A SOURCEBOOK ON GOOD GOVERNANCE AND RULE OF LAW IN THE EAST AFRICAN COMMUNITY

FORD FOUNDATION

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A SOURCEBOOK ON GOOD GOVERNANCE AND RULE OF LAW IN THE EAST AFRICAN COMMUNITY

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Preface

This Sourcebook has been developed as an introductory resource into key principles of the East African Community (EAC) and a significant part of the jurisprudence of the East African Court of Justice (EACJ). The principles on good governance and the rule of law stand out strongly in the discourse on East African integration and decisions of the EACJ over the past 25 years (since the issuance of its first decision in 2006).

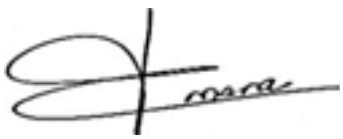
The Sourcebook is a product developed to facilitate training of Judges and stakeholders on Good Governance and the Rule of Law in the East African Community. The training are part of activities under a project funded by the Ford Foundation on *Enhancing the ability of the Bench and the Bar in East Africa to promote and expand the East Africa Civic Space through the East African Court of Justice Legal Architecture.*

The Sourcebook has benefited from notable contributions of the EACJ Judges during the induction training for new Judges of the EACJ held in Nairobi, Kenya on July 12-15, 2021. The Judges recommended that decisions of the EACJ referred to during training and in the presentations be hyper-linked to the EACJ website. The recommendation is addressed in the sourcebook—the hyper-links ensure the uses of this sourcebook readily access the EACJ website. As a resource, such access is available to potential users that include legal practitioners, academicians, and civic actors interested in EAC integration.

The idea of the sourcebook to enable training of judicial officers and key stakeholders found ready support and champions in the EACJ itself. And deep gratitude goes to the EACJ Registrar, His Worship Yufnalis N. Okubo who has tirelessly taken leadership in liaising and scheduling the EACJ judges' training in Nairobi as well as the national judiciaries' trainings. The EACJ Registrar has also lent his intricate knowledge of the EACJ and served as trainer to introduce the EAC and the regional Court during the national judiciaries' trainings.

Separate gratitude goes to the team I led to develop this Sourcebook. Special thanks and gratitude goes to Dr Henry Onoria of ALP East Africa for his laudable and invaluable technical contribution to the Sourcebook. My gratitude is extended to the CEPIL team, in particular Patricia Mutiso, the Project Officer for the project and Francis Obonyo, the Ag. Executive Director, CEPIL for the coordination and support towards the trainings and development of the sourcebook.

Finally, heartfelt gratitude goes to the Ford Foundation, especially its East African office, for the financial support to the project that has enabled CEPIL to develop this sourcebook and to organize trainings for judges on *good governance* and the *rule of law* in the East African Community. We have no doubt that the initiative will go a long way in enriching the EACJ jurisprudence on the twin principles that adorn the EAC Treaty.



Francis Gimara, SC
August 2021

1. Introduction

1.1. Necessity for a Sourcebook

The East African Community (EAC)—as is the case with other similar communities in Africa—is primarily regarded as a regional *economic* integration bloc. However, the reality is that the Community is also a vehicle for realizing *good governance* and the *rule of law.* And the East African Court of Justice (EACJ), as the judicial organ for resolving disputes, has demonstrated the Community is indeed a vehicle for achieving and fostering *good governance* and the *rule of law.* Good governance and the rule of law is essential to the realization of trade integration in terms of the *free movement of services, goods, and capital.* Notably, the ***Treaty for the Establishment of the East African Community*** (as amended) conditions membership in the Community on the "adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice" (Article 3(3)(b)) and the achievement of economic integration objectives (as multifaceted as they are enumerated) is to be premised on fundamental and operational principles that include, among others, *good governance* and the *rule of law* (Articles 6(d) and 7(2)).

The Sourcebook is to provide an insight into principles of the Community that have come to define and shape a significant part of the EACJ jurisprudence since it issued its first decisions in 2006. The twin principles—considered to create justiciable obligations for Partner States—have been addressed by the EACJ in terms of its jurisdiction over the references that have been brought before it; the concurrent jurisdiction of national courts; and the very scope and parameters of good governance and rule of law. Further, with the Sourcebook's exposition of the rich jurisprudence into the principles in Articles 6(d) and 7(2) of the Treaty, it should serve as a sourcebook for both justices of the EACJ (as a regional court with the *primacy* to interpret and ensure compliance with the Treaty) and of national courts. It is of note that the EACJ has held that national courts are positioned to enforce the Treaty (and Community law) and has noted that the *good governance* and *rule of law* obligations under Articles 6(d) and 7(2) are justiciable before, and enforceable by, national courts. National judiciaries will doubly get an insight into the jurisprudence their regional counterparts have nurtured. As a sourcebook, it can be a quick look-up reference source on text of the Treaty and EACJ decisions.

Beyond that, the Sourcebook should serve as a training resource for induction trainings and continuous judicial education. Importantly, in this digital age, it can be updated to include any new judicial developments in respect of Articles 6(d) and 7(2) of the Treaty.

1.2. East African Community

The EAC is a regional economic integration bloc or, to use a more appropriate legal term, regional economic community (REC). A hitherto defunct EAC had existed from 1967 to 1977. The current EAC was revived on November 30, 1999 with the signing of the *Treaty for the Establishment of the East African Community,* 1999. This followed a process of re-integration embarked in 1993 and had involved tripartite programs of co-operation in political, economic, social and cultural fields, research and technology, defense, security, legal and judicial affairs.

The original Partner States of the EAC were the Republic of Kenya, the United Republic of Tanzania, and the Republic of Uganda. The Republic of Burundi and the Republic of Rwanda joined in 2007 while the Republic of South Sudan joined in 2016. Presently, the EAC comprises of the six (6) Partner States.

The *Treaty for the Establishment of the East African Community* (EAC Treaty) entered into force in July 2000. The Treaty seeks to foster trade integration in the EAC in terms of widening and deepening mutual cooperation to boost economic growth, cooperation and development of their common region. In furtherance of the establishment of the Community, the Partner States agreed to establish a customs union and a common market as transitional integral parts of the Community (Article 2(2) of the Treaty). Subsequently, a monetary union and, ultimately, a political federation is envisaged in order to strengthen and regulate their relations, the benefits of which are to be shared equally (Article 5 of the Treaty). To achieve the objectives of integration, Partner States agreed to fundamental and operational principles including those on *good governance* and the *rule of law*:

> *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 (Article 6(d) of the Treaty).
>
> The Partner States undertake to abide by the principles of *good governance*, including adherence to the principles of democracy, the *rule of law*, social justice and the maintenance of universally accepted standards of human rights (Article 7(2) of the Treaty).

The EAC Treaty is bolstered by Protocols (that, one signed and ratified by Partner States, are an integral part of the Treaty (and Community law)). The protocols include those that establish the Customs Union (2004) (it entered into force on January 1, 2010)); Common Market (2009) (it entered into force on July 1, 2020)); and Monetary Union (2013). The Customs Union protocol provides for a customs union in which tariffs and non-tariff barriers are reduced and progressively dismantled while the Common Market protocol elaborates the freedoms of movement of goods, services, labour, capital, persons, and the rights of establishment and residence. The Monetary Union protocol provides a roadmap to a single EAC currency by 2024.

The EAC Treaty establishes the East African Court of Justice (EACJ) as the judicial body with a primary jurisdiction of interpretation of the Treaty and ensuring adherence and compliance with the Community law (Article 23(1) and 27(1)). The Treaty also sets up the concurrent jurisdiction by national courts with regards the Treaty, although decisions of EACJ override those of the national courts (Articles 27 (*proviso*), 33 and 34).

Apart from the EACJ, the EAC has six other key organs—the Summit of the Heads of State and Government (the "Summit"), Council of Ministers, Co-ordination Committee, the Sectoral Committees, East African Legislative Assembly (the "EALA"), and the EAC Secretariat. These collective organs have been created by the Treaty as mechanisms to achieve its goals. In that context, the EACJ has been crucial in addressing and resolving disputes arising from obligations under the Treaty including, as addressed in this source-book, those pertaining to *good governance* and *rule of law* under Articles 6(d) and 7(2) of the Treaty.

2. Good Governance and Rule of Law in the East African Community

2.1. Conceptualizing and Locating Concepts in the East African Community

2.1.1. EAC Treaty

The East African Community (EAC)—as is the case with other communities in Africa—is primarily viewed as a regional *economic integration* bloc. However, the EAC is also the vehicle for realization of *good governance* and the *rule of law.* One of the golden threads running through the EAC Treaty and indeed part of the mission of the EAC's judicial organ—the East African Court of Justice (EACJ)—is the observance of *good governance* and the *rule of law* by Partner States.

(a) Admission of a State to the East African Community

Firstly, good governance and the rule of law are principles that Partner States are to take into account in considering a State for admission into the Community (EAC Treaty, art. 3(3)(b)).

> **ARTICLE 3**
> **Membership of the Community**
>
> …
>
> 3. Subject to paragraph 4 of this Article, the matters to be taken into account by the Partner States in considering the application by a foreign country to become a member of, be associated with, or participate in any of the activities of the Community, shall include that foreign country's:
>
> …
>
> (b) adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice;
>
> …

Article 3(3)(b) of the Treaty does not apply in respect of a State that is "already a partner State" of the Community ***(Forum pour Renforcement de la Société Civile & 4 Others v Attorney General of the Republic of Burundi & Another,*** EACJ Reference No 12/2016 (First Instance Division), at 35 (December 4, 2019)).

(b) Foreign and security policies

Secondly, the rule of law is listed among the objectives of common foreign and security policies between the Community and Partner States (EAC Treaty, art. 123(3)(c)).

> **ARTICLE 123**
> **Political Affairs**
>
> …
>
> 3. The objectives of the common foreign and security policies shall be to:
>
> …
>
> (c) develop and consolidate democracy and the *rule of law* and respect for human rights and fundamental freedoms;
>
> …

(c) Fundamental and operational principles of the Treaty

Thirdly, the achievement of economic integration objectives (as multifaceted as they are enumerated in the Treaty) is premised on *fundamental* and *operational* principles of good governance and the rule of law (EAC Treaty, arts 6(d) and 7(2)).

ARTICLE 6
Fundamental Principles of the Community

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

…

(d) *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;

…

ARTICLE 7
Operational Principles of the Community

1. …

2. The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the *rule of law,* social justice and the maintenance of universally accepted standards of human rights.

2.1.2. Aspirations or Justiciable Obligations?

The principles of good governance and the rule of law, encapsulated in articles 6(d) and 7(2) of the Treaty, have been considered to create justiciable obligations. The EACJ first voiced the idea of these principles as enforceable where a breach by a Partner State "gives rise to an infringement of the Treaty" and, in effect, giving the EACJ jurisdiction in its primacy over interpretation of the Treaty.

> … The respective Partner States' responsibilities to their citizens and residents have, through those States voluntary entry into the EAC Treaty, been scripted, transformed and fossilised into the several objectives, principles and obligations now stipulated in, among others, **Articles 5, 6 and 7 of the Treaty,** the breach of which by any Partner State, gives rise to infringement of the Treaty. It is that alleged infringement which, through interpretation of the Treaty under Article 27(1), constitutes the cause of action in a Reference, such as the instant Reference.
> ***Attorney General of the Republic of Kenya v Independent Medical Legal Unit,*** EACJ Appeal No 1/2011 (Appellate Division), at 13 (March 15, 2011).

The EACJ affirmed this attribute of the principles in ***Samuel Mukira Mohochi v Attorney General of the Republic of Uganda,*** EACJ Reference No 5/2011, when it rejected the argument of the Partner State that the principle of good governance, as espoused in article 6(d) of the Treaty, represents "aspirations and broad policy provisions for the Community which are futuristic and progressive in application", and considered the principle to entail "actionable obligations, breach of which gives rise to infringement of the Treaty". The EACJ further viewed the principles as foundational pillars of the *integration agenda* in the East African Community.

36. The Respondent submitted that the provisions of Articles 6(d) of the Treaty are aspirations and broad policy provisions which are futuristic and progressive in application and that they raise political questions which cannot be answered by this Court. Further, that they are not capable of being breached and, therefore, are not justiciable. We find this stance erroneous for the following reasons:

(i) Article 6 provides the six Fundamental Principles of the Community. **Black's Law Dictionary** defines "Principle" as "a basic rule, law or doctrine" *(9th Edition at p 1313).* Our understanding of *"Fundamental Principles"* as used in this Article, aided by the above definition, is that these are rules that ***must*** be followed or adhered to by the Partner States in order that the objectives of the Community are achieved.

Paragraph 11 of the Preamble to the Treaty provides that the Partner States are:

"resolved to adhere themselves to the fundamental and operational principles that will govern the achievement of the objectives ..."

Article 146(1) of the Treaty provides, inter alia, that a Partner State may **be suspended from taking part in activities of the Community if that State fails to observe and fulfil the fundamental principles and objectives of the Treaty.**

Article 147(1) provides, inter alia, that a Partner State may **be expelled from the Community for gross and persistent violation of the principles and objectives of the Treaty.**

These provisions show that the framers of the Treaty, attached the greatest importance to the fundamental principles, among very few other provisions. Why then, would they attach to them such importance, including severe sanctions for non-observance thereof, if they were, as the Respondent claims, no more than mere aspirations?

Fortified by the above provisions of the Treaty, we agree with the Applicant that these principles are foundational, core and indispensable to the success of the integration agenda, and were intended to be strictly observed. Partner States are not to merely aspire to achieve their observance, they are to observe them as a matter of Treaty obligation. In our view, all the six principles in the Article were each carefully thought out, negotiated, appropriately weighted, individualized and crafted the way they are for a particular effect. Integration depends on each of them singly and collectively.

…

Apart from asserting that the provisions are aspirations and broad policy provisions for the Community, political in character and with a futuristic and progressive application, Counsel did not substantiate. They did not explain how and why these fundamental principles are mere aspirations. They failed to show us why we should depart from the position of this Court succinctly stated in ***[Attorney General of the Republic of Kenya v Independent Medical Legal Unit,*** EACJ Appeal No 1/2011] that these provisions constitute responsibilities of Partner States to citizens which, through those States' voluntary entry into the EAC, have crystallised into actionable obligations, breach of which gives rise to infringement of the Treaty.

> It is clear to us that the provisions of Article 6(d) of the Treaty are solemn and serious governance obligations of immediate, constant and consistent conduct by the Partner States. In our humble view, we know of no other provisions that embody the sanctity of the integration process the way the above do.
> ***Samuel Mukira Mohochi v Attorney General of the Republic of Uganda,*** EACJ Reference No 5/2011 (First Instance Division), at 16-18 (May 17, 2013).

The dicta in ***Mohochi*** case—on the binding and justiciable obligations in Articles 6(d) and 7(2) of the Treaty—has been echoed in later EACJ decisions.

> [T]he provisions of Article 6(2) and 7(d) as well as 8(1) [of] the Treaty ... are binding and not merely aspirational. The provisions are justiciable and create an obligation to every Partner State to respect those sacrosanct principles of good governance, and rule of law which include accountability, transparency and the promotion and protection of democracy.
> ***The Managing Editor, MSETO & Other v Attorney General of the United Republic of Tanzania,*** EACJ Reference No 7/2016 (First Instance Division), at 33 (June 21, 2018).

The dicta in Mohochi case has found resonance in the COMESA Court's reflection of Articles 3 and 6 of the COMESA Treaty (embodying the principles of rule of law and democratic governance in a manner similar to articles 6(d) and 7(2) of the EAC Treaty) (Malawi Mobile Ltd v Government of the Republic of Malawi & Another, COMESA Reference No 1/2015 at 13-14).

Subsequently, the EACJ has viewed the foundational pillars of the integration agenda as likewise justiciable before the Partner States' national courts and tribunals.

> 64. Throughout the ever expanding web of the Court case law one golden thread is always to be seen, the Court has held that the principles espoused by Article 6, 7, and 8 are justiciable [reference is made to *Samuel Mukira Mohochi v Attorney General of the Republic of Uganda,* EACJ Reference No 5/2011]. The Court is persuaded by the above elucidation of the law by the First Instance Division and affirms it.
> …
> 65. Certainly, the designers of the Treaty contemplated Articles 6, 7 and 8 as forming the fundamental and paramount Objectives, Principles and law of the Community. The preamble to the Treaty fortifies this view. It states:
>
> ***[A]ND WHEREAS the said countries, with a view to strengthening their co-operation are resolved to adhere themselves to the fundamental and operational principles that shall govern the achievement of the objectives set herein …***
>
> The Court is cognisant of the fact that a preamble is not binding in law. However, it forms a vital tool for the interpretation of the context and purpose of a Treaty provision ... In other words, the section of the preamble cited above unequivocally provides that the Partner States have agreed to be bound by the Fundamental and Operational Principles which are to be found in Articles 6, 7 and 8 of the Treaty. Failure to do so constitutes a breach of the Treaty and an impediment to the achievement of its objectives.

66. This Court agrees with and affirms the view of the First Instance Division in the ***Mukira case (supra)*** that the stiff penalties established in Articles 146(1) and 147(2) of the Treaty for any Partner State which, *"fails to observe and fulfil the fundamental principles and objectives of the Treaty"* or which grossly and persistently violates the "principles and objectives of the Treaty" is cogent evidence of the intention of the designers of the Treaty to make binding the provisions which articulate the principles and objectives of the Treaty, especially Articles 6 and 7; and to make their violation a breach of the Treaty.

67. The chapeau of Article 6 provides: *[T]he fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:.* The use of the emphatic word "shall" is evidence that the designers of the Treaty intended Article 6 to be binding on Partner States. The same can be said of the *chapeaus* of Article 7 and Article 8.

68. These Fundamental Objectives and Fundamental Operational Principles of the Treaty are just that: truly fundamental, solemn, sacred and sacrosanct. They are the rock foundation, upon which the solid pillars of the Treaty, the Community and the Integration agenda are constructed. They stand deeper, larger and loftier than "mere aspirations" that certain counsel for Partner States would make them out to be.

69. The Court, therefore, holds that Articles 6, 7 and 8 are justiciable both before this Court and before the national courts and tribunals.

Reference for a Preliminary Ruling under Article 34 of the Treaty made by the High Court of Uganda in the Proceedings between the Attorney General of Uganda v Tom Kyahurwenda, EACJ Case Stated No 1/2014 (Appellate Division), at 26-8 (July 31, 2015).

2.1.3. National Laws of Partner States

The Treaty, under article 8, places an undertaking on the part of partner States regarding the implementation of its provisions. Most significantly, under Article 8(1)(c), partner States are exhorted to "abstain from any ***measures*** likely to jeopardise the achievement of [the] *objectives* or the implementation of the provisions of this Treaty". The measures a Partner State may take certainly include those that jeopardise the implementation of the obligations on *good governance* and the *rule of law* under Articles 6(d) and 7(2) of the Treaty. In several references, involving *national* laws of Partner States, it is evident that the enactment or implementation of national laws have infringed *good governance* and the *rule of law*.

Additionally, under Article 8(2), Partner States are called upon to *"secure the enactment* and the *effective implementation* of such *legislation as is necessary to give effect to this Treaty"*. Partner States—for instance, Kenya, Tanzania, and Uganda—have enacted and put in place *domestic implementing legislation* to give the EAC Treaty the force of law within their territories. Section 8 of Kenya's ***Treaty for the Establishment of the East African Community Act,*** No 2/2000 is such an instance.

8. Acts of the Community to have force of law

(1) The provisions of any Act of the Community shall, from the date of publication of that Act in the Gazette of the Community, have the force of law in Kenya.

(2) An Act of the Community shall come into operation on the date of its publication in the Gazette of the Community or, if it is provided in that Act that some or all of its provisions shall come into operation on some other date (whether before or after the date of publication), those provisions shall come into operation on that other date.

Treaty for the Establishment of the East African Community Act, No 2/2000 (Kenya) s. 8. The Act commenced by virtue of the *Treaty for the Establishment of the East African Community Act (Commencement),* LN No 137/2004.

Other EAC domestic implementing legislation include the ***Treaty for the Establishment of the East African Community Act,*** 2001 (Tanzania) and the ***East African Community Act,*** No 13/2002 (Uganda) (which commenced by virtue of the ***East African Community Act (Commencement) Instrument,*** SI No 29/2005).

The national or domestic context and character of the EAC Treaty is significant given that domestication makes the Treaty part of the law of a Partner State (that can be invoked by EAC residents before national courts) and, in that sense, this includes the provisions on *good governance* and the *rule of law* under Articles 6(d) and 7(2) of the Treaty. And, as the EACJ noted in the ***Tom Kyahurwenda*** case, "Articles 6, 7 and 8 are justiciable … before the national courts and tribunals". The justiciability is founded on both the EAC Treaty and *domestic implementing legislation*.

2.2. Identifying Actors in Good Governance and Rule of Law

2.2.1. Accountability actors

The framework of EAC Treaty positions Partner States as the primary actors for regional integration (and, in effect, fostering good governance and the rule of law). This is evident in Article 30(1) of the Treaty as regards the actors against which references may be brought before the EACJ.

ARTICLE 30
Reference by Legal and Natural Persons

1. Subject to the provisions of Article 27 of this Treaty, 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.

(a) Partner States (incl. State officials, organs, etc.)

EACJ jurisprudence is replete with findings on *non-compliance* with (and infringement of) *good governance* and *rule of law* in terms of arts 6(d) and 7(2) of the Treaty, with the Partner States as the foremost accountability actors.

The EACJ has underscored the manner in which a Partner State can be accountable for infringement of articles 6(d) and 7(2) of the Treaty—that is, through actions of *officials, agencies, institutions, departments, and organs.* Where it has exercised jurisdiction over acts of a Partner State involving alleged infringement of the Partner State's own laws, the EACJ has had to determine whether there has been an infringement of the principles of good governance and rule of law under Articles 6(d) and 7(2) of the Treaty. Thus, an official act of a **minister**—a Ministerial Ordinance banning five non-profit organizations and freezing their bank accounts—gave rise to a *legal question* concerning the legality of the Ordinance under Articles 6(d) and 7(2) of the Treaty ***(Forum pour Renforcement de la Société Civile & 4 Others v Attorney General of the Republic of Burundi & Another,*** EACJ Application No 16/2016 (First Instance Division), at 9 (January 23, 2018)). In the substantive reference ***(EACJ Reference No 12/2016),*** the EACJ found no infringement of Article 6(d) of the Treaty. The EACJ has held a Partner State accountable in relation to actions of a mayor and the inaction of a minister (of Home Affairs) that are in violation of Article 6(d) of the Treaty ***(Venant Masenge v Attorney General of the Republic of Burundi,*** EACJ Reference No 9/2012 (First Instance Division), at 20 (June 18, 2014)).

A Partner State is accountable for the infringement of Articles 6(d) and 7(2) of the Treaty in relation of actions of its **national courts** as judicial organs.

> 36. A cause of action has been severally held to exist where a Reference raises a legitimate question under the Court's legal regime as spelt out in Article 30(1), more specifically, where the matter complained off is alleged to violate the national law of a Partner State or infringe any provision of the Treaty. Causes of action before this Court are grounded in a party's recourse to the Court's interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty … Indeed … the violation of municipal law [is] held to give rise to a cause of action either under Article 30(1) to the extent that it amounts to an **'unlawful' act per se, or under Article 6(d) of the Treaty in so far as it would constitute a violation of the principle of rule of law enshrined therein.'**
>
> 37. In the instant case, the Reference does question the compliance of the Supreme Court decision with the right of access to justice and fair trial contemplated in the rule of law principle under Article 6(d) of the Treaty. This undoubtedly is a legitimate legal question under Article 30(1) of the Treaty, which *inter alia* mandates an intending litigant to refer to the Court's determination a decision that is considered an infringement of any Treaty provision. We are therefore satisfied that the Reference discloses as a cause of action against the Respondent State.
>
> ***Martha Wangari Karua v Attorney General of the Republic of Kenya,*** EACJ Reference No 20/2019 (First Instance Division), at 13-4 (November 30, 2020).

Further, actions of **institutions**—that are not considered agencies of a Partner State—but otherwise exercise governmental functions are attributable to a Partner State. Thus, the actions of a commission and a tax authority, held to infringe Articles 6(d) and 7(2) of the Treaty, were attributed to Rwanda, as the Partner State ***(Union Trade Centre Limited v Attorney General of the Republic of Rwanda (No 2),*** EACJ Reference No 10/2013 (First Instance Division) at 27-32, 49-51 (November 26, 2020)). Actions of Burundi security agents and municipal and provincial administration in violation of Articles 6(d) and 7(2) of the Treaty were attributed to the Partner State ***(Grand Lacs Supplier S.A.R.L & Others v Attorney General of the Republic of Burundi,*** Reference No 6/2016 (First Instance Division) at 25 (June 19, 2018)).

(b) Community Institutions

As evident in Article 30(1) of the treaty, another key "accountable" actor is an institution of *the Community.* The EAC institutions are provided for under Article 9(2) and (3) of the Treaty, including a number that survived from the previous Community under the 1967 treaty. The EACJ has held the Inter-University Council of East Africa to be one such institution of the Community but additionally clarified that such institutions can only be represented by the Counsel to the Community.

> 8. … First, there is no doubt whatsoever that the Respondent is an institution of the Community. The Act itself [the Inter-University Council for East Africa Act, 2009] states as much.
>
> …
>
> 9. The said Act is explicitly **'enacted by the East African Community and assented to by the Heads of State'.** It thus falls squarely under Article 9(2) of the Treaty as an institution of the Community.
>
> ***Prof Elias Bizuru v Inter-University Council of East Africa,*** EACJ Application No 10/2018 (First Instance Division) at 4-7 (July 5, 2019).

2.2.2. Enforcement actors

The framework of EAC Treaty is to position certain "actors" at the centre of *enforcement* of the Treaty (and, in effect, *good governance and the rule of law*).

(a) Partner States

While being a primary "accountable" actor in the Community, the Partner States are also "enforcement' actors in that they can make references to the EACJ. The Partner States' locus standi to refer matters to the EACJ is two-fold, in respect of—(i) *non-fulfilment of a treaty obligation or treaty infringement* and (ii) *legality of Act, regulation, directive, decision or action.* This is evident from Article 28 of the Treaty.

ARTICLE 28
Reference by Partner States

1. A Partner State which considers that another Partner State or an organ or institution of the Community has failed to ***fulfil an obligation under this Treaty*** or has ***infringed a provision of this Treaty,*** may refer the matter to the Court for adjudication.

2. A Partner State may refer for determination by the Court, the ***legality of any Act, regulation, directive, decision or action*** on the ground that it is ultra ***vires or unlawful or an infringement of the provisions of this Treaty*** or any ***rule of law*** relating to its application or amounts to a misuse or abuse of power.

The *non-fulfilment of a treaty obligation or legality of* specific conduct may be in regards to good governance and the rule of law in terms of Articles 6(d) and 7(2) of the Treaty which, as noted above in 2.1.2, create "justiciable obligations". Further, under Article 28(2) of the Treaty, the impugned action may in fact constitute an infringement of "any rule of law relating to the application [of Act, regulation, directive, decision] or amounts to a *misuse or abuse of power".*

Presently, beyond instances of requests for advisory opinion (and, even in such instances, by the Council of Ministers), there has been no reference brought before the EACJ under Article 28 of the Treaty.

(b) Secretary General

The Treaty, under Article 67, makes the Secretary General the principal executive officer of the Community and the head of the EAC Secretariat. Under Article 29 of the Treaty, the Secretary General is empowered to make references to the EACJ in respect of *non-fulfilment of a treaty obligation or treaty infringement.* In that regard, this *locus standi* mirrors one ambit of that of the Partner States under Article 28 of the Treaty.

ARTICLE 29
Reference by the Secretary General

1. Where the Secretary General considers that a Partner State has ***failed to fulfil an obligation under this Treaty*** or has ***infringed a provision of this Treaty,*** the Secretary General shall submit his or her findings to the Partner State concerned for that Partner State to submit its observations on the findings.

2. If the Partner State concerned does not submit its observations to the Secretary General within four months, or if the observations submitted are unsatisfactory, the Secretary General shall refer the matter to the Council which shall decide whether the matter should be referred by the Secretary General to the Court immediately or be resolved by the Council.

3. Where a matter has been referred to the Council under the provisions of paragraph 2 of this Article and the Council fails to resolve the matter, the Council shall direct the Secretary General to refer the matter to the Court.

While there has been no reference to the EACJ by Secretary General under article 29 of the Treaty, the jurisprudence of the EACJ has considered the scope of the responsibility of the Secretary General under this provision. In several of the references filed by EAC residents, the EACJ has been required to address what was viewed as a failure on the part of the Secretary General to exercise responsibility as an "enforcement" actor in holding partner States accountable for *good governance* and rule of law obligations. The various references have been brought against *the Secretary General* (as face of the Community) on the basis of *responsibility* under art 29 of the Treaty—that is, to bring to task an errant Partner State that has "failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty".

In ***James Katabazi & Others v Secretary General of the East African Community & Another,*** the Secretary General was considered not to have exhibited diligence in dealing with Uganda's flouting of Article 6(d) and 7(2) obligations in relation to the re-arrest of applicants after their release on bail by the courts.

> …[T]he powers that the Secretary General has under Article 29 are so encompassing and are pertinent to the advancement of the spirit of the re-institution of the Community and we dare observe that the ***Secretary General ought to be more vigilant than what his response has portrayed him to be.***
>
> … [I]t is our considered opinion that even if the 1st respondent is taken to have been ignorant of these events, the moment this application was filed and a copy was served on him, he then became aware, and if he was mindful of the delicate responsibilities he has under Article 29, he should have taken the necessary actions under that Article. That is all that the complainants expected of him: ***to register with the Uganda Government that what happened is detestable in the East African Community.***
>
> ***James Katabazi & Others v Secretary General of the East African Community & Another,*** EACJ Reference No 1/2007 at 25-6 (November 1, 2007).

The EACJ likewise held the Secretary General to have failed in his role to ensure Uganda, as a Partner State, met its obligations with regards to a draft protocol to operationalise the extended jurisdiction of the EACJ in ***Hon Sitenda Sebalu v Secretary General of the East African Community & 3 Others,*** EACJ Reference No 1/2010.

Article 67(3) of the Treaty designates the 1st Respondent as the principal executive officer of the Community. By virtue of Article 4(3), he/she is the person who represents the Community. Article 29 mandatorily requires the 1st Respondent:

(a) if he/she considers that a Partner State has failed to fulfil an obligation under the Treaty or

(b) if he/she considers that a Partner State has infringed a provision of the Treaty,

to submit his/her findings to the Partner State concerned for the Partner State to submit its observations on the findings. If the Partner State does not submit its observations within four months, or if it submits unsatisfactory observations, the 1st Respondent must refer the matter to the Council which shall decide whether to resolve the matter itself or to refer the matter to the EACJ.

…

The Court observes from the submissions and evidence on record that:

(a) At its meeting held on 24 November 2004, the Sectoral Council decided that in view of the growing scope of the East African Community integration process, the jurisdiction of the EACJ be extended.

(b) The EAC Secretariat, under the guidance of the 1st Respondent prepared a draft protocol (zero draft); that at the Sectoral Council Meeting of 8 July 2005 the draft protocol to operationalise the extended jurisdiction of the EACJ was adopted; and that the 1st Respondent has since organized, or caused to be organized, various consultative meetings to consider the draft.

…

(d) Vide ground 6(d) of the 1st Respondent's Response to the Amended Reference, he averred that Article 29 of the Treaty on which the Applicant relies does not apply because no Partner State has failed to fulfil an obligation of the Treaty or infringed a provision of the Treaty to necessitate Reference by the Secretary General to this Honourable Court.

…

The Court finds that:

(a) It has taken over six years since the consultative process on the draft protocol began after adoption of the draft but the outcome of that process is yet to be made manifest notwithstanding acknowledgement by the Sectoral Council way back in 2004 that in view of the growing scope of the Community's integration process, the jurisdiction of the EACJ ought to be extended.

…

(h) There is no plausible explanation for the 1st Respondent's failure to ensure that the 2nd Respondent met the 31 December 2010 deadline or to report the issue to the Council of Ministers as mandated by Article 29 of the Treaty and by Rule 7(5) of the Rules of Procedure of the Council of Ministers.

(i) There was failure by the 2nd Respondent to meet the 31 December 2010 deadline for submitting written comments on the draft protocol to operationalise the extended jurisdiction of the EACJ.

…

(k) No reasonable explanation was offered by the 2nd Respondent for the aforesaid failure or inaction and that in so failing, the 2nd Respondent must be deemed, on behalf of the Republic of Uganda, not to have fully discharged his obligation regarding the conclusion of the protocol to operationalise the extended jurisdiction of the EACJ.

(l) By failing to take action against the 2nd Respondent under Article 29, the 1st Respondent, too, has not fully discharged his obligations regarding the conclusion of the protocol.

(m) Whereas the records presented before this Court by the 1st Respondent show that there have been consultative meetings from 2005–2010 on the draft protocol and whereas the meetings were a necessary part of the process, it is clear that all those meetings have not culminated in achieving the objective for which they were convened, namely, to conclude a Protocol to Operationalise Extended Jurisdiction of the East African Court of Justice.

(n) There is no evidence that the 1st Respondent invoked any of the powers vested in him by the Treaty to cause the issue of EACJ's extended jurisdiction to be brought to a conclusion.

Hon Sitenda Sebalu v Secretary General of the East African Community & 3 Others, EACJ Reference No 1/2010 (First Instance Division), at 22, 27, 29, 30-31 (June 30, 2011).

In the end, the EACJ held that the delay to extend jurisdiction of the EACJ infringed the principles of *good governance* under Articles 6(d) and 7(2) of the Treaty (at 35-36, 42).

On the other hand, the EACJ did not find a failure on part of the Secretary General under article 29 of the Treaty to ensure Uganda fulfilled its obligations as regards electoral rules for the East African Legislative Assembly in ***Democratic Party & Another v Secretary General of the East African Community & Another,*** Reference No 6/2011 (First Instance Division) at 15-17 (May 10, 2012). Similarly, the EACJ found no fault on the part of the Secretary General given that he expeditiously acted upon receipt of reference filed before the Court on basis of Articles 6(d) and 7(2) of the Treaty and written to the respondent Partner State in ***Hon Justice Malek Mathiang Malek v Minister of Justice of South Sudan & Others,*** Reference No 9/2017 (First Instance Division) at 15-18 (July 24, 2020)).

The *distinctive* character of the role of the Secretary General (and member States) with regards to ***failure to fulfil*** obligations (including on good governance and the rule of law) under the COMESA Treaty was elucidated in ***Polytol Paints & Adhesives Manufacturers Co Ltd v Republic of Mauritius,*** COMESA Reference No 1/2012. The COMESA Court held that legal and natural persons can only refer matters of conduct or measures that are *unlawful or an infringement of the Treaty but not the non-fulfilment of a Treaty obligation by a Member State,* and that the latter responsibility was reserved for Member States and the Secretary General. This is crucial for the EACJ given that the provisions of Articles 24, 25 and 26 of the COMESA Treaty mirror the provisions of Articles 28, 29 and 30 of the EAC Treaty. There is a hint on the character of the three disparate types of references in ***East African Law Society & 4 Others v Attorney General of Kenya & 3 Others,*** EACJ Reference No 3/2007 at 15-16.

(c) Regional Court—EACJ

As the judicial body, the EACJ is charged with ensuring Partner States' adherence to and compliance with the EAC Treaty and, in exercising this jurisdiction, it has primacy over the interpretation and application of the Treaty. This is the essence of Articles 23 and 27 of the Treaty.

> **ARTICLE 23**
> **Role of the Court**
>
> 1. The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.
>
> …
>
> **ARTICLE 27**
> **Jurisdiction of the Court**
>
> 1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty:
>
> ...

In the context of references filed under Article 30 of the Treaty for non-adherence with (and infringement of) good governance and rule of law under Articles 6(d) and 7(2) of the Treaty, the EACJ has held it has power to examine whether or not it has jurisdiction under articles 23 and 27. The EACJ has distinguished its exercise of *jurisdiction* from a determination of the *merits* of a reference.

> 30. Jurisdiction is quite different from the specific merits of any case and their arguments on this point will best be addressed when dealing with issue No.5: *whether the delay in depositing declarations is an infringement of the Treaty.*
>
> 31. As it is, it should be noted that one of the issues of agreement as set out by the parties is that there are triable issues based on Articles 6, 7, 27 and 30 of the Treaty. That is correctly so because once a party has invoked certain relevant provisions of the Treaty and alleges infringement thereon, it is incumbent upon the Court to seize the matter and within its jurisdiction under Articles 23, 27 and 30 determine whether the claim has merit or not. But where clearly the Court has no jurisdiction because the issue is not one that it can legitimately make a determination on, then it must down its tools and decline to take one more step.
>
> ***Democratic Party v Secretary General of the East African Community & Others,*** EACJ Reference No 2/2012 (First Instance Division) at 18 (November 29, 2013).

In the context of Partner States' national laws, the EACJ has considered the interpretation whether Articles 6(d) and 7(2) of the Treaty are infringed by the said laws to fall within its jurisdiction under Articles 23(1) and 27(1) of the Treaty.

> 39. The jurisdiction of this Court is set out in Articles 23(1) and 27(1) of the Treaty which in a nutshell clothe it with the exclusive mandate to apply and interpret the Treaty save in the context of the proviso in Article 27(1) of the Treaty. This fact is not denied by either Party but the Respondent argued that once the issue of the legality and constitutionality or otherwise of the Press Law has been determined by the Constitutional Court of Burundi, then, that issue is finalized and no other Court, including the EACJ, can be properly seized of it.
>
> 40. … [W]hat is before this Court is not a question whether the Press Law meets the

constitutional muster under the Constitution of the Republic of Burundi but whether it meets the expectations of Articles 6(d) and 7(2) of the Treaty.

41. The … jurisdiction … conferred by Article 27(1) which provides that this Court shall *"initially have jurisdiction over the interpretation of the Treaty."* The proviso thereof is irrelevant for purposes of this Reference, but ***suffice it to say that interpretation of the question whether Articles 6(d) and 7(2) of the Treaty were violated in the enactment of the Press Law is a matter squarely within the ambit of this Court's jurisdiction.***

Burundi Journalists Union v Attorney General of the Republic of Burundi, EACJ Reference No 7/2013 (First Instance Division) at 9 (May 15, 2015).

In another reference against Burundi, the EACJ held it had jurisdiction to entertain the reference in which Act No 1/26 was challenged as contravening Articles 6(d) and 7(2) of the Treaty in so far as it offends the rule of law and good governance ***(Raphael Baranzira & Another v Attorney General of the Republic of Burundi,*** EACJ Reference No 15/2014 (First Instance Division) at 12-13 (March 22, 2016).

(d) National Courts of Partner States

As other organs exercising judicial powers to hear and determine disputes, national courts (and tribunals) are expected to play a crucial "enforcement" role in relation to the EAC Treaty (including on *good governance* and the *rule of law*). The role of the national courts in relation to *interpretation* and *application* of the Treaty is envisaged under Articles 27 (proviso), 33 and 34 of the Treaty.

ARTICLE 27
Jurisdiction of the Court

1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty: *Provided* that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

ARTICLE 33
Jurisdiction of National Courts

1. Except where jurisdiction is conferred on the Court by this Treaty, disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the Partner States.

2. Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.

ARTICLE 34
Preliminary Rulings of National Courts

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

The role of the national court is supplementary to the EACJ (as the *primary* judicial body of the Community). The EACJ has held that, in the context of Articles 27, 33 and 34 of the Treaty, national courts and the EACJ have concurrent jurisdiction on Treaty matters, although decisions of EACJ override those of the national courts.

In the ***Tom Kyahurwenda*** *case*—involving a preliminary ruling reference from the High Court of Uganda—the EACJ was requested to provide a ruling on whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 of the Treaty are enforce-able before national courts.
The EACJ has stated the premise and scope of preliminary ruling references by national courts as follows—

(a) The preliminary ruling references is to—
  (i) enable national courts to apply EACJ interpretation to the facts of a case before a national court and to enable that court to make a judgment.
  (ii) ensure uniform interpretation and avoid possible conflicting decisions and uncertainty in the interpretation of the same provisions of the Treaty.

(b) The preliminary ruling jurisdiction affords national courts a discretion to determine if interpretation of the Treaty is necessary.
  However, national courts' discretion is "narrow" and shall be exercised in favour of requesting a preliminary ruling from the EACJ unless—
  (i) Community law is not required to solve the dispute (an irrelevant question).
  (ii) EACJ has already clarified the point of law in previous judgments (*Acte eclair*);
    or
  (iii) the correct interpretation of the Community law is obvious (*Acte clair*).

In the end, the EACJ held that "Articles 6, 7 and 8 are justiciable both before this Court [EACJ] and before the national courts and tribunals." In effect, the *good governance* and *rule of law* obligations under Articles 6(d) and 7(2) of the Treaty are justiciable before, and enforceable by, national courts.

In the wake of the ***Tom Kyahurwenda*** case, the EACJ has emphasized that it is the duty of the national courts to refer questions on interpretation of the Treaty ***(Attorney General of the United Republic of Tanzania v Anthony Calist Komu,*** EACJ Appeal No 2/2015 (Appellate Division) at 32-3 (November 25, 2016)).

(e) EAC Residents

The framework of EAC Treaty, under article 30, positions *legal* and *natural* persons as main actors for *enforcement* of the Treaty (and, in effect, *good governance* and the *rule of law*). All the references on Articles 6(d) and 7(2) of Treaty been filed by individuals; political parties (e.g. Democratic Party of Uganda); bar associations (e.g. East African Law Society), professional associations (e.g. on media); and civic actors.

An emerging concern is who constitutes a "resident" of the Community for the purposes of enforcing and litigating good *governance* and *rule of law* matters before the EACJ. This was at issue in the decision in ***Manariyo Desire v Attorney General of the Republic of Burundi,*** EACJ Appeal No 1/2017 (Appellate Division) (November 28, 2018).

3. Enforcing Good Governance and Rule of Law by the East African Court of Justice

3.1. Conceptualization of Good Governance

3.1.1. Definition

(a) Introduction

Although the EAC Treaty provides, under articles 6(d) and 7(2), for indicative listing of what constitutes good governance, a definition of the concept itself has been elusive. There is no concise articulation of what *good governance* means in EACJ's decisions, with an admission by the Court of such difficulty in the absence of a definition in Treaty in ***Hon Sitenda Sebalu v Secretary General of the East African Community & 3 Others,*** EACJ Reference No 1/2010.

(b) Non-legal and extraneous sources

The EACJ has sought definition of good governance from extraneous sources (outside of the EAC Treaty itself) in, for instance, *non-legal sources* (e.g. documents on international agencies or organizations).

> The expressions **"good governance"** and **"principles of good governance"** are recurrent themes in this Reference. They are not legal terms. Although the said expressions also recur in the Treaty, they are not defined there. They seem to be used interchangeably in the Treaty. The only hint one gets from the Treaty, in particular Article 6(d), as to what the usage of the expression **"principles of good governance"** in the Treaty entails is that the said principles include adherence to the principles of democracy, rule of law, social justice and maintenance of universally accepted standards of human rights. To widen understanding of the concept of "governance", it may be helpful to look at a couple of definitions from non-legal sources.
>
> Habitat for Humanity, in a write-up entitled **"The Global Campaign for Good Urban Governance"** (Draft 3 of 1st December, 1999), instructively, described the term governance as both **"complex and controversial".** The same write-up gave a definition of good governance in an urban context as under:
>
> > **"Good [urban] governance … can be defined as an efficient and effective response to [urban] problems by accountable [local] governments …"**
>
> According to a United Nations Development Programme (UNDP) Report entitled **'Governance for Sustainable Growth and Equity: Report of the Growth and Equity of the International Conference'** (New York: United Nations, 1997), **governance** refers to:
>
> > **"the exercise of political, economic and administrative authority in the management of a country's affairs at all levels … it incorporates the complex mechanisms, processes and institutions through which the citizens and groups articulate their interests, mediate their rights and obligations"**
>
> ***Hon Sitenda Sebalu v Secretary General of the East African Community & 3 Others,*** EACJ Reference No 1/2010 (First Instance Division), at 34 (June 30, 2011).

The use of extraneous sources in defining good governance is also evident in the use of an article by an international agency in both ***Godfrey Magezi v Attorney General of the Republic of Uganda,*** EACJ Reference No 5/2013 (First Instance Division) at 26 (May 14, 2015) and ***Raphael Baranzira & Another v Attorney General of the Republic of Burundi,*** EACJ Reference No 15/2014 (First Instance Division) at 23 (March 22, 2016).

(c) Referencing other treaty instruments

The EACJ has likewise sought a definition (or conceptualization) of good governance by reference to other international treaties (e.g. AU treaty instruments). In ***Attorney General of the Republic of Rwanda v Plaxeda Rugumba,*** EACJ Appeal No 1/2012, it located good governance in a Partner State's ratification of an AU instrument.

> 25. The Republic of Rwanda is a Community member and a signatory to the EAC Treaty. It is also a signatory to the African Charter on Human and People's Rights. On 9th July 2010 it ratified the African Charter on Democracy, Elections and Governance and deposited the Instrument of Ratification on 14th July 2010. By the latter Charter, State Parties who subscribe to it are obligated by Article 3 as follows:
>
> *"State Parties shall implement this Charter in accordance with the following principle:*
>
> *1. Respect for human rights and democratic principles".*
>
> *Similarly, Article 4 of ... that Charter states as follows:*
>
> ***"Democracy, Rule of Law and Human Rights***
>
> *1. State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights."*
>
> ***Attorney General of the Republic of Rwanda v Plaxeda Rugumba,*** EACJ Appeal No 1/2012 (Appellate Division), at 10-11 (June 2012).

3.1.2. Scope of Good Governance

(a) Minimum set of requirements in the Treaty

The scope of good governance under the EAC Treaty is viewed as broad in the light of particular contexts—as *a fundamentally political, philosophical and elastic subject* ***(Hon Sitenda Sebalu v Secretary General of the East African Community & 3 Others,*** EACJ Reference No 1/2010). Articles 6(d) and 7(2) of the Treaty are regarded a *"minimum set of requirements* that constituted the *good governance package* that … suited the EAC integration agenda" ***(Samuel Mukira Mohochi v Attorney General of the Republic of Uganda,*** EACJ Reference No 5/2011).

The principle in Article 6(d), which was the main target of the Respondent's attack, is good governance. "Good governance" means many things in many contexts. *Wikipedia, the online Encyclopedia* defines it in descriptive terms. We paraphrase it thus:

> **"Good governance is an indeterminate term used in international development literature to describe how public institutions conduct public affairs and manage public resources. The concept "good governance" centres around the responsibility of governments and governing bodies to meet the needs of the masses. Because the term "good governance" can be focused on any one form of governance, organisations and authorities will often focus the meaning of good governance to a set of requirements that conform to the organisation's agenda, making good governance imply many different things in many different contexts."**

We fully associate ourselves with the above description and we are of the firm belief that herein lies the explanation why the framers of the Treaty went beyond stating the principle and instead negotiated and agreed upon a specific minimum set of require-ments that constituted the good governance package that, in their wisdom, suited the EAC integration agenda. That package, for purposes of the EAC integration, as set out in Article 6(d), includes:

(a) adherence to the principles of democracy,
(b) the rule of law, accountability,
(c) transparency,
(d) social justice,
(e) equal opportunities,
(f) gender equality, as well as
(g) the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Samuel Mukira Mohochi v Attorney General of the Republic of Uganda, EACJ Reference No 5/2011 (First Instance Division), at 18 (May 17, 2013).

Articles 6(d) and 7(2) of the Treaty provide indicia for good governance. The implication that comes across in a number of EACJ decisions is that a breach or infringement of the indicia (e.g. rule of law, protection of human rights) is in itself a breach or infringement of *good governance* ***(Venant Masenge v Attorney General of the Republic of Burundi,*** EACJ Reference No 9/2012 (First Instance Division), at 18-19 (June 18, 2014)).

(b) Legitimate expectations within integration agenda

The principle of good governance has, in the context of the integration agenda underlying the Community, been addressed in the light of *legitimate expectations* of EAC residents as to a certain social ordering of the larger East African society. Therefore, arrangements that abound under the integration process constitute "good governance" expectations of the EAC residents. Such legitimate expectations included the "extended jurisdiction of the EACJ" as a "vital component of good governance" and the inaction as regards a zero draft protocol and delays to extend the EACJ's appellate jurisdiction was inimical to the principles of good governance.

> Simply put, ***governance*** refers to the organization of society and management of its affairs. Governance can be good or bad. The expression ***"good governance"*** appears to be a fundamentally political, philosophical and elastic subject, it connotes sound management of societal affairs and what that entails.
>
> This Court notes that the issue of extended jurisdiction of the EACJ did not come as an afterthought. It was acknowledged as an important complement of the Court right at the inception of the Community, the Court being recognized as a vital component of good governance which the Community Partner States undertook to abide by as Article 7(2) of the Treaty clearly demonstrates.
>
> …
>
> Article 6(d) of the Treaty requires Partner States, *inter alia,* to adhere to the principle of accountability as part of good governance. The import of accountable governance is that the people can hold those holding public office to account for the manner in which they exercise the function of their office or for lack of exercise or for improper exercise of those functions.
>
> In the present case, the Applicant is questioning the inaction or delay by the concerned organs of the Community in concluding or causing to be concluded a protocol on the extended jurisdiction of the EACJ. He has a right to do so; and doing it peacefully through the EAC's judicial forum …
>
> In view of the foregoing, we have no hesitation in finding that the delay to extend the jurisdiction of the EACJ contravenes the principles of good governance as stipulated in Article 6 of the Treaty.
>
> ***Hon Sitenda Sebalu v Secretary General of the East African Community & 3 Others,*** EACJ Reference No 1/2010 (First Instance Division), at 35, 42 (June 30, 2011).

Similar legitimate expectations was expected of a Partner State's treatment of residents of the Community in accordance with the law and EAC Treaty (and protocols) as they exercise free movement of persons.

> 83. We have discussed the import of Articles 6(d) and 7(2) of the Treaty at length elsewhere in this judgment, and we reiterate that position here. ***The Applicant travelled to a Partner State that is bound by the principles of good governance enshrined in Article 6(d), and had a legitimate expectation of being treated in accordance therewith.*** We find, however, that the treatment he was subjected to was adverse and discriminatory.
>
> 84. That he was singled out of a delegation, declared a prohibited immigrant, denied entry, returned to Kenya, without being furnished with reasons why and without being heard in his defence was clearly at variance with and in violation of Uganda's obligation to adhere to the rule of law, accountability, transparency as well as the recognition and protection of human rights in accordance with the Charter, as provided under Articles 6(d) and 7(2) of the Treaty and 7(2) of the Protocol.
>
> …
>
> 112. We should recall for clarity of issues that the actions complained of are the denial of entry to the Applicant, being declared a prohibited immigrant, detention and return to Kenya. We have shown above that these actions were in violation of the freedom of movement of the Applicant which is among the foundational principles of the Common Market. We therefore do not hesitate to hold that the same actions are in violation of Article 104 of the Treaty.
>
> ***Samuel Mukira Mohochi v Attorney General of the Republic of Uganda,*** EACJ Reference No 5/2011 (First Instance Division), at 38, 51 (May 17, 2013).

(c) Good governance-human rights nexus.

The principle of good governance in terms of Articles 6(d) and 7(2) of the Treaty has, as part of its indicia, "*recognition, promotion and protection of human and peoples' rights*". In ***The Managing Editor, MSETO & Other v Attorney General of the United Republic of Tanzania,*** EACJ Reference No 7/2016, the EACJ considered the nexus between Articles 6(d) and 7(2) of Treaty and Article 9 of the African Charter on Human and Peoples' Rights as a guarantee of freedom of expression (including press freedom). And, in that context, a Partner State's duty is "to ensure that *any laws promulgated by them are not prejudicial to the achievement of good governance, which includes the promotion, protection and recognition of the fundamental human rights and freedoms.*" The EACJ has considered freedom of expression (and the press), as a human right, to be pertinent to good governance (as well as the other indicia in Articles 6(d) and 7(2) of Treaty on accountability and transparency).

> 75. … [T]he substantive issue to be addressed is the freedom of the press and freedom of expression in the context of Articles 6(d) and 7(2) as read with the Press Law. In that regard, there is no doubt that freedom of the press and freedom of expression are essential components of democracy …
>
> …
>
> 82. Firstly, under Articles 6(d) and 7(2), the principles of *democracy* must of necessity include *adherence to press freedom.*
>
> 83. Secondly, a free press goes hand in hand with the *principles of accountability and transparency* which are also entrenched in Articles 6(d) and 7(2).

> 84. Thirdly, by acceding to the Treaty and based on our finding above that Articles 6(d) and 7(2) are justiciable, Partner States including Burundi, are obligated to abide and adhere by each of the fundamental and operational principles contained in Articles 6 and 7 of the Treaty and their National Laws must be enacted with that fact in mind.
>
> ***Burundi Journalists Union v Attorney General of the Republic of Burundi,*** EACJ Reference No 7/2013 (First Instance Division) at 27, 31 (May 15, 2015).

In the subsequent decision, the EACJ affirmed *freedom of opinion* and *freedom of the media* to be at the core of fundamental and operational principles (on good governance) in Articles 6 and 7 of the EAC Treaty ***(Media Council of Tanzania & 2 Others v Attorney General of the United Republic of Tanzania,*** EACJ Reference No 2/2017 (First Instance Division) at 28 (March 28, 2019)). On the other hand, in ***Mohochi*** case, good governance lay in ensuring integration-related freedoms, i.e. free movement of persons under the Common Market Protocol.

3.2. Conceptualization of Rule of Law

3.2.1. Definition

(a) Introduction

In general terms, the rule of law implies that the creation of laws and their enforcement are legally regulated, so that no one—including the most highly-placed official—is above the law. This legal constraint means that the government is subject to existing laws as much as its citizens are. However, as with good governance, there has never been a generally accepted or even systematic formulation of the *rule of law*. Despite wide use by politicians, judges and scholars, rule of law has been described as "an exceedingly elusive notion". Nonetheless, there have being attempts to provide a definition.

(b) Sources of definition

As it has done with good governance, the EACJ has drawn upon legal and non-legal sources for the definition and scope of the rule of law. This was its approach in one of its earliest decisions in ***James Katabazi & Others v Secretary General of the East African Community & Another,*** EACJ Reference No 1/2007, in which the applicants contended that their re-arrest after release on bail contravened rule of law under Article 6(d) and 7(2) of the Treaty.

> The complainants invite us to interpret Articles 6(d), 7(2) and 8(1)(c) of the Treaty so as to determine their contention that those acts, for which they hold the 2nd respondent responsible, contravened the doctrine of the rule of law which is enshrined in those articles.
>
> …
>
> The starting point is what does rule of law entail?
>
> From Wikipedia, the Free Encyclopedia:
>
> > The rule of law, in its most basic form, is the principle that no one is above the law. **The rule** follows logically from the idea that truth, and therefore law, **is based upon fundamental principles** which can be discovered, but **which cannot be created through an act of will**. (Emphasis is supplied.)

The Free Encyclopedia goes further to amplify:

> Perhaps the most important application of the rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. The principle is intended to be a safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. Thus, the rule of law is hostile both to dictatorship and to anarchy.

Here at home in East Africa Justice George Kanyeihamba in Kanyeihamba's Commentaries on Law, Politics and Governance at page 14 reiterates that essence in the following words:

> The rule of law is not a rule in the sense that it binds anyone. It is merely a collection of ideas and principles propagated in the so-called free societies to guide lawmakers, administrators, judges and law enforcement agencies. **The overriding consideration in the theory of the rule of law is the idea that both the rulers and the governed are equally subject to the same law of the land.** (Emphasis is supplied.)

It is palpably clear to us, and we have no flicker of doubt in our minds, that the principle of **"the rule of law"** contained in Article 6(d) of the Treaty encapsulates the import propounded above ...

James Katabazi & Others v Secretary General of the East African Community & Another, EACJ Reference No 1/2007 at 17-19 (November 1, 2007).

In ***Raphael Baranzira & Another v Attorney General of the Republic of Burundi,*** EACJ Reference No 15/2014, the EACJ relied on a legalistic definition from a 2004 report of the UN Secretary General on rule of law and transnational justice.

> 53. … [T]he Applicant's claim that the principle of good governance has been contravened within the context of the right to fair trial and the principle of separation of powers does, in our considered opinion, bring into purview the principle of the rule of law. **In a Report of the (UN) Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (UN Doc S/2004/616 (2004), para. 6,** the concept of the rule of law was defined as follows:
>
> > **"It refers to the principle of governance to which all persons, institutions and entities, public or private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principle of supremacy of the law, equality before the law, *accountability* to the law, *fairness* in the application of the law, *separation of powers,* participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal *transparency.*"**

> 54. It is quite clear from the foregoing definition that the rule of law is the king-pin that ferments, and by which nation states progressively aspire towards the ideal of good governance.
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> ***Raphael Baranzira & Another v Attorney General of the Republic of Burundi,*** EACJ Reference No 15/2014 (First Instance Division) at 23-24 (March 22, 2016).

The UN report had previously been referred to in ***Mary Ariviza & Another v Attorney General of the Republic of Kenya & Another,*** EACJ Reference No 7/2010 (First Instance Division) at 23 (October 28, 2010).

(c) Rule of law as a legal construct

Rule of law is a quintessential law order principle enjoining the *law's control over public power and governmental acts conformity with the law.* Further, it underlies the twin ideas that *no one is above the law and everyone is equally subject to the law.* The EACJ has highlighted these aspects of rule of law as "the premier value of the … Community".

> 82. Before concluding our consideration of the principle of the Rule of Law in the Treaty, we must say this: Observance of the Rule of law restrains the arbitrary will of the strong, it is the sure protection of all, it equalizes the unequal, it is the antithesis of arbitrariness, and it is the nemesis of anarchy. Without the Rule of Law, justice, peace and security would be mere chimeras. In light of that, it is clear that observance of the Rule of Law is the premier value of the East African Community. Disregard of it will torpedo the ship of regional integration.
>
> ***Henry Kyarimpa v Attorney General of the Republic of Uganda,*** EACJ Appeal No 6/2014 (Appellate Division) at 41 (February 19, 2016).

In ***Godfrey Magezi v Attorney General of the Republic of Uganda,*** EACJ Reference No 5/2013 (First Instance Division) at 27-8 (May 14, 2015), it was held: "Rule of law implies that *every citizen is subject to the law including the lawmakers.* Put another way and specifically in the context of this reference, it means that the IGG as well as the Attorney General of Uganda are bound by the rule of law."

3.2.2. Scope of Rule of Law in Court's decisions

(a) Court's power of review

One of the means by which EACJ ensures adherence to the rule of law is by the exercise of its judicial review powers over decisions and directives, Acts or regulations of the Community to ensure they conform to the dictates of the Community law. The grounds listed for review, as apparent in Article 28, 29 and 30 of the Treaty, are: (i) *ultra vires* (where an act is done outside the powers of a particular body or person), (ii) where the impugned acts are unlawful or infringe on the Treaty or rule of law, or (iii) where the act or directive amounts to an abuse of power.

In this sense, the EACJ has been well positioned to check on the exercise of the legislative or executive power of the Partner States and the Community (or its other organs) and, on various occasions, has been called to exercise its review powers. By doing so, the EACJ has kept various actors in check ensuring that they act within the law. This is evident in its decisions in ***Mohochi*** and ***Katabazi*** cases. It was also evident in the EACJ's first-ever decisions in ***Prof Peter Anyang' Nyong'o & 10 Others v Attorney General of Kenya & Others,*** EACJ Reference No 1/2006 (in providing a litmus test for *democratic processes* for Partner States' election of representatives to one of EAC's organs, the East African Legislative Assembly (EALA)); ***Calist Mwatela & 2 Others v East African Community,*** EACJ Reference No 1/2005 (delineating the *mandates* and *competences* of EAC's organs (EALA and Council of Ministers) under the Treaty); and so on.

In this way, the EACJ has served as the *primary* rule of law body and sought to protect and enforce the integration agenda. Further, it has positioned the EAC Treaty as *a rule of law* instrument and as the basis for *lawfulness* of actions and conduct of Partner States and Community organs/institutions.

(b) Uniform application of Community law

A tenet of the rule of law is the consistent implementation of law and the ability to offer equal protection. The EACJ has the task of setting jurisprudence and ensuring uniformity in interpretation and application of Treaty matters. This is evident in the provisions of Articles 27, 33 and 34 of the Treaty under which, (i) although both the national courts and EACJ have concurrent jurisdiction on Treaty matters, the decisions of EACJ override those of the national courts; and (ii) the national courts are required to refer to the EACJ matters for preliminary rulings. These twin aspects promote consistency, predictability and guarantees uniform application of Community law.

In order to ensure uniform application of Community law, the EACJ has emphasized that it has *primacy* over interpretation of the Treaty in relation to Partner States' internal laws and shall not defer to national courts' interpretation of the internal laws or processes.

> 74. We have carefully considered the rival submissions on the aspect of contempt or disobedience of Court Orders. Having done so, we accept the Appellant's submissions that the Trial Court erred in law in finding that since the National Courts in Uganda had not been called to find, and had not found, that the Respondent in cancelling the procurement bids, selecting Sinohydro to undertake the Karuma Dam, and signing a MOU with Sinohydro to execute the project, was in contempt of Court, it lacked jurisdiction to delve into the alleged contempt and disobedience of the orders of those Courts and to determine whether such disobedience was a contravention of the principle of the rule of law under the Treaty. We also accept the submission that such a stand was an abdication of the Court's mandate to interpret Articles 6(d), 7(2) and 8(1)(c) of the Treaty …
>
> … [I]t is the duty of the East African Court of Justice to interpret the provisions of the Treaty and to determine whether there is a contravention thereof. The Court can only do so by applying the facts found by itself to the provisions of the Treaty … [W]hen the Court has to consider whether particular actions of a Partner State are unlawful and contravene the Principle of the Rule of Law under the

> Treaty, the Court has jurisdiction, and, indeed, a duty to consider the internal laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty. *The Court does not and should not abide the determination of the import of such internal law by the National Courts.* By parity of reasoning, it should be equally obvious that *when what is alleged to be a violation of the Treaty Principle of the Rule of Law is the disobedience of an order of the Court of a Partner State, the Court should not abide the determination, if any, by such National Court on whether such Court's order has been disobeyed.* It is for this Court to satisfy itself, without the input of the National Court, whether there has been disobedience or disregard of a Court order and to apply that finding in the interpretation of the Treaty …
>
> … If pertinent facts about the existence of National Court orders and a State's subsequent contrarian conduct are brought to the attention of this Court, the Court does not need, let alone require, the assistance of the National Court, in any form or shape, to determine whether the Treaty has been breached in those circumstances … [I]t is offensive to principle and logic that in a Court whose jurisprudence is clear that a party does not have to exhaust domestic remedies before approaching it, the exercise of the Court's jurisdiction to interpret the Treaty should be tied to a determination of the import of the internal law or an adjudication of contempt of court by that State's National Courts. To support the position taken by the Trial Court would be perilously close to *making this Court subservient to, and subject to, the vagaries of judicial interpretation by National Courts. It would be tantamount to surrendering to National Courts our jurisdiction to interpret the Treaty.* We refuse to countenance such a spectacle. In short, we are of the firm view that the Trial Court was entitled to find whether there had been contempt of or violation of Court orders by the Respondent even without their having been such a finding by the National Courts of Uganda and to apply such a finding(s) to its interpretation of Articles 6, 7 and 8 of the Treaty.
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> ***Henry Kyarimpa v Attorney General of the Republic of Uganda,*** EACJ Appeal No 6/2014 (Appellate Division) at 35-37 (February 19, 2016).

The EACJ has been relied upon by Partner States and EAC residents as the final arbiter and decision-maker on matters regarding regional integration in the Community. This is the aim of Article 23 of the Treaty in establishing the EACJ as a judicial body that shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty. This is also in line with the provisions of Article 8 of the EAC Treaty, which provides that, on matters relating to integration, the Community law will take precedence over the municipal law of Partner States.

(c) Rule of law-human rights nexus

As is the case with good governance, the EACJ has addressed "human rights" from the context of the principle of rule of law under Articles 6(d) and 7(2) of the Treaty. Although the EACJ does not explicitly have jurisdiction over human rights matters, it has regarded such matters properly within its jurisdiction in terms of rule of law (and good governance) obligations under the Treaty.

In a number of decisions, the EACJ has identified "due process" as a feature or hallmark of the rule of law.

> In our understanding, the expression "due process" means the same thing as "due process of law". Simply put, "due process" and "due process of law" mean following laid down laws and procedures. Further, "due process of law" is a component of the principle of "the rule of law" as generally understood in Anglo-American jurisprudence.
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> We adopt this amplified conceptualization of the rule of law and endorse the view that due process of law is one of its core components.
>
> ***Mary Ariviza & Another v Attorney General of the Republic of Kenya & Another,*** EACJ Reference No 7/2010 (First Instance Division) at 21-22 (October 28, 2010).

As a feature of the rule of law, due process has arisen especially in the context of actions by Partner States taken in non-conformity with settled or laid down procedures under the law. The procedures include a duty to give reasons for a decision, afford a person a fair opportunity to be heard, etc.

> 72. ***"Due process"***, according to ***Black's Law Dictionary (supra) at p. 575*** is defined as ***"The conduct of legal proceedings according to established rules and principles for the protection of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case".*** We adopt this definition.
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> 73. The process … claimed amounted to due process i.e. filling an immigration card, taking finger prints and pictures and "a discussion" with the desk officer before being found unworthy to enter Uganda, is at variance with the above definition …
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> …
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> 76. … [O]nce they decided to infringe upon the Applicant's rights and liberties as recognised by the Protocol, [the immigration officials] ought to have guaranteed his right to redress. This entailed, in our view, a duty to give the Applicant sufficient reasons for denying him entry, declaring him a prohibited immigrant and removing him from Uganda. Equally importantly, they had a duty to afford him a fair opportunity to be heard, and, as they made their decisions about him, to take into consideration whatever he had to say. *These, in our view, are basic indicators of due process, are the hallmarks of the rule of law and they distinguish a potentially just and fair process from a potentially unjust and unfair one.* Worthy of underscoring also is the fact that the Applicant was owed these things not as favours from anyone but as hallowed rights guaranteed by the Treaty. The provisions of its own national law, even if they existed, could not exempt the Republic of Uganda from this Community law obligation.
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> ***Samuel Mukira Mohochi v Attorney General of the Republic of Uganda,*** EACJ Reference No 5/2011 (First Instance Division), at 34, 36 (May 17, 2013).

The EACJ had held deprivation of rights guaranteed either by the Treaty or applicable Partner State's law where deprivation is riddled with "procedural irregularities" amounts to "lack of procedural due process".

> 96. We agree with Counsel for the Applicant's reading of the two provisions that according to Burundi Laws, the prohibition from travelling outside the territory of Burundi is imposed by an order of the court. Accordingly, it is our view that procedural irregularities amounting to lack of procedural due process were committed in the way Mr. Rufyikiri was banned from travelling outside the Burundian territory. Consequently, we hold that due process of law, one of the cornerstones of the rule of law, was not respected by the 1st Respondent and that this constitutes a violation of its Treaty obligations under Articles 6(d) and 7(2) of the Treaty.
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> ***East African Law Society v Attorney General of the Republic of Burundi & Another,*** EACJ Reference No 1/2014 (First Instance Division) at 30-31 (May 15, 2015).

The other feature of the rule of law identified by the EACJ is the respect for court process (and decisions). It has treated it as "an important tenet of respect for and observation of the *rule of law* and *good governance* principles" ***(Rt. Hon Margaret Zziwa v Secretary General of the East African Community,*** EACJ Reference No 17/2014 (First Instance Division) at 15 (February 3, 2017)).

In the ***Katabazi*** case, the re-arrest of the applicants after their release on bail by the High Court was held to constitute a disregard of court orders as to undermine the independence of courts and the rule of law.

> We, therefore, hold that the intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently contravened the Treaty. Abiding by the court decision is the corner stone of the independence of the judiciary which is one of the principles of the observation of the rule of law.
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> ***James Katabazi & Others v Secretary General of the East African Community & Another,*** EACJ Reference No 1/2007 at 23 (November 1, 2007).

In the ***Kyarimpa*** case, disobedience or disregard of court orders was affirmed to be in contravention of the principle of the rule of law under Articles 6(d) and 7(2) of the Treaty.

> 80 … Observance of the rule of law dictates that when an act has been prohibited by a court order, unless and until such an order has been set aside or vacated by the same Court or another court of competent jurisdiction, such act is prohibited, and no reason or ground advanced for doing it can suffice to legitimize such action. Lawful justification for disobedience of Court orders, we say loudly, is not a creature known to the law. It is a pure and simple contradiction in terms. In the result, we find and hold that the selection and subsequent signing of the MoU between the GoU and Sinohydro was in disobedience or disregard of pertinent Court orders and, as such, a violation of the Treaty principle of the Rule of Law.
>
> ***Henry Kyarimpa v Attorney General of the Republic of Uganda,*** EACJ Appeal No 6/2014 (Appellate Division) at 40-41 (February 19, 2016).

3.2.3. National Law-Community Law Nexus in Rule of Law

The principles of the rule of law under Articles 6(d) and 7(2) of the Treaty have brought to the fore the nexus (or relationship) between Community law and national laws of the Partner States. The national law-Community law nexus has been significant in decisions of the EACJ on partner State's *rule of law* obligations.

(a) Doctrine of supremacy

The national law-Community law nexus is underscored by the doctrine of supremacy. The following questions abound. What is the hierarchy of laws between Community and national laws? What happens when laws of the Community and national laws of Partner States on the same subject matter clash? The Treaty is categorical that Community laws take precedence over similar national ones "on matters pertaining to the implementation of the Treaty" (Article 8(4)). The Treaty expressly provides for primacy of Community institutions and laws over those of Partner States with regard to Community affairs.

The supremacy of Community (and precedence over national) law is evident in the ***Kyarimpa*** case, where the EACJ refused to countenance to being guided or bound by the decision taken by a Partner State's national courts (at 35-37). In the ***Burundi Journalists Union*** case, the EACJ noted: "Partner States by dint of Article 8(2) of the Treaty are obligated to enact National Laws to give effect to the Treaty and to that extent, the Treaty is superior law" (at 31).

(b) Partner States' national law in violation of Treaty

The national law-Community law nexus has arisen in EACJ's inquiry into infringement of the rule of law and the fact it may need to consider the internal law of the Partner State. In the ***Kyarimpa*** case, the EACJ underscored its "inescapable duty" to consider a Partner State's internal law in determining whether the conduct complained of amounts to a violation or contravention of the Treaty (at 30).

In the ***Burundi Journalists Union*** case, the EACJ held that the impugned provisions of Burundi's press law were in violation of the principles enshrined in Articles 6(d) and 7(2) of the Treaty (at 42-43). It arrived at a similar determination and holding with regards to the *Media Services **Act*** of Tanzania in the ***Media Council of Tanzania*** case (at 24-49).

(c) Violations of own national law by Partner States

The national law-Community law nexus has been most evident in the EACJ's review of actions and conduct of Partner States that are in violation of, or non-compliance with, a Partner State's own national law. The EACJ has noted that non-compliance with a Partner State's national laws amounts to a violation of the principle of the rule of law enshrined in Article 6(d) and is, to that extent, a violation of the Treaty. It has noted that ultimately the inquiry is not whether a Partner State's act or conduct is "in conformity with internal law, but rather whether it is in conformity with the Treaty". The EACJ considers national law and compliance therewith by the Partner States in the context of interpretation (of Articles 6(d) and 7(2)) of the Treaty.

In the ***Kyarimpa*** case, the contracting process for construction of the Karuma Dam breached Uganda's own procurement law and was accordingly in breach of the principles of rule of law under Articles 6(d) and 7(2) of the Treaty.

> 70. Why then, it may be asked, all this analysis of Uganda's Internal law when the Court's jurisdiction is limited to the interpretation and application of the Treaty? …
>
> …
>
> In … adjudging an impugned state action as being internationally wrongful this Court asks itself the question not whether such action is in conformity with internal law, but rather whether it is in conformity with the Treaty. Where the complaint is that the action was inconsistent with Internal law and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the Principle of the rule of law, it is this Court's inescapable duty to consider the Internal Law of such Partner State in deter-mining whether the conduct complained of amounts to a violation or contravention of the Treaty.
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> …
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> 72. The upshot of our consideration of this aspect of the issue is that the procurement of Sinohydro to construct the Karuma Dam was in contravention of the Internal Laws of Uganda. We find in this case that such conduct by the Respondent offended the principles of the rule of law, transparency and accountability encapsulated in Articles 6(d) and 7(2) of the Treaty. We note in passing that the Appellant did not make out a case for the said conduct to be considered a violation of Article 6(c) of the Treaty which deals with peaceful settlement of disputes. However a case exists for holding that any conduct in breach of the rule of law is conduct which is likely to jeopardize the achievement of the objectives of the Treaty and, accordingly, offends Article 8(1)(c) thereof.
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> ***Henry Kyarimpa v Attorney General of the Republic of Uganda,*** EACJ Appeal No 6/2014 (Appellate Division) at 30, 33 (February 19, 2016).

In an earlier decision, the EACJ held the illegal detention of prisoner without trial before a competent court did not abide with Rwanda's own penal laws and procedures and was therefore in a violation of the rule of law under the Treaty ***(Plaxeda Rugumba v Secretary General of the East African Community & Others,*** Reference No 8/2010 (First Instance Division) at 23-31 (December 1, 2011)). In the ***Mohochi*** case, the EACJ held that where a Partner State had declined to follow its immigration laws in declaring the applicant a prohibited immigrant, then it was in breach of the rule of law under the Treaty (and the Common Market Protocol which included the right of free movement of persons with the Community).

In Grand Lacs Supplier S.A.R.L case, the seizure of Applicant's goods was found to be in non-conformity with Burundi's laws (including the East African Community Customs Management Act, 2004) and, in effect, the rule of law under Articles 6(d) and 7(2) of the Treaty.

> 56. … [I]n order to comply with … the rule of law, it would require that the seizure of the Applicant's goods be executed in respect of the applicable laws in Burundi, particularly the East African Community Customs Management Act, 2004 as revised. In that regard, Section 213 on the power to seize goods liable to forfeiture and Section 214 on the procedure of seizure are most relevant. It transpires from Section 213 of the Act that any officer or a police officer or an authorized public officer may seize and detain any goods or other thing liable to forfeiture under this Act or which he or she has reasonable grounds to believe is liable to forfeiture. And, according to Section 214, when there is a seizure, a Notice of seizure must be served upon the importer. The Notice must contain specific information about what was seized and must also state the laws applicable for the violation in justification of the seizure. When served with the Notice of seizure, the importer can object to the Notice of seizure and can institute a legal proceeding against the seizing authority.
>
> 57. Reverting to the matter at hand, we have not seen any Notice of seizure of the Applicant's goods or at least a written communication to the Applicants indicating that their goods had been seized. In light of the abovementioned provisions of the East African Community Customs Management Act which are applicable in Burundi as a Partner State of the Community, it is our considered opinion that the decision of seizing the Applicants' goods without due process runs afoul of the principle of the rule of law stipulated in Articles 6(d) and 7(2) of the Treaty.
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> ***Grand Lacs Supplier S.A.R.L & Others v Attorney General of the Republic of Burundi,*** EACJ Reference No 6/2016 (First Instance Division) at 24-25 (June 19, 2018).

In the more recent, the EACJ held the removal of an applicant from office as a justice of the Court of Appeal by a presidential decree to be in violation of South Sudan's national laws (including its Constitution and Judiciary Act 2008) and, consequently, Articles 6(d) and 7(2) of the Treaty ***(Hon Justice Malek Mathiang Malek v Minister of Justice of South Sudan & Others,*** Reference No 9/2017 (First Instance Division) at 15 (July 24, 2020)).

3.2.4. Applying Rule of Law in Interlocutory Measures

The EACJ is vested with the jurisdiction to grant interim orders under Article 39 of the Treaty. It has exercised its powers of granting interim injunctions pending determination of a main reference.

The use of interlocutory measures or interim orders pending determination of substantive references poses questions as regards the scope of the EACJ's jurisdiction to issue such measures or orders. Should the conduct of a Partner State constitute an actionable threat to the *rule of law* (and *good governance*)? In the *Henry Kyarimpa case*, an application for a temporary injunction was denied in spite of *bona fide* triable issues on violation of Articles 6(d) and 7(2) of the Treaty, with the EACJ opting to fast-track the hearing and determination of the reference ***(Henry Kyarimpa v Attorney General of the Republic of Uganda,*** EACJ Application No 3/2013 (First Instance Division) at 6-10 (November 29, 2013)). In the substantive reference, on appeal ***(EACJ Appeal No 6/2014),*** the EACJ held the contracting process for construction of the Karuma Dam was in non-compliance with Uganda's own procurement law and was in breach of the principles of rule of law under Articles 6(d) and 7(2) of the Treaty.

In later decisions, the EACJ adopted, as part of the principles on the grant of interlocutory injunctions, a test of "triable issues" of infringements of the Treaty in relation to Articles 6(d) and 7(2) references. In ***Venant Masenge v Attorney General of the Republic of Burundi,*** EACJ Application No 5/2013 (First Instance Division) at 10-11 (June 18, 2014), although the reference raised triable issues (as regards violation of Articles 6(d) and 7(2) of the Treaty), the EACJ held the balance of convenience was not in applicant's favour.

The "triable issue" in relation to Articles 6(d) and 7(2) of the Treaty has been held to be a *legal question* (or "cause of action") under the EACJ's legal regime and, in that context, the illegality of a law or action by a Partner State in non-compliance with national law. ***In Forum pour Renforcement de la Société Civile & 4 Others v Attorney General of the Republic of Burundi & Another,*** EACJ Application No 16/2016 (First Instance Division) at 6-9 (January 23, 2018), the legality of a ministerial order gave rise to a *legal question* concerning the legality of a ministerial order under Articles 6(d) and 7(2) of the Treaty. In the end, the EACJ did not consider the applicants would suffer irreparable injury that was not capable of compensation by way of damages. In the substantive reference ***(EACJ Reference No 12/2016),*** the EACJ found no infringement of Article 6(d) of the Treaty.

4. Conclusion

The EACJ jurisprudence over the past over 15 years is one that the residents of the East African Community ought to cherish. The regional Court has stood firmly as the bastion of justice and champion of *good governance* and the *rule of law* in holding EAC Partner States to account for infringements of these principles that adorn Articles 6(d) and 7(2) of the EAC Treaty. In that regard, the EACJ has been the *rule of law* institution that has sought to ensure that the 1999 Treaty is likewise truly a *rule of law* instrument.

The commonsense attitude towards the Community is trade integration, in terms of free movement of capital, goods and services reflected in its twin pillars of the Customs Union and Common Market. However, the jurisprudence of the EACJ on *good governance* and the *rule of law* demonstrates that these twin operational and fundamental principles in the Treaty are in fact part and parcel of an integration effort. There cannot be a successful integration experiment without good governance and rule of law. The EACJ has alluded to this fact in its decisions. In the ***Kyarimpa*** case, it cautioned that disregard of the "rule of law" as premier value of the Community "will torpedo the ship of regional integration" while viewing good governance in Article 6(d) and 7(2) of the Treaty as pertinent to "the EAC integration agenda" in ***Mohochi*** case. Notably, in ***Mohochi*** case, good governance was considered essential to ensuring integration-related freedoms, i.e. *free movement of persons* under the Common Market Protocol. In a similar vein, while the EACJ focused its attention to due process (and, in effect, rule of law) in ***Grand Lacs Supplier S.A.R.L*** case, a fact that should not be lost is seizure of goods by the Partner State and, therefore, inhibiting the *free movement of goods* (and this was in non-compliance with Burundi's laws, including the East African Community Customs Management Act 2004).

The impetus for trade integration (and the economic benefits of a larger market) should be matched by the adherence by Partner States with the *good governance* and rule of law obligations they entered into under Articles 6(d) and 7(2) of the EAC Treaty.

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COMESA Court

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