdiction of the community courts and that of the WTO dispute-settlement institutions on

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<sup>100</sup> See Maurice Oduor, “Resolving Trade Disputes in Africa: Choosing between Multilateralism and Regionalism: The Case of COMESA and the WTO” (2005) 13 *Tulane J. Int’l & Comp. L.* 177; Joost Pauwelyn, “Going Global, Community, or Both - Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdiction” (2004) 13 *Minn. J. Global Trade* 231; Kenneth P. Kiplagat, “Jurisdictional Uncertainties and Integration Processes in Africa: The Need for Harmony” (1995-1996) 4 *Tulane J. Int’l & Comp. L.* 43. See generally Rafael Leal-Arcas, “Choice of Jurisdiction in International Trade Disputes: Going Regional or Global?” (2007) 16 *Minn. J. Int’l L.* 1.

<sup>101</sup> This problem should be distinguished from issues of conflict of jurisdictions. Conflicting judgments deal with conflicts between the jurisprudence, both in terms of the principles developed and the remedies provided, by the relevant courts. However, the two problems are related. For example, inconsistent principles developed by community courts may encourage forum shopping and give rise to the prospect of conflict of jurisdictions.

<sup>102</sup> Shany, *supra* note 2.

<sup>103</sup> *Supra* note 15.

<sup>104</sup> See Charter of the United Nations, 26 June 1945, 1 U.N.T.S. XVI arts. 33 and 95; and Statute of the International Court of Justice, *supra* note 57 art. 36(2).



issues relating to international trade.<sup>105</sup> Proceedings before the judicial institutions of the EC and NAFTA have been fertile sources of conflict with WTO dispute settlement proceedings.<sup>106</sup> Another source of conflict could be the African community courts.

In contrast with developments elsewhere,<sup>107</sup> there are, at present, no treaty provisions for resolving potential conflicts between the community courts, and between the community courts and other international courts.<sup>108</sup> The Protocol on Relations between the African Union and the Regional Economic Communities [Protocol on Relations]<sup>109</sup> is equally silent on this issue. The absence of conflict-of-jurisdictions-resolution provisions is troubling. In international law, jurisdictional co-ordination between international courts is largely not mandatory. It is often subject to the goodwill of individual judges.<sup>110</sup> There is, therefore, no defined set of rules that African judges confronted with this problem can readily resort to. One would have expected that, with a view to ensuring jurisdictional harmony among the community courts, conflict-of-jurisdictions-resolution provisions would have been included in the Protocol on Relations. Conflict of jurisdictions between community courts can undermine the effectiveness of the overarching AEC legal system.

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<sup>105</sup> So far, Africa's participation in the WTO dispute settlement process has been minimal. This lowers, but does not eliminate the prospect for such conflicts. See generally, Victor Mosoti, "Africa in the First Decade of WTO Dispute Settlement" (2006) 9 J. Int'l Econ. L. 427; Amin Alavi, "African Countries and the WTO Dispute Settlement Mechanism" (2007) 25:1 Development Policy Rev. 25; Z. Ntozintle Jobodwana, "Participation of African Member States in the World Trade Organization Dispute Settlement Mechanism" (2009) 2 Int'l J. Priv. L. 206.

<sup>106</sup> Shany, *supra* note 2 at 54-59 where he chronicles some of the cases revealing this conflict.

<sup>107</sup> See e.g. EC Treaty, *supra* note 21 art. 292; *Treaty creating the Court of Justice of the Cartagena Agreement*, 28 May 1979, 18 I.L.M. 1203 (as amended by *Treaty creating the Court of Justice of the Andean Community*, 28 May 1996) art. 42(1); *North American Free Trade Agreement*, 17 December 1992, 32 I.L.M. 605, art. 2005; *Olivos Protocol for the Settlement of Disputes in Mercosur*, 18 February 2002, 2251 U.N.T.S. A-37341, 42 I.L.M. 2, art. 1(2). The issue of whether the WTO will uphold these forum selection clauses in matters over which it too has jurisdiction remains undecided. See *Mexico-Tax Measures on Soft Drinks and other Beverages*, WT/DS308/AB/R, 2006 at [54] (Appellate Body).

<sup>108</sup> Articles 17, 18 and 19 of the SADC Tribunal Protocol, *supra* note 37 grants the Tribunal exclusive jurisdiction over all disputes between the member states and the community, natural or legal persons and the community, and between the community and its staff. It can, however, be argued that this is not enough since the provisions do not appear to bar parties from litigating elsewhere even if the latter court may subsequently decline jurisdiction.

<sup>109</sup> Online: <<http://www.afrimap.org/english/images/treaty/AU-RECs-Protocol.pdf>>.

<sup>110</sup> Shany, *supra* note 2 at 109.

Historically, the East African Community was attentive to the problem of conflict of jurisdictions. Article 41(1) of the Treaty for East African Co-operation<sup>111</sup> provided that ‘the Partner States undertake not to submit a dispute concerning the interpretation or application of this Treaty, so far as it relates to or affects the Common Market, to any method of settlement other than those provided for in this Treaty’. It is quite intriguing that this provision is not in the present EAC Treaty. Indeed, given the proliferation of community and international courts, this is the time when such a provision would be very much needed.

In the absence of conflict of jurisdiction-resolution provisions, community judges may have to resort to jurisdiction regulating norms that have been applied by national judges to address similar issues in the area of international litigation. In private international law, the common law doctrines of comity<sup>112</sup> and *forum non conveniens*, and respect for party autonomy as regards choice of forum agreements serve as jurisdiction-regulating norms between national courts.<sup>113</sup> They may provide a solution to the problem of conflicting jurisdictions between the community courts.<sup>114</sup> Indeed, the ECOWAS court has already invoked one of the doctrines. In *Chukwudolue v. Republic of Senegal*,<sup>115</sup> it declared itself incompetent to hear the case on the grounds of a choice of forum clause in a document submitted by the plaintiff. The clause provided that claims were to be referred to ‘the World Court at the Hague or the International Court of Arbitration’.

*Chukwudolue* affirms the relevance of private international law doctrines in resolving conflicts of jurisdictions between community courts. However, it is suggested that in their application of private international law doctrines, community courts should prioritize the interests of the community. Given the nature and demands of economic integration, disputes affecting the interests of a community should be submitted exclusively to its community court or, at least, there

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<sup>111</sup> 6 June 1967, 6 I.L.M. 932.

<sup>112</sup> See Caroline Henckels, “Overcoming Jurisdictional Isolationism at the WTO – FTA Nexus: A Potential Approach for the WTO” (2008) 19 Eur. J. Int’l L. 571 at 594-596 on using comity to regulate conflict of jurisdiction between WTO dispute settlement institutions and other dispute settlement bodies. Lawrence Collins, “Comity in Modern Private International Law” in J.J. Fawcett ed., *Reform and Development of Private International Law – Essays in Honour of Sir Peter North* (Oxford: Oxford University Press, 2002) 89.

<sup>113</sup> See generally Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford: Oxford University Press, 2003).

<sup>114</sup> See generally Jenny S. Martinez, “Towards an International Judicial System” (2003-2004) 56 Stanford L. Rev. 429.

<sup>115</sup> Judgment No. ECW/CCJ/APP/07/07 (ECOWAS Court of Justice, 2007).

should be a presumption in favour of litigating such disputes before its community court.<sup>116</sup> Accordingly, community courts should be slow to decline jurisdiction or stay proceedings in favour of another court in such disputes.

### **8.2.5 Judicial Co-operation between Community and National Courts**

The jurisprudence of African national courts reveals instances where they have grappled with judicial co-operation with foreign courts. In these instances, issues including the service of documents abroad and admissibility of foreign evidence were discussed.<sup>117</sup> Indeed, international judicial co-operation is now indispensable for the effective administration of justice in cases involving a foreign element. Some African countries have responded to this by becoming parties to international treaties dealing with judicial co-operation. Four African countries – Egypt, Botswana, Malawi, and Seychelles – are parties to The Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters,<sup>118</sup> and two – South Africa and Seychelles – are parties to The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.<sup>119</sup>

Presently, no regional or continental convention on judicial co-operation exists in Africa. The legal framework for judicial co-operation with foreign courts in civil matters is regulated by national statutes.<sup>120</sup> However, the same cannot be said of co-operation with international courts, especially when they are exercising ‘civil’ jurisdiction. Admittedly, when most of these statutes were enacted, international courts were rare, especially in Africa. With the emergence of community courts, the importance of providing a legal framework to regulate judicial co-operation between community courts and national courts, and perhaps among community courts themselves, is evident. Can national courts help community courts to gather evidence from member states? Can

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<sup>116</sup> Shany, *supra* note 2 at 211-212.

<sup>117</sup> See e.g. *Fonville v. Kelly III* [2002] 1 East Afr. L.R. 71; *Willow Investment v. Mbomba Ntumba* [1997] T.L.R. 47; *Microsoft Corp. v. Mitsumi Computer Garage Ltd.* [2001] K.L.R. 470; *Pastificio Lucio Garofalo SPA v. Security & Fire Equipment Co.* [2001] K.L.R. 483; *Mashchinen Frommer GmbH v. Trisave Engineering & Machinery Supplies (Pty) Ltd.* 2003 (6) S.A. 69; *Blanchard, Krasner & French v. Evans* 2004 (4) S.A. 427.

<sup>118</sup> 15 November 1965, 20 U.S.T. 361.

<sup>119</sup> 18 March 1970, 23 U.S.T. 2555.

<sup>120</sup> See e.g. Kenya: Civil Procedure Act, Chapter 21, sec. 55. It provides that ‘commissions issued by foreign courts for the examination of persons in Kenya shall be executed and returned in such manner as may be from time to time be authorized by the High Court’; Uganda: Foreign Tribunals Evidence Act, Chapter 10 and Civil Procedure Act, Chapter 71, sec. 56.

national courts help to serve documents on natural and legal persons within their jurisdiction? If they can, what will be the legal basis and procedure for such co-operation? Do the legal basis and procedure provide an adequate regime to ensure efficient administration of justice at the community level? Will a community court stay its proceedings if a similar issue is pending before a national court? Will procedures adopted by national courts in co-operating with community courts be conducive to the effectiveness of community law?

These are important issues which have not been examined in the discourse on community courts in Africa. Apart from legislation in Zimbabwe, there does not appear to be any statute that explicitly envisages judicial co-operation with an international court. Zimbabwe's Civil Matters (Mutual Assistance) Act, 1995, allows the Minister of Justice to extend provisions of the Act to 'any international tribunal'.<sup>121</sup> To my knowledge, this is the first provision of its kind in the field of judicial co-operation in civil matters in Africa.<sup>122</sup> With the proliferation of community courts in Africa, the importance of such co-operation for the effective administration of justice cannot be overemphasized.

Unfortunately, treaties and laws on the community courts have not provided a clear legal framework for co-operation between them and national courts on issues such as taking evidence, summoning witnesses and serving documents.<sup>123</sup> It appears that the only area where co-operation is explicitly anticipated, and a framework provided for, is that of enforcing community judgments. Surely, judicial co-operation goes beyond the enforcement of judgments. The need for co-operation with national courts is important, especially as the community courts allow individuals to litigate directly before them and also have jurisdiction to arbitrate disputes between individuals.

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<sup>121</sup> See sec. 3(2). An international tribunal is defined as any court or tribunal which, in pursuance of any international agreement or any resolution of the General Assembly of the United Nations—(a) exercises any jurisdiction or performs any function of a judicial nature or by way of arbitration, conciliation or inquiry, or (b) is appointed, whether permanently or temporarily, for the purpose of exercising any jurisdiction or performing any such function.

<sup>122</sup> This section appears to have been borrowed from some countries. See e.g. United Kingdom: Evidence (Proceedings in Other Jurisdictions) Act 1975, sec. 6(1), which allows Her Majesty by Order in Council to extend the operation of the Act to international tribunals, including arbitration tribunals appointed pursuant to international agreements or resolution of the General Assembly of the United Nations. See also the United States Code, chapter 28, sec. 1782(a), which applies to 'international tribunals'.

<sup>123</sup> See e.g. Statute of the African Court of Justice, *supra* note 15 sec. 37(2)(3). It relies on the government of the relevant state to serve documents and procure evidence. In the absence of a specific legislation, such as in Zimbabwe, it is doubtful whether and how national courts can serve documents or secure evidence for the community courts. Compare Agreement establishing the Caribbean Court of Justice, *supra* note 58, art. XXVI(a), which obliges national governments to enact legislation to ensure that all national authorities 'act in aid of the Court... '.

The lack of a legal framework on the issue of judicial co-operation between national and community courts is somewhat remedied by the rules of procedure of the community courts. Under Rule 74(1)(a) of the COMESA Court Rules,<sup>124</sup> the court may, *suo motu* or on application, stay its proceedings where the court and a national court are seized of a case in which the same relief is sought, the same issue of interpretation is raised, or the validity of the same act is called into question. Such a stay of proceedings will be an act of deference by the community court to the national court. It is likely to improve relations between the two courts. From the perspective of national courts, the existence of *lis pendens* is a factor that weighs heavily in their decisions to stay proceedings, but they still retain the discretion not to do so under both common and statute law.<sup>125</sup>

Under Rule 27 of the East African Court of Justice Rules of Procedure, 2008 [EAC Court Rules],<sup>126</sup> a national court may be requested to serve notice on a person. A national court to which a request for service of notification is sent *may*, upon receipt, proceed as if the notification had been issued by it, and then return the notification to the EAC court together with the record, if any, of its proceedings regarding it. In other words, national courts have discretion to serve the notification. What happens when discretion is exercised against the service of a notification is left unanswered. Article 74(1) of the Rules of the Court of Justice of the Economic Community of West African States [ECOWAS Court Rules] seems not to envisage the need to use national courts for serving documents.<sup>127</sup> It provides that where the rules require that a document be served on a person, the Chief Registrar of the court should ensure that service is effected at that person's address either by the dispatch of a copy of the document by registered post with a form for acknowledgement of receipt, or by personal delivery of the copy against a receipt. It is very likely that such a process of serving documents will be considered an infringement of the sovereignty of

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<sup>124</sup> *Supra* note 81.

<sup>125</sup> See e.g. Uganda: Civil Procedure Act, Chapter 71, sec. 6 which provides that the pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in that suit in the foreign court. For a recent international case on this issue see *Teck Cominco Metals Ltd v. Lloyd's Underwriters*, 2009 SCC 11.

<sup>126</sup> Available at <http://www.eac.int/rules-applicable.html>.

<sup>127</sup> Online: ECOWAS Court of Justice <<http://www.ecowascourt.org/site2.html>>. Rule 43(5) which provides that an order summoning witnesses shall be served on the parties and the witnesses, but there is no statement on how this service is to be made.

national legal systems.<sup>128</sup> Also, without the use of national legal processes, it is unlikely any sanction can be imposed on an individual who does not acknowledge service from a community court.

Under article 41(6)(7) of the COMESA Court Rules, the court may order that a witness or expert be heard by the judicial authority of his place of permanent residence. The order shall be sent for implementation to the competent judicial authority under conditions laid down in its rules of procedure.<sup>129</sup> Under article 41(8), a member state shall treat any violation of an oath or affirmation by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings. At the instance of the court, the member state concerned *shall* prosecute the offender before its competent court. This provision is unlikely to sit well with constitutional provisions in member states which confer the discretion to prosecute criminal offences solely with the Attorney General.<sup>130</sup>

The above suggests that the community courts acknowledge the limitations on their jurisdiction. They seek to overcome their limitation through co-operation with national courts. However, it does not appear that careful thought has been given to the issue of whether the existing national law are tailored to facilitate this co-operation. To ensure effective co-operation, it is important for member states to enact statutes regulating co-operation between community and national courts. A particular issue that demands attention should be whether national courts should still maintain the discretion they currently enjoy in deciding whether or not to meet the demands of a foreign court. Pending such legislation, it is suggested that national courts should treat the community courts as foreign courts for the purposes of their civil procedure rules. However, it must be admitted that, in their current form, the definition of a foreign court in national statutes often tends towards meaning a foreign state's courts.<sup>131</sup>

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<sup>128</sup> It is envisaged under article 99(a) of the ECOWAS Court Rules that the court will adopt supplementary rules on letters rogatory.

<sup>129</sup> COMESA Court Rules, *supra* note 80 Rule 41(7)(a).

<sup>130</sup> In *George Lipimile v. Mpulungu Harbour Management*, Judgment No 22 of 2008 (Zambia: Supreme Court, 2008) the court held that it had jurisdiction to try a person [in this case a Zambian] for contempt committed in France. However, the act of contempt related to an order of a Zambian court and not a French court.

<sup>131</sup> Kenya's Civil Procedure Act, Chapter 21, defines a foreign court as a court situated outside Kenya which has no authority in Kenya. Uganda's Civil Procedure Act, Chapter 71, defines foreign court as a court situated beyond the limits of Uganda which has no authority in Uganda. Section 1 of Tanzania's Civil Procedure Code, 1966 contains a

### 8.3 CONCLUSION

This chapter has examined how inter-institutional relations can be enhanced using the rules of public and private international law. The chapter reveals that the effectiveness of community institutions, in this instance community courts, can be affected by how they relate to each other and also to national institutions. Using the relations between community and national courts, the chapter has argued that inattention to important public and private international law issues is likely to affect the effectiveness of community courts. In general, community laws in Africa acknowledge the role of national courts in enhancing the effective operations of community courts. However, community and national laws have been largely inattentive to whether the existing national laws provide an adequate legal framework for performing that role. National courts relate to each other using private international law principles. However, it is unlikely that these principles can be wholly adopted as the legal framework for the relations between community and national courts. They have to be complemented by specifically-tailored national and community laws. So far, it appears community and national laws have been drafted on the unwritten assumption that private international law principles provide an adequate legal framework for the relations between community and national courts. This chapter has exposed difficulties with this assumption.

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similar definition. It remains an open question as to whether it can be argued that the COMESA and EAC courts, neither of which is geographically situated in either Kenya or Uganda, has authority in either country. The EAC Court and COMESA Court are geographically situated in Tanzania and Zambia respectively.

## CHAPTER NINE: INTERSTATE RELATIONS, ECONOMIC TRANSACTIONS AND PRIVATE INTERNATIONAL LAW

### 9.1 INTRODUCTION

Interstate relational issues are a key aspect of economic integration. Regional economic communities operate within the context of multiple state legal systems. The legal relations between the member states of a community are just as important for effective community development as community-state relations. Such relations directly impact on economic transactions within a community. A number of issues arise in this context. Are normative acts<sup>132</sup> in one state recognized and/or enforced in other member states? Are there any constraints attached to the recognition and/or enforcement of foreign normative acts? Do member states share the same legal traditions – common law, civil law, Roman-Dutch law and so on – and how does that impact upon their relations with one another? What is the degree of harmonization of laws between the member states? Should harmonization of laws be pursued as part of the integration processes? In the absence of harmonization, are there any approaches or techniques that could be adopted? To what extent do judges take account of each other's jurisprudence? These are weighty issues which communities are likely to face, especially as they progress through the stages of economic integration.

This chapter has two principal aims. Firstly, it investigates the extent to which African states relate with each other using private international law as the barometer. Economic integration fosters interaction among states. These interactions provide evidence of the strength of the integration process. The deeper the level of integration, the stronger one would expect the level of interaction to be. Put differently, there should be a positive correlation between the intensity of interstate legal relations and the strength of an economic integration process. The choice of private international law as the barometer is appropriate. Apart from public international law and, to a lesser extent, comparative law, no other law subject deals with interstate legal relations more than private international law. Secondly, the chapter assesses how private international law can affect economic transactions generated by strengthened economic integration in Africa. It makes

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<sup>132</sup> By this I am referring to all acts within a member states that create legal consequences. These include enacted laws, court judgments, arbitration awards, and administrative acts such as the registration of companies.



proposals for reforming private international law in Africa to serve better the needs of cross-border economic transactions.

## 9.2 PRIVATE INTERNATIONAL LAW IN ECONOMIC INTEGRATION – GENERAL AND COMPARATIVE OVERVIEW

In settings which foster intense economic relationships, private international law has been used to address some interstate relational issues necessary for these relationships to thrive.<sup>133</sup> Private international law is concerned with claims or matters within a state that involves a foreign element. In addition to its principal function of ensuring justice for individuals whose relations touch more than one state<sup>134</sup>, private international law performs a regulatory function between states. It can be used to regulate the conduct of persons who transact across states with a view to achieving the objectives of an economic community.<sup>135</sup> For example, choice of law rules could be used to ensure adherence to standards set by a community, and protect community interests by preventing any resort to laws that may defeat community goals.<sup>136</sup> The rules on the enforcement of

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<sup>133</sup> See generally Antonio Boggiano, “The Law of Relations Between Legal Systems: A Methodological Analysis” in Jurgen Basedow ed., *Private Law in the International Arena: From National Conflict Rules Towards Harmonization and Unification - Liber Amicorum Kurt Siehr* (The Hague: TMC Asser Press, 2000) at 79-94; Kurt Siehr, “Coordination of Legal Systems in Private International Law”, in Talia Einhorn & Kurt Siehr eds., *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter Nygh* (The Hague: TMC Asser Press, 2004) at 325; Peter Hay *et al.*, “Conflict of Laws as a Technique for Legal Integration” in M. Cappelletti *et al.* eds., *Integration through Law Europe and the American Experience* Vol. 1(2) (New York: Walter de Gruyter, 1989) at 168 [Hay, Conflict of Laws]; R.H. Graveson, “The Conflict of Laws in Non-Unified Legal Systems” in Edward McWhinney & Pierre Pescatore eds., *Federalism and Supreme Courts and the Integration of Legal Systems* (Heule, Belgium: Editions UGA, 1973) at 193.

<sup>134</sup> See Robert Wai, “In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law” (2001) 39 *Can. Ybk. Int’l L.* 117 at 187, where he notes that ‘private international law in the Commonwealth traditions ... has traditionally focused on the conflicts between the interests and preferences of individual parties’.

<sup>135</sup> See Robert Wai, “Transnational Lifftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalisation” (2001- 2002) 40 *Colum. J. Transnat’l. L.* 209; Robert Wai, “Transnational Private Law and Private Ordering in a Contested Global Society” (2005) 46 *Harv. Int’l L.J.* 471; Horatia Muir Watt, “Integration and Diversity: The Conflict of Laws as a Regulatory Tool” in Fabrizio Cafaggi ed., *The Institutional Framework of European Private Law* (Oxford: Oxford University Press, 2006) at 107; Dimitris Tzouganatous, “Private International Law as a means to Control the Multinational Enterprise” (1986) 19 *Vanderbilt J. Transnat’l. L.* 477; Sara Seck “Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law” (1999) 37 *Can. Ybk. Int’l L.* 139.

<sup>136</sup> See e.g. EC, *Regulations (EC) No. 864/2007 of the European Parliament and Council of the 11 July 2007 on the Law Applicable to Non-Contractual Obligations* [2007] O.J. L 199/40, art. 27; EC, *Regulation (EC) No. 593/2008 of the European Parliament and Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] O.J. L 177/6, art 23.

foreign judgments can be used to ensure greater effectiveness of judgments and, thus, aid cross-border settlement of disputes within a community.<sup>137</sup>

Indeed, without an effective private international law regime, important community goals might not be achieved. There can be no meaningful implementation of factor mobility, which is the free movement of persons, goods, capital and services, without attention to the facilitative role of private international law. Factor mobility is envisioned by Africa's economic communities.<sup>138</sup> Private international law affects the functioning of any economic community that promotes factor mobility. Indeed, it was social and commercial relations between individuals of independent European states that set the stage for the emergence and development of private international law as a subject.<sup>139</sup>

In economic communities and the world at large, private international law can be a tool for multi-level governance. By co-operating with other national courts, a state can maintain adherence to its norms even though litigation is pursued outside its borders. Indeed, private international law is a force for ensuring order and stability in legal relationships that transcend national legal systems.<sup>140</sup> This role is most visible in federal states – a more advanced form of economic

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<sup>137</sup> Significantly four of the current international conventions on the enforcement of foreign judgments have been spearheaded by economic integration organizations. See *Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards*, 8 May 1979, 1439 U.N.T.S. I-24392, 18 I.L.M. 1224; *Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments*, 24 I.L.M. 468; *EC Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, [2001] O.J. L 012/1 [Brussels I Regulation] and the *Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, [2007] O.J. L339/3. So far, attempts by the Hague Conference on Private International Law to have a global convention on the subject have failed.

<sup>138</sup> See e.g. *Treaty establishing the African Economic Community*, 3 June 1991, 30 I.L.M. 1241, art. 6(2)(f)(i) [AEC Treaty]; *Treaty establishing the Common Market for Eastern and Southern Africa*, 5 November 1993, 33 I.L.M. 1067, art. 84 [COMESA Treaty]; *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 U.N.T.S. I-37437, art. 104 [EAC Treaty]; *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, 35 I.L.M. 660, (1996) 8 Afr. J. Int'l & Comp. L. 187, art. 55(1)(ii) [ECOWAS Treaty].

<sup>139</sup> John Alderson Foote, *Foreign and Domestic Law: A Concise Treatise on Private International Jurisprudence, Based on the Decisions in the English Courts* (London: Stevens and Haynes, 1904). On page 23, he notes: 'If society of each legislating State was entirely isolated, so that the individuals composing it were cut off from intercourse with all but their fellow subjects, the law of each State would have full operation within its own domain, and could claim to extend itself no further'.

<sup>140</sup> Horatia Muir Watt, "European Integration, Legal Diversity and the Conflict of Laws" (2005) 9 Edin. L.R. 6; Hay, Conflict of Laws, *supra* note 2 at 168; Ulrich Drobnig, "Conflict of Laws and the European Economic Community" (1966-1967) 15 Am. J. Comp. L. 204.

integration – where, in some jurisdictions, rules are deployed to ensure legal harmony or unity within the federation.<sup>141</sup>

In economic communities, private international law provides an avenue for harmony in decision-making in the face of legal pluralism. In other words, regardless of the multiplicity and diversity of legal traditions, the application of private international law rules can provide some comfort for individuals transacting across states. Indeed, this is the very essence of the role of private international law in economic integration. Economic integration assumes and fosters the dismantling of state boundaries, private international law is founded on the existence of boundaries, but it provides principles for managing cross-border co-existence.

Politically, private international law's approach to managing the co-existence of states is suitable for states which may want to maintain their distinct legal traditions and laws while integrating.<sup>142</sup> Private international law maintains the integrity of the national legal systems; it defines the applicable law for the resolution of a particular problem, but leaves the content of that applicable law untouched. This characteristic can be useful in the harmonization of laws since it reassures executives and legislatures of their control over their substantive laws. African states are in the early stages of economic integration. They have concerns about sovereignty and some might equally be concerned about the erosion of the ideals of their legal traditions. In such a setting, a developed private international law regime can provide legal certainty for cross-border transactions, and, at the same time, ensure that substantive national laws are not fundamentally changed. But the virtues of private international law as a tool for addressing interstate relational issues and promoting economic transactions should not blind us from its limitations. The need to

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<sup>141</sup> Canada and Australia have witnessed the constitutionalization of private international law. The Supreme Court of Canada has held that private international law has a role to play in fulfilling the intention of the framers of the Canadian constitution to create a single country. See *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256; *Hunt v. T & N plc* [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16; *Tolofson v. Jensen* [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289; *John Pfeiffer Ltd. v. Rogerson* (2000) 203 C.L.R. 503; Elizabeth Edinger, "The Constitutionalization of the Conflict of Laws" (1995) 25 Can. Bus. L.J. 38; Janet Walker, "Must there be Uniform Standards for Jurisdiction within a Federation?" (2003) 119 L.Q.R. 567; James Stellios, "Choice of Law and the Australian Constitution: Locating the Debate" (2005) 33 Federal L.R. 8.

<sup>142</sup> The demands of integration may, however, compel a different result. An example of this is the Europeanization of English private international law. See e.g. *Allianz SpA v. West Tankers Inc.*, Case C-185/07; *Turner v. Grovit*, Case C-159/02, [2004] E.C.R. I-3565; *Owusu v. Jackson*, Case C-281/02, [2005] E.C.R. I-1383; T.C. Hartley, "The European Union and the Systematic Dismantling of the Common Law Conflict of Laws" (2005) 54 Int'l & Comp. L. Q. 813; Jonathan Harris, "Understanding the English Response to the Europeanisation of Private International Law" (2008) 4 J. Priv. Int'l L. 347.

ascertain foreign law and the possibility that courts may be *pro lex fori*<sup>143</sup> can be costly for businesses. The guarantees private international law offers for maintaining the integrity of the substantive laws of national legal systems may also be thwarted by other community laws which may displace national laws.<sup>144</sup>

Given the importance of private international law in economic integration, it comes as no surprise that it is an essential component of economic integration in parts of the world.<sup>145</sup> For example, considerable institutional and academic attention is given to it within the European Community (EC).<sup>146</sup> The Organization of American States (OAS) is another organization with economic integration among its objectives.<sup>147</sup> Through its Inter-American Conference on Private International Law, the OAS has supervised the negotiation and adoption of over twenty conventions by its members.<sup>148</sup> These conventions cover various issues including the recognition

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<sup>143</sup> It is arguable that within an integrated economy, such *pro lex fori* tendencies, if carried to the extreme, may be deemed a non-tariff barrier to trade. See generally Reid Mortensen, "Homing Devices in Choice of Tort Law: Australian, British, and Canadian Approaches" (2006) 55 Int'l & Comp. L. Q. 839.

<sup>144</sup> Hartley, *supra* note 11.

<sup>145</sup> Robert C. Casad, *Civil Judgment Recognition and the Integration of Multi-State Associations: Central America, the United States of America, and the European Economic Community* (Lawrence: Regent Press of Kansas, 1981); Bradford A. Caffrey, *International Jurisdiction and the Recognition and Enforcement of Foreign Judgment in the LAWASIA Region: A Comparative Study of the Laws of Eleven Asian Countries Inter-se and with the E.E.C. Countries* (North Ryde, N.S.W.: CCH Australia Limited, 1985).

<sup>146</sup> From the EC's inception, a sound private international law regime was identified as having a key role to play in the creation and sustenance of the internal market. Thus, article 220 (now Article 293 EC) of the Treaty establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 11 enjoined member states to enter into negotiations with each other with a view to securing for the benefit of their nationals, 'the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and arbitration awards'. As was subsequently noted, 'a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbance and difficulties unless it is possible ... to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships'. See note sent to member states on 22 October 1959, quoted in, EC, *Council Report by Mr. Jenard on the Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters*, [1968] O.J. C 59/1. The Convention (now Regulation) on Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters was the direct product of article 220.

<sup>147</sup> *Charter of the Organization of American States*, 30 April 1948, 119 U.N.T.S. 3, art. 42. It provides that 'the Member States recognize that integration of the developing countries of the Hemisphere is one of the objectives of the inter-American system and, therefore, shall orient their efforts and take the necessary measures to accelerate the integration process, with a view to establishing a Latin American common market in the shortest possible time'.

<sup>148</sup> See generally Friedrich Juenger, "The Inter American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons" (1994) 42 Am. J. Comp. L. 381; Alejandro Garro, "Unification and Harmonization of Private Law in Latin America" (1992) 40 Am. J. Comp. L. 587; Jose Daniel Amado, "Recognition and Enforcement of Judgment in Latin American Countries: An Overview and Update" (1990-91) 31 Virginia J. Int'l L. 99; Leonel Pereznieta Castro, "Some Aspects concerning the Movement for Development of Private International Law in the Americas through Multilateral Conventions" (1992) 39 Netherlands Int'l L. Rev. 243; Paul A. O'Hop Jr.,

and enforcement of judgments and choice of law in contracts.<sup>149</sup> The topics for recent Conferences have focused on the free trade agenda of the region.<sup>150</sup> The Common Market of the Southern Cone (MERCOSUR) sees the ‘harmonization of legislation in relevant areas’ as a key to strengthening its integration process.<sup>151</sup> Private international law has attracted MERCOSUR’s attention, and progress there has been described as ‘impressive’.<sup>152</sup> Indeed, the history of co-operation on private international law issues in the Americas dates back to the nineteenth century. As early as 1928, the Pan-America Code on Private International Law, better known as the ‘Bustamante Code’, was adopted.<sup>153</sup>

Against this background, it is baffling that, despite decades of economic integration in Africa, none of the communities has or has had private international law on its agenda. This is so despite the fact that the treaties contain provisions that may be interpreted as enjoining the communities to adopt private international law initiatives. For example, article 57(1) of the Revised Treaty establishing the Economic Community of West African States [ECOWAS Treaty],<sup>154</sup> member states undertook ‘to co-operate in judicial and legal matters with a view to harmonizing their judicial and legal systems’. The modalities for the implementation of this article were to be the subject matter of a protocol. So far, none has been concluded. Article 126 of the Treaty establishing the East African Community [EAC Treaty]<sup>155</sup> also obliges member states to ‘encourage the standardization of judgments of courts within the community’, and ‘harmonize all

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“Hemispheric Integration and the Elimination of Legal Obstacles under a NAFTA-Bases System” (1995) 36 *Harvard Int’l L.J.* 127 at 163-166.

<sup>149</sup> See *Inter-American Convention on the Law Applicable to International Contracts*, 17 March 1994, 33 *I.L.M.* 732; *Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments*, 24 May 1984, 24 *I.L.M.* 468.

<sup>150</sup> Diego P. Fernandez Arroyo & Jan Kleinheisterkamp, “The VIth Inter-American Specialized Conference on Private International Law (CIDIP VI): A New Step towards Inter-American Legal Integration” (2002) 4 *Yearbook of Private Int’l L.* 237 at 254.

<sup>151</sup> *Treaty for the establishment of a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay*, 26 March 1991, 2140 *U.N.T.S.* I-37341, art. 1. See also Diego P. Fernandez Arroyo, “International Contracts Rules in Mercosur: End of an Era or Trojan Horse” in Patrick J Borchers & Joachim Zekoll eds., *International Conflict of Laws for the Third Millennium, Essays in Honour of Friedrich K Juenger* (New York: Transnational Publishers, 2000) at 157-163.

<sup>152</sup> Fernandez Arroyo, *ibid.* at 172.

<sup>153</sup> See generally Ernest G. Lorenzen, “The Pan American Code of Private International Law” (1930) 4 *Tulane L. Rev.* 499.

<sup>154</sup> ECOWAS Treaty, *supra* note 7.

<sup>155</sup> EAC Treaty, *supra* note 7.

their national laws appertaining to the community'. I am, however, unaware of any initiative on private international law of significance undertaken under it.

### **9.3 INTERSTATE RELATIONS IN AFRICA'S ECONOMIC COMMUNITIES**

#### **9.3.1 Through a Private International Law Lens**

##### **9.3.1.1 Introduction**

As noted above, private international law provides a barometer for measuring the extent to which states interact with other, especially through the medium of litigation. It creates linkages between legal systems without unifying them. As states become more interconnected – a concomitant of economic integration – and their residents interact, the number of private international law issues should, in theory, increase and the need to address those issues should become more immediate. In other words, the theory is that strong economic integration enhances cross-border activities resulting in disputes whose resolution will engage private international law principles. Admittedly, private international law is only one of the means through which legal systems interact. And, even if it was the only means, it is unlikely to give a wholly accurate picture. Many cross-border economic disputes do not make it to the courts, and where they do, the court may miss the private international law issue at stake.

The extent to which African states are interacting with one another on private international law issues provides an insight into how they are related and the strength of the economic integration process. It can be argued that an appreciable volume of inter-African private international law cases<sup>156</sup> is evidence of interactions between African countries. These interactions could be the result of cross-border trade, or investment and movement of people, all of which are being promoted by the various communities. Evidence of interaction could be located in the extent to which African courts assume jurisdiction over persons domiciled or resident in each other's states, apply each other's laws, assist in judicial proceedings in each other's countries, and enforce each other's judgments. The findings on these points can inform us on the state of the strength of economic integration in Africa.

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<sup>156</sup> By this, I am referring to cases in which the foreign element (e.g. law, judgment, party and conduct) is from an African country.

Africans have been promoting African unity for over forty years.<sup>157</sup> Indeed, African economic integration initiatives date back to 1910.<sup>158</sup> So what does the level of inter-African private international law problems teach us about the interconnected African legal systems? To answer to this question, I studied over three hundred and fifty private international law judgments given by courts at all levels in thirteen Commonwealth African countries over a decade, 1997-2007 [case study].<sup>159</sup> The decade coincides with the emergence of the communities examined in this thesis. From the examination, fewer than ten per cent of the cases involved inter-African private international law issues.<sup>160</sup>

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<sup>157</sup> The Organization of African Unity (now African Union) was established in 1963. Under article 2(1)(a) of the *Charter of the Organization of Africa Unity*, 25 May 1963, 479 U.N.T.S. 39, a principal purpose of the organization was to 'promote the unity and solidarity of the African States'.

<sup>158</sup> The Southern African Customs Union, which consists of Botswana, Lesotho, Namibia, South Africa and Swaziland, was created in 1910.

<sup>159</sup> The countries studied were: Botswana, Ghana, Kenya, Lesotho, Malawi, Namibia, Nigeria, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. The only former British colonies and common law countries which were not studied were Gambia and Sierra Leone. In the case of Sierra Leone, the period under review overlapped with the country's civil war. It can therefore be cautiously assumed that nothing of much significance for private international law would have happened over the period. The following law reports and websites were used: Botswana Law Reports 1997-2006; Namibia Law Reports 1997-2006; Electronic Kenya Law Reports; Kenya Law Reports 2002-2004; East African Law Reports 1998-2006 (reports cases from Kenya, Uganda, Tanzania); Law Africa Law Reports 1997-2007 (report cases from Kenya, Uganda, Tanzania); Nigerian Weekly Law Reports 1997-2006; South African Law Reports 1997-2007 (reports cases from South Africa, Namibia and Zimbabwe); Kampala Law Reports 1997-1998; Ghana Law Reports 1997-2001; Supreme Court of Ghana Law Reports 1997-2006; Tanzania Law Reports 1997; Zambia Law Reports 1997-2002; Zimbabwe Law Reports 1997-2002; and Lesotho Law Reports and Legal Bulletin 1999-2000. The following websites were also consulted: <<http://www.kenya.law.org/eK.L.R./>>; <<http://www.lawafrica.com/>>; <<http://www.datacenta.com/>>; <[http://www.worldlii.org/cgi-bin/gen\\_region.pl?region=250](http://www.worldlii.org/cgi-bin/gen_region.pl?region=250)>; <<http://www.saflii.org/cgi-bin/search.pl>>; <<http://www.law.wits.ac.za/sca/index.php>>; <[http://ildc.oxfordlawreports.com/public/log\\_in](http://ildc.oxfordlawreports.com/public/log_in)>; <<http://www.ugandaonlinelawlibrary.com/default.asp>>. The methodological limitations of the study should be acknowledged. Some of the reports considered were not up to date. This resulted from the difficulties of accessing the reports, and the fact that in some countries (e.g. Tanzania) the publication schedule appears to be seriously delayed. To an extent this limitation was mitigated by reliance on various websites hosting both reported and unreported judgments. I also relied on the index to the law reports in making the selection of cases. Thus, where the editors of the reports missed the private international law point in a judgment, such cases will not have come to my attention. See Richard Frimpong Opong, "A Decade of Private International Law in African Court Part I" (2007) 9 Yearbk Priv. Int'l L. 223; Richard Frimpong Opong, "A Decade of Private International Law in African Court Part II" (2008) 10 Yearbk. Priv. Int'l L. 367.

<sup>160</sup> See e.g. *Ssebagala & Sons Electric Centre Ltd. v. Kenya National Shipping Line Ltd.* [2000] LawAfrica L.R. 931 (enforcement of judgment from Uganda); *Willow Investment v. Mbomba Ntumba* [1997] T.L.R. 47 (enforcement of judgment from Zaire); *Mtui v. Mtui* 2000 (1) B.L.R. 406 (recognition of divorce decree from Tanzania); *Molly Kiwanuka v. Samuel Muwanga* [1999] Swaziland High Court 13 (maintenance of a child in Uganda); *Sello v. Sello* (No. 2) 1999 (2) B.L.R. 104 (order to return child in Lesotho to Botswana).

### 9.3.1.2 Enforcing African States' Judgments

Enforcing foreign judgments is, perhaps, the best evidence of interstate relations from the perspective of private international law. An effective foreign judgment enforcement regime is a key component of any integration initiative likely to achieve significant success. Indeed, in federal states, it is often given constitutional foundation.<sup>161</sup> So far, it appears careful thought has not been given to this issue in Africa. From the case study, there were cases in which judgments from other African countries were denied recognition or enforcement. This was due to the fact that the foreign judgment emanated from a country which had not been designated as a beneficiary under the statutory regime for registration of foreign judgments.<sup>162</sup> In *Heyns v. Demetriou*,<sup>163</sup> it was held that a South African judgment could not be registered under Malawi's British and Commonwealth Judgments Act, 1922 and the Judgment Extension Act 1922.<sup>164</sup> In *Barclays Bank of Swaziland v. Koch*,<sup>165</sup> it was held that a Swaziland judgment could not be registered under Botswana's Judgments (International Enforcement) Act (Cap 11: 04).<sup>166</sup> It is worth remembering that Botswana, Malawi, South Africa and Swaziland are all members of the Southern African Development Community.

The cases in which African judgments were denied registration reflect a wider problem. It is that, under the statutes on the registration of foreign judgments, not many African countries have

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<sup>161</sup> See e.g. Constitution of the Commonwealth of Australia, art. 118. It provides that: 'Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State'. Constitution of the United States of America, art. 4(1).

<sup>162</sup> The statutory regime for the registration of foreign judgments co-exists with a common law regime. A judgment which is not eligible for registration under statute may be enforced at common law.

<sup>163</sup> [2001] Malawi High Court 52. See also *Willow Investment, supra* note 29 (the Tanzanian court refused to enforce a judgment from Zaire); *SDV Transmi (Tanzania) Limited v. MS STE Datco*, Civil Application No. 97 of 2004 (Court of Appeal, Tanzania, 2004) in which the absence of a regime for the reciprocal enforcement of judgments between Tanzania and Democratic Republic of Congo was the determinative consideration that made the court grant a stay of execution in favour of the applicant against the Democratic Republic of Congo resident respondent judgment creditor who had no assets in Tanzania.

<sup>164</sup> The court was, however, prepared to consider the possibility of enforcing the judgment under the common law rules and allowed the applicant to proceed by writ for that purpose.

<sup>165</sup> 1997 B.L.R. 1294.

<sup>166</sup> The court held that it could have been enforced at common law, but in this instance the plaintiff failed to meet some procedural requirements. For some cases outside the scope of the case study see e.g. *Italframe Ltd.v. Mediterranean Shipping Co.* [1986] K.L.R. 54 (judgment from Tanganyika (now Tanzania) denied registration in Kenya); *Re Lowenthal and Air France* 1966(2) A.L.R. Comm. 301 (judgment from Zambia denied registration in Kenya).



been designated as beneficiaries.<sup>167</sup> Even for the designated countries, only judgments from specified courts, usually the designated state's superior courts, can be registered. This state of affairs evinces inattention to a pertinent relational issue in economic integration. It can undermine economic transactions in the communities as they progress. Perhaps, the paucity of inter-African judgment enforcement cases has made this less than an immediate issue. But it is a damning indictment on Africa's economic integration that a judgment from the United Kingdom – a former colonial power – is more likely to be registered in member states of the various communities than judgments from their respective member states.

After years of promoting economic integration, this is a troubling. National statutes deny judgments from other African countries the expedited and simplified procedure for enforcing foreign judgments through registration. Registration is a simplified and expedited procedure for enforcing foreign judgments. One would have expected that African governments,<sup>168</sup> in their 'determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States',<sup>169</sup> would make the procedure available to African judgments. Of all the communities, it is only between the founding members of the East African Community (EAC)<sup>170</sup> – Kenya, Tanzania and Uganda – that judgments can be registered in each other's countries.<sup>171</sup> To be certain, I am not arguing that a judgment from an African country should be automatically enforced in another African country. Indeed, there are factors that can justify the non-registration

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<sup>167</sup> For example, South Africa's regime designates only Namibia. Namibia's regime designates only South Africa. Swaziland's regime has been extended to Lesotho, Botswana, Zimbabwe, Zambia, Zanzibar, Malawi, Kenya, and Tanzania. Ghana's designates only Senegal (see First Schedule of Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument, 1993, L.I. 1575). Tanzania's regime designates Lesotho, Botswana, Mauritius, Zambia, Seychelles, Somalia, Zimbabwe, and the Kingdom of Swaziland (see Reciprocal Enforcement of Foreign Judgments Order, GN Nos. 8 & 9 of 1936); Kenya's regime designates Malawi, Seychelles, Tanzania, Uganda, Zambia and Rwanda ( Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, sec. 2).

<sup>168</sup> Under the statute for the registration of foreign judgments, it is the executive that designates countries whose judgments may benefit from that regime.

<sup>169</sup> *Constitutive Act of the African Union*, 11 July 2000, (2005) 13 Afr. J. Int'l & Comp. L. 25, preamble.

<sup>170</sup> Burundi and Rwanda recently became members of the EAC. Under Kenya's Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, judgments from Rwanda can be registered. See generally S. Thanawalla, "Foreign *Inter Partes* Judgments: Their Recognition and Enforcement in the Private International Law of East Africa" (1970) 19 Int'l & Comp. L. Q. 430.

<sup>171</sup> See e.g. *Ssebagala*, *supra* note 29; *Pioneer General Assurance Society Limited v. Zulfikarali Nimji Javer* [2006] eK.L.R. (Kenyan court registered judgments from Uganda); *Société de Transports International Rwanda v. H. Abdi*, Civil Application No. NAI 298 of 1997 (Court of Appeal, Kenya, 1997) (appeal against a decision setting aside the registration in Kenya of a Rwanda judgment); *Pioneer General Assurance Society Limited v. Zulfikarali Nimji Javer* [2006] eK.L.R. (payment of interest on a Ugandan judgment registered in Kenya).

of an African judgment.<sup>172</sup> What I am arguing is that an effective economic community should have judgments easily enforceable among member states. Currently, in Africa, as far as enforcement through registration is concerned, this is not the case.

It is recommended that, to remedy this problem, each African state should designate many more African states as beneficiaries of its statutory regime for the registration of foreign judgments. A more ambitious and long-term project would be to conclude an African foreign judgment enforcement convention.<sup>173</sup> But, given the paucity of inter-African judgment enforcement cases, the similarities in the provisions of existing national statutes on foreign judgment enforcement, the challenges of negotiating an international convention<sup>174</sup> and the general ambivalence towards private international law issues, the statutory designation of more African states may be the only feasible option, at least for the immediate future. Indeed, statutory designation is an easier course to take and can be done immediately. Negotiating an African convention could take years. However, with the benefit of the experiences of others such as the EC and OAS, this need not be the case.

### **9.3.1.3 Applying African States' Laws**

The application of each other's laws is also another manifestation of relations between states. Comity sometimes demands that individuals are not allowed to evade foreign state laws merely by litigating in another state or choosing a different applicable law. Thus, in *Herbst v. Surti*,<sup>175</sup> the Zimbabwean court refused to enforce a contract which was illegal under the proper law of the contract, in this instance South African law. From the case study, choice of forum agreements which designate an African state, and choice of law agreements which adopt an African state's law were at issue in some cases.<sup>176</sup> Courts have been prepared to uphold these

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<sup>172</sup> See e.g. *Cairo Bank v. Mohamed Ali Bahaydar* 1966 (1) A.L.R.Comm. 33 (Sudanese court refused to enforce an Egyptian judgment on the ground that the judgment debtor had not been served with notice of the Egyptian proceedings nor appeared before the Egyptian court).

<sup>173</sup> Richard Frimpong Oppong, "Private International Law in Africa: The Past Present and Future" (2007) 55 Am. J. Comp. L. 677 at 704.

<sup>174</sup> The collapse of the attempt by The Hague Conference on Private International Law to negotiate one such convention illustrates this challenge.

<sup>175</sup> 1990 (2) Z.L.R. 269.

<sup>176</sup> In the absence of such agreements, the courts applied various tests including the place of performance and the real and substantial connection test. See e.g. *Georgina Ngina v. Inter Freight East Africa Ltd.* [2006] eK.L.R. (a contract

agreements. In *Friendship Container Manufacturing Ltd. v. Mitchell Cotts Ltd.*,<sup>177</sup> the Kenyan court upheld an exclusive choice of forum agreement contained in a bill of lading which vested jurisdiction in South African courts. In *Barlows Central Finance Corporation Ltd. v. Joncon Limited*,<sup>178</sup> a sales agreement contained a South African choice of law and forum clause. The Swaziland court upheld the choice of law clause, but declined to enforce the choice of forum agreement. One factor that influenced the court's latter determination was that Swaziland and South African law were similar in many respects. As economic integration in Africa strengthens and spurs on cross-border transactions, issues of applying other African countries' laws are likely to increase. In this regard, the present judicial attitude of generally upholding party autonomy, which sometimes translates into an application of foreign law, is important.

Admittedly, neither *Friendship Container Manufacturing* nor *Barlows Central Finance Corporation* involved the direct application of the law of another African country. But, the fact that courts uphold parties' choice of law or forum will ultimately prove important for economic transactions within the communities. As discussed in Chapter Four, apart from the initiative of the Organization for the Harmonization of Business Laws in Africa, there appears to be no present or immediate future initiative on the agenda of the communities to harmonize member states' laws. In the absence of such harmonization, judicial enforcement of parties' choice of law and forum agreements is an alternative which individuals may use to regulate the law which governs their transactions. There are definitely limitations on this alternative. The courts may not give effect to a choice of law agreement which violates mandatory rules of the forum.<sup>179</sup> A badly-drafted choice of

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was entered into in Kigali (Rwanda). The place of performance was in Kenya. It was held that the Kenya courts had jurisdiction). *Roger Parry v. Astral Operations Ltd.*, Case No. C 190/2004 (Labour Court, South Africa, 2005) a central issue in the case was the applicable law for a contract of employment which was performed in Malawi. The South African court rejected the respondent's argument that the contract was governed by Malawi law as that was the place of performance. The court found there were strong enough factors connecting the contract with South Africa to make its law the applicable law.

<sup>177</sup> [2001] East Afr. L.R. 338.

<sup>178</sup> Case No. 2491/99 (High Court, Swaziland, 1999). See also *Afinta Financial Services (Pty) Limited v. Luke Malinga T/A Long Distance Transport*, Civ. Case No. 123/2001 (High Court, Swaziland, 2001) A lease agreement provided that it 'shall be governed by and construed in accordance with the laws of the Republic of South Africa and the Kingdom of Swaziland'. The Swaziland court applied Swaziland law. It held that the agreement was entered into in Swaziland by parties domiciled, resident and carrying on business in Swaziland and the agreement was to be performed wholly in Swaziland.

<sup>179</sup> See e.g. *Roger Parry*, *supra* note 45. (The employment contract at issue did not contain a choice of law clause but, even if it did, the court was willing to uphold that choice only if it did not deprive the employee of the protections afforded by the mandatory rules of South African law).

law clause may place the courts in a difficult position regarding the parties' intentions.<sup>180</sup> Notwithstanding these limitations, this alternative is one which individuals may have to be content with for some time.

While courts are prepared to uphold African choice of law and choice of forum agreements, few such choices are made compared with agreements which choose non-African states and laws.<sup>181</sup> The minimal use of African state choice of law and forum agreements tells us a lot about individuals' perceptions of the adequacy of courts and laws in Africa to deal with the complex issues involved in cross-border transactions.

### 9.3.2 Through a Comparative Law Lens

#### 9.3.2.1 Introduction

To the extent that it deals with an analysis of the operation of rules in multiple legal systems, comparative law bears some affinity with private international law.<sup>182</sup> Both subjects deal with foreign legal systems, albeit from different perspectives.<sup>183</sup> The importance of comparative law as a means for creating and strengthening relations between states, however, goes beyond its affinity with private international law; to Tunc, comparative law could be a source of peace among nations.<sup>184</sup> In Chapter Two, it was argued that inter-system jurisprudential communication, which often takes the form of a comparative law exercise, is useful in all branches of law. It can be used to strengthen relations between member states within a community and aid the harmonization of

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<sup>180</sup> See e.g. *Afinta Financial Services*, *supra* note 47. ('This agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa and the Kingdom of Swaziland'.); *Ekkehard Creutzburg v. Commercial Bank of Namibia* [2006] All S.A. 327. ('This suretyship shall in all respects be governed by and construed in accordance with the law of the Republic of South Africa and/or the Republic of Namibia, and all disputes, actions and other matters in connection therewith shall be determined in accordance with such law'.).

<sup>181</sup> See e.g. *Raytheon Aircraft Credit Corporation v. Air Al-Faraj Ltd.* [2005] 2 K.L.R 47 (Kansas state, USA choice of law and forum agreement); *Fonville v. Kelly III* [2002] 1 East Afr. L.R. 71 (Florida state, USA, choice of law and forum agreement); *Valentine Investment Company Ltd. v. Federal Republic of Germany* [2006] eK.L.R. (Bonn, Germany, choice of law and forum agreement); *Nika Fishing Co Ltd. v. Lavinia Corporation* [2001] 16 N.W.L.R. 556 (Argentina choice of law and forum agreement).

<sup>182</sup> Peter de Cruz, *Comparative Law in a Changing World*, 3rd ed. (London: Routledge Cavendish, 2007) at 9.

<sup>183</sup> Professor Reimann has described the relationship between the two disciplines as 'intimate'. See Mathias Reimann, "Comparative Law and Private International Law" in Mathias Reimann & Reinhard Zimmermann eds., *Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) at 1364.

<sup>184</sup> See André Tunc, "Comparative Law, Peace and Justice" in Kurt H. Nadelmann *et al.* eds. *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema* (Leyden: A.W. Sythoff, 1961) at 80.

law. This section looks at the state of jurisprudential communication among African states using private international law. However, the discussion here may equally apply to other branches of law relevant to strengthening economic integration in Africa such as contract, investment and labour laws.

### 9.3.2.2 Looking to African Cases

Comparative law and the use of comparative foreign materials enrich judicial decisions. For private international lawyers, this has been argued as a path to harmonization in the absence of international conventions.<sup>185</sup> Southern Africa provides a good example of how comparative law aids international (in this case regional) harmonization of law.<sup>186</sup> Judgments of southern African courts, but mainly those of South Africa,<sup>187</sup> have been relied on frequently in other southern African countries. In part, this may be attributed to the fact that they all share the same legal tradition – the Roman-Dutch law. Also, law reporting (and access to legal materials) is fairly up to date in the major states of the region namely, South Africa, Namibia, Botswana and Zimbabwe.

As noted above, there has been no systematic examination of the significance of private international law in Africa's economic integration. Nor has there been any attempt to harmonize private international law in the communities. Given this state of affairs, jurisprudential communication can be used to achieve a degree of harmonization in laws across the communities. Indeed, it is refreshing to notice that there is a high level of harmony between the jurisprudence of the various Roman-Dutch law countries that are members of the Southern African Customs Union, the Southern African Development Community and the Common Market for Eastern and Southern

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<sup>185</sup> Christopher F. Forsyth, "The Eclipse of Private International Law Principle? The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era" (2005) 1 J. Priv. Int'l L. 93.

<sup>186</sup> See e.g. *American Flag plc v. Great African T-shirt Corporation* 2000 (1) S.A. 356 in which it was held that where a foreign defendant had submitted to the jurisdiction of the court, attachment was neither necessary nor permissible. This decision was followed in Botswana. See *Bizy Holdings Ltd. v. Eso Management Ltd.* 2002 (2) B.L.R. 125.

<sup>187</sup> In *Silverston Ltd. v. Lobatse Clay Works* 1996 B.L.R. 190, Justice Tebbutt held that '...the common law of Botswana is the Roman-Dutch law ... The courts of Botswana have never been reluctant, in their own adaptation of the common law to the requirements of modern times, to have regard to the approach of the South African courts and to the writings of authoritative South African academics'.

Africa. Through judicial decisions<sup>188</sup> and recent proposed legislative reforms,<sup>189</sup> the Roman-Dutch law jurisprudence is also converging with the common law.

The jurisprudence of the common law countries within the EAC and ECOWAS is also largely similar.<sup>190</sup> But, unlike the Roman-Dutch law countries, there is infrequent jurisprudential communication between them. In other words, the common law countries, especially those in West Africa, do not demonstrate an appreciable level of reliance on each other's case law.<sup>191</sup> Rather, the source of the harmony in their jurisprudence is England from where they borrow principles of law. From the perspective of economic integration and with a view to strengthening interstate relations, this state of affairs among the common law countries is problematic. With the increasing Europeanization of English private international law, a development currently reflected in the minimal amount of textbook space devoted to 'the traditional rules', there is a need for the common law African countries to diversify their sources of law. Southern Africa may be a good place to look at. As noted earlier, there are a number of issues on which the common law converges with Roman-Dutch law.<sup>192</sup> Indeed, two recent judgments from the South African Supreme Court of Appeal have brightened up the prospect of closer convergence.<sup>193</sup> Communication between judges of the common law and Roman-Dutch law traditions can be an important step in creating a judicially-engineered harmonized private international law regime in

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<sup>188</sup> See Richard Frimpong Oppong, "Roman-Dutch Law meets the Common Law on Jurisdiction in International Matters" (2008) 4 J. Priv. Int'l L. 311.

<sup>189</sup> See South African Law Reform Commission (SALRC), Report on Consolidated Legislation Pertaining to International Judicial Co-operation, Project 121, 2006.

<sup>190</sup> Ghana, Gambia, Kenya, Nigeria, Tanzania, Sierra Leone, Uganda.

<sup>191</sup> But see *Eastern and Southern African Trade v. Hassan Basajjalaba* [2007] Uganda Commercial Court 30. The Ugandan court referred to two decisions on the effect of choice of law agreements on the court's jurisdiction. They were *Fonville v. Kelly* [2002] 1 East Afr. L.R. 71 and *Tononoka Steels Ltd. v. East & Southern African Trade & Development Bank* [2002] 2 East Afr. L.R. 536. It noted in respect of one of the cases, 'it is a case from a Sister Republic, with comparable jurisprudence. The decision, though not binding upon the High Court of Uganda, is pleasantly persuasive'. The court followed that decision. The demise of the West African Court of Appeal Reports and the East African Law Reports (recently revived) which reported cases from the common law countries of West and East Africa respectively, account in part for the infrequent jurisprudential communication between the courts in these regions.

<sup>192</sup> See generally Peter B. Kutner, *Common Law in Southern Africa: Conflict of Laws and Torts Precedent* (New York: Greenwood Press, 1990).

<sup>193</sup> See *Richman v. Ben-Tovim* 2007 (2) S.A. 283 which accepted mere presence as a basis of international competence, a position well entrenched, albeit highly criticised, at common law; *Bid Industrial Holding v. Strang* 2008 (3) S.A. 355 which abolished arrest of foreign defendants as a basis of jurisdiction and accepted mere presence as a basis of jurisdiction and the prospect of applying the principles of *forum non conveniens* in such cases.

Africa. A study that distils the common core of principles between both legal traditions will be an important aid to this pursuit.

In general, there is need to enhance jurisprudential communication within the communities by making jurisprudence – case law, statute and academic commentary – more accessible. My case study revealed that occasionally courts in two neighbouring states faced a similar issue, and yet came to different conclusions, often in ignorance of an earlier decision on the same point in the other country.<sup>194</sup> I illustrate this with two pairs of cases addressing two different issues. The first related to whether or not a plaintiff, who was resident in an EAC country, should be ordered to pay security for costs when litigating in another. In the Kenyan case of *Healthwise Pharmaceuticals Ltd. v. Smithkline Beecham Consumer Healthcare Ltd.*,<sup>195</sup> the court rejected the applicant's argument that it was a resident of the EAC and therefore the defendant would have no difficulties in recovering any costs that may be awarded. However, in the Ugandan case of *Shah v. Manurama Ltd.*,<sup>196</sup> the court held that given the establishment of the EAC there could no longer be an automatic and inflexible presumption for the courts to order security for costs with regard to plaintiffs who are resident in the EAC.

The second issue related to whether a court might assume jurisdiction to grant an *in personam* interdict against an *incola* in respect of conduct in another country. In *Bozimo Trade and Development Ltd. v. First Merchant Bank of Zimbabwe Ltd.*,<sup>197</sup> the Zimbabwean court drew a distinction between mandatory and prohibitory interdicts. It held that it had no jurisdiction to grant a mandatory injunction for acts committed abroad as that would infringe the sovereignty of the foreign country. A different conclusion was reached in the South African case of *Metlika Trading Ltd. v. Commissioner, South African Revenue Service*,<sup>198</sup> the court held that it had jurisdiction to

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<sup>194</sup> But see *Coutts v. Ford* 1997 (1) Z.L.R. 440 and *Society of Lloyd's v. Price* 2006 (5) S.A. 393 where both the Zimbabwean and South African courts adopted the *via media* approach to solving the problem of gap in characterization as to substance and procedure. *Detmold v. Minister of Health and Social Services* 2004 N.R. 175 and *Minister for Welfare and Population Development v. Fitzpatrick* 2000 (3) S.A. 422 where both the Namibian and South African courts sanctioned inter-country adoption of children by foreign nationals, and held their respective national legislation prohibiting such adoptions unconstitutional.

<sup>195</sup> [2001] LawAfrica L.R. 1279.

<sup>196</sup> [2003] East Afr. L.R. 294.

<sup>197</sup> 2000 (1) Z.L.R. 1.

<sup>198</sup> 2005 (3) S.A. 1.

issue such an interdict and it did not matter that it was mandatory or prohibitory. Fortunately, in both examples, the later decision (given without reference to the earlier case) was, in my opinion, better than the earlier one.

### 9.3.2.3 Looking Beyond Africa

It is important that jurisprudential communication should not be limited to that between African states. National legal systems and, indeed, community legal systems should communicate with the international legal system too. They must demonstrate awareness of and partake in relevant developments on the international plane. Judges and lawyers must show awareness of the growing volume of private international law jurisprudence by international and regional institutions. This is especially so if the private international law regimes in the communities are not to be isolationist. Indeed, it is reassuring that in a number of recent cases, judges and counsel showed an awareness of relevant international conventions.<sup>199</sup>

## 9.4 PRIVATE INTERNATIONAL LAW AND ECONOMIC TRANSACTIONS

### 9.4.1 General Overview

Private international law, like any domestic private law regime, can in effect be a non-tariff barrier to international trade and a disincentive to economic transactions.<sup>200</sup> Unbridled application of the *lex fori*, disrespect for choice of law and forum agreements, and the non-recognition or enforcement of foreign judgments by states may all evince protectionism. These can act as a clog on the free flow of ‘wealth, skills and people’ across national boundaries.<sup>201</sup> Diversity in private international rules can impose undue transaction costs on businesspeople and encourage forum shopping and other strategic behaviour inimical to international trade. Rules that clearly allocate international jurisdiction, respect parties’ choice of law and forum agreements, and provide certain and expedited means of enforcing foreign judgments are an essential part of a private international law regime meant to facilitate economic transactions.

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<sup>199</sup> See e.g. *Sello v. Sello (No. 2)* 1999 (2) B.L.R. 104 at 109; *De Gree v. Webb* 2007 (5) S.A 184 at [11], [17], [47]-[55], [85]-[94]; *Roger Parry v. Astral Operations Ltd.* 2005 (10) Butterworths Labour L.R. 989; *Kisko Products Ltd. v. Delmas America Africa Line Inc.*, Civil Appeal No. J4/28/2005 (Supreme Court, Ghana, 2004).

<sup>200</sup> See generally Paolo Mengozzi, “Private International Law and the WTO Law” (2001) 292 *Recueil des Cours* 249.

<sup>201</sup> *Morguard*, *supra* note 10 at 1096.



The need to make private international law responsive to the needs of international economic transactions has been recognized in academic writing and judicial decisions.<sup>202</sup> African courts have also recognized this need. For example, South African courts have emphasized the need for the country's trade and commercial relations to be an important consideration in applying its laws on jurisdiction.<sup>203</sup> Namibia's High Court has held that commercial considerations influence parties in agreeing to choice of law and forum clauses, and that this should be considered in assessing the international competence of foreign courts in an action to enforce a foreign judgment.<sup>204</sup>

Indeed, historically, the first major private international law legislation in common law Africa was aimed at facilitating commerce in the colonies. It was legislation for the enforcement of foreign judgments. Patchett<sup>205</sup> traces the genesis of the first Gold Coast (now Ghana) legislation in this area, the Foreign Judgment Extension Ordinance, 1907, to a complaint to a District Commissioner from a trading company in the Gold Coast regarding debtors who absconded to the Ivory Coast (now Cote d'Ivoire), which was then under French rule, ostensibly to avoid payment. The company suggested that extradition arrangements should be instituted, but the Colonial Secretary did not respond positively to this idea. He was of the view that the fault lay with the traders who allowed credit indiscriminately. This response incensed the company. They wrote directly to the Secretary of State. They reiterated their earlier plea, and further suggested that the problem of fleeing debtors existed even among the British colonies in West Africa. The colonial office, after some hesitation, took a second look at the matter. It suggested that the system of registration of judgments, then in force in the United Kingdom, would be a better solution. This led to the enactment in the Gold Coast of the Foreign Judgment Extension Ordinance. Similar statutes

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<sup>202</sup> See e.g., Ronald A. Brand, "Recognition and Enforcement of Judgments as a Trade Law Issue: The Economics of Private International Law" in Jagdeep Bhandari & Alan O. Sykes eds., *Economic Dimensions of International Law: Comparative and Empirical Perspectives* (Cambridge: Cambridge University Press, 1997) at 592; Alan O. Sykes, "Transnational Forum Shopping as a Trade and Investment Issue" (2008) 37 J. Leg. Stud. 339.

<sup>203</sup> See e.g., *American Flag plc v. Great African T-shirt Corp.* 2000 (1) S.A. 356, 375; *Hay Management Consultants (Pty) Ltd. v. P3 Management Consultants (Pty) Ltd.* 2005 (2) S.A. 522.

<sup>204</sup> *Argos Fishing Co. Ltd. v. Friopesca SA* 1991 (3) SA 255.

<sup>205</sup> Keith W. Patchett, *Recognition of Commercial Judgments and Awards in the Commonwealth* (London: Butterworths, 1984) at 20.

were enacted for the other colonies.<sup>206</sup> In our present climate of easier communication and movement of assets, the dangers of ‘absconding debtors’ and, I may add, ‘absconding assets’ is an even greater reality.

Private international law can be a direct source of investment in Africa’s economic communities if, working with some member states, they create a climate which encourages what I term ‘jurisdictional tourism’. Note the British pride in Lord Denning’s famous statement that England is a good place to forum shop.<sup>207</sup> Private international lawyers have generally shied away from statistical or empirical measures of the effect of the subject on issues like international business decision-making or international corporate behaviour, or even economic development. These issues, however, are often the unarticulated background to the development and application of private international law rules and judicial decisions.<sup>208</sup> Undeniably, the status of London as an international commercial litigation centre provides money and employment to the Queen’s Counsel and to many others who practise there. This provides foreign currency for the country. Contracting parties with no association to England are attracted to litigate there because of its accommodating jurisdiction rules, respect for choice of law and forum agreements, and effective foreign judgments enforcement regime. This is not to suggest that the English rules have been deliberately developed to encourage jurisdictional tourism, but in practice they facilitate it. Of course, these rules must be combined with a judicial system that is neutral, modern, efficient and independent.

Reflecting on the Roman-Dutch rules on jurisdiction in South Africa, Forsyth has noted the impossibility of a *peregrine* (foreigner) suing another *peregrine* in South Africa unless they have some other association with the jurisdiction other than their choice-of-forum agreement.<sup>209</sup> At common law this will not ordinarily be a problem; the presence of an exclusive jurisdiction

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<sup>206</sup> See e.g., Gambia: Foreign Judgment Extension Ordinance 1908; Northern Nigeria: Foreign Judgment Extension Ordinance 1908; Southern Nigeria: Foreign Judgment Extension Ordinance 1908; Sierra Leone: Foreign Judgment Extension Ordinance 1908.

<sup>207</sup> *The Atlantic Star* [1973] Q.B. 364 at 382.

<sup>208</sup> An explicit admission of this is art. 65 of the Treaty Establishing the European Community providing that private international law issues may be necessary for the ‘proper functioning of the internal market’.

<sup>209</sup> Christopher Forsyth, “The Impact of the Domestic on the International: Some Crucial Deficiencies in the South African Law of Jurisdiction with their Regional and International Consequences” (2006) 18 S. Afr. Mercantile L.J. 1. For judicial support for this position, see *Chong Sun Wood Products Ltd. v. K & T Trading Ltd.* 2001 (2) S.A. 651; *Hulse-Reutter v. Godde* 2001 (4) S.A. 1336.

agreement, without more, will be enough to confer jurisdiction.<sup>210</sup> As economic integration in Africa progresses and trade and investment grows, African countries with advanced and independent legal systems should, with the support of their respective communities explore the possibility of developing into jurisdictional tourist sites for the resolution of commercial disputes, including those involving non-African parties.<sup>211</sup> A contract between a Ghanaian and a Kenyan businessperson or a Ghanaian and a Dutch exporter could have a South African choice of law and forum clause rather than an English one. Jurisdictional tourist sites will provide a neutral, easily accessible, and potentially less costly forum for resolving commercial disputes in Africa. They will also be a source of investment, employment, and foreign exchange for the countries involved.

Aside from national courts, it has been discussed in Chapter Eight that some community courts also have jurisdiction to determine cases referred to them by private parties who choose them as forums for arbitration of their commercial disputes.<sup>212</sup> For people transacting in Africa and seeking a neutral forum to settle disputes, the community courts can provide a viable dispute settlement forum. The community courts' arbitral jurisdiction can be used to develop them into forums for the resolution of commercial disputes in Africa. To develop national and community courts into jurisdictional tourist sites, corruption within the judiciary must be eliminated. This can be done through institutional reforms, independent oversight of the operations of courts, which should not compromise their independence, and the adoption of strict and enforceable codes of judicial conduct.

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<sup>210</sup> The importance of choice of forum agreements has been given a further boost under The Hague Convention on Choice of Court Agreements 2005. The convention is not yet in force and there are no African countries currently party to it. As of May 2009, it had been signed by the European Community and the United States of America, and ratified by Mexico. See generally Paul Beaumont, "Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status" (2009) 5 J. Priv. Int'l L. 125.

<sup>211</sup> Christopher F. Forsyth, *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Court*, 4th ed. (Cape Town: Juta and Co, 2003) at 216, where he advocates South Africa courts develop an international role akin to that of the Commercial Court in London for Southern and Central Africa.

<sup>212</sup> EAC Treaty, *supra* note 7 art. 32; COMESA Treaty, *supra* note 7 art. 28. Article 16 of the ECOWAS Treaty, *supra* note 7 also establishes an Arbitration Tribunal for the community. The status, composition, powers, procedure, and other issues concerning the Arbitration Tribunal are to be set out in a Protocol relating thereto. Until that time, art. 9(5) of the Protocol A/P.1/7/91 on the Community Court of Justice of the High Contracting Parties as amended by Supplementary Protocol A/SP.1/01/05 Amending the Protocol Relating to the Community Court of Justice [ECOWAS Court Protocol] provides that the ECOWAS Court of Justice exercises the powers of the Arbitration Tribunal.

## **9.4.2 Enforcing Foreign Judgments**

### **9.4.2.1 Introduction**

Enforcing a judgment from another state is, perhaps, the best testament to the recognition that an enforcing state gives to validity of normative acts performed in the foreign state. As noted above, in economic integration, a regime for the enforcement of foreign judgments is needed to facilitate commercial transactions. A judgment given against a person resident in one state should easily be enforced in a state where that person has assets. Individuals who transact across national boundaries are concerned about the extent to which foreign judgment enforcement regimes are cheap, rapid and uncomplicated. In summary, an effective regime for foreign judgment enforcement offers practical benefits for individuals. There are limitations on existing state regimes for the enforcement of foreign judgments that affect the extent to which they can give effect to judgments from other countries.

### **9.4.2.2 Reciprocity and International Competence**

We have already noted the reciprocity requirement in the statutory regimes for the enforcement of foreign judgment in common law countries and the limited number of African countries that have been designated. It is, however, worth adding that under South Africa's Enforcement of Civil Judgment Act 32 of 1988, reciprocal treatment from a designated country is not mandatory, but the country must be designated nonetheless. Reciprocity also exists for some of the civil law regimes but it appears that here, unlike in the common law countries, it is a judicial rather than an executive decision.<sup>213</sup> The fact that very few African countries have been designated under these statutory regimes means that not many countries benefit from statutory regimes.

Another problem relates to the diversity in bases of international competence. This implies that not all judgments from other countries will be enforced despite having been validly decreed in the foreign country. The principle that the foreign court should have been competent in accordance

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<sup>213</sup> Examples are Ethiopia, Egypt and Tunisia. They entrust the reciprocity assessment to the judiciary. See Ethiopian Civil Procedure Code 1965, art 457; Egyptian Civil and Commercial Procedure 1968, art. 296; Tunisian Code of Civil and Commercial Procedure, art 319. See generally Samuel Teshale, "Reciprocity with respect to Enforcement of Foreign Judgments in Ethiopia: A critique of the Supreme Court's Decision in the Paulos Papassinous Case" (2000) 12 *Afr. J. Int'l Comp. L.* 569.

with the enforcing court's rules of private international law is a requirement in all the countries.<sup>214</sup> What differs is what each country treats as international competence. In South Africa, and indeed the other Roman Dutch law jurisdictions of southern Africa, namely Botswana, Lesotho, Namibia, Swaziland and Zimbabwe, residence and submission are recognized bases of international competence. More recently, mere presence was also accepted as a basis of international competence in South Africa.<sup>215</sup> It remains to be seen whether the other Roman Dutch law countries will also adopt this basis of international competence. There is continuing debate as to whether other grounds such as nationality, domicile, and attachment of property should suffice for international competence in Roman Dutch law.<sup>216</sup> At common law, and for the common law countries in Africa, presence, residence and submission appear to be the only recognized bases of international competence.<sup>217</sup>

When these differences in the bases of international competence are read with the differences in the bases of domestic competence in international matters, it becomes evident that the scope of judgments from some African countries that can be enforced in other African countries is reduced. This is so despite the fact that such judgments might have been legitimately decreed in the foreign jurisdiction. For example, attachment of property and arrest of a *peregrine* defendant are bases of jurisdiction in international matters in Roman Dutch law jurisdictions of

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<sup>214</sup> See e.g. *John Holt v. Christoph Nutsugah* (1929-1931) Gold Coast Divisional Court 75; *Pakou v. Rudnap Zambia Ltd.* (1998) Z.R. 233; *Steinberg v. Cosmopolitan National Bank of Chicago* 1973 (4) S.A. 564; *Argos Fishing Co. Ltd. v. Friopesca SA* 1991 N.R. 106.

<sup>215</sup> *Richman*, *supra* note 62; Richard F. Oppong, "Mere Presence and International Competence in Private International Law" (2007) 3 J. Priv. Int'l L. 321.

<sup>216</sup> P.S.G. Leon, "*Roma non Locuta est.*: the Recognition and Enforcement of Foreign Judgments in South Africa" (1983) 26 Comp. Int'l L. J. S. Afr. 325 at 338-339.

<sup>217</sup> In Canada, the courts have extended the scope of the common law bases of international competence to include situations in which the parties and cause of action had 'real and substantial connection' with the state which granted the foreign judgment. See *Morguard*, *supra* note 10; *Beals v. Saldanha* [2003] 3 S.C.R. 416; Joost Blom & Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) U.B.C. Law Rev. 373. I am aware of only one African case in which real and substantial connection was invoked, albeit unsuccessfully. In *Supercat Incorporated v. Two Oceans Marine* 2001 (4) S.A. 27, the plaintiff sought enforcement of a Florida, USA judgment against the defendant South African company. The Florida court assumed jurisdiction on the basis that the tort involved, fraud, was committed within its jurisdiction. At the time of the action the defendant was neither resident nor domiciled in Florida. It, however, entered appearance, denied the jurisdiction of the court, and thereafter failed to proceed with its defence. The court held that the Florida court was not internationally competent under South African law. Counsel referred to Canada's real and substantial connection bases of international competence. He argued that the traditional approach to the recognition of foreign judgments was obsolete and that the exigencies of international trade called for a new approach. The judge found the Canadian cases 'informative', but felt 'not inclined or, sitting as a single judge, entitled to ignore the considerable weight of judicial authority in this country'. *Ibid.* at 31

Southern Africa.<sup>218</sup> However, it is unlikely that a judgment given on either bases will be enforced in the common law jurisdiction where, as noted above, presence, residence and submission are the only recognized bases of international competence.

Indeed, even where countries have the same basis of international competence, they may interpret it differently or require different standards of proof. Submission is a case in point. In *Blanchard, Krasner & French v. Evans*,<sup>219</sup> the Full Bench of the Witwatersrand Local Division rejected the trial court's ruling that submission must be proved as a matter of legal certainty. It held that submission must be proved on the balance of probabilities.<sup>220</sup> In *Richman v. Ben-Tovim*,<sup>221</sup> the trial court laid down the test as being conduct which clearly indicated, and was consistent only with, an unqualified acceptance of or acquiescence to jurisdiction. These cases appear to suggest that although the South African courts have accepted that submission to jurisdiction may be express or implied, they have set a high threshold test for it, especially where it is to be inferred from conduct. It is arguable whether other jurisdictions adhere to this high threshold test. What is certain from the case study I have carried out is that, in the Ugandan and Nigerian cases where submission was also argued, enforcement was refused.<sup>222</sup>

#### 9.4.2.3 Judgment for a Fixed Sum

Equally constraining to the enforcement of foreign judgments within the communities is the fact that the present enforcement regimes, especially those of the common law countries, are restricted to the enforcement of foreign money judgments. At common law, only judgments for a

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<sup>218</sup> South Africa has abolished arrest as a basis of jurisdiction in international matters. *Bid Industrial Holding*, *supra* note 62. Omphemetse Sibanda, "Jurisdictional Arrest of a Foreign *Peregrinus* now Unconstitutional in South Africa: *Bid Industrial Holdings v Strang*" (2008) 4 J. Priv. Int'l L. 329; Richard F. Opong, "Roman Dutch Law meets the Common Law on Jurisdiction in International Matters" (2008) 4 J. Priv. Int'l L. 311. Arrest however remains a basis of competence in international matters in other countries. See Zimbabwe: High Court Act, Chapter 7:06, sec. 15; Namibia: Rules of the High Court of Namibia, sec. 9(1); Lesotho: High Court Rules, 1980, Rule 6(8). See also *Lesotho Express Delivery Services Ltd. v. Ravin Panambalana* Civ/T/634A/02, Civ/T/APN/469/02 (High Court, Lesotho, 2006), which was an application for the seizure of the defendant's property and his arrest to found or confirm jurisdiction. The case was ultimately decided in favour of the defendant on a technical point of pleading.

<sup>219</sup> 2002 (4) S.A. 144.

<sup>220</sup> *Ibid.* at 148.

<sup>221</sup> 2006 (2) S.A. 591 at 602.

<sup>222</sup> *Transroad Ltd. v. Bank of Uganda* [1998] UGA J. No. 12; *Ghassan Halaoui v. Grosvenor Casinos Ltd.* [2002] 17 N.W.L.R. 28.

fixed sum of money can be enforced.<sup>223</sup> This means that injunctions, orders of specific performance and other non-monetary remedies cannot be enforced in many states. These remedies are important in international litigation. Occasionally, there may be the need to seek their recognition and enforcement in other countries. If, in these instances, they cannot be enforced, that can be problematic for the relevant party.

#### 9.4.2.4 Defences to Enforcement Actions

Another limitation worth examining relates to the bases on which a foreign judgment can be denied recognition. These bases include the fact that the judgment is contrary to public policy, infringes the rules of natural justice or was procured by fraud. These grounds often give rise to interpretive difficulties and leave a lot of room for judicial discretion. Public policy is an example of an ill-defined basis for non-recognition. Its unbridled invocation and application, especially in the context of economic integration where states are expected to respect each other's laws and legal acts, can affect the horizontal relations between states and negatively impact on economic transactions. It is comparatively significant that within the European Community, which has a well-established community regime for the enforcement of foreign judgments,<sup>224</sup> the jurisprudence favours restricting the scope of public policy in actions to enforce foreign judgments.<sup>225</sup>

From the case study, it does not appear that public policy is often invoked as a defence in actions to enforce foreign judgments. Indeed, the study revealed only two cases, both involving judgments from non-African countries, in which the courts grappled with the defence and its scope. In *Eden v. Pienaar*,<sup>226</sup> the respondent challenged the recognition and enforcement of an Israeli judgment as contrary to South African public policy. The judgment contained a linkage provision, the effect of which was to ensure that depreciation of the Israeli currency did not redound to the benefit of the judgment debtor. The trial court refused enforcement on the grounds that the linkage provision escalated the face value of the debt to an unconscionable amount, and that the Israeli statute on which the action was based (the statute created liability for failure to

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<sup>223</sup> *In re Lowenthal and France* 1966 (2) A.L.R. Comm. 301; *In re the Maintenance Orders Enforcement Ordinance* (1954) 27 K.L.R. 94.

<sup>224</sup> Brussels I Regulation, *supra* note 6.

<sup>225</sup> *Ibid.* art 34 and 35; *Krombach v. Bamberski*, Case C 7/98, [2000] E.C.R I-1935; *Regie Nationale de Usines Renault SA v. Maxicar SpA*, Case C 38/98, [2000] E.C.R. I-2973.

<sup>226</sup> 2001 (1) S.A. 158. See also *Patel v. Bank of Baroda* [2001] 1 East Afr. L.R. 189.

negotiate in good faith) was contrary to South African law. In allowing the appeal, the court held that the linkage provision was an aspect of revalorization, which increased the face value of the debt, but did not affect its real value. The purchasing power of the debt remained the same and there was nothing unconscionable or *contra bonos mores* about revalorization. It was further held that the mere fact that a foreign statute embodied concepts not recognized by South African law did not of itself constitute a ground for refusing to enforce the judgment. There was nothing contrary to South Africa public policy in requiring a party to pay damages for not negotiating in good faith.

#### 9.4.2.5 Protectionist Statutes

Statutes with inappropriate nationalistic or protectionist undertones need to be re-examined to ensure the free flow of judgments within communities in Africa. The much-criticized South African Protection of Business Act 99 of 1978<sup>227</sup> is an example. The Act provides that, except with the permission of the Minister of Economic Affairs, no judgment, order, direction, arbitration award or letter of request, or any other request delivered, given or issued or emanating from outside the Republic, shall be enforced in the Republic if it arises from an act or transaction which took place at any time and is connected with the following defined matters, namely, mining, production, importation, exportation, refinement, possession, use, or sale of, or ownership of any matter or material, of whatever nature, whether within, outside, into or from the Republic.<sup>228</sup> Regardless of the Minister's consent, the recognition and enforcement of a foreign judgment for punitive or multiple damages arising out of the defined matters is prohibited.<sup>229</sup> A defendant who has already paid part of such awards can recover it from the judgment creditor.<sup>230</sup> The Act was to protect South Africans from the adverse effects of foreign laws such as those which allow for penal or multiple damages. Indeed, other countries have statutes with similar purpose.<sup>231</sup>

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<sup>227</sup> For a discussion and critique of this Act see Forsyth, *supra* note 80 at 435-437.

<sup>228</sup> Protection of Business Act 99 of 1978, sec. 1(1)(a).

<sup>229</sup> *Ibid.* sec. 1A(1).

<sup>230</sup> *Ibid.* sec. 1B

<sup>231</sup> See e.g., UK: Protection of Trading Interest Act of 1980; Australia: Foreign Anti-Trust Judgments (Restrictions on Enforcement) Act, 1979 (Cth); Canada: Foreign Extra-Territorial Measures Act 1984, sec. 8 & 9.



The South African Act is, however, unique in its breadth and has rightly been described as the clearest example of ‘legislative overkill’,<sup>232</sup> and conveying a ‘discouraging message to foreigners seeking the assistance of [South African] courts’.<sup>233</sup> If applied to the letter, its effect on business confidence might be devastating. Schulze has observed that it is nothing but a stumbling block to much-needed foreign investment in South Africa.<sup>234</sup> Happily, it has seldom been invoked, and even where it has, the courts have been careful to construe its scope narrowly.<sup>235</sup> Indeed, the South African Law Reform Commission has recommended repeal of the Act.<sup>236</sup>

Thomashausen’s study of the judgment-enforcement regimes in Angola and Mozambique,<sup>237</sup> both civil law countries in southern Africa, also reveal a protectionist tenor. One of the conditions that a foreign judgment must meet before it will be recognized and enforced is that where the rules of private international law of the enforcing court provide that its substantive law should have been applied, a foreign court’s decision, which affects an Angolan or Mozambican, must not disadvantage that citizen in relation to the decision that would have been reached had the law of the enforcing court been applied. In other words, a national of the forum should not be treated by the foreign court less favourably than he would have been in his national court. Also the foreign judgment must originate from a court that had jurisdiction in accordance with Angolan or Mozambican law. However, unlike in the Roman-Dutch law and common law countries, the international jurisdiction of the foreign court will be acknowledged only when the Angolan or Mozambican courts do not claim international jurisdiction of their own as regards the dispute at issue. Professor Thomashausen rightly describes the enforcement regimes in the two countries as a “‘home-bound’ system’.<sup>238</sup>

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<sup>232</sup> Forsyth, *supra* note 80 at 435.

<sup>233</sup> South African Law Reform Commission, *supra* note 58 at [5.2.2].

<sup>234</sup> Christian Schulze, *On Jurisdiction and the Recognition and Enforcement of Foreign Judgments* (UNISA Press, 2005) at 32.

<sup>235</sup> *Ibid.* at 31.

<sup>236</sup> South African Law Reform Commission, *supra* note 58 at [5.3.1]-[5.3.4].

<sup>237</sup> Andre Thomashausen, “The Enforcement and Recognition of Foreign Judgments and other forms of Legal Cooperation in the SADC” (2002) 35 *Comp. Int’l L. J. of Southern Africa* 26.

<sup>238</sup> *Ibid.* at 33.

#### 9.4.2.6 Foreign Judgments in Foreign Currency

Another area of interest to business is currency issues in foreign judgment enforcement. Should foreign judgments be converted into the local currency? When should the conversion be effected<sup>239</sup> and at whose rate? Given the currency inconvertibility and fluctuating exchange rates problems in Africa, these issues are particularly important. Some of these issues were raised in *Ssebagala & Sons Electric Centre Ltd. v. Kenya National Shipping Line Ltd.*<sup>240</sup> The applicant sought to register and enforce, in Kenya, a Ugandan judgment which, interestingly, was denominated in British pounds. The application was brought under the Foreign Judgment (Reciprocal Enforcement) Act.<sup>241</sup> Two issues that arose for determination were the currency in which the judgment was to be registered and the time for conversion of currency. The court held that under section 7 of the Act, a foreign currency judgment *may* be registered as a judgment for a sum payable in such sums in Kenya currency as are equivalent thereto on the basis of the rate of exchange prevailing at the time of registration. Also, the time of conversion was when the judgment was registered and not the date of enforcement.

Some African countries have departed from the common law rule that the courts cannot give judgments in foreign currency.<sup>242</sup> In the absence of other exchange control restrictions, the courts' jurisdiction to grant judgments in foreign currency enures to the benefit of judgment creditors who bring common law actions to enforce foreign judgments or secure payment of other debts denominated in foreign currency.<sup>243</sup> However, where a party seeks to register a foreign

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<sup>239</sup> Some countries use the date of the original judgment as the conversion date. See e.g. Ghana: Courts Act, 1996, Act 459, sec. 82(7); South Africa: Enforcement of Foreign Civil Judgment Act 32 of 1988, sec. 3(4).

<sup>240</sup> *Supra* note 29.

<sup>241</sup> Laws of Kenya, Chapter 43.

<sup>242</sup> See *Miliangos v. George Frank (Textiles) Ltd.* [1976] A.C. 443; *Barclays Bank of Swaziland Ltd. v. Mnyeketi* 1992 (2) S.A. 425; *Makwindi Oil Procurement Ltd. v National Oil Company of Zimbabwe* 1988 (2) S.A. 690; *Makwindi Oil Procurement Ltd. v National Oil Company of Zimbabwe* 1989 (3) S.A. 191; *Royal Dutch Airlines (KLM) v. Farmex Ltd.* [1989-90] 1 G.L.R. 46; R.E. Bannermah, "Award of Damages in Foreign Currency: A Critical Look at the Judgments" (1993-1995) 19 Rev. Ghana L. 231; Lisa Niewoudt, "The Power of the South African Court to Give Judgment in Foreign Currency" (1992-1993) 18 South Afr. Ybk. Int'l L. 147. See generally Vaughan Black, "Foreign Currency Obligations in Private International Law" (2003) 302 *Recueil des Cours* 9.

<sup>243</sup> See *Echodelta Ltd. v. Kerr and Downey Safaris* 2004 (1) S.A. 509 (the foreign plaintiff ended up with a judgment in Zimbabwe dollars equivalent to about U.S.D. \$18,000 for a debt of U.S.D. \$90,385.60). Compare *Chiraga v. Msimuko* 2004 (1) S.A. 98 (the foreign defendant successfully resisted the conversion of a debt denominated in South African Rands into Zimbabwe dollars). *Eden v. Pienaar* 2001 (1) S.A. 158 (the court held that the enforcement of an Israeli judgment given in U.S. dollars with a linkage provision designed to ensure that depreciation of the Israeli

judgment, a number of the registration statutes compel the conversion of the judgment into the currency of the enforcing forum.<sup>244</sup> The provision in the Ghanaian legislation, which can be said to be representative of those in other jurisdictions, reads:

Where the sum payable under a judgment, which is to be registered, is expressed in a currency other than the currency of Ghana, the judgment shall be registered as if it were a judgment for a sum in the currency of Ghana based on the rate of bank exchange prevailing at the date of the judgment of the original court.<sup>245</sup>

Some jurisdictions, such as Kenya, however, make the date of registration rather than the date of the original judgment the conversion date.<sup>246</sup>

These currency conversion provisions may be of great financial significance to individuals, especially in an era of fluctuating exchange rates which may work to the prejudice of one party. Recognizing the potential hardship and injustice that can result, especially to the foreign judgment creditor, legislation in Australia and New Zealand gives a judgment creditor the option to state in his application for registration whether he wishes the judgment to be registered in the currency of the original judgment.<sup>247</sup> This choice mitigates the potential hardship that can be caused by the provisions, at least from the perspective of the judgment creditor. It appears from the discretionary language of the Kenya legislation that such an option is available to foreign judgment creditors.<sup>248</sup> I suggest that subsequent reform of legislation for the enforcement of foreign judgments in Africa should incorporate a provision similar to the New Zealand and Australia statutes.

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currency does not redound to the benefit of the judgment debtor was not contrary to South African public policy). *Charles Thys v. Herman Steyn* [2006] eKLR (court held that it will be contrary to public policy for judicial procedure to be exploited to rake in supernormal profits associated with the rapid fluctuations of the Kenyan shilling on the international money markets.).

<sup>244</sup> Botswana: Judgments (International Enforcement) Act 1981, Ch. 11:04, sec. 5(5); Namibia: Enforcement of Foreign Civil Judgments Act 1994, Act 28 of 1994, sec. 3(4); Tanzania: Foreign Judgments (Reciprocal Enforcement) Ordinance 1935, sec. 4(3); Ghana: Courts Act 1996, Act 459, sec. 82(7); Zambia: Foreign Judgments (Reciprocal Enforcement) Act, Chapter 76, sec. 4(3); Uganda: Foreign Judgments (Reciprocal Enforcement) Act, Chapter 9, sec. 3(3); Nigeria: Foreign Judgments (Reciprocal Enforcement) Act 1990, Chapter. 152 LFN, sec. 4(3). But see Kenya: Foreign Judgment (Reciprocal Enforcement) Act, sec. 7(1) which uses the discretionary language 'may be registered'.

<sup>245</sup> Ghana: Courts Act 1996, Act 459, sec. 82(7).

<sup>246</sup> *Supra*, note 29.

<sup>247</sup> Australia: Foreign Judgments Act 1991, sec. 6(11)(a); New Zealand: Reciprocal Enforcement of Judgments Act 1934, sec. 4(3).

<sup>248</sup> Kenya: Foreign Judgments (Reciprocal Enforcement) Act, sec. 7(1).

With a view to strengthening interstate relations and facilitating economic integration in Africa, the above limitations must be reviewed either nationally or, more appropriately, through an African convention on the enforcement of foreign judgments. A well thought-out foreign judgment enforcement regime is indispensable to the success of any economic community. Where the enforcement of private legal claims is impossible, unduly complicated, time-consuming or expensive, it hinders closer economic relations and hampers the development of a stable economic community.<sup>249</sup> The development of a common regime for the enforcement of foreign judgments in Africa will benefit individuals who utilize the regime. It will also strengthen the relational bond existing between legal systems in Africa.

## **9.5 DEVELOPING A PRIVATE INTERNATIONAL LAW REGIME TO AID INTEGRATION**

### **9.5.1 Introduction**

The above discussion demonstrates the importance of private international law in economic integration, but, as was suggested, there is palpable inattention to it in Africa's economic communities. To strengthen interstate relations and to aid economic transactions, there is need for African countries to embark on a comprehensive look at and reform of their private international law regimes. This is especially important as the communities progress through the stages of integration. The goal of ensuring 'the free movement of persons, goods, services and capital and right of establishment and persons' outlined in the AEC Treaty<sup>250</sup> and also pursued in other communities will be seriously hampered or not materialize without these reforms.<sup>251</sup> With deeper integration, one can foresee not only increased development of cross-border personal relationships, such as through marriages, but also an increase in cross-border economic transactions. This will mean greater resort to private international law principles. Indeed, there may be a need to harmonize private international law rules to govern the operation of divergent national substantive

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<sup>249</sup> Peter Hay, "The Common Market Preliminary Draft Convention on the Recognition and Enforcement of Judgments – Some Considerations of Policy and Interpretation" (1968) 16 Am. J. Comp. L. 149; P.M.C. Koh "Foreign Judgments in ASEAN – A Proposal" (1996) 45 Int'l Comp. L.Q. 844; Robert C. Casad, "Civil Judgment Recognition and the Integration of Multi-state Associations: A Comparative Study" (1980-1981) 4 Hasting Int'l & Comp. L. Rev. 1 where he identifies 'an effective scheme for the mutual recognition and enforcement of civil judgments' as one feature of any economic integration initiative 'likely to achieve significant integration'.

<sup>250</sup> AEC Treaty, *supra* note 7 art. 4(2)(1).

<sup>251</sup> A. Ovwah, "Harmonisation of Laws with the Economic Community of West African States (ECOWAS)" (1994) 6 Afr. J. Int'l & Comp. L. 76.

rules.<sup>252</sup> At the continental level, although the vision of an African common market under the AEC Treaty looks distant, it can be inferred from the treaty that it must happen within the next fifteen years. This thesis contends that the time to begin preparation for it is now. For the RECs communities this call is even more immediate and strong. Luckily, Africa has the benefit of learning from other regions' efforts.

Among the areas that should receive immediate attention are choice of law in contract and tort, *in personam* jurisdiction in international matters and the recognition and enforcement of foreign judgments and international civil procedure. These areas are of direct and immediate impact on economic transactions, and there is either inappropriate diversity of rules across Africa or an absence of any authoritative legal positions. Choice of law in torts is illustrative of this. Industrial and technological developments, as well as advancements in international transportation, have made international torts a fertile area of private international law problems. But, so far, the position in many African countries is unclear due to the absence of any law on the subject.

A recent opportunity to discuss the subject came in the Kenyan case of *Rage Mohammed Ali v. Abdullahim Maasai*.<sup>253</sup> The case arose out of an accident in Uganda. Both parties were citizens and residents of Kenya. The plaintiff brought a claim in contract (instead of tort) for general and special damages arising from injuries sustained in an accident. The court disallowed the claim. The plaintiff was unable to prove that he was an employee of the defendant. To the court, 'this is a simple and straightforward case of a motor vehicle accident that took place in a foreign country outside the limits of the jurisdiction of the courts in Kenya'. Neither counsel nor the court raised the possibility of a claim in tort and the concomitant choice of law issues that would have called for resolution.<sup>254</sup>

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<sup>252</sup> H.D. Tebbens, "Private International Law and the Single European Market: Coexistence or Cohabitation" in *Forty Years on: The Evolution of Postwar Private International Law in Europe* (Kluwer Deventer, 1990) at 62.

<sup>253</sup> [2005] eK.L.R.

<sup>254</sup> In *Riddlesbarger v. Robson* [1958] East Afr. L.R. 375, in which the Kenya Court of Appeal held that an action will lie in Kenya for a libel published abroad if the libel was wrongful and actionable both in Kenya and the country of publication.

There is currently a trend towards upholding the *lex loci delicti commissi* as the choice of law rule in torts.<sup>255</sup> Australian<sup>256</sup> and Canadian<sup>257</sup> courts have abandoned the English double actionability rule. The United Kingdom has also reformed its law on this issue by statute.<sup>258</sup> Whether African countries will follow this trend remains to be seen. In Nigeria, case law relating to intra-state torts supports both the double-actionability rule and the *lex loci delicti* principle.<sup>259</sup> However, the position on international torts is unclear. A Ghanaian court has expressed a preference for parties to sue in the state in which ‘the cause of action arose and according to whose law the liability is to be determined’,<sup>260</sup> but it is yet to be decided what law will apply if the court decides to assume jurisdiction.<sup>261</sup> In South Africa, the consensus amongst scholars is that the issue is *res nova*, and thus for the Courts to decide which of the various approaches to choice of law in torts they want to adopt.<sup>262</sup>

In the area of international civil procedure, the existing laws are often very dated, and most African countries have not taken advantage of international developments in the area. Indeed, the case study suggests it is a difficult area.<sup>263</sup> This can be problematic when courts are invited to settle

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<sup>255</sup> John Kiggundu, “Choice of Law in Delict: The Rise and Rise of the *Lex Loci Delicti Commissi*” (2006) 18 S. Afr. Mercantile L.J. 97.

<sup>256</sup> *Regie National des Usines Renault SA v. Zhang* (2002) 210 C.L.R. 491.

<sup>257</sup> Tolofson, *supra* note 10.

<sup>258</sup> Private International Law (Miscellaneous Provisions) Act 1995.

<sup>259</sup> See I.O. Agbede, “Nigeria” in B. Verschraegen ed., *International Encyclopaedia of Law: Private International Law* (The Hague: Kluwer Law International, 2004) at 39-40; I. Oluwole Agbede, *Themes on Conflict of Laws* (Ibadan: Shaneson C.I. Ltd., 1989) at 159-179.

<sup>260</sup> *Signal Oil & Gas Company v. Bristow Helicopters Ltd.* [1976] 1 G.L.R. 371 at 379.

<sup>261</sup> The earlier case of *Wachter v. Harlley* [1968] G.L.R. 1069, which involved slander allegedly committed in Switzerland, supports the double actionability rule.

<sup>262</sup> Forsyth, *supra* note 80 at 326-27 and the writers cited therein.

<sup>263</sup> From the case study, among the areas of difficulty identifiable from the judgments were, procedures for serving documents abroad (*Fonville v. Kelly III* [2002] 1 East Afr. L.R. 71; *Willow Investment v. Mbomba Ntumba* [1997] T.L.R. 47); the procedures for taking evidence abroad (*Kells v. Ako Adjei*, Case No. CA 8/2000 (Supreme Court, Ghana); rules on the formalities and admissibility in court of affidavits taken abroad (*Microsoft Corporation v. Mitsumi Computer Garage Ltd.* [2001] K.L.R. 470; *Pastificio Lucio Garofalo SPA v. Security & Fire Equipment Co.* [2001] K.L.R. 483); the law regarding the relevance and effect of rules on the authentication of foreign documents (*Blanchard, Krasner & French v. Evans* 2004 (4) S.A. 427; *Lamus Agricultural Services Co. Ltd. v. Gwembe Valley Dev Ltd.* [1999] Zambia L.R. 1; *Slyvanus Juxon-Smith v. KLM Royal Dutch Airline*, Civil Appeal No. J4/19/2005 (Supreme Court, Ghana); deposit of security for costs by foreign plaintiffs (*Fasco Trading Co Ltd. v. Goodearth Ltd.* [2000] LawAfrica L.R. 1236; *Noble Builders (U) Ltd. v. Sandhu* [2004] 2 East Afr. L.R. 228; *B & W Industrial Technology Ltd. v. Baroutsos* 2006 (2) S.A. 135.

disputes arising from cross-border economic transactions and there is a need for co-operation with another African court in terms of serving documents, securing witnesses or evidence.

## **9.5.2 Role of Constituencies**

### **9.5.2.1 Academics and Academic Institutions**

The development of private international law to enhance interstate relations and aid economic transactions within the communities demands constituencies with interest in the subject and a consciousness that allows them to look beyond the confines of their own legal systems. These constituencies have a role to play in reforming private international law to meet the challenges of economic integration in Africa. The reform agenda should be approached at both national and community levels. The ultimate aim should be to ensure a well-thought-through private international law regime that will engender stability, security and predictability in international commercial transactions within an economically-integrated Africa. African academics and academic institutions have a crucial role to play. Through their research and writings, they can expose areas in need of reform and suggest ways of addressing them.

It is noteworthy that there are efforts to enhance the institutional development of the subject. In 2000, the Institute for Private International Law in Southern Africa was established as a part of the University of Johannesburg.<sup>264</sup> Its current goal is to draft a code of private international law of contract for the Southern African Development Community and/or the African Union. The Institute of Foreign and Comparative Law of the University of South Africa strives to be the premier research institution in the development and application of private international law, public international law, and comparative law in Africa. It aims to maintain and develop a database of private international law, particularly in the area of family law.<sup>265</sup> The Hague Conference on Private International Law has also established a document centre for southern Africa at the University of Johannesburg. These efforts have so far been concentrated in southern Africa and are likely to benefit the economic integration processes there. There is a need to expand these initiatives into other regions of Africa and the various law faculties have a crucial role to play.<sup>266</sup>

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<sup>264</sup> <http://general.rau.ac.za/law/English/ipr/ipr.htm>

<sup>265</sup> <http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=675>

<sup>266</sup> Oppong, *supra* note 42 at 699.

### 9.5.2.2 National Legislatures and Courts

The lack of written rules is very much a feature of the common law and Roman-Dutch law countries; very few areas of private international law have legislation on them in Africa. There is an urgent need to legislate or reform existing legislation on some private international law issues.<sup>267</sup> Law Reform Commissions and parliaments are important here. Legislation takes time. Before then, courts will be the principal institution for reform. Indeed, historically, courts have been at the forefront of the development of private international law and they will continue to perform that role in Africa.<sup>268</sup>

National constitutions and the courts' visions of their role in the development of law will influence the extent to which they can be helpful on this score. In a number of cases in the case study, African judges have encountered difficult private international law issues and chosen to defer to the appropriate legislative institution for solution. For example, in *Raytheon Aircraft*<sup>269</sup> the Kenya court found as problematic the absence of rules of court on how a defendant, who had been sued in Kenya for being in breach of a choice of forum agreement, could challenge the court's jurisdiction. It did not create a rule to fill that vacuum. Instead, it called on the Rules Committee to look at the issue. There were other cases in which courts reformed the law without reference to parliament. In *Bid Industrial Holding v. Strang*<sup>270</sup> the South African court abolished the rule that a foreign *peregrinus* can be arrested to found or confirm jurisdiction in a claim sounding in money.<sup>271</sup> It also sanctioned mere presence as a basis of jurisdiction in international matters, a

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<sup>267</sup> Some countries have recently adopted private international law legislation and their experiences could be useful. See e.g. Toni Deskoski, "The New Macedonian Private International Law Act of 2007" (2008) 10 Yearbook of Priv. Int'l L. 441; Guloren Tekinalp, "The 2007 Turkish Code Concerning Private International Law and International Civil Procedure" (2007) 9 Yearbook of Priv. Int'l L. 313; Christa Jessel-Holst, "The Bulgarian Private International Law Code of 2005 (2007) 9 Yearbook of Priv. Int'l L. 375; Weidong Zhu, "China's Codification of the Conflict of Laws: Publication of a Draft Text" (2007) 3 J. Priv. Int'l L. 283; Aude Fiorini, "The Codification of Private International Law: The Belgian Experience" (2005) 54 Int'l & Comp. L. Q. 499; and see generally F. von Schwind, "Problems of Codification of Private International Law" (1968) 17 Int'l & Comp. L. Q. 428.

<sup>268</sup> See generally Joost Blom, "Reform of Private International Law by Judges: Canada as a Case Study" in James Fawcett ed., *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford: Oxford University Press, 2002) at 31.

<sup>269</sup> [2005] 2 K.L.R. 47. See also *Drive Control Services Ltd. v. Troycom Systems Ltd.* 2000 (2) S.A. 722; *Nku v. Nku* 1998 B.L.R. 187.

<sup>270</sup> *Supra* note 62.

<sup>271</sup> Under South Africa law, the courts will not assume jurisdiction over a foreign defendant in claims sounding in money, unless his assets within the jurisdiction have been attached to found or confirm jurisdiction.



basis of jurisdiction previously unknown to South African law. Earlier, in *Richman v. Ben-Tovim*,<sup>272</sup> the court held that mere physical presence suffices as a basis of international competence in actions to enforce foreign judgments.

The challenges of economic integration coupled with the underdeveloped state of private international law in Africa is likely to bring up issues which courts may have to address without any national precedent. On such issues, attention to international developments and a judicial philosophy informed by the needs of economic integration will be useful. ‘Internationalist policy consciousness’<sup>273</sup> in private international law refers to an approach to resolving problems on the basis of internationalist visions or goals. The internationalist objects of promoting international trade and commerce, aiding international uniformity or harmonization of rules and fostering harmonious interstate relations are examples of these goals. All these objects are relevant in economic integration. Internationalist consciousness is a source of reform in private international law through the adoption of international conventions and judicial decisions informed by its goals. African states are parties to a small number of private international law conventions.<sup>274</sup> Therefore, international conventions are unlikely to be a significant and immediate source of reform and development of private international law to aid Africa’s economic integration. Rather, it is to the courts that we must look.

The case study revealed judgments that already reflect the existence of this internationalist consciousness in African judges. But, it must be admitted, the way the courts approached internationalist objects was often superficial. In *Barclays Bank of Swaziland v. Koch*<sup>275</sup> the Botswana court held that ‘the comity of nations and international commerce required that foreign judgments be recognised and enforced in each other’s countries as far as possible’. In *Sunrise*

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<sup>272</sup> *Supra* note 62.

<sup>273</sup> Robert Wai, “International Trade Agreements, Internationalist Policy Consciousness, and the Reform of Canadian Private International Law” in *The Measure of International Law: Effectiveness, Fairness and Validity* (Proceedings of the 31st Annual Conference of the Canadian Council on International Law) (The Hague, Kluwer Law International, 2004) at 123; Wai, *supra* note 3.

<sup>274</sup> See generally Richard F. Oppong, “The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation” (2006) 8 Yearbook of Priv. Int’l L. 189.

<sup>275</sup> 1997 B.L.R. 1294 at 1297.

*Travel and Tours Ltd. v. Wanjigi*,<sup>276</sup> the Kenyan court suggested that, in an ‘era of increased globalization’, it would be a good thing for defendants to be sued where they are domiciled.<sup>277</sup>

The radical changes in South African law introduced by *Richman* and *Bid Industrial Holding* were also in part justified by internationalist objects. In *Richman v. Ben-Tovim*,<sup>278</sup> the court found ‘compelling reasons why ... in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen’. In *Bid Industrial Holding*, the fact that neither counsel nor the court was able to identify any other countries which required arrest as a prerequisite for jurisdiction over foreign defendants in claims sounding in money<sup>279</sup> influenced the court’s decision to abolish arrest as a basis of jurisdiction.

But, perhaps, the most significant reform informed by internationalist objects was in the Ugandan case of *Shah v. Manurama Ltd.*<sup>280</sup> In *Shah*, the court held that, given the re-establishment of the East African Community, there could no longer be an automatic and inflexible presumption for the courts to order security for costs with regard to plaintiffs resident in the East African Community when they bring claims against Ugandan residents. Among the factors that informed this decision were the facts that the EAC Treaty made express provision for the unification and harmonization of the laws of the member states, and that there existed a regime for the reciprocal enforcement of judgments among the member states.

It must be admitted that advancing internationalist object can sometimes unfairly subject the parties’ interests to systemic and states’ interests. As Wai has observed:<sup>281</sup>

Private international law in the Commonwealth traditions ... has traditionally focused on the conflicts between the interests and preferences of individual parties. A significant danger in promoting international system objectives is that the interests and values of individual parties are dealt with unfairly.

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<sup>276</sup> [2002] LawAfrica L.R. 5933 at [12].

<sup>277</sup> This seems consistent with the EC approach under article 2 of the Brussels I Regulations, *supra* note 6.

<sup>278</sup> *Supra* note 62.

<sup>279</sup> *Supra* note 62 at [46]. The fact that the court accepted this is unfortunate; a cursory look at the law of South Africa’s neighbours – Zimbabwe, Namibia and Lesotho – would have revealed that they also required arrest as a basis of jurisdiction over foreign defendants. See legislation cited in footnote 86 above.

<sup>280</sup> [2003] East Afr. L.R. 294.

<sup>281</sup> Wai, *supra* note 3 at 187.

I have also argued that the *Richman* decision, which was informed by various internationalist objects, potentially undermines defendants' rights to a fair hearing and defeats their legitimate expectations as to the venue of trial.<sup>282</sup> Notwithstanding these objections, it is worth emphasizing that, for the purpose of using private international law to aid Africa's economic integration, courts cannot be inattentive to internationalist objects, especially when they will enhance integration by facilitating economic transactions.

### 9.5.3 Need for Continental and International Engagement

National efforts to reform private international law should be complemented by continental efforts, spearheaded by the African Union (of which the AEC is an integral part), and aimed at harmonizing private international law rules. Despite their diverse legal traditions, it is definitely possible for African nations to achieve this. The Institute for Private International Law in Southern Africa is already doing some work in that direction in Southern Africa. This work of the Institute should be encouraged, possibly adopted, by the AU and made a continent-wide initiative. In Chapter Four, I outlined a path to harmonization of laws in Africa which builds on the diverse legal traditions in Africa. Indeed, as it was argued there, the extent to which African laws are diverse should not be exaggerated, at least as between countries belonging to the same legal tradition.<sup>283</sup>

From the perspective of the AEC, I advocate the establishment of a body with a specific mandate to look into Africa's private international law rules and how they relate to economic integration. Article 25(2) of the AEC Treaty, which allows the Assembly of Heads of State or Governments to establish additional specialized technical committees can provide the basis for establishing such an institution. A similar case can be made for the various RECs. In this regard, it is significant that the Assembly of Heads of State and Government of the African Union adopted, in February 2009, the Statute of the African Union Commission on International Law.<sup>284</sup> The eleven-member commission, whose members are yet to be elected, is to undertake activities

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<sup>282</sup> Oppong, *Mere Presence*, *supra* note 83.

<sup>283</sup> Indeed, the law on the same subject under different legal traditions may also display remarkable similarities. For example, as far as private international law is concerned, South Africa's Roman-Dutch law is largely consistent with the English common law. See generally Kutner, *supra* note 61.

<sup>284</sup> 1 February 2009, online: African Union <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>>.

relating to the codification and progressive development of international law in Africa.<sup>285</sup> It is also mandated to conduct studies on legal matters of interest to the African Union and its member states.<sup>286</sup> It is suggested that, in addition to the many public international law problems identified in this thesis, private international law should also find a place on the agenda of the commission.

Parallel to these, there is a need for states and the communities to increase their co-operation with the international institutions working on private international law.<sup>287</sup> The principal institution in this regard is The Hague Conference on Private International Law. Co-operation could start with the ratification of Hague conventions by African countries. The Hague conventions and methods of the Conference could also serve as a model for the development of African conventions on private international law. The Conference can make an input in the development of African regional conventions.<sup>288</sup> Significantly, the idea of an African convention on private international-law issues has already been advocated by scholars,<sup>289</sup> and, as already noted, is being pursued by the Institute of Private International Law.

Co-operation with the Conference could also take the form of sending official delegations to participate in the Conference's proceedings as a prelude to membership. Currently, only three African countries, Egypt, Morocco and South Africa, are members of the Conference.<sup>290</sup> In an era of globalization, Africa and its economic communities cannot be oblivious to international developments.<sup>291</sup> It is significant that although all members of the EC are members of the

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<sup>285</sup> *Ibid.* art. 4(a).

<sup>286</sup> *Ibid.* art. 4(d).

<sup>287</sup> I discuss the issues discussed in this paragraph more extensively in Oppong, *supra* note 143. See also Luca G. Castellani, "International Trade Law Reform in Africa" (2008) 10 Yearbook of Priv. Int'l L. 547.

<sup>288</sup> Currently, UNIDROIT is helping the Organisation for the Harmonisation of Business Law in Africa (OHADA) to develop a uniform law of contract. This can provide a model of cooperation between the Conference and Africa in the area of private international law.

<sup>289</sup> Christopher Forsyth, "The Provenance and Future of Private International Law in Southern Africa" [2002] J. South Afr. L. 60. See also A.E.A.M. Thomashausen, "Private International Law in Africa" (Paper presented at the "Private International Law Seminar" of 7 August 2000 Faculty of Law Rand Afrikaans University, South Africa) (On file with author) who proposes a Model Act of Private International Law for Africa.

<sup>290</sup> Excluding the three member states, 15 African countries (Niger, Burundi, Botswana, Lesotho, Guinea, Mauritius, Swaziland, Kenya, Liberia, Malawi, Mali, Namibia, Seychelles, Burkina Faso and Zimbabwe) have ratified various Hague Conventions.

<sup>291</sup> See generally Thalia Kruger, "The South African Litigant and European Union Rules of Civil Procedure" (2005) 38 Comp. Int'l L. J. S. Afr. 75; Charles T. Kotuby, "Internal Developments and External Effects: The Federalization of Private International Law in the European Community and its Consequences for Transnational Litigants" (2001-2002)

Conference, the EC itself has recently become a member.<sup>292</sup> MERCOSUR also co-operates with the Conference and an agreement has been concluded between the Conference and the Inter-American Children's Institute, a specialized organization of the Organization of American States.<sup>293</sup> A strong relationship with the Conference should be a key aspect of any strategy within the communities to develop their private international law regimes.

#### **9.5.4 Values to Inform Africa's Private International Law Regime**

The above exposition suggests that to meet the challenges and demands of economic integration, the communities will need to develop a private international law regime that suits the ends of integration. As noted earlier, similar regimes, founded principally on treaties and community legislation, have already been developed by some economic communities outside Africa. So far, such a regime is absent in Africa. At best, what the case study reveals is an emerging, judicially-led, academically-unexplored, and institutionally-inactive body of law that provides adequate, appropriate and fair solutions to private international law problems. It is also receptive to the influence of external values such as human rights, internationalism and the use of comparative foreign materials. These can be useful for the ends of economic integration.

This body of law is currently riddled with difficult, unsettled and underdeveloped areas. Its evolution into a regime comparable to those of the economic communities outside Africa is inextricably linked with the progress of economic integration in Africa.<sup>294</sup> Any movement to develop a regime that suits Africa's economic integration should combine community laws with national case law. I propose ten values that should influence this regime:

- It should not be isolationist. It should be sensitive to and participate in international processes in the field.

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21 J. L. & Commerce 157; J.J. Fawcett, "The Europeanization of Private International Law: The Significance for Singapore" [1997] Singapore J. Int'l & Comp. L. 69.

<sup>292</sup> The Community became a member on 3 April 2007. See Andrea Schulze, "The Accession of the European Community to the Hague Conference on Private International Law" (2007) 56 Int'l & Comp. L. Q. 939.

<sup>293</sup> <[http://www.hcch.net/index\\_en.php?act=events.details&year=2006&varevent=116](http://www.hcch.net/index_en.php?act=events.details&year=2006&varevent=116)>.

<sup>294</sup> See Richard F. Oppong, "Private International Law and the African Economic Community: A Plea for Greater Attention" (2006) 55 Int'l & Comp. L.Q. 911.

- It should emphasize the importance of harmonizing and/or unifying private international law rules across Africa. This can be done through the adoption of international conventions and the active use of comparative law in resolving private international law problems.
- It should recognize the multiple interests at stake in the resolution of private international law problems and, as far as possible, prioritize the interests of the disputing parties.
- It should not be overtly discriminatory, but be sensitive to the interests of African residents and domiciliaries when deciding private international law cases or adopting rules.
- It should ensure a proper balance between the role of courts in the development of private international law and legislative interventions in areas where the law is undeveloped, underdeveloped or uncertain.
- It should have rules that are sensitive to the demands of international human rights laws.
- It should aim at making Africa an attractive place for the resolution of international commercial disputes by adopting and providing rules conducive to that goal.
- It should be responsive and receptive to alternative modes of settling disputes such as international arbitration and litigation before regional courts by providing rules which facilitate their processes, including supportive judicial remedies.
- It should respect party autonomy in international transactions and uphold parties' rights to regulate their transactions through choice of law and forum agreements.
- It should pay attention to the institutional development of the subject by acknowledging, supporting and facilitating the work of academics and academic institutions working in the field.

## **9.6 CONCLUSION**

This chapter has argued that private international law can perform a dual role in Africa's economic integration. Its principles may be used to strengthen interstate relations and facilitate cross-border economic transactions within the communities. To perform both roles effectively, there is the need for radical reform of Africa's private international law. The reform should be approached at both national and community levels. The rules adopted should be tailored to meet

the needs of economic integration in Africa. To this end, a set of values has been suggested. Reform at national and community levels should be combined with increased participation in international institutions working on private international law. It is only through participation that Africa can learn, be heard and make the emerging international conventions take account of its needs and interests.

## **CHAPTER TEN: CONCLUSION**

### **10.1 INTRODUCTION**

This thesis set out to examine how relational issues of law in economic integration are being approached in Africa. At its core, relational issues deal with the legal interactions among community, national, regional and international legal systems within the context of economic integration. The theory was that effective economic integration is the product of properly structuring and managing, within well-defined legal frameworks, vertical, horizontal and vertico-horizontal relations among states, legal systems, laws and institutions. Put differently, an economic community must have well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness.

After expounding this theory and applying it to the state of affairs in Africa, the conclusion of the thesis can be captured in a few words: Africa's economic integration processes have not paid systematic or rigorous attention to relational issues. The interactions between community and member states' legal systems, among the various communities, as well as among member states' legal systems have neither been carefully thought through nor placed on a solid legal framework. Where attempts have been made to provide a legal framework, they have been incomplete, unsatisfactory, and, sometimes, grounded on questionable assumptions. The thesis has argued consistently that unless these shortfalls are remedied, the growth and effectiveness of Africa's economic integration will be seriously undermined. Put differently, even if all the socio-economic and political challenges that bedevil Africa's economic integration were to disappear, there remains much in the realm of law which, if unaddressed, will hinder its success and effectiveness.

So far, the impact of relational issues has not been felt due to the slow pace at which Africa's economic integration is progressing. That will not remain so for ever. Indeed, the communities are progressing through the various stages of integration – from free trade areas to customs unions, common markets, economic unions and complete economic integration. The Southern African Customs Union (SACU) as a customs union dates back to 1910; the Common Market for Eastern and Southern Africa (COMESA) became a customs union in 2009; the Southern African Development Community (SADC) became a free trade area in 2008, plans to be a customs union in 2010 and a common market by 2015; the Economic Community of West



African States (ECOWAS) is edging closer to creating a customs union; and the East African Community (EAC), which is already a customs union, is currently negotiating a common market protocol. Relational issues become more evident as integration progresses; the deeper the level of integration, the greater the demands that the community makes on member states become. Accordingly, sooner rather than later, the inadequacies in the existing legal framework will be exposed and will have to be addressed, if the communities are to be effective.

In terms of their architecture, as reflected in their constitutive treaties, some communities have utilized a number of the relational principles and mechanisms discussed in Chapter Two. For example, the COMESA, ECOWAS and EAC treaties provide for a preliminary reference procedure,<sup>1</sup> envisage a role for national courts in the implementation and enforcement of community laws and judgments,<sup>2</sup> and allow individuals to access their community courts.<sup>3</sup> Also, within the EAC, a fairly adequate regime for enforcing member states' judgments and jurisprudential communication among the three founding members – Kenya, Tanzania and Uganda – exists. These are important first steps. The first generation of Africa's economic integration treaties were very much inattentive to relational issues<sup>4</sup> and did not utilize many of the relational principles examined in Chapter Two.

Although the community treaties adopt some relational principles, they have also shied away from others. For example, only the Treaty establishing the East African Community provides for the supremacy of community law. All the treaties provide that the implementation of

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<sup>1</sup> See *Treaty establishing the Common Market for Eastern and Southern Africa*, 5 November 1993, 33 I.L.M. 1067, art. 30 [COMESA Treaty]; Protocol A/P.1/7/91 on the Community Court of Justice of the High Contracting Parties as amended by Supplementary Protocol A/SP.1/01/05 Amending the Protocol Relating to the Community Court of Justice, art. 10(f) [ECOWAS Court Protocol]; *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 U.N.T.S. I-37437, art. 34 [EAC Treaty]. See also Protocol to the Southern African Development Community Tribunal and Rules Thereof, 7 August 2000, online: SADC <<http://www.sadc.int/index/browse/page/163>>, art. 16 [SADC Tribunal Protocol].

<sup>2</sup> See EAC Treaty, *ibid.* art. 44; COMESA Treaty, *ibid.* art. 40; ECOWAS Court Protocol, *ibid.* art. 24; SADC Tribunal Protocol, *ibid.* art. 32(1)(2)(3).

<sup>3</sup> See COMESA Treaty, *ibid.* art. 26; SADC Tribunal Protocol, *ibid.* art. 18; EAC Treaty, *ibid.* art. 30; Protocol of the ECOWAS Court, *ibid.* art. 10.

<sup>4</sup> See e.g. *Treaty establishing a Central African Economic and Customs Union*, 8 December 1964, 4 I.L.M. 699; *Charter of the Union of Central African States*, 2 April 1968, 7 I.L.M. 725; *Treaty of the Economic Community of West African States*, 28 May 1975, 1010 U.N.T.S. I-14843. The only exception appears to be the *Treaty for East African Co-operation*, 6 June 1967, 6 I.L.M. 932.

community law will be done through national legislation.<sup>5</sup> Although the treaties provide for various categories of community laws with varying legal effects, these categories appear to be largely ignored in the making of community laws.<sup>6</sup> For example, we noted that the law of the African Union, of which the African Economic Community (AEC) is an integral part, provides for various categories of decisions including regulations. Regulations are directly applicable and member states are obliged to align their laws with the demands of regulations. However, since the AU's inception, the categorization of decisions has been ignored, and no use has so far been made of regulations. It was argued in Chapter Seven that reliance on national legislation to implement community law is likely to create a disjunction between community and national legal systems and adversely affect the status of community law in member states. National governments may not prioritize implementation of community laws.<sup>7</sup> This stalls the development of the communities and poses significant problems for individuals who seek to rely on community law in member states. Indeed, we examined, in Chapter Seven, cases in which individuals in dualist countries unsuccessfully relied on community laws because of the absence of domestic implementing legislation.

The full practical impacts of the adopted relational principles on Africa's integration processes remain to be seen. The progress of integration has been slow, and also, although in existence, the principles have not been invoked by individuals, national and community institutions.<sup>8</sup> In view of Africa's longstanding commitment to economic integration, and in light of

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<sup>5</sup> See e.g. *Treaty establishing the African Economic Community*, 3 June 1991, 30 I.L.M. 1241, art. 5(2) [AEC Treaty]; *Treaty of the Southern African Development Community*, 17 August 1992, 32 I.L.M. 120, art. 6(5) [SADC Treaty]; *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, 35 I.L.M. 660, (1996) 8 Afr. J. Int'l & Comp. L. 187, art. 5(2) [ECOWAS Treaty]; COMESA Treaty, *supra* note 1 art. 5(2); EAC Treaty, *supra* note 1 art. 8(2).

<sup>6</sup> See e.g. COMESA Treaty, *supra* note 1 arts. 10-12

<sup>7</sup> Article 8(2) laid down a 12-month period within which member states were to enact legislation to give the force of law to the EAC Treaty in their national legal systems. This provision has been complied with. See Tanzania: Treaty for the establishment of East African Community Act 2001; Kenya: Treaty for the establishment of East African Community Act 2000; Uganda: East African Community Act 2002. However, these Acts are not detailed enough. They do not take account of all the consequences of giving force of law to community law in member states. Compare, for example, the United Kingdom's European Communities Act 1972 which gave force of law to the treaties of the European communities.

<sup>8</sup> For example, resort to the community courts has been relatively minimal. Between January 2007 and November 2007, 12 applications were filed with the ECOWAS court. Five final judgments were delivered, and nine interim decisions were also given. See *Annual Report of the ECOWAS Court of Justice*, 2007 at [13]-[14], online: ECOWAS Court of Justice <<http://www.ecowascourt.org/annual.html>>. So far, none of the community courts has received a preliminary reference from a national court.

the demonstrated significance of relational issues in economic integration, it is ironic that not much practical use has been made of relational principles. National courts appear largely unaware of their role in economic integration and the nature of their relations with the communities' legal systems. In a few instances, community law was invoked in national courts. A preliminary reference<sup>9</sup> or recognition of community decisions would have been appropriate.<sup>10</sup> However, in those instances, national courts seemed oblivious of their duties under community law. For example, the supremacy of the community law principle is enshrined in the EAC Treaty<sup>11</sup> and Kenya has implemented the treaty.<sup>12</sup> However, a Kenyan court has held that if the treaty were in conflict with the Kenyan constitution, the municipal court's first duty would be to uphold the supremacy of the constitution.<sup>13</sup> To be fair, it has been noted that some national courts have relied on the interpretative and adjudicative relational principles. They have utilized community law and the goals of the communities in their decisions.<sup>14</sup>

Individuals are an important medium for linking the communities with member states. Individuals have invoked community law before national courts with varying degrees of success.<sup>15</sup> They have achieved greater success before the community courts. In a number of actions brought directly to the community courts by individuals, member states' measures have been found to be in breach of community law. Indeed, in Chapter Five, we noted that, but for actions brought by individuals, the community courts would have fallen into desuetude. In general, there do not

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<sup>9</sup> See *Peter Anyang' Nyong'o v. Attorney General* [2007] eKLR (High Court, Kenya, 2007) [*Peter Anyang' Nyong'o*]. The issue in the case was whether amendments of the EAC Treaty should follow the procedure laid down in the Kenya Constitution or that set out in the EAC Treaty.

<sup>10</sup> In *Mike Campbell (Private) Limited v. Minister of National Security Responsible for Land, Land Reform and Resettlement*, Judgment No. S.C. 49/O7 (Supreme Court, Zimbabwe, 2008), the court appears to have given a judgment in disregard of an injunction that had been granted earlier in favour of the plaintiff by the SADC Tribunal in the case of *Mike Campbell Limited v. Republic of Zimbabwe* [2007] SADC Tribunal 1.

<sup>11</sup> EAC Treaty, *supra* note 1 art. 8(4).

<sup>12</sup> Kenya: Treaty for the establishment of East African Community Act 2000.

<sup>13</sup> *Peter Anyang' Nyong'o*, *supra* note at 9.

<sup>14</sup> See e.g. *R v. Obert Sithembiso Chikane*, Crim. Case No. 41/2000 (High Court, Swaziland, 2003); *Friday Anderson Jumbe v. Humphrey Chimpano*, Constitutional, Case Nos 1 and 2 of 2005 (High Court, Malawi, 2005); *Chloride Batteries Limited v. Viscosity*, Civil Cause No. 1896 of 2006 (High Court, Malawi, 2006); *Hoffman v. South African Airways* 2001 (1) S.A.1.

<sup>15</sup> See e.g. *Healthwise Pharmaceuticals Ltd. v. Smithkline Beecham Consumer Healthcare Ltd.* [2001] LawAfrica L.R. 1279; *Shah v. Manurama Ltd.* [2003] 1 E.A. 294; *Movement for Democratic Change v. The President of the Republic of Zimbabwe*, HC 1291/05 (High Court, Zimbabwe, 2007).

appear to have emerged in Africa constituencies who have interest in the integration processes and are prepared to champion it at both domestic and community levels. This is in part because economic integration and its law are not taught in most African universities, either as a freestanding undergraduate course or as sections of courses such as commercial, constitutional or public international law. As a result, awareness of Africa's economic integration processes remains limited. Most lawyers do not view them relevant to their practice. Scholars have not taken much interest, and there are yet to emerge journals, private institutions or non-governmental organizations dedicated to economic integration.

Despite the fact that some community courts have found national measures that are in breach of community law, their jurisprudence does not demonstrate a conscious attempt to articulate the place of relational principles in Africa's economic integration. Indeed, in *Anyang' Nyong'o v. Attorney General*<sup>16</sup> the East African Court of Justice was presented with an opportunity to affirm the principle of supremacy of community law enshrined in article 8(4) of the EAC Treaty. However, the court did not even make reference to the article, let alone expand on its significance for community law. In *Frank Ukor v. Alinno*,<sup>17</sup> the ECOWAS court held that the ECOWAS treaty was 'the supreme law of the ECOWAS, and it may be called its Constitution'. This dictum may be favourably interpreted as supporting the supremacy of ECOWAS law but, admittedly, it is too cursory for one to launch a forceful argument on it. In *Jerry Ugokwe v. Federal Republic of Nigeria*<sup>18</sup> the ECOWAS Court observed that the kind of relationship existing between the ECOWAS court and national courts of member states is not of a vertical nature, but demands an 'integrated Community legal order'.<sup>19</sup> One can infer from the court's vision of an 'integrated community legal order', that it recognizes the importance of the bond that should exist between the community and national legal systems. The jurisprudence of national and community courts on matters directly related to economic integration is comparatively scant and cursory. However, the jurisprudence suggests that there is prospect for integrating community law into

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<sup>16</sup> [2008] 3 K.L.R 397.

<sup>17</sup> Suit No. ECW/CCJ/APP/01/04 (ECOWAS Court of Justice, 2005) at [21].

<sup>18</sup> Case No. ECW/CCJ/APP/02/05 (ECOWAS Court of Justice, 2005) at [32].

<sup>19</sup> This observation was made in the context of the issue of whether one can appeal, to the Community court, a decision of a national court.

national legal systems in Africa. This should be exploited for the purposes of strengthening Africa's economic integration.

In economic integration, it is not only community-state relations that matter. Interstate relations are equally important. Indeed, integration is principally concerned with the latter. In this regard, the thesis has revealed a number of worrying issues that can affect interstate relations and hinder integration. Cross-border economic activity thrives in a setting where the relations between states are harmonious. Inadequate foreign judgment enforcement regimes, diversity in laws, and the absence of any systematic attempt to harmonize aspects of national law were identified as potential obstacles to integration and innovative solutions to overcoming them have been proffered.

On interstate relations, private international law has an important role. However, its role in integrating legal systems has been largely ignored by the communities despite calls by many writers.<sup>20</sup> The thesis has suggested values that should inform the development of a private international law regime that can serve the needs of an economically integrated Africa. In addition to private international law, jurisprudential communication between courts is useful for strengthening interstate relations. Indeed, in Chapter Four, it was offered as a path to harmonization of national laws. Jurisprudential communication currently exists among African courts, but it is largely sporadic and concentrated within geographical regions and legal traditions. This thesis has suggested improved access to legal materials, and a study that distils the common core of African laws as undertakings that could improve communication between courts.

## 10.2 ISSUES FOR FURTHER RESEARCH

The sparse adoption of relational principles in the founding treaties of the communities, and the rare invocation of those adopted, raise a question. Is Africa suitably conditioned to make

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<sup>20</sup> See generally Richard F. Opong, "Private International Law and the African Economic Community: A Plea for Greater Attention" (2006) 55 Int'l & Comp. L. Q. 911; Bankole Thompson, "Legal Problems of Economic Integration in the West African Sub-Region" (1990) 2 Afr. J. Int'l. Comp. L. 85 at 99-100; Bankole Thompson & Richard S. Mukisa, "Legal Integration as a Key Component of African Economic Integration: A Study of Potential Obstacles to the Implementation of the Abuja Treaty" (1994) 20 Commonwealth L. Bull. 1446 at 1454; Yinka Omorogbe, "The Legal Framework for Economic Integration in the ECOWAS: An Analysis of the Trade Liberalisation Scheme" (1993) 5 Afr. J. Int'l. Comp. L. 355 at 364; Muna Ndulo, "The Promotion of Intra-African Trade and the Harmonisation of Laws in the African Economic Community: Prospects and Problems" in M.A. Ajomo and Omobolaji Adewale eds., *African Economic Community Treaty, Issues Problems and Prospects* (Lagos: Nigerian Institute of Advanced Legal Studies, 1993) 107 at 111-112.

effective use of them? Socio-cultural, economic, political and constitutional factors condition the effectiveness of relational principles. Africa is plagued with issues that may work against their effective operation. These include: the lack of activist and independent national and regional judiciaries; the presence of potentially-inimical constitutional provisions; the dominance of politics in the integration processes; the perceived absence of a litigation culture;<sup>21</sup> the lack of public awareness about the activities and laws of the communities; and the lack of interest of African lawyers<sup>22</sup> and private institutions<sup>23</sup> in economic integration processes. Empirical studies on how these issues truly affect Africa's integration processes are generally lacking, and should form an important research agenda.<sup>24</sup>

Another important issue is how the communities relate with each other and with the international legal system. Africa's integration treaties have paid some attention to community-state relations. However, the same cannot be said of the communities' relations with each other, and with the international legal systems, especially that of the World Trade Organization (WTO). There are treaty references to international law as a source of community law,<sup>25</sup> and the need for

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<sup>21</sup> See generally Malcolm Shaw, "Dispute Settlement in Africa" (1983) 37 Yearbook of World Affairs 149; Tiyanjana Maluwa, "The Peaceful Settlement of African Disputes, 1963-1983: Some Conceptual Issues and Practical Trends" (1989) 38 Int'l & Comp. L. Q. 299. Aranzazu Pagoaga Ruiz de La Illa, "International Dispute Settlement in Africa: Dispute Settlement and Conflict Resolution under the Organisation of African Unity, the African Union, and African Traditional Practices: A Critical Assessment" (2006) Yearbook of Humanitarian Action and Human Rights 57.

<sup>22</sup> See Simon E. Kulusika, "The Lawyer and the Challenges of Economic Integration" (2000) 32 Zambia L.J. 20 at 47. He notes: 'The supply of well-trained lawyers in the COMESA sub-region is more than adequate. It seems the issue is not the number of lawyers available, but the problem lies in the interest of these lawyers in matters related to economic integration and co-operation'.

<sup>23</sup> The absence of private sector involvement and the domination of intergovernmentalism have been identified as a key obstacle to the success of Africa's regional economic integration processes. See Jeffrey Fine & Stephen Yeo, "Regional Integration in Sub-Saharan Africa: Dead End or a Fresh Start?" in Ademola Oyejide *et al.* eds., *Regional Integration and Trade Liberalisation in Sub-Saharan Africa* Vol. 1 (London: Macmillan Press Ltd, 1999) at 434-435; Samuel K. B. Asante, *Regionalism and Africa's Development* (Hampshire: Macmillan Press, 1997) at 147. One notable exception is the work of the Trade Law Center for Southern Africa. Since 2001, it has been publishing what, to my knowledge, is the only academic journal devoted to regional economic integration issues in Africa. It is *Monitoring Regional Integration in Southern Africa Yearbook*.

<sup>24</sup> Friedrich Ebert Foundation (Botswana), "Deepening Integration in the SADC: A Comparative Analysis of 10 Country Studies and Surveys of Business and Non-State Actors" in *Regional Integration in Southern Africa*, volume 12 (2007), online: Friedrich Ebert Foundation (Botswana) <<http://www.fes.org/bw/Downloads/Vol%2012%20Comparative%20Analysis%20-%20Web.pdf>>. The report found that there is great and widespread support from the business community and civil society organizations for deepening integration within the SADC.

<sup>25</sup> ECOWAS Court Protocol, *supra* note 1 art. 20(1); SADC Tribunal Protocol, *supra* note 1 art. 21(1).

the communities to co-ordinate with other communities, especially the AEC.<sup>26</sup> But, these references are not enough. They do not provide a concrete or structured legal framework for the many complex issues that could arise in this area. Chapter Three addressed some of the complex issues that arise from the relations between the communities and the AEC. Many more remain unexamined let alone addressed. Does AEC law enjoy supremacy over a conflicting law of a community? Are there any subjects on which only the AEC can legislate? How are breaches of AEC decisions and directives by the communities to be remedied? How is AEC law enforceable in the communities? Are the regional communities competent before the African Court of Justice? Can the AEC intervene in an action before a community in which the interest of the AEC is affected? These issues are worth further exploration.

Equally important are the relations between Africa's communities and the WTO. The status of WTO law within the legal systems of the communities, how to reconcile the multiple commitments of African states under community law and WTO law, the rules for resolving conflicts between WTO law and the communities' laws are all important issues that have been addressed neither by the communities' treaties nor in academic writing.<sup>27</sup> These are important issues for the stability of the world trade system and Africa's economic integration. Indeed, these issues will become even weightier as economic integration progresses in Africa. Differences between community laws, or national laws founded on community law, and WTO law are susceptible to challenge under the WTO dispute settlement system. So far, the WTO trade policy reviews of some of the communities have not found them to be directly or significantly in breach of WTO laws.<sup>28</sup> It remains to be seen whether this will be the case as they progress and strengthen their integration processes. Indeed, already, concerns have been expressed about overlapping

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<sup>26</sup> See e.g. COMESA Treaty, *supra* note 1 preamble, arts. 178-179; ECOWAS Treaty, *supra* note 5 preamble, arts. 78-79; EAC Treaty, *supra* note 1 preamble, art. 130(2); SADC Treaty, *supra* note 5 preamble, art. 24.

<sup>27</sup> There have been some works in the area of dispute settlement. See e.g. Maurice Oduor, "Resolving Trade Disputes in Africa: Choosing between Multilateralism and Regionalism: the Case of COMESA and the WTO (2005) 13 Tul. J. Int'l & Comp. L. 177; Joost Pauwelyn, "Going Global Regional or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and other Jurisdictions" (2004) 13 Minnesota J. Global Trade 231.

<sup>28</sup> See World Trade Organization, *Trade Policy Review – Southern African Customs Union*, 2003, WT/TPR/S/114; World Trade Organization, *Trade Policy Review-East African Community*, 2006, WT/TPR/S/171. See generally Edwini Kessie, "Trade Liberalisation under ECOWAS: Prospect, Challenges and WTO Compatibility" (1999) 7 Afr. Y.B. Int'l L. 31.

African states' membership of regional communities, and the tendency of the communities to detract from the multilateral trade regime.

### **10.3 CONCLUSION**

Relational issues of law are endemic in economic integration. Broadly, these issues focus on the interactions among community, national, regional and international legal systems. The extent to which relational issues manifest themselves and the degree of attention devoted to them often varies with the level or stage of integration reached. Economic communities around the world have acknowledged the challenge that relational issues pose for their development and effectiveness. They have used various relational principles and mechanisms as part of the legal framework to address relational issues.

Africa's economic communities have deployed some relational principles and mechanisms, but they also shy away from others. As regards the relational principles adopted their true impact on economic integration in Africa remains to be seen. Indeed, it remains an open question whether Africa is socio-culturally, economically, politically and constitutionally conditioned for the effective use of them. However, in the few instances in which they have been invoked before the courts, their potential to aid economic integration has been evident. To an extent, the future success of Africa's economic integration will depend on how relational principles are utilized to bridge the gap between the communities and member states.

Moving forward, it is worth recalling that this thesis has exposed a number of relational issues that currently bedevil Africa's economic integration processes. All the issues cannot be addressed at the same time. There should be prioritization in any attempt to address them. In my opinion, the most important and immediate first steps are the rationalization of the relations between the various communities, overcoming the canker of multiple memberships of the communities, and putting the path to the formation of the African Economic Community on solid legal foundation. Another important step would be for member states to enact legislation implementing the respective community treaties. This should be preceded by detailed national studies on any potential conflicts between existing community and national laws. Member states should iron out any differences to ensure smooth national implementation of the treaties and other community laws. These steps should be followed by concrete community and national measures aimed at creating constituencies with interest in community law. In this regard, three important



constituencies are judges, lawyers, and law enforcement and training institutions. The integration of community law into national education curricula, educational campaigns aimed at creating awareness about the communities, and litigation aimed at testing unsettled aspects of community law should be encouraged and pursued. As the communities move up the stages of integration – and they are – relational issues will become more important. The earlier the communities, states, policy makers, businesses and scholars devote some time to them, the better it will be for Africa.

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