

REVISITING THE REGIONAL INTEGRATION PROJECT IN EAST AFRICA

Is It Near or Far from the Promised Land?



TGCL SERIES 6

Tanzanian-German Centre for Eastern African Legal Studies
at the University of Dar es Salaam School of Law
in Cooperation with the University of Bayreuth

Editors

Petro Protas, Thoko Kaime, Isabelle Zundel,
Richard Frimpong Oppong and Tomasz Milej



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List of Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African on the Rights and Welfare of the Child
ADFLC	Alliance of Democratic Forces for the Liberation of Congo
AEC	African Economic Community
AFA	Agriculture and Food Authority
AfCFTA	African Continental Free Trade Area
AfCHPR	African Charter on Human and Peoples' Rights
ALPC	African Land Policy Centre
AMISOM	African Union Mission in Somalia
ASP	Afro-Shirazi Party
ATMIS	African Transitional Mission in Somalia
AU	African Union
BCI	Business Climate Index Survey
BRELA	Business Registrations and Licensing Agency
BRS	Business Registration Service
CBC	Competence Based Curriculum
CDF	Chiefs of Defence Forces
CDF	Consultative Dialogue Framework
CDS	Chiefs of Defence Staffs
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CET	Common External Tariff

CHCU	Egyptian Coop Housing Central Union
CJEU	Court of Justice of the European Union
CMP	Common Market Protocol
CNMW	Convention on the Nationality of Married Women
COMESA	Common Market for Eastern and Southern Africa
Coop Europe	Cooperatives Europe
CRC	Convention on the Rights of the Child
CUP	Customs Union Protocol
DRC	Democratic Republic of Congo
EAA	East African Airways
EABC	East African Business Council
EAC	East African Community
EACB	East African Currency Board
EACHEA	EAC Common Higher Education Area
EACJ	East African Court of Justice
EACRF	EAC Regional Force
EACSO	East African Common Services Organisation
EACT	Treaty for the Establishment of the EAC
EACU	East African Customs Union
EAEO	East African Employers Organisation
EAFF	East African Farmers Federation
EAHC	East African High Commission
EALA	East African Legislative Assembly
EALS	East African Law Society
EAQFHE	East African Qualifications Framework for Higher Education
EC	European Community
ECCAS	Economic Community of Central African States
ECCJ	ECOWAS Community Court of Justice
ECLS	European Commission's Legal Service

ECR	EU Council Regulation
EEMIS	External Employment Management Information System
EU	European Union
FACC	Argentinian Federation of Consumer Cooperatives
FCCs	Fears, Concerns, and Challenges
FDLR	Democratic Forces for the Liberation of Rwanda
FPTP	First-Past-the-Post
HRW	Human Rights Watch
ICA	International Cooperative Alliance
ICCPR	International Convention on Civil and Political Rights
ICGLR	International Conference on the Great Lakes Region
ICJ	International Court of Justice
IDPs	Internally Displaced Persons
ILO	The International Labour Organisation
IOM	International Organisation for Migration
IUCEA	Inter-University Council of East Africa
KENATCO	Kenya National Transport Cooperative Society
LAPSSET	Lamu Port South Sudan & Ethiopia Transport
LEGCO	Legislative Councils
LMIS	Labour Management Information System
LRA	Lord's Resistance Army
KEBS	the Kenya Bureau of Standards
MoGLSD	Ministry of Gender, Labour and Social Development
M23	March 23 Movement
NEA	National Employment Authority
NGOs	Non-Governmental Organisations

NMCs	National Monitoring Committees
NTBs	Non-Tariff Barriers
OAU	Organisation of African Unity
OCA	Organisation of Cooperatives of America
OECD	Organisation for Economic Co-operation and Development
OHADA	Organisation for the Harmonisation of Business Law in Africa
PR	Preliminary Ruling
PRM	Preliminary Ruling Mechanism
R-ARCSS	Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan
REC	Regional Economic Community
SACCOS	Saving and Credit Cooperative Societies
SADC	Southern African Development Community
SCE	Statute for a European Cooperative Society
SCTIFI	Sectoral Council of Ministers on Trade, Industry, Finance and Investment
SDGs	UN Sustainable Development Goals
SICOOP	Successful national integration through cooperatives is the inter-cooperation system in Uruguay
SIPRI	Stockholm International Peace Research Institute
SPS	Sanitary and Phytosanitary
SQMT	Standardisation, Quality Assurance, Metrology and Testing
STP	Somali Transition Plan
TAA	Tanganyika African Association
TANU	Tanganyika African National Union
TBT	Technical Barriers to Trade

TGCL	Tanzanian-German Centre for Eastern African Legal Studies
TIP	Trafficking in Persons
TMCM	Trade Monitoring and Compliance Mechanism
TPF	Trade Policy Framework
UAERA	Uganda Association of External Recruitment Agencies
UAS	Union of African States
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UPA	Uganda People's Army
URSB	Uganda Registration Services Bureau
USA	United States of America
USA	United States of Africa
VFCU	Victoria Federation of Cooperative Union
WMA	Weight and Measures Agent
WTO	World Trade Organisation

Foreword

In the past quarter-century, the East African Community (EAC) has embarked on a remarkable regional integration journey, characterised by significant achievements and formidable challenges. This book, “*Revisiting the Regional Integration Project in East Africa: Is it Near or Far from the Promised Land?*”, serves as a timely reflection of the transformative process, providing a comprehensive analysis of the EAC's evolution since its re-establishment in 1999. The editors—Petro Protas, Thoko Kaime, Isabelle Zundel, Richard Frimpong Oppong, and Tomasz Milej—have curated a collection of insightful contributions that delve into the historical context, current dynamics, and future prospects of regional integration in East Africa.

The chapters within this volume explore critical themes ranging from the historical foundations of the EAC to contemporary challenges such as political federation, economic disparities, and the impact of global influences. One of the central tenets of this work is the recognition that regional integration is not merely an economic endeavour but a complex socio-political process that requires the commitment and cooperation of all partner states. The EAC journey has been marked by collaboration and contention among its partner states—Kenya, Uganda, Tanzania, Rwanda, Burundi, the Democratic Republic of Congo (DRC), South Sudan and Somalia. Understanding these dynamics is essential for appreciating the intricate tapestry of relationships that define the EAC.

As we reflect on the past 25 years, it is crucial to acknowledge the successes and setbacks experienced along the way. The EAC has made notable strides in areas such as trade liberalisation, infrastructure development, and policy harmonisation. However, persistent challenges remain—governance issues, economic inequality among partner states, and external geopolitical pressures continue to test the resilience of this regional bloc. This book not only highlights the achievements of the

EAC but also critically examines its shortcomings. It invites readers to engage with thought-provoking questions about the future of regional integration in East Africa: What lessons can be learned from past experiences? How can partner states navigate their differences to foster greater unity? And ultimately, what does it mean for East Africa to reach its “promised land” of integration?

The reflections in the present book are crucial for policymakers, scholars, and practitioners to engage in meaningful discussions about enhancing our integration efforts and fostering a more cohesive regional identity. As we celebrate 25 years of the EAC re-establishment, we must recognise that our journey is far from complete. The road ahead requires renewed commitment from all stakeholders to address issues such as governance, economic inequality, and external pressures.

In this context, institutions such as the Tanzanian-German Centre for Eastern African Legal Studies (TGCL) play an essential role in supporting legal frameworks that underpin regional cooperation. Their contributions to legal education and research provide valuable insights that can help shape effective policies for integration. As we embark on this exploration through the pages that follow, I encourage readers—scholars, policymakers, students, and practitioners alike—to reflect on their roles in shaping the future of regional integration in East Africa. In essence, this book serves as a call to action for everyone involved in the EAC to strive for a future in which regional integration translates into tangible benefits for all citizens.

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Introduction

*Petro Protas, Thoko Kaime, Isabelle Zundel, Richard Frimpong Oppong and
Tomasz Milej*

Integration initiatives in the East African region have a long history, dating back to the pre-colonial era. Societies in this region interacted long ago, before the coming of the Arabs, explorers, missionaries, and colonial powers. Societies engaged in trade among themselves, exchanging agricultural products, minerals, and ivory, to mention a few. The introduction of colonial rule in the 1890s continued the integration initiatives, but this time, it was for the benefit of the colonial powers and not the natives. In the 1960s, the independent East African states of Tanzania, Kenya, and Uganda reversed the colonial trend by forging a regional integration project to benefit their people and countries. They started with the creation of the East African Common Services Organisation (EACSO) in 1961, which in 1967 was transformed into the EAC, the first Regional Economic Community (REC) by independent East African states.

Even when things turned sour, and the community collapsed in 1977, the EAC partner states still managed to revive it in 1999. The revival saw partner states set broad objectives, including widening and deepening cooperation in various fields for mutual benefit. These fields include social, cultural, political, research and technology, defence, security, as well as legal and judicial affairs. Furthermore, the community aims to achieve political federation as its last integration stage. This is set to be achieved after going through other crucial stages such as the customs union, common market and monetary union.

To ensure that the EAC objectives are not rendered illusory, the founding partner states enshrined fundamental and operational principles in the constitutive treaty framework to guide them in achieving

the community's objectives. These include adherence to the universally accepted principles of good governance, human rights, rule of law, democracy, transparency, social justice, gender equality, equal opportunities, and social justice. The principles also focus on good neighbourliness, peaceful settlement of disputes and making the EAC a people-centred community. To oversee the implementation of the community's objectives and its principles, organs such as the summit, the Council of Ministers, the Coordination Committee, the Sectoral Committees, the East African Court of Justice (EACJ), the East African Legislative Assembly (EALA), the Secretariat and several other institutions have been created.

It has been more than 25 years since the EAC was revived and its objectives reset. During this time, the EAC was also enlarged, and five more partner states were accepted to join the community. The states include Rwanda and Burundi, which joined in 2007; the Republic of South Sudan in 2016; the DRC in 2022; and the Federal Republic of Somalia in 2023. This book explores the 25 years since the revival of the regional integration project in East Africa to respond to the question, 'Is it near or far from the promised land?'. Scholars across East Africa and beyond conducted research and contributed chapters to the book on various key areas of the EAC regional integration project.

The book contains 13 chapters that address critical issues in five thematic areas: the historical foundation and the quest for political federation; the general principles of laws, human rights and the EACJ preliminary ruling; human trafficking, statelessness and forced displacement in the EAC; human mobility, investment and labour market; and barriers to trade and interstate disputes in the EAC. We hope this book will provoke constructive debates and discussions aiming at building a more vibrant regional economic bloc in the EAC.

PART I

HISTORICAL FOUNDATION AND THE QUEST FOR POLITICAL FEDERATION

Chapter One

The EAC Leap of Faith During the Second Phase of Integration

*Felix Otieno Odhiambo**

1. Introduction

Regional integration is a favourite economic action among states all over the world. The European experiment with regional integration through the European Union (EU) offers great lessons on this painstaking and laborious journey. Despite its compactness, the EU also still faces certain hurdles arising from internal dynamics, which, for instance, witnessed the United Kingdom (UK) exiting the bloc in what has popularly become known as Brexit. Like the EU, the EAC has had its fair share of stuttering in its regional integration journey. The bloc first had a false start that saw the first phase of its integration collapse in 1977 after having been in existence for only ten years. Presently, the region is involved in the second phase of its experimentation on a much wider scale which comprises many more countries.

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This chapter contextualises EAC's present strides in its integration journey. The chapter notes and appreciates the great strides that the regional bloc has made thus far. It is, however, argued that inherent in the EAC's exponential expansion strategy lies the risk that the bloc may be lacking an inbuilt safety net to absorb the pressures that come with the twists and turns of the integration process and journey. To deal with this task, the chapter is organised into five interrelated sections. This first section offers an introduction to the chapter. The second section lays a historical background to the chapter. The third one explores the regional bloc's first phase of integration, while the fourth section then delves into the regional bloc's second phase of integration. The final section offers the conclusion of the chapter.

2. Historical Background of EAC Integration

The EAC states have enjoyed close historical, commercial, industrial and cultural ties. The ties are more prominent when viewed against the historical context of the bloc's three founders: namely, Kenya, Uganda and Tanzania. These three founding states share a common colonial history with Kenya, Uganda and Zanzibar having been colonised by Britain.¹ Even though Tanganyika was originally a German colony, it subsequently became a British mandate in 1920 after the defeat of Germany in the First World War.²

The United Republic of Tanzania is a union of two previously independent states, Tanganyika (presently known as Mainland Tanzania) and Zanzibar.³ This union was realised through the enactment of two laws which are collectively referred to as Acts of

¹ Jonas Fossli Gjersø, "The Scramble for East Africa: British Motives Reconsidered, 1884–95" (2015) 43 *The Journal of Imperial and Commonwealth History*, p. 831.

² Margaret L. Bates, "Tanganyika: The Development of a Trust Territory" (February 1995) 9(1) *International Organization*, p. 32; see also Edward Humphrey Manisty Leggett, "The Tanganyika Territory" (15 September 1922) 70 (3643) *Journal of the Royal Society of Arts*, p. 737.

³ See The Constitution of the United Republic of Tanzania, 1977, art. 22(1).

the Union of Tanganyika and Zanzibar.⁴ The two pieces of legislation consist of the Union of Tanganyika and Zanzibar Act 1964⁵ and the Union of Tanganyika and Zanzibar Law 1964.⁶ Immediately after its formation, the country was known as the United Republic of Tanganyika and Zanzibar.⁷ This name was later changed to the United Republic of Tanzania in December 1964 *vide* the United Republic (Declaration of Name) Act, 1964.⁸

Soon after gaining their respective political independence from Britain, Kenya, Uganda and Tanzania came together to found the EAC in 1967. The impetus for this first phase of integration, to a great extent, was given the push by the fact that these three countries already had a common historical antecedent which arose from their colonial history.⁹ As a result, there were certain common systems and institutions that were already in place from the colonial epoch. These common systems and institutions then became useful building blocks that served to enhance the path towards post-independence integration efforts as will be examined hereinafter.

3. The First Phase of Integration: The First EAC

The first EAC was established through the Treaty for East African Cooperation in 1967. The treaty was signed in Kampala on 6 June

⁴ The Union of Tanganyika and Zanzibar Law, 1964 (Government Notice No. 243 published on 1 May 1964), s. 1 In addition to the Acts of the Union of Tanganyika and Zanzibar, 1964, other laws that were passed to operationalise the Union included the Articles of the Union between the Republic of Tanganyika and the People's Republic of Zanzibar, 1964 (signed on 22 April, 1964), The Transitional Provisions Decree, 1964 (Government Notice No. 245 published on 1 May 1964), and the Interim Constitution Decree, 1964 (Government Notice No. 246 published on 1 May 1964).

⁵ Act No. 22 of 1964.

⁶ Government Notice No. 243 published on 1 May 1964.

⁷ Act No. 61 of 1964. See Maalim, M. Juma, *The United Republic of Tanzania in the East African Community: Legal Challenges in Integrating Zanzibar* (Dar es Salaam University Press 2014).

⁸ Jonas Fossli Gjersø, *supra*.

⁹ Ibid.

1967 and came into effect on 1 December 1967 after being ratified by the three partner states.¹⁰ The organisation only lasted between 1967 and 1977.¹¹ Despite the first EAC being established only in 1967, its foundation had, however, been laid during colonialism from way back in the 1920s.¹² The foundation had been laid through the establishment of certain common institutions by the colonialists. Examples of institutions in this category included, for instance, the East African Customs Union (EACU) which had been established by Kenya and Uganda in 1917, with Tanganyika later joining in 1927.¹³ The other institutions included the East African High Commission (EAHC) established in 1948, and the EACSO, which was established in 1961.¹⁴

Therefore, by the time of its establishment in 1967, the first EAC was being founded on a fairly well-established integration ground since it inherited institutions whose structures had already been in existence.¹⁵ By the time of its collapse in 1977, the region had achieved a very high level of integration given that it, for instance, had a full-fledged Customs Union and Common Market.¹⁶ In addition, it also shared economic institutions which consisted of railways, harbours, airlines, posts and telecommunication, civil

¹⁰ Sena Eken, “Breakup of the East African Community” (December 1979) 16(4) *Finance & Development*, p. 37.

¹¹ Juma V. Mwapachu, *Challenging the Frontiers of African Integration: The Dynamics of Policies, Politics and Transformation in the East African Community* (E and D Vision Publishing 2012).

¹² Ibid.

¹³ EAC, “East African Community” (EAC, 2023), available at <<https://www.eac.int/eac-history>> (accessed 1 October 2023).

¹⁴ Joseph K. Kipkoech, ‘Challenges and Prospects of East African Community Regional Integration Process (2001- 2009)’ (MA Dissertation, University of Nairobi 2010).

¹⁵ Reith, S. and Boltz, M., *The East African Community: Regional Integration between Aspiration and Reality* (KAS International Reports 2011).

¹⁶ Juma V. Mwapachu, *Challenging the Frontiers of African Integration: The Dynamics of Policies, Politics and Transformation in the East African Community* (E and D Vision Publishing 2012), p. 61.

aviation, road transport, inland waterways, power and lightning as well as a common university.¹⁷

Besides, the EAC also had other common institutions such as the East African Authority, the East African Legislative Assembly, Ministers of the Community, the Common Market Council, the Communications Council, the Economic Consultative and Planning Council, the Finance Council, Research and Social Council, the East African Airways Corporation, the East African Harbours Corporation, the East African Railways Corporation, the East African Posts and Telecommunications Corporation; judicial institutions such as the East African Court of Appeal, the East African Industrial Court; as well as specialised bodies like the East African Development Bank, the EAC Service Commission, and the East African Tax Board.

Further, there were also specialised departments and services such as the East African Medical Research Council and the East African Trypanosomiasis Institute.¹⁸ The presence of the well-established common services and institutions provided impetus for some of the political leaders, like Mwalimu Julius Nyerere, to even seek a delay in Tanganyika's independence to enable all the three states to enter into independence as a federal entity.¹⁹ However, even when the political federation sought for at independence failed to materialise, the independence political leaders still chose to maintain the common services at the regional level, hence, making the common services become critical foundational building blocks in the first EAC integration journey.²⁰

¹⁷ Kaahwa, W.T.K., "The Institutional Framework of the EAC" (Ugirashebuja, et al., eds, East African Community Law 2017).

¹⁸ Ibid.

¹⁹ Issa G. Shivji, Saida Yahya-Othman and Ng'wana Kamata, *Development as Rebellion: A Biography of Julius Nyerere* (Dar es Salaam, Mkuki na Nyota Publishers Ltd 2020).

²⁰ Ibid.

The Treaty for East African Cooperation also established the East African Common Market.²¹ Through the treaty, therefore, the partner states undertook to, among others, continue and maintain a common customs tariff on all goods which were imported from outside the Community, to do away with all trade restrictions on intra-Community trade, and to also harmonise their monetary and fiscal policies.²² The partner states also agreed to coordinate their economic planning efforts. However, it is worth noting that the East African Common Market did not provide for the free movement of labour and capital.²³ Similarly, the provisions of the Treaty did not extend to agricultural products.²⁴

However, despite the deep extent of the integration, the first EAC project still collapsed in 1977.²⁵ Several reasons have been proffered for its collapse. These include, first, the polarisation of national development and the perceived unequal gains which saw Kenya's share of intra-community trade shooting up from 63% in 1968 to 77% in 1974, whereas that of Uganda dipped sharply from 26% to 6% during the same period.²⁶ On its part, Tanzania's intra-regional export trade grew from 8.8% to 15.9% while its import trade increased marginally from 42.4% to 42.9% between 1961 and 1976.²⁷ In the same period, Kenya's intra-regional trade improved by seeing its export trade growing from 63.6% to 83.1% while its import trade reduced from 28.0% to 16.9%.²⁸

²¹ The Common Market was established under Article 30 of the Treaty for East African Cooperation, 1967. The Common Market Council, which was established under Article 53 of the Treaty, overseen its responsibilities.

²² Eken, p. 38.

²³ Ibid.

²⁴ Ibid.

²⁵ Biswaro, J.M., *The Quest for Regional Integration in the Twenty First Century: Rhetoric versus Reality-A Comparative Study* (Dar es Salaam, Mkuki wa Nyota Publishers Ltd 2012).

²⁶ Olatunde, O.J.C.B., "Regional Cooperation and Integration" in Olatunde, O.J.C.B., Orwa, D.K. and Utete, M.C.B., (eds) *African International Relations*, Longman Publishers 1985.

²⁷ Sena Eken, 'Breakup of the East African Community' [December 1979] 16(4) *Finance & Development*, p. 40.

²⁸ Ibid.

Uganda's intra-regional trade was the worst affected, with its export trade reducing drastically 27.6% to 1% while its import trade increased from 29.6% to 40.2% during the same period.²⁹

Secondly, there were insufficient compensatory and corrective measures for the trade disparities highlighted above.³⁰ Thirdly, the ideological differences and the rise of economic nationalism among the partner states.³¹ This factor was most profound between Kenya and Tanzania, given that economically, Kenya was heavily capitalist, whereas Tanzania, through its *Ujamaa* economic policy, was socialist.³² Further to the foregoing reasons, there was also the impact of foreign influences, especially those arising from the then existing global ideological differences precipitated by the Cold War.³³

While the concoction of the reasons highlighted above brewed to produce the ultimate collapse of the bloc, the final act that catalysed the collapse was the military *coup d'état* in Uganda. The coup deposed President Milton Obote in 1971 and brought in President Idi Amin.³⁴ One immediate effect of the coup was that it destabilised the workings and operations of the EAC then-highest decision-making body, the East African Authority.³⁵ The Authority consisted of the three Presidents of

²⁹ Ibid.

³⁰ Ibid.

³¹ Binda, E.M., "The Legal Framework of the EAC" in Ugirashebuja E., Ruhangisa J.E., Ottervanger T., and Cuyvers A., (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, (Brill Nijhoff Publishers Ltd 2017).

³² Horace Campbell, "Socialism in Tanzania: A Case Study" (May 1975) 6(8) *The Black Scholar*, p. 41; see also Zaki Ergas, 'Why did *Ujamaa* village policy fail? Towards a global analysis' (1980) 18(3) *The Journal of Modern African Studies*, p. 387.

³³ Ibid.

³⁴ Sena Eken, "Breakup of the East African Community" (December 1979) 16(4) *Finance & Development*, p. 37.

³⁵ Ibid. The Authority was established under Article 46 of the Treaty for East African Cooperation, 1967.

the partner states.³⁶ After the coup, the Authority never held any sessions again until the collapse of the Community in July 1977.

The lack of meetings arose from President Nyerere's refusal to meet with President Amin, whose regime Tanzania refused to recognise.³⁷ Besides, simmering economic tensions between Kenya and Tanzania did not help matters with bilateral relations between the two countries grinding to a halt. This was evidenced by an uneven level of development among the partner states and differences arising from Kenya's pro-Western orientation as contradistinguished with Tanzania's Socialist leanings.³⁸ Matters then ground to a halt in February 1977 when Tanzania closed its common border with Kenya, hence, eliminating all legal trade between the two countries.³⁹ This action had the unintended consequence of ending the East African Common Market.

With the absence of the Authority meetings to provide leadership and direction to the EAC, the states started taking actions that ran counter to the spirit of regional integration. For instance, in 1972, they implemented exchange controls and import restrictions on intra-EAC trade.⁴⁰ These policies had the corresponding effect of bringing down the effectiveness of the EAC Common Market, hence, precipitating the regional bloc's common monetary area.⁴¹ Soon thereafter, in 1973, the EAC partner states imposed restrictions on the interstate transfers of funds and this

³⁶ The Treaty for East African Cooperation, 1967, art. 47.

³⁷ Agrippah T. Mugomba, "Regional Organisations and African Underdevelopment: The Collapse of the East African Community" [June 1978] 16(2) *The Journal of Modern African Studies*, p. 261.

³⁸ Joanna Bar, "East African Communities (1967-1978, 1999-) And Their Activity for Political Stability of The Region" (2018) 5(56) *Politeja*, p. 248.

³⁹ Sena Eken, 'Breakup of the East African Community' [December 1979] 16(4) *Finance & Development*, p. 38.

⁴⁰ Ibid.

⁴¹ Ibid.

action, on its part, caused financial crises in the operations of the EAC four corporations.⁴²

In June 1977, partner states failed to agree on the budget for the General Fund Services. This arose from the fact of Kenya's refusal to commit any funds for the 1977/1978 budget and following this with the announcement of its withdrawal from the EAC.⁴³ Starved of a budget for the 1977/1978 financial year, the EAC became financially destitute and, therefore, ceased to operate in July 1977, upon the commencement of the new financial year.⁴⁴

It is worth noting that for the entire period of its existence, there was always a simmering discontent by both Uganda and Tanzania out of the feeling that Kenya was benefitting more from the EAC than both of them owing to the trade asymmetry that was heavily tilted in favour of Kenya.⁴⁵ Similarly, even upon its dissolution in 1977, both Uganda and Tanzania felt that Kenya had gained an unfair advantage over them in respect of access to the assets of the defunct Community.⁴⁶ These feelings of mistrust caused bad blood in subsequent bilateral relations, especially between Kenya and Tanzania to the point that Tanzania chose to close its common border with Kenya and then impounded several Kenyan vehicles and private aircraft.⁴⁷ The common border remained closed until 1984 when it was re-opened following intense bilateral

⁴² Ibid.

⁴³ Agrippah T. Mugomba, "Regional Organisations and African Underdevelopment: The Collapse of the East African Community" [June 1978] 16(2) *The Journal of Modern African Studies*.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Mann, R., "Kenya-Tanzania Border Tension Rises" *The Washington Post* (Washington DC, 27 April 1977), available at <<https://www.washingtonpost.com/archive/politics/1977/04/27/kenya-tanzania-border-tension-rises/3d85043b-bddb-4aaa-8265-659c40b56ec6/>> (accessed 21 September 2019).

⁴⁷ Ibid.

discussions between President Julius Kambarage Nyerere of Tanzania and President Daniel Toroitich arap Moi of Kenya.⁴⁸

4. The Second Phase of Integration: The Second EAC

It is ironical, but interesting to note, nonetheless, that the death and ultimate administration of the estate of the first EAC is the very process that rekindled the embers of fires for the EAC's second phase of regional integration journey. This is because after the dissolution of the first EAC, the three former partner states negotiated a mediation agreement known as the Agreement for the Division of Assets and Liabilities of the Former EAC 1984.⁴⁹ Kenya ratified this Mediation Agreement by enacting the EAC Mediation Agreement Act 1984.⁵⁰ Pursuant to Article 14.02 of the Mediation Agreement, the former partner states of the defunct EAC agreed to explore and identify further areas for future cooperation and also to work out concrete arrangements for such cooperation.

Pursuant to the enabling provisions of Article 14.02 of the Treaty, on 30 November 1993, the Heads of State of Kenya, Uganda, and Tanzania held subsequent meetings that ultimately led to the signing of the Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation.⁵¹ The full operations of East African Cooperation started on 14 March 1996, when the Secretariat of the Permanent Tripartite Commission was established in Arusha, Tanzania.⁵²

⁴⁸ The Citizen, "Query Arises over Kenya's \$1m Project" *The Citizen* (Dar es Salaam), 23 February 2017, available at <<https://www.thecitizen.co.tz/news/business/Query-arises-over-Kenya-s-1m-project/1840414-3824642-oedh0yz/index.html>> (accessed 21 September 2019).

⁴⁹ Treaty entered into at Arusha on 14 May 1984.

⁵⁰ Chapter 4 Laws of Kenya.

⁵¹ East African Community, "History of the EAC" (*East African Community*, 2023), available at <<https://www.eac.int/eac-history>> (accessed 10 October 2023).

⁵² Ibid.

The Heads of State, in appreciating the need to consolidate regional cooperation, at their 2nd Summit held in Arusha on 29 April 1997, directed the Permanent Tripartite Commission to upgrade the existing Agreement into a Treaty.⁵³ The treaty-making process lasted for three years, culminating in the signing of the Treaty for the Establishment of the EAC on 30 November 1999.⁵⁴ The Treaty then came into force on 7 July 2000 following its ratification and deposit of the Instruments of Ratification with the Secretary-General by all three partner states: Kenya, Uganda and Tanzania. The entry into force of the Treaty marked the birth of the 2nd phase of the EAC.

Unlike the first EAC, which had a lifespan of only 10 years, the second has been around for 25 years and seems to hold a lot of promise for the future. The great promise arises from the fact that the present EAC is considered to be one of the most advanced in its integration objectives.⁵⁵ Its resilience has largely been attributable to its success in the improvement of the economic growth of the partner states.⁵⁶ Its strong economic growth is demonstrated by, among others, the fact that the EAC has been noted as being the fastest-growing economic region within sub-Saharan Africa.⁵⁷ For instance, between 2005 and 2011, the region's per capita income growth averaged 3.6% per year as compared with 3.0% for sub-Saharan Africa as a whole, thereby, quadrupling the rate which had been achieved during the previous 15 years.⁵⁸

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Joanna Bar, "Accession of the Democratic Republic of the Congo to The East African Community — A Threat to Regional Security or an Opportunity for the Peacebuilding Process?" [2023] 11(1) *Polish Political Science Review*, p. 102.

⁵⁶ Joanna Bar, "East African Communities (1967 – 1978, 1999 –) And their Activity for Political Stability in the Region" (2018) 56 *Politeja*, p. 247.

⁵⁷ Catherine McAuliffe, Sweta C. Saxena and Masafumi Yabara, "Sustaining Growth in the East African Community" in Paulo Drummond, S.K. Wajid and Oral Williams (eds) *The Quest for Regional Integration in the East African Community* (Washington DC, International Monetary Fund 2015).

⁵⁸ Ibid.

Besides economic growth, the EAC is also considered to be strong in its support for the internal and national security of its partner states, as well as the entire region's stability.⁵⁹ Perhaps, one best demonstration of this fact is EAC's recent deployment of military troops to the eastern DRC under the auspices of the East African Regional Force. The deployment was done pursuant to the roadmap put into place by the EAC Chiefs of Defence Forces/Staffs (CDF/CDS) on 9 February 2023 in Nairobi, Kenya.⁶⁰ The roadmap by the CDFs/CDS was, itself, undertaken towards the implementation of directives by the 20th Extra-Ordinary Summit of EAC Heads of State held on 4 February 2023 in Bujumbura, Burundi.⁶¹

4.1. Key Highlights of the Contemporary EAC

4.1.1. Stable Institutions and Programmes

The contemporary EAC has developed stable institutional structures to guide its operations. Some of the key institutions include the Summit, the Legislative Assembly, the Court of Justice, the Council of Ministers, the Coordinating Committee, the Sectoral Committees and the Secretariat.⁶² The summit is made up of the heads of government of partner states and has the responsibility to provide a strategic direction towards the realisation of the goals and objectives of the Community.⁶³ The Council of Ministers, which consists of the partner states' ministers responsible for regional cooperation, serves as the central decision-making and governing organ of the EAC.

The EACJ, established under Article 9 of the EAC Treaty, is the principal judicial organ of the Community with the mandate of interpretation and

⁵⁹ Ibid.

⁶⁰ East African Community, *Status of Deployment of EAC Troops and Verification Mechanisms in Eastern DRC*, East African Community, available at <<https://www.eac.int/statements/2733-status-of-deployment-of-eac-troops-and-verification-mechanisms-in-eastern-drc>> (accessed 13 October 2023).

⁶¹ Ibid.

⁶² East African Community, "EAC Organs" (*East African Community*, 1999-2022), available at <<https://www.eac.int/eac-organs>> (accessed 30 November 2023).

⁶³ Ibid.

application of the EAC Treaty.⁶⁴ The EALA, established under Article 9 of the EAC Treaty, is the legislative arm of the EAC, which therefore offers representation and oversight to the EAC. The Secretariat is the executive organ of the Community and is responsible for the implementation of the directives of the EAC. All these EAC institutions have demonstrated signs of institutional maturity by discharging their respective mandates effectively.⁶⁵

Apart from the nature of its stable institutions, it is also the case that the Community's programmes, especially those implemented through its four pillars of integration, are also useful points of highlight. Through these pillars, the EAC partner states have harmonised their monetary and fiscal policies.⁶⁶ In this regard, the EAC has not only made efforts to harmonise the partner states' banking rules and regulations but also facilitated finance ministries' pre- and post-budget consultations.⁶⁷ While the partner states may not have fully implemented all their obligations under the four pillars, it is acknowledged that remarkable progress has, nonetheless, been made.

4.1.2. EAC Exponential Growth in Membership

Upon the Treaty's entry into force, the second EAC, like the first one, had three partner states: Kenya, Uganda and Tanzania. This position, however, changed on 18 June 2007 when both Rwanda and Burundi acceded to the EAC Treaty, hence raising the EAC membership from three to five members.⁶⁸ Similarly, on 16 April 2016, the Republic of South Sudan joined the EAC Treaty, thereby bringing the bloc's

⁶⁴ Ibid.

⁶⁵ Chilomba Khoti Kamanga, "An Enquiry into the Achievements and Challenges of East African Regional Integration" (2016) 43(1) *African Review*, p. 64.

⁶⁶ Anna Cichecka, "EAC – An Answer for Regional Problems or Failed Solutions in East Africa?" (2018) 56 *Politeja*, p. 273.

⁶⁷ Ibid.

⁶⁸ Juma Mwapachu, *Challenging the Frontiers of African Integration: The Dynamics of Policies, Politics and Transformation in the East African Community* (E & D Vision Publishing 2012).

membership to six members.⁶⁹ The EAC welcomed its seventh member, the DRC on 8 April 2022⁷⁰ and the Federal Republic of Somalia on the 24 November 2023 during the 23 Ordinary Heads of State Summit held in Arusha, Tanzania.⁷¹ This development, therefore, brings the total number of EAC partner states to eight.

It will not be lost on observers that Sudan's application for admission into the EAC had earlier been declined in 2011.⁷² Sudan's application had reportedly been denied on the basis that it failed the geographical proximity rule under Article 3 (3) (d) of the EAC Treaty.⁷³ Besides Sudan's failure to meet the geographical proximity rule, another reason proffered against its membership was the argument that the country lacked mature institutions, such as revenue collection and customs authorities.⁷⁴ Given it was felt that Sudan might have taken long to address the shortcomings noted, the country was therefore considered to

⁶⁹ East African Community, "History of the EAC" (*East African Community* 2023), available at <<https://www.eac.int/eac-history>> (accessed 10 October 2023); see also, Laura Nyantung Beny & Matthew Snyder, "Analysis of The Republic of South Sudan's Accession to The East African Community: Benefits, Detriments and Recommendations" (2020) *Michigan Law*.

⁷⁰ East African Community, "The Democratic Republic of the Congo formally joins EAC after signing of the Treaty of Accession to the Community" (*East African Community* 2023), available at <<https://www.eac.int/press-releases/2411-the-democratic-republic-of-the-congo-formally-joins-eac-after-signing-of-the-treaty-of-accession-to-the-community>> (accessed 10 October 2023); see also, Luke Anami, "DR Congo becomes full-fledged member state of East African Community" (*East African*, Tuesday 12 July 2022), available at <<https://www.theeastafican.co.ke/tea/news/east-africa/dr-congo-becomes-full-fledged-member-east-african-community-3876838>> (accessed 10 October 2023).

⁷¹ Vincent Owino, "Somalia joins East African Community" (*Nation* for 24 November 2023), available at <<https://nation.africa/africa/news/somalia-joins-east-african-community-4444176>> (accessed 25 November 2023).

⁷² Francis Akena Adyanga, "Regional Integration, a Prospect for Development: Lessons from Rwanda's Experience in the East African Community" [2014] 443 *Emerging Perspectives on 'African Development': Speaking Differently* 128; see also, East African, "Why Khartoum failed in its bid to join EAC" (*East African*, 4 December 2011), available at <<https://www.theeastafican.co.ke/tea/news/east-africa/why-khartoum-failed-in-its-bid-to-join-eac-1306094>> (accessed 10 October 2023).

⁷³ *Ibid.*

⁷⁴ *Ibid.*

have been incompatible with the EAC partner states, which already had strong organs and infrastructure in place.

However, it is submitted that the admission of South Sudan into the EAC would, therefore, mean that the geographical proximity rule—which informed the Community’s refusal to allow Sudan’s admission into the EAC—is no longer applicable as a basis to deny Sudan’s renewed application if it ever comes. This is because Sudan now shares borders with an EAC partner state of South Sudan. It would, therefore, not be surprising if the country renewed its application for admission and other neighbouring states like Ethiopia and Djibouti picked the cue sooner rather than later.⁷⁵ Without any doubt, the expansion of the EAC is good for the economic growth of its partner states because it offers a large internal market, which presently stands at more than 300 million people.⁷⁶ Therefore, the expansion increases EAC’s competitiveness in regard to foreign direct investments because it offers an attractive trade area.⁷⁷ In addition, it presents greater opportunities for regional economic growth owing to bigger market access by the partner states.

⁷⁵ Jackson Mutinda, “Peter Mathuki: Why We Want Addis to Join EAC after Somalia” (*EastAfrican*, 1 April 2023), available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/mathuki-after-somalia-we-want-addis-to-join-eac-4181390>> (accessed 18 October 2023).

⁷⁶ International Monetary Fund, “World Economic Outlook Database for April 2022” (*International Monetary Fund* 2022), available at <<https://www.imf.org/en/Publications/WEO/weo-database/2022/April/weo-report?c=618,636,664,714,733,738,746,&s=NGDPD,PPPGDP,NGDPDPC,PPPPC,L,P,&sy=2022&ey=2022&ssm=0&scsm=1&scs=0&ssd=1&ssc=0&sic=0&sort=country&ds=.&br=1>> (accessed 19 November 2023).

⁷⁷ Halkano Wario and Rahel Hassen, “Too Much, Too Fast? Somalia Joins the East African Community” (*Institute of Security Studies*, 1 November 2023), available at <<https://issafrica.org/iss-today/too-much-too-fast-somalia-joins-the-east-african-community>> (accessed 19 November 2023).

4.1.3. Establishment of the EAC Regional Force

This development came from a resolution of the 22nd Ordinary Meeting of the Summit held on 22 July 2022 in Arusha, Tanzania, which directed the deployment of the EAC Regional Force into the Eastern DRC.⁷⁸ Kenya, Burundi, and South Sudan have each contributed a battalion, with Uganda contributing two battalions to the Force.⁷⁹ Despite facing a lot of challenges ranging from, among others, hostility from sections of the local civilian population and the host government, the regional force is now fully deployed with nearly 5000 troops.⁸⁰

Even though the EAC is just venturing into the somewhat controversial remit of peacekeeping for the very first time, it is worth noting that some other regional blocs have previously made forays into the said realm. For instance, the Economic Community of the West African States (ECOWAS) had previously ventured into the realm of peacekeeping operations.⁸¹ Such operations started during the late 1990s and were executed through the ECOWAS Monitoring Group, abbreviated as ECOMOG.⁸² ECOMOG was established to prevent, manage, and resolve conflicts among the ECOWAS member countries.⁸³ To achieve its mandate, ECOMOG intervened militarily in Sierra Leone in 1998 to

⁷⁸ East African Community, “Status of The East African Community Regional Force in Eastern Democratic Republic of Congo” (*East African Community*), available at <<https://www.eac.int/statements/2791-status-of-the-east-african-community-regional-force-in-eastern-democratic-republic-of-congo>> (accessed on 15 October 2023).

⁷⁹ Ibid.

⁸⁰ Mary Wambui, “EACRF says Full Troops Deployment in Eastern DR Congo Achieved” (*East African*, 7 April 2023), available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/eacrf-troops-now-fully-deployed-in-drc-4191138>> (accessed 18 October 2023).

⁸¹ Peter A. Dumbuya, “ECOWAS Military Intervention in Sierra Leone: Anglophone-Francophone Bipolarity or Multipolarity?” [Fall 2008] 25(2) *Journal of Third World Studies*, p. 83.

⁸² Ibid.

⁸³ F.O. Ndukwe, “Promoting Trade: Regional Integration and the Global Economy” in Saleh M. Nsouli (ed), *New Partnerships for Africa's Development* (Washington DC, International Monetary Fund 2004).

restore the civilian rule of President Ahmed Tejan Kabbah, who had been overthrown in 1997.⁸⁴

The military junta, led by Major Johnny Paul Koroma of the Armed Forces Revolutionary Council, had ruled the country in conjunction with the Revolutionary United Front, a rebel group led by the late Foday Sankoh.⁸⁵ Even though ECOMOG faced its own fair share of challenges leading to its replacement with the United Nations Mission in Sierra Leone, UNAMSIL, it is generally accepted that ECOWAS roles had made it to become a trailblazer within the contentious space of peacekeeping which had previously been a near exclusive preserve of the United Nations.⁸⁶ Apart from Sierra Leone, ECOMOG also played a similar peacekeeping role in Liberia during the early 2000s.⁸⁷

Therefore, the EAC involvement in peacekeeping activities, when evaluated within the context of institutional progression, remains a critical diplomatic and political move that certainly raises the regional bloc's positioning towards playing a stronger role as a regional economic and political bloc in a fast-changing world. In today's globalised world, it is very encouraging to note that economic players, such as the EAC, have to fully appreciate the interconnectedness of their economic roles with those of political and military activities. Economic activities and pursuits cannot be undertaken within a vacuum but, rather, within a background of political stability.

From the nascent foundation built by the bloc's three founding members through the antecedent of a common colonial history, the EAC present engagement in the DRC can only be described as being, indeed, a leap of diplomatic and economic faith for the region; it is a leap that can be considered a very positive step. This is despite the fact that there have

⁸⁴ Ibid.

⁸⁵ Lansana Gberie, "ECOMOG: The Story of an Heroic Failure" [2003] 102(406) *African Affairs*, p. 147.

⁸⁶ See, for instance, Olusegun Obasanjo, *My Watch: Now and Then* (Lagos Kachifo Limited 2014).

⁸⁷ Ibid., p. 316.

been contestations about the role and success of the Force within the country, especially in light of the criticisms from the Government of the DRC.⁸⁸ It will be recalled that at some point, the Government of the DRC even sought to have the EAC Regional Force (EACRF) replaced with forces from the Southern African Development Community (SADC).⁸⁹

4.2. Achilles' Heel of the Contemporary EAC

Admittedly, the EAC has made remarkable progress in undertaking its mandate as an economic bloc. This is because it has sought to widen and deepen integration among its partner states by systematically establishing a customs union, a common market, and a monetary union.⁹⁰ However, despite these clear strides of development, it is nonetheless acknowledged that a number of challenges still exist. One author has captured such challenges in the following non-flattery words:

The EAC Partner States are almost unable to control the pace of integration. The Customs Union has achieved some level of implementation including institutionalisation of the common external tariff regime and single customs territory among others. Similarly... certain aspects of the Common Market have been implemented with mixed results. Whereas the Common Market has led to increased intra-EAC trade, however, specific provisions of it in regard to enhancement of regional integration have not

⁸⁸ Evans Habil, “East African Regional Force Fails to Quell Rebels in DR Congo” (*East African*, 27 April 2023), available at

<<https://www.theeastafrican.co.ke/tea/news/east-africa/east-african-force-fails-to-quell-drc-rebels-4214392>> (accessed 15 October 2023).

⁸⁹ See, for instance, Mqondisi Dube, “DRC President Accuses East African Forces of ‘Cohabiting’ With M23 Rebels” (*VOA*, 21 November 2023), available at <<https://www.voanews.com/a/drc-president-accuses-east-african-forces-of-cohabiting-with-m23-rebels-/7087283.html>> (accessed 15 October 2023); see also Felix Mukwiza Ndahinda, “Military Interventions Have Failed to End DRC’s Conflict – What’s Gone Wrong?” (*East African*, 27 June 2023), available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/military-interventions-have-failed-to-end-drc-conflict-4285102>> (accessed 16 October 2023).

⁹⁰ Wilbert T.K. Kaahwa, “The Institutional Framework of the EAC” in Ugirashebuja, E., Ruhangisa E.J., Ottervanger, T. and Cuyvers, A. (eds.), *East African Community Law* (Brill Nijhoff 2017).

been implemented or are facing severe bottlenecks. Critical steps, including cross border movement of capital, free movement of labour, the rights of establishment and residence are yet to be realised in full. The questions that ought to be investigated are: why is it that EAC Partner States have consistently failed to implement their commitments in regard to certain aspects of EAC integration? Could all these be as a result of national policies and interests? Could the EAC econo-political journey be the victim of hostile, immutable and insular foreign policies of Partner States?⁹¹

It is now proposed that some of the key challenges be examined hereinafter.

4.2.1. Management of Environment and Natural Resources

The EAC Treaty makes clear provisions regarding the governance of the environment and natural resources. More particularly, Chapter 19 of the Treaty provides for cooperation in the management of the environment and natural resources. International cooperation refers to the voluntary coordinated action undertaken by two or more states to achieve a specific objective between them.⁹² The principle is the basis upon which meaningful efforts are premised, with the goal of realising sustainable governance of transboundary natural resources.⁹³ States are exhorted to adopt international cooperation in managing natural resources because

⁹¹ J. P. Wakhungu, G. P. Okoth, E. O. S. Odhiambo, “Challenges and Opportunities Constraining and Enhancing Kenya and Tanzania Participation in the EAC Econo-Political Integration Process” (2021) 11 *Open Journal of Political Science*, p. 135.

⁹² Bryan A. Garner (ed), *Black’s Law Dictionary* (8th edition, St. Paul, Minnesota, West Publishing Co. 2004); see also Justine Thornton and Silas Beckwith, *Environmental Law* (London, Sweet & Maxwell Publishers 2004).

⁹³ Robert Owino, *Trans-boundary Resource Cooperation in the Lake Victoria Basin: An International Environmental Law Perspective* (LawAfrica Publishers, 2017); see also Felix Otieno Odhiambo, “Conservation of Living Marine Resources of the Exclusive Economic Zone: Analysing the Role of East African Community” (PhD Thesis, University of Dar es Salaam 2021).

environmental problems that arise from their mismanagement are also transnational.⁹⁴

Towards this end, Article 111 of the EAC Treaty provides on environmental issues and natural resources; Article 112 provides on the management of the environment; Article 113 provides on prevention of illegal trade in and movement of toxic chemicals, substances and hazardous wastes; and Article 114 provides on the management of natural resources. Similarly, Chapter 20 of the Treaty also has a bearing on the management of the environment and natural resources. In this regard, Article 116 of the Treaty provides for the management of wildlife. Like Chapter 19, Article 116 invites partner states to cooperate in the management of the region's wildlife resources. Thus, the Treaty requires that there be close cooperation between the members in matters relating to the management of environmental issues and natural resources. As a principle of International Environmental Law, international cooperation is considered necessary in environmental matters because such matters are transboundary.⁹⁵

However, despite the very good intentions and the underlying exhortation to the partner states for cooperation in the management of environment and natural resources, the partner states have not scored very highly in this regard. Perhaps, an indicator of this poor performance can be gleaned from the fact that the EAC Protocol on Environment and Natural Resources 2006 has not come into force despite having been signed by the three EAC founding partner states way back on 3 April

⁹⁴ Kariuki Muigua, Didi Wamukoya and Francis Kariuki, *Natural Resources and Environmental Justice in Kenya* (Nairobi, Glenwood Publishers Limited 2015); see also Kariuki Muigua, *Nurturing Our Environment: For Sustainable Development* (Glenwood Publishers Limited, 2016).

⁹⁵ See, for instance, Neil Craik, "The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect" (2019) 30(1) *Yearbook of International Environmental Law*, p. 22.

2006.⁹⁶ The protocol has since been ratified by both Kenya and Uganda with Tanzania having failed to ratify it.⁹⁷ For the protocol to have come into force, it required to have been ratified and the instruments of ratification deposited by all the three signatory partner states.⁹⁸

The protocol obligates partner states to, among others, cooperate and uphold the principles of sustainable development, and also cooperate in the development of common policies for the management of environment and natural resources.⁹⁹ Had the partner states ratified the protocol, then it would have provided a sound legal instrument for the operationalisation of Chapters 19 and 20 of the EAC Treaty. Tanzania's refusal to ratify the protocol is founded on several reasons. The first pre-eminent reason is its fear that the protocol would be the primary legal instrument to govern matters relating to access to and use of land and premises, hence, denying national laws and policies that responsibility.¹⁰⁰

The second reason for Tanzania's rejection of the protocol is its feeling that it contradicts the protocol on the Establishment of the EAC Common Market.¹⁰¹ Thirdly, Tanzania holds the view that the protocol has provisions which relate to marketing and trading in minerals, rather than just being restricted to the protection of the environment in mining activities.¹⁰² Fourthly, the rejection was also founded on the basis that the

⁹⁶ East Africa Community, "Protocol on Environment and Natural Resource Management" (*East African Community* 2023), available at

<<https://www.eac.int/environment/natural-resources-management/protocol-on-environment-and-natural-resource-management>> (accessed 15 October 2023).

⁹⁷ William Onzivu, "The Long Road to Integrating Public Health into Sustainable Development of Shared Freshwaters in International Environmental Law: Lessons from Lake Victoria in East Africa" [Fall 2012] 46(3) *International Lawyer*, p. 881.

⁹⁸ Article 46 of the Protocol on Environment and Natural Resource Management 2006.

⁹⁹ Article 7(1) (a) and (c) of the Protocol.

¹⁰⁰ The EastAfrican, "Why Tanzania Said No to EAC Protocol on the Environment" *The EastAfrican* (Nairobi, 27 September 2014), available at

<<https://www.theeastafican.co.ke/tea/news/east-africa/why-tanzania-said-no-to-eac-protocol-on-the-environment--1328428>> (accessed 22 November 2023).

¹⁰¹ Ibid.

¹⁰² Ibid.

country would have preferred to have matters relating to tourism addressed through a separate protocol, instead of them being lumped together in this protocol.¹⁰³ The final reason was that Tanzania is of the view that the protocol deviated from the scope of environment and natural resources.¹⁰⁴ This specific contestation arose from the fact that the protocol has provisions relating to the transmission of electric power as well as development of integration policy on rural electrification and inter-connection of partner states' electric grids.¹⁰⁵

Apart from the EAC Protocol on Environment and Natural Resources, the lack of cooperation among the EAC members also arises in the management of transboundary water resources like Lake Victoria. The EAC institutional approach to the management of Lake Victoria avails through the Lake Victoria Basin Commission which is established pursuant to the Protocol for Sustainable Development of Lake Victoria Basin. The protocol, signed in November 2003, was ratified in December 2004 by the three founding partner states and provided a joint legal framework for managing the Lake Victoria Basin. The protocol has significant provisions for the management of the natural resources within the Lake Victoria Basin, including the lake itself.

For example, Article 8 of the protocol requires the sustainable development and management of fisheries resources, whereas Article 11 requires the partner states to promote trade, commerce and industry. Article 12 of the protocol obliges the partner states to have their laws mainstream requirements for environmental impact assessments into their activities. However, despite the existence of this protocol, partner states have continued to manage Lake Victoria's resources through a restricted kind of compartmentalisation without evidence of inter-state

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

cooperation. For instance, there are reports of harassment against citizens of neighbouring states by the government agencies of the other neighbouring states. For instance, Kenyan fishermen have always been harassed by Ugandan security agencies whenever they go out fishing in the lake.¹⁰⁶ Besides, there is no coordinated management and exploitation of the lake's fishery resources.¹⁰⁷

4.2.2. Fluid Political Realities and the Coalition of the Willing

Over the years, the eight EAC partner states have had very diverse social, economic and political realities which even sometimes pit some of them against each other. Some of those realities have revolved around natural resources and the national security situations within the partner states. This has then led to a problem of internecine conflicts variously between Rwanda, Uganda and the DRC.¹⁰⁸ The problem is a hydra-headed one which, on the one hand, derives from the fact of the vastness of the DRC, hence, leading to the country's inability to have effective governmental control over its entire space. On the other hand, the country's vast mineral resources, especially, within the eastern parts of its territory, have attracted foreign commercial interests that have fueled political instability through never-ending conflicts.¹⁰⁹

¹⁰⁶ James Omoro, "Uganda Arrests Kenyan Fishermen in Lake Victoria" *Sunday Standard*, available at <<https://www.standardmedia.co.ke/nyanza/article/2001326887/uganda-arrests-kenyan-fishermen-in-lake-victoria>> (accessed 15 October 2023). See also Rushdie Oudia, Barack Oduor and Elisha Otieno, "Tension grips Lake Victoria after Ugandan Officers Hold Kenyan Fishermen", *East African*, 18 June 2018, available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/tension-grips-lake-victoria-after-ugandan-officers-hold-kenyan-fishermen-1396304>> (accessed 15 October 2023).

¹⁰⁷ See Robert Omondi Owino, "Fouling Adam's Eden: A Legal Analysis of the Collective Action Challenge in Lake Victoria", in Paul Martin and Amanda Kennedy, (et al), *Implementing Environmental Law*, (Edward Elgar Publishing: UK, 2015).

¹⁰⁸ Martin Meredith, *The State of Africa: A History of the Continent Since Independence* (Simon & Schuster Publishers 2011).

¹⁰⁹ Tom Burgis, *The Looting Machine: Warlords, Tycoons, Smugglers, and the Systematic Theft of Africa's Wealth* (William Collins Publishers 2015).

DRC's vast mineral resources have, unfortunately, but predictably, made it a target of hostile foreign military activities, hence, making its eastern parts always restive due to the near-permanent presence of belligerents whose activities are often supported by foreign commercial interests.¹¹⁰ Thus, Eastern DRC has, oftentimes, been used as the bastion for rebellions against not just the country's successive governments but also those of neighbouring states, like Rwanda and Uganda.¹¹¹ For instance, it is to be recalled that the region was used by the late Laurent Kabila's rebel movement, Alliance of Democratic Forces for the Liberation of Congo (ADFLC), to launch its successful rebellion against the late Mobutu Sese Seko's government between 1996 and 1997.¹¹² Similarly, Jean Bosco Ntaganda and his March 23 (M23) rebels launched and maintained their operations against the Government of DRC from the same region.¹¹³

Apart from internal rebellion, eastern DRC is also a hotchpotch of cross-border base for rebel activities against some neighbouring countries. For example, the rebels of the Democratic Forces for the Liberation of Rwanda (FDLR), who are fighting against the present Rwandan Government, also launched their operations from the eastern regions of DRC, and actually still operate from the same region.¹¹⁴ Similarly, the Lord's Resistance Army (LRA), the rebel organisation fighting against the

¹¹⁰ Ibid.

¹¹¹ Berna Namata, Ange Iliza and Patrick Ilunga, "Rwanda-DR Congo Tension Threatening Regional Integration's Nascent Gains" *EastAfrican* (Nairobi 5 June 2022), available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/rwanda-dr-congo-tension-threatening-regional-integration-3837838>> (accessed 16 October 2023).

¹¹² Emizet F. Kisangani, "Conflict in the Democratic Republic of Congo: A Mosaic of Insurgent Groups" (September 2003) 20(3) *International Journal on World Peace*, p. 51.

¹¹³ See, for instance, Felix Makonye, "Demystifying March 23 (M23) Rebellion: Case of Eastern Democratic Republic of Congo (DRC)" (2023) 4(1) *African Journal of Terrorism and Insurgency Research*.

¹¹⁴ Nicodemus Minde, "To Negotiate or Not-to Negotiate with the FDLR Rebels? President Kikwete and Tanzania's Foreign Policy towards Rwanda (2013-2015)" (2021) 48(1) *The African Review*, p. 52.

Ugandan Government, also operates in part from Eastern DRC.¹¹⁵ Apart from Eastern DRC, the LRA also has operational bases in other places such as Northern Uganda, South Sudan, as well as the Central African Republic.¹¹⁶

Therefore, the situation in Eastern DRC provides a cocktail of opportunities for foreign-sponsored belligerent activities which always cause political instability for the country as well as for the region. As a result, both Rwanda and Uganda have had to deploy their military troops within the Eastern DRC to contain acts of rebellion against their governments.¹¹⁷ Since the late 1990s, there have been accusations and counter-accusations between Rwanda, Uganda and the DRC regarding support for or against rebels fighting each other's respective governments.¹¹⁸ The DRC has, for instance, accused Rwanda of supporting M23 rebels in retaliation against the DRC's alleged support for the FDLR's rebels.¹¹⁹ On its part, the DRC accuses foreign military troops, especially Ugandans, of being involved in the illegal exploitation of the DRC's natural resources like timber and gold.¹²⁰ Such accusations

¹¹⁵ Frank Van Acker, "Uganda and the Lord's Resistance Army: The New Order No One Ordered" (2004) *African Affairs* 335; see also Kevin C. Dunn, "The Lord's Resistance Army and African International Relations" (January – March 2010) 3(1) *African Security*, p. 46.

¹¹⁶ See, for instance, Gary K. Busch, "The United States and the Lord's Resistance Army" [2011] *Small Wars Journal*, available at <<https://smallwarsjournal.com/jrnl/art/the-united-states-and-the-lord%E2%80%99s-resistance-army>> (accessed 16 October 2023).

¹¹⁷ Martin Meredith, *The State of Africa: A History of the Continent Since Independence* (Simon & Schuster Publishers 2011), p. 393.

¹¹⁸ See, for instance, Patrick Ilunga, "US Sanctions 6 Rwandans, Congolese over Conflict in Eastern DRC" *EastAfrican* (Nairobi 25 August 2023), available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/us-sanctions-6-rwandans-congolese-over-conflict-in-eastern-drc-4346724>> (accessed 18 October 2023).

¹¹⁹ Maria Paz Ortega Rodriguez, "The FDLR as an Obstacle to Peace in the DRC" (2011) 23(2) *Peace Review*, p. 176.

¹²⁰ *Ibid.*

founded the basis of the DRC's previous claims against Uganda, Rwanda and Burundi at the International Court of Justice (ICJ).¹²¹

Through the case, the DRC claimed against Burundi, Uganda and Rwanda for acts of armed aggression committed against it in flagrant breach of the United Nations Charter and the Charter of the OAU.¹²² The ICJ delivered its judgment on 9 February 2022, wherein it found in favour of the DRC as against Uganda, and awarded USD 225,000,000 for damage to persons, USD 40,000,000 for property damage and USD 60,000,000 for damage related to natural resources.¹²³ However, it is instructive to note that it is still reported that both Rwandan and Ugandan troops remain within the Eastern DRC. Similarly, the plunder of the DRC's natural resources continues unabated owing to the country's inability to have effective governmental control over its entire territory.

The political undertones arising from the respective national security situations and concerns within the Eastern DRC, Uganda, Rwanda and Burundi would certainly have a bearing on the operations of the EAC, given that these four states are now members of the Community. The near-hostile reception of the EACRF by the Government of the DRC largely has everything to do with the fluid political realities arising from the mistrust between these four states, which now find themselves lumped together under the EAC.¹²⁴

¹²¹ Julian Arato, "Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)" [January 2023] 117(1) *American Journal of International Law*, p. 113.

¹²² International Court of Justice, "Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda): Overview of The Case" (*International Court of Justice* 2017-2024), available at <<https://www.icj-cij.org/case/116>> (accessed 16 October 2023); see also John F. Clark, "Explaining Ugandan Intervention in Congo: Evidence and Interpretations" [2001] 39(2) *The Journal of Modern African Studies*, p. 261.

¹²³ *Ibid.*

¹²⁴ Muliwo Wilfred Nasong'o, "Dilemma of EAC peace Process in Eastern DRC" *Nation* (Nairobi 15 March 2023), available at <<https://nation.africa/africa/opinion/dilemma-of-eac-peace-process-in-eastern-drc-4159004>> (accessed 16 October 2023).

4.2.3. Undesired Implementation Effects of the Principles of Variable Geometry and Asymmetry

The principles of variable geometry and variable asymmetry are provided for, respectively, under Article 7 (1) (e) and Article 7 (1) (h) of the Treaty for the Establishment of the EAC 1999.¹²⁵ The principle of variable geometry provides the partner states with the flexibility for progression in cooperation within a sub-group of partner states in a variety of areas and at different speeds.¹²⁶ Therefore, it enables states to implement integration projects at different paces depending on the respective individual state's needs and abilities.¹²⁷ Through variable geometry, partner states of a regional bloc are permitted to move forward with integration initiatives, while leaving others behind, to join at a later date, depending on their convenience and programmes of action.¹²⁸

Consequently, it offers flexibility during the implementation of projects or programmes by some of the partners, as opposed to a situation in which all the partner states would be required to move together at the same time.¹²⁹ That way, progress can still be realised towards integration despite the different economic abilities and unique needs of the partner states. On its part, the principle of asymmetry addresses itself to the differences in the process of implementation of measures in the

¹²⁵ Juma V. Mwapachu, *Challenging the Frontiers of African Integration: The Dynamics of Policies, Politics and Transformation in the East African Community* (E and D Vision Publishing 2012), pp. 362-366.

¹²⁶ Kamanga, Khoti C., and Possi, Abdalla, "General Principles Governing EAC Integration" in Ugirashebuja E., Ruhangisa J.E., Ottervanger T., and Cuyvers A., (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Leiden, Brill Nijhoff Publishers Ltd 2017).

¹²⁷ Khoti Kamanga Chilomba, "An Enquiry into the Achievements and Challenges of East African Regional Integration" [June 2016] 43(1) *The African Review: A Journal of African Politics, Development and International Affairs*, p. 51.

¹²⁸ Ibid.

¹²⁹ Ibid.

integration process to achieve a common objective.¹³⁰ These two principles operate to offer market safeguards for states that are weaker economically within a regional bloc to avert fears of possible economic domination of their market by goods from states that are stronger economically.

The two operating principles, well intended within the EAC legal architectural design as they are, have sometimes, nevertheless, become divisive, rather than common points of unity that they are supposed to be. This was especially witnessed during the last decade when the implementation of the two principles became euphemistically referred to as “the coalition of the willing”. During that time, the regional bloc still had only five partner states, Kenya, Uganda, Tanzania, Rwanda and Burundi.¹³¹ Then, Kenya, Rwanda and Uganda swam together on one side of the spectrum of the said coalition of the willing, while Tanzania and Burundi remained on the other end.¹³² The three states pursued common projects such as having common tourist visas, a common defence and security pact, and using the countries’ respective national identity cards as official travel documents, among other common initiatives.¹³³

On their part, both Tanzania and Burundi remained “stuck” without any apparent interest in the implementation of any of the integration initiatives that the other three partner states were involved in. Therefore,

¹³⁰ Binda, E.M., “The Legal Framework of the EAC” in Ugirashebuja E., Ruhangisa J.E., Ottervanger T., and Cuyvers A., (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Leiden, Brill Nijhoff Publishers Ltd 2017).

¹³¹ The Citizen, “Coalition of the Willing Emerges Again in EAC” *The Citizen* (Dar es Salaam 13 January 2014), available at: <<https://www.thecitizen.co.tz/tanzania/news/east-africa-news/coalition-of-the-willing-emerges-again-in-eac-2503256>> (accessed 17 October 2023).

¹³² Joachim Buwembo, “Why the Coalition of the Willing is no Longer the Winning Team” *EastAfrican* (Nairobi 4 January 2022), available at: <<https://www.theeastafican.co.ke/tea/oped/comment/why-the-coalition-of-the-willing-is-no-longer-the-winning-team-3671776>> (accessed 17 October 2023).

¹³³ The Citizen for 13 January 2014.

instead of serving a legitimate regional integration purpose in the case of EAC, implementation of the two principles tends to make the sub-groups appear to gang up against and sideline another sub-group. This way, therefore, the unintended implementation effects of the two principles tend to undermine regional integration efforts rather than strengthen them.

Further, it is observed that the approach of implementation for these two principles tends to be fluid insofar as they depend heavily upon the personalities of the partner states' presidents. Thus, originally, President Uhuru Kenyatta was able to galvanise the support of Rwanda and Uganda to coalesce around Kenya's EAC development initiatives.¹³⁴ However, with the arrival of President John Magufuli in 2015, Tanzania appeared to have pulled the rug from under Kenya's feet on matters of implementation of a common integration agenda.¹³⁵ Consequently, Tanzania has since been able to strike a number of common projects with partner states, such as with Uganda over the Hoima Oil Pipeline which was initially supposed to have been developed with Kenya.¹³⁶ Similarly, Tanzania has been able to pull other trade and economic "coups" with both Rwanda and Burundi, especially in terms of making the Port of Dar es Salaam a more attractive destination for these landlocked countries' goods, instead of the Port of Mombasa.¹³⁷

¹³⁴ Joachim Buwembo, "Why the Coalition of the Willing is no Longer the Winning Team" *East African* (Nairobi 4 January 2022), available at <<https://www.theeastafrican.co.ke/tea/oped/comment/why-the-coalition-of-the-willing-is-no-longer-the-winning-team-3671776>> (accessed 17 October 2023).

¹³⁵ Ibid.

¹³⁶ Namunane, B. and Mutambo, A., "Tanzania Seized Keter Passport in Tanga Port Tour" *Daily Nation* (Nairobi 24 March 2016) 1.

¹³⁷ Berna Namata, Ange Iliza and Anthony Kitimo, "Dar's Turn to Eat Mombasa's Lunch as Rwanda Looks South for Trade across Borders" *East African* (Nairobi 7 August 2021), available at <<https://www.theeastafrican.co.ke/tea/business/dar-s-turn-to-eat-mombasa-s-lunch-as-rwanda-looks-south-3502602>> (accessed 17 October 2023).

Through some of these intra-regional shifts, it is clear that Tanzania is emerging as a more favourable partner in the implementation of economic projects, rather than Kenya. As the unintended effect of these fluid integration implementation policy shifts, several Kenya's key economic projects have been dealt near-deathly blows. For example, a key Kenya Vision 2030 implementing project like the Lamu Port South Sudan & Ethiopia Transport (LAPSSET) Corridor now seems to have been derailed due to a lack of sufficient intra-regional support following Uganda's withdrawal.¹³⁸ In this regard, therefore, it is submitted that the principles of variable geometry and asymmetry are presently tending to be more of points of division and divergence, rather than of integration and convergence, as they seem to encourage unnecessary cut-throat competition among the partner states.

4.2.4. The Strenuous Overlaps between the EAC and the SADC: Tanzania and the DRC in the SADC and the EAC

Perhaps the most recent conspicuous way through which the strenuous relationship between the EAC and SADC has been illustrated is the deployment of the EACRF into the DRC. The deployment of the force started in November 2022, when the first batch of 1000 Kenyan troops was deployed.¹³⁹ Since then, other countries like Burundi, South Sudan and Uganda have also deployed troops under the aegis of the EACRF.¹⁴⁰

¹³⁸ Andae, G., "Uhuru Castigates Lamu Port Naysayers on Launch" *Business Daily* (Nairobi 21 May 2021), available at: <<https://www.businessdailyafrica.com/bd/economy/uhuru-castigates-lamu-port-naysayers-on-launch-3408248>> (accessed 17 October 2023); see also, Obura, F., "President Uhuru Kenyatta Opens Lamu Port" *The Standard* (Nairobi 20 May 2021), available at <<https://www.standardmedia.co.ke/business/article/2001413431/president-uhuru-kenyatta-opens-lamu-port>> (accessed 17 October 2023).

¹³⁹ Africa Defence Forum, "Fully Deployed Regional Force Starting to Impact Eastern DRC" *Africa Defence Forum* (Washington DC 11 April 2023), available at <<https://adf-magazine.com/2023/04/fully-deployed-regional-force-starting-to-impact-eastern-drc/>> (accessed 17 October 2023).

¹⁴⁰ Kevin Cheruiyot, "Defence Ministers Endorse Longer Stay of EACRF in Eastern Congo" *EastAfrican* (Nairobi 25 August 2023), available at

Tanzania's commitment to the EACRF is presently unclear although the country has a significant troop deployment through the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo or MONUSCO.¹⁴¹

The strenuous, if not somewhat conflicting, relationship between the two regional blocs has recently shown through the demand of the Government of the DRC to have the EACRF troops leave the country and have them replaced with SADC troops, only four months after their deployment.¹⁴² The DRC's point of departure from the EACRF arises from reasons premised on the fact that the mandate of the EACRF troops is restricted to them serving only as a buffer zone against the M23 rebels, instead of being offensive against the rebels.¹⁴³ When SADC agreed to send troops into the DRC, President Tshisekedi announced that the SADC troops would be offensive, rather than just being a buffer zone against the M23 rebels.¹⁴⁴ The DRC Government directed that the term of the EACRF was not to be extended beyond 8 December

<<https://www.theeastafrican.co.ke/tea/news/east-africa/defence-ministers-endorse-longer-stay-of-eacrf-in-eastern-congo-4347738>> (accessed 18 October 2023).

¹⁴¹ United Nations Peacekeeping, "MONUSCO Fact Sheet: United Nations Organization Stabilization Mission in the Democratic Republic of the Congo" *United Nations Peacekeeping* (Kinshasha, 2023), available at

<<https://peacekeeping.un.org/en/mission/monusco>> (accessed 17 October 2023).

¹⁴² Patrick Ilunga, "Tshisekedi to East African Force: Act on Rebels or Leave DRC" *East African* (Nairobi 10 May 2023), available at

<<https://www.theeastafrican.co.ke/tea/news/east-africa/tshisekedi-gives-ultimatum-to-eacrf-4229574>> (accessed 18 October 2023).

¹⁴³ Mary Wambui, "Kenyan Commander's Exit Exposes Tussle Over Regional Force Mandate" *East African* (Nairobi 30 April 2023), available at

<<https://www.theeastafrican.co.ke/tea/news/east-africa/why-kdf-man-is-unwanted-in-congo-mission-4217032>> (accessed 18 October 2023).

¹⁴⁴ Mary Wambui, "Kenyan Commander's Exit Exposes Tussle Over Regional Force Mandate" *East African* (Nairobi 30 April 2023), available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/why-kdf-man-is-unwanted-in-congo-mission-4217032>> (accessed 18 October 2023).
 Mary Wambui, "Reality Check on DRC with EACRF Getting Extension Amid Protests" *East African* (Nairobi 10 September 2023), available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/reality-check-on-drc-with-eacrf-getting-extension-amid-protests-4363420>> (accessed 18 October 2023); see also Mqondisi Dube, "SADC to Send Troops to DRC to Help Quell Disturbances in East" *VOA* (Washington DC 9 May 2023), available at <<https://www.voanews.com/a/sadc-to-send-troops-to-drc-to-help-quell-disturbances-in-east/7085633.html>> (accessed 18 October 2023).

2024.¹⁴⁵ With this directive, it meant that EACRF's term in the DRC was for a period less than a year from the time of its full deployment.

Unlike the EACRF which are newbies, President Tshisekedi considers SADC troops more reliable and natural historical allies. This is because SADC countries, including Angola, Zimbabwe and Namibia, had previously deployed troops in the Eastern DRC in the 1998 rebellion against the late President Laurent Kabila.¹⁴⁶ Therefore, the DRC believes that due to these historical alliances, SADC troops would be much more reliable allies than the EACRF, with which the DRC has disagreements over tactical approaches to the handling of the conflict in the Eastern DRC.¹⁴⁷ This is despite the fact that the SADC has previously deployed troops in the Eastern DRC, with some of them having been accused of grave offences, including sexual abuse against civilians.¹⁴⁸

4.2.5. Too Fast Growth in Numbers?

Between its inception in July 2000 and 2007, the EAC only had its three founding partner states, that is Kenya, Uganda and Tanzania. Since 2007, five additional members have been admitted into the regional bloc's fold. Indications are such that other additional members could be in the offing with media reports quoting the EAC Secretary-General indicating that

¹⁴⁵ East African Community, "Communiqué of The 23rd Ordinary Summit of the East African Community Heads of State" *East African Community* (Arusha 1999-2023), available at <<https://www.eac.int/communiqu/2976-communiqu%C3%A9-of-the-23rd-ordinary-summit-of-the-east-african-community-heads-of-state>> (accessed 27 November 2023).

¹⁴⁶ Jean A.P. Clement, "Post-conflict Economics in Sub-Saharan Africa, Lessons from the Democratic Republic of the Congo" *International Monetary Fund* (Washington DC 2005) 8.

¹⁴⁷ Patrick Ilunga, "East African Forces to Leave the Nation by December, DRC Official Says" *The EastAfrican* (Nairobi 10 October 2023), available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/eacrf-to-leave-the-nation-by-december-drc-official-say-4396400>> (accessed 29 July 2024).

¹⁴⁸ Peter Dube, "South African Soldiers Arrested for Sexual Abuse in DR Congo" *EastAfrican* (Nairobi 14 October 2023), available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/south-african-soldiers-arrested-for-sexual-abuse-in-dr-congo-4401126>> (accessed 18 October 2023).

the Federal Republic of Ethiopia is being courted to join the EAC.¹⁴⁹ On the one hand, the fast growth in numbers is significant because the expansion offers a bigger common market, hence, more enlarged opportunities for trade between the partner states.¹⁵⁰ However, despite the underlying potential benefits, this exponential growth in numbers of partner states also comes with certain challenges that need to be appreciated. One such challenge arises from the varying degrees of fluid geopolitical dynamics, especially, those arising from the varied national security concerns of the partner states. For example, it has been examined herein that the entry of the DRC into the EAC now poses the Community inherent operational challenges owing to its conflicting national security position with those of Rwanda, Burundi and Uganda.¹⁵¹

Similarly, Somalia's entry into the bloc poses its fair share of challenges to its relationship with Kenya. The two countries have had historical difficulties in their relationship starting with Kenya's and Ethiopia's mutual feelings that Somalia harboured expansionist ideologies against both of their territorial integrities.¹⁵² The said expansionist ideologies led to the *Shiffo* War between Kenya and Somalia during the early 1960s.¹⁵³ The effects of the said ideologies were also experienced in Ethiopia through the seven-year Oromo Uprising within the Ogaden Region of

¹⁴⁹ See Jackson Mutinda, "Peter Mathuki: Why We Want Addis to Join EAC after Somalia" (*East African*, 1 April 2023), available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/mathuki-after-somalia-we-want-addis-to-join-eac-4181390>> (accessed 18 October 2023).

¹⁵⁰ See Jeffrey R. Campbell and Hugo A. Hopenhayn, "Market Size Matters"[March 2005] 53(1) *The Journal of Industrial Economics* 1. See also Jonne Lehtimäki and David Sondermann, 'Baldwin versus Cecchini Revisited: The Growth Impact of the European Single Market' [2022] 63 *Empir Econ*, p. 603.

¹⁵¹ Oswald T. Brown, "EAC Troops 'Failed,' DR Congo's Foreign Minister Says", *The Washington Informer* (Washington DC 17 May 2023), available at <<https://www.washingtoninformer.com/eac-troops-failed-dr-congos-foreign-minister-says/>> (accessed 18 October 2023).

¹⁵² Harry Ododa, "Somalia's Domestic Politics and Foreign Relations since the Ogaden War of 1977-78" [July 1985] 21(3) *Middle Eastern Studies*, p. 291.

¹⁵³ Martin Meredith, *The State of Africa: A History of the Continent Since Independence* (Simon & Schuster Publishers 2011), p. 209.

Ethiopia where the West Somali Liberation Front fought to drive out the Ethiopians and restore Somali sovereignty.¹⁵⁴ Both the *Shifita* War and the Oromo Uprising of the Ogaden were part of the larger five-star Somali Unification attempt through which Somalia had sought to unify all the five Somali nationalities living in Kenya, Ethiopia, Somalia, Djibouti and Somaliland, with each of them being represented by a star.¹⁵⁵

Subsequently, Kenya deployed its troops into Somalia through the military operation code-named *Operation Linda Nchi* in 2012.¹⁵⁶ The purpose of the military operation was to deal with what it considered threats to its internal security after a spate of terrorist attacks attributed to the lawlessness in Somalia.¹⁵⁷ The Kenyan troops were then incorporated into the UN-authorized African Union Mission in Somalia (AMISOM),¹⁵⁸ which has since been converted to the African Transitional Mission in Somalia (ATMIS).¹⁵⁹ ATMIS, which became operational on 1 April 2022, is mandated to fully implement the Somali Transition Plan (STP).¹⁶⁰

Flowing from Somalia's old expansionist ideology which led to the *Shifita War*—followed by Kenya's fight against terrorism and its consequent military intervention through *Operation Linda Nchi*, Kenya has, over the

¹⁵⁴ Harry Ododa, "Somalia's Domestic Politics and Foreign Relations since the Ogaden War of 1977-78" [July 1985] 21(3) *Middle Eastern Studies*, p. 291.

¹⁵⁵ Martin Meredith, *The State of Africa: A History of the Continent Since Independence* (Simon & Schuster Publishers 2011), p. 209.

¹⁵⁶ James Fergusson, *The World's Most Dangerous Place: Inside the Outlaw State of Somalia* (Black Swan Publishers 2014).

¹⁵⁷ Ibid.

¹⁵⁸ Stig Jarle Hansen, *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group* (Hurst & Company 2013).

¹⁵⁹ ATMIS is a multidimensional mission, including military, police and civilians, and was authorised by the AU and mandated by the United Nations Security Council – AU Peace and Security Council Communique for 1068th Meeting and UN Security Council Resolution 2628 of 2022.

¹⁶⁰ Ibid.

years, had troubled relations with the Federal Republic of Somalia.¹⁶¹ As a result, the two countries' recent maritime boundary dispute in the Indian Ocean before the ICJ did not, therefore, come as a surprise to many.¹⁶² This dispute continues to gnaw although the ICJ delivered its judgment on 12 October 2021, a judgment which Kenya has vowed to ignore.¹⁶³ It is therefore against this backdrop of relationship that all of EAC's four pillars of integration, comprising customs union, common market, monetary union and political federation are supposed to be premised.

Of the four pillars, the one whose implementation is likely to pose the biggest challenge is that of the common market. The implementation of this particular pillar of integration anticipates the free movement of goods, people, labour, services and capital from one partner state to another, as well as the rights of establishment and residence without restrictions.¹⁶⁴ If Kenya's national security concerns arising from terrorism continue to mount, it is foreseeable that Kenya will not fully implement its obligations under the common market concerning the Federal Republic of Somalia, whose citizens it has accused of engaging in acts of terrorism against Kenya's interests.¹⁶⁵

It is to be recalled that due to national security fears, the Government of Kenya, in 2024, proposed to construct a wall along its common border with Somalia to serve as a buffer against the free movement of those

¹⁶¹ James Fergusson, *The World's Most Dangerous Place: Inside the Outlaw State of Somalia* (Black Swan Publishers 2014), p. 405.

¹⁶² *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya), 2014 General List No. 161.

¹⁶³ Kamau Muthoni, "Kenya Vows to Defend Disputed Maritime Border with Somalia" *The Standard* (Nairobi 2021).

¹⁶⁴ East African Community, "Pillars of EAC Regional Integration" *East African Community* (Arusha 1999-2023), available at <<https://www.eac.int/integration-pillars>> (accessed 29 November 2023).

¹⁶⁵ Daniel Torbjörnsson and Michael Jonsson, "Containment or Contagion? Countering al Shabaab Efforts to Sow Discord in Kenya" *Studies in African Security* (Stockholm June 2016).

undesirable Somalia citizens whom Kenya accused of acts of terrorism.¹⁶⁶ Apart from the proposal of the construction of the wall, Kenya was even on the brink of violating its obligations under international law prohibiting states from violating the principle of non-refoulement.¹⁶⁷ This is because Kenya planned to close down the Daadab Refugee Camp which has been housing Somalia's refugees since 1991.¹⁶⁸ The principle of non-refoulement guarantees that no one should be forcefully returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm.¹⁶⁹

Despite international pleas against the illegality of its intended action, Kenya would hear none of it and it had to take the intervention of Kenya's High Court to slam the brakes on the proposed Government action.¹⁷⁰ Even though the spate and intensity of the terrorist attacks have considerably dissipated, Kenya remains on edge and has not fully turned the corner of safety from acts of terrorism. Therefore, it is to be expected that its national security concerns remain acutely in place.¹⁷¹ Also, no

¹⁶⁶ Simon Allison, "Kenya to Build a Wall on Somali Border to Keep out Al-Shabaab" *The Guardian* (Manchester 2 March 2015), available at <<https://www.theguardian.com/world/2015/mar/02/kenya-wall-israel-separation-barrier>> (accessed 30 November 2023).

¹⁶⁷ Dina Imam Supaat, "Escaping the Principle of Non-Refoulement" [June 2013] 2(3) *International Journal of Business, Economics and Law*, p. 86.

¹⁶⁸ See Simon Allison, "Kenya to Build a Wall on Somali Border to Keep out Al-Shabaab" *The Guardian* (Manchester 2 March 2015), available at <<https://www.theguardian.com/world/2015/mar/02/kenya-wall-israel-separation-barrier>> (accessed 30 November 2023).

¹⁶⁹ David Weissbrodt and Isabel Hortreiter, "The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties" [1999] 5 *Buffalo Human Rights Law Review*, p. 1.

¹⁷⁰ *Kenya National Commission on Human Rights & another v. Attorney General & 3 others* [2017] eKLR.

¹⁷¹ Oscar Gakuo Mwangi, "Kenya is on edge again: Here's what you should know about terror alerts" *Nation* (Nairobi 8 February 2022), available at <<https://nation.africa/kenya/news/explainers/kenya-is-on-edge-again-here-s-what-you-should-know-about-terror-alerts-3709434>> (accessed 29 July 2024).

doubt, Somalia's entry into the EAC would, certainly, complicate the implementation of the common market obligations for the EAC.¹⁷²

On the other side, there is every indication that the topsy-turvy reception that EACRF has had in the DRC has much to do with the country's distrust of some of the troop-contributing countries with which it has previously traded accusations and counter-accusations of supporting rebel activities against each other's government.¹⁷³ Just like what has been observed as the likely scenario in the interplay of national security interests between Kenya and Somalia, it is submitted that implementation of the common market obligations between the DRC, Rwanda and Uganda would also, most predictably, pose problems because the three countries have mutual concerns of their respective national security interests. As a result, it is submitted that the increase in numbers of EAC partner states, rather than be beneficial, weakens the states' obligations to the pillars of the EAC integration agenda.

Besides, even apart from the sensitive issue of national security, the EAC partner states have not been able to implement other programmes and activities required of them under the EAC.¹⁷⁴ Consequently, some observers concluded that the EAC is therefore unable to control its own

¹⁷² Dominic Omondi, "What Somalia's entry into the EAC means for the region" *Business Daily* (Nairobi 4 June 2023), available at <<https://www.businessdailyafrica.com/bd/economy/what-somalia-s-entry-into-eac-means-for-the-region--4257998>> (accessed 29 July 2024). See also, Nelson Naturinda, "Mogadishu not ready for the EAC, so what's the hurry to bring it on board?" *The EastAfrican* (Nairobi 26 November 2023), available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/somalia-not-ready-for-eac-what-s-the-hurry-4445040>> (accessed 29 July 2024).

¹⁷³ See, Patrick Ilunga, "East African Forces to Leave the Nation by December, DRC Official Says" *The EastAfrican* (Nairobi 10 October 2023), available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/eacrf-to-leave-the-nation-by-december-drc-official-say-4396400>> (accessed 29 July 2024).

¹⁷⁴ J. P. Wakhungu, G. P. Okoth, E. O. S. Odhiambo, "Challenges and Opportunities Constraining and Enhancing Kenya and Tanzania Participation in the EAC Economic Integration Process" [2021] 11 *Open Journal of Political Science*, p. 135.

pace of integration.¹⁷⁵ Therefore, considering that the EAC has not been able to have effective control even with its previous smaller number of partner states, it can only be surmised that there is a foreseeable chance that bigger numbers of partner states would pose an even greater set of challenges towards implementation of the integration agenda than what is already being witnessed presently. Thus, in the final analysis, it is submitted that while growth in the number of EAC partner states is not inherently bad, *per se*, there is a need for the partner states to gel well and be in a position to have a common drive towards a common agenda before other new members are admitted to raise new unanticipated dynamics that may derail the integration agenda for the bloc. In this regard, it is argued that the EAC needs to slow down on admission of new members and strive towards enhancing the social, economic and political cohesion among the present members. Similarly, it is further submitted that the admission process ought to be much more rigorous with membership not being a near guarantee for every applicant.

5. Conclusion

This chapter explored the present status of the EAC integration process. It has been observed that the fundamentals of the regional bloc's integration are quite strong, as demonstrated through its existing institutional and legal frameworks. However, certain internal dynamics within its partner states still pose certain inherent risks which claw back into the integration gains of the Community. There is, therefore, the need for the regional bloc to develop safety nets for its integration journey so that its second phase avoids the ignominy of closing shop like its first phase sibling.

The EAC exponential expansion creates momentum which may, ultimately, undermine the very reasons for the regional integration. This is especially a major concern because EAC intra-regional trade still

¹⁷⁵ Ibid.

remains generally low.¹⁷⁶ This is demonstrated by the fact that the role of intra-EAC trade accounted for only 19% of EAC exports between 2010 and 2012.¹⁷⁷ The subdued intra-regional trade within the Community has been attributable to the existence of regulatory bottlenecks which undermine the region's competitiveness.¹⁷⁸ It is further noted that although the region has a common market in place, the nontariff barriers are still high within the region.¹⁷⁹ Besides, the partner states are yet to agree upon common standards and harmonised regulations.¹⁸⁰ Therefore, the exponential growth in the numbers of the EAC partner states does not bode well for the regional bloc's interests due to the lack of economic compactness and the fluid market dynamics.

¹⁷⁶ Nicholas Ngepah and Maxwell C. Udeagha, "African Regional Trade Agreements and Intra-African Trade" [March 2018] 33(1) *Journal of Economic Integration*, p. 1191.

¹⁷⁷ UNCTAD, "East African Community Regional Integration: Trade and Gender Implications" *UNCTAD* (Geneva 2018) p. ix.

¹⁷⁸ Catherine McAuliffe, Sweta C. Saxena and Masafumi Yabara, "Sustaining Growth in the East African Community" in Paulo Drummond, S.K. Wajid and Oral Williams (eds) *The Quest for Regional Integration in the East African Community* (Washington DC, International Monetary Fund 2015), p. 32.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

Chapter Two

Federating the East African States: A Century-Long Search for Consensus

*Idd R. Mandi**

1. Introduction

A century has passed since the idea of federating the East African states was conceived in the midst of World War I and its implementation began in the 1920s. The British were the ones who started it. The British deserve to be blamed for their colonial rule in East Africa and elsewhere around the world, for colonialism was nothing less than a pernicious form of dictatorship. While colonial rule was an excruciating pain in the necks of the natives, some faint democratic spots could be seen, albeit with the assistance of a powerful flashlight. The idea, efforts, and approach they took to form the East African federation are a case in point. Although the British colonised Kenya, Tanganyika and Uganda, they never attempted to unilaterally impose a federation. Instead, they consistently sought consensus although it turned out to be elusive. Apart from the lack of consensus, there were other factors, including Adolf Hitler's demands for the return of Tanganyika to Germany that prevented the

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British from integrating the three territories immediately. This chapter, therefore, narrates the long journey of the East African integration process. It highlights the efforts that have been expended on the project. In the long quest for the realisation of a federal union, there have been many heroes, rebels, and saboteurs. Leo Amery, Julius Kambarage Nyerere and Yoweri Kaguta Museveni stand out as the three men whose service in the integration process stands above all others. The chapter, thus, highlights their contribution to the integration process. Furthermore, the chapter points out mistakes that have been committed along the way. Moreover, it also draws attention to challenges that are standing in the way towards the federal union and, finally, makes recommendations.

The chapter explores challenges and mistakes that impeded the formation of the union. The idea is that it is through a thorough understanding of the past mistakes and challenges that they can be overcome at the present and in the future. It is crucial to federate for the purpose of securing the social, political and economic development of the East African peoples. Therefore, the young and future generations of the East African peoples need to study and understand the history of the East African integration process so that they can properly manage and push it towards its conclusion.

2. Early Common Services

The United States of America (USA) Federation, which was created in 1789, blossomed after a few years and became the cynosure of all eyes around the world. Inspired by American federalism, the British government adopted a policy of creating federations in their colonies in the 1800s. Between 1846 and 1851, they were busy promoting federations in “Australasia, South Africa, and British North America [Canada].”¹ In 1871, Otto von Bismark completed his work of state-making through war and treaty making in Germany by establishing a

¹ Bruce A. Knox, “The Rise of Colonial Federation as an Object of British Policy, 1850-1870” (1971) *The Journal of British Studies*, p. 92.

federal government. The German federation had also given the British another excellent lesson. It was Joseph Chamberlain, the Secretary of State for Colonies (1895-1903), who greatly promoted the federalist policy and gave it a great push.² Thus, from the early years of British colonial rule in East Africa, British politicians and bureaucrats thought of establishing a closer administrative arrangement between Uganda Protectorate and British East Africa Protectorate (Kenya).³ In 1899, the British Government instructed the British Commissioner to Uganda, Sir Harry Johnson, to look into the possibility of closer cooperation between the two territories.⁴ Johnson recommended a unitary amalgamation but the British colonial office in London was hesitant and did not buy the idea.⁵ Of course, the amalgamation of the two territories would have resulted in resistance. As will be shown later, Kabaka of Buganda, for instance, was a formidable opponent of the integration of the region. In dealing with Buganda and other kingdoms in modern Uganda, the British, rather uniquely, resorted to diplomatic negotiations rather than brute force.⁶

The construction of the Kenya-Uganda Railway was completed in 1901.⁷ In the spirit of closer cooperation, the Common Railway Administration was established in 1902.⁸ In 1911, a common Postal Union was created.⁹ In 1923, the Customs Union was established to serve the two territories. In 1919, the East African Currency Board (EACB) was established to cater for the control of currency in the British East Africa Protectorate and Uganda Protectorate. Tanganyika and Zanzibar joined in 1920 and

² D. Wadada Nabudere, *Imperialism in East Africa, Vol. 2: Imperialism and Integration*, (Zed Press Ltd 1982), p. 18.

³ Elinaza Sendoro, E., et al., *Sengodo Mrungi: Breathing the Constitution*, (LHRC 2014), p. 293.

⁴ Ibid.

⁵ Ibid.

⁶ See the Buganda Agreement, 1900; the Buganda Agreement 1955; the Ankole Agreement 1901; and the Toro Agreement, 1900.

⁷ Consolidated Report of the Mediator of the East African Community, 1981, p. 4.

⁸ Elinaza Sendoro, E., et al., *Sengodo Mrungi: Breathing the Constitution*, (LHRC 2014), p. 293.

⁹ Ibid.

1936, respectively. Although the British government sought what they called “closer cooperation” in the administration of the two territories, there was no mention of a federation at the time. Probably gradual amalgamation in the form of a unitary union was what they envisaged, as Sir Harry Johnson recommended. As indicated below, the idea of a federation emerged when Tanganyika entered the scene.

2.1. World War I and British Plans

The idea of federating the East African states draws its genesis from World War I. Thus, it is necessary to highlight the war and its resultant consequences on the idea of creating a federal union. When the war broke out in Europe on 28 July 1914, expectations were that Africa in general and East Africa in particular would stay out of hostilities. For instance, Dr Albert Heinrich Schnee, the German Governor in *Deutsch-Ostafrika* (German East Africa), did not want to be involved in the hostilities.¹⁰ German East Africa comprised modern Mainland Tanzania, Rwanda, Burundi and the Kionga Triangle in northern Mozambique. Similarly, the Governor of British East Africa (now Kenya), Sir Henry Conway Belfield, was averse to the idea of engaging in the war and actually proclaimed the neutrality of British East Africa.¹¹ However, hopes for peace were dashed on 8 August 1914 when two British cruisers bombed the Dar es Salaam harbour.¹² Schnee resisted all temptations to retaliate and, instead, initiated negotiations with the British in the hope of maintaining peace.¹³

While British bureaucrats in East Africa were keen to avoid hostilities, British politicians in Europe had different ideas. For politicians, war in East Africa was necessary for two major reasons. Firstly, as Britain coveted the vast colony, war had opened an opportunity to acquire it. The British wanted the colony for two major purposes. One was the

¹⁰ Hew Strachan, *The First World War in Africa*, (OUP 2004), p. 100.

¹¹ John Keegan, *The First World War*, (Hutchison 1998) p. 210.

¹² Hew Strachan, *The First World War in Africa*, (OUP 2004), p. 101.

¹³ Ross Anderson, *The Forgotten Front: The East African Campaign*, (Temptus Publishing 2004), p. 40.

desire to exercise more control over trade on the East African coast. Another was that annexation of the colony would provide an opportunity to realise their long-held dream of constructing a Cape Town-Cairo railway. Secondly, they feared that the Germans could use the colony as a training and preparation ground for the service of war in Europe.¹⁴ Consequently, the British attempts to land their troops in Tanga on 23 August 1914 and 8 September 1914 brought them into direct confrontation with the Commander of the German *Schutztruppe* (army), Lt. Col. Paul von Lettow-Vorbeck. The encounters marked the beginning of a four-year war between Germans and their local *askaris* on the one hand, and the British, Belgians, Portuguese, South Africans and their locally recruited soldiers, on the other. “The East African campaign,” as historians characterise the war, destroyed lives and the economy. The fighting went on without the victor or vanquished until its official cessation on 25 November 1918, following an armistice in Europe.¹⁵

Even before the cessation of the war, the British had two alternative plans for the colony. The first one was a unitary union with the British East Africa Protectorate (Kenya). A precedent existed, as they had merged North-Eastern Rhodesia and North-Western Rhodesia (Barotziland) to form Northern Rhodesia (modern Zambia) in 1911.¹⁶ To merge German East Africa and British East Africa and put them under the same administration would have reduced administration costs.¹⁷ Colonies were not states under international law; they were mere

¹⁴ John Iliffe, *A Modern History of Tanganyika*, (CUP 1979), p. 246.

¹⁵ Hew Strachan, *The First World War in Africa*, (OUP 2004), p. 182.

¹⁶ A Proclamation No. 3 of 1911 declared “Whereas by the Northern Rhodesia Order in Council, 1911, the territory formerly known as North-Eastern Rhodesia (hereinafter referred to as “North-Eastern Rhodesia”) and the territory formerly known as Barotziland-North-Western Rhodesia were united into one territory under the name of Northern Rhodesia.” See also the Northern Rhodesia Order-in-Council, p. 1911.

¹⁷ Alexander Makulilo, et al., “An Institutional Mission That Nobody Wants to Accomplish: Actors and Interests in the Genesis of the East African Political Federation,” (2018) *the African Review*, p. 100; and Tomasz Milej, “East African Community (EAC) – inspiring constitutional change by promoting constitutionalism?” (2023) *International Organisations Law Review*, p. 9.

appendages of the European metropolises as they lacked sovereignty. However, they were organised in such a way that each had its own government, something that gave them an appearance of independent political units.

Something needs to be said about “unitarianism” before proceeding further. It is a system of unified governmental power in which one governmental authority exercises control over the entire state territory.¹⁸ Other governmental authorities, which are ordinarily called “local governments,” “exist at the mercy of the central government.”¹⁹ Constitutionally, such authorities are mere branches or agents of the central government that retains the authority to establish, restructure or even abolish them altogether.

The second plan was to create a vast colony running from Rhodesia all the way to Egypt.²⁰ This would have constituted modern Burundi, Egypt, Kenya, Mainland Tanzania, Malawi, Rwanda, Somalia, South Sudan, Sudan, Uganda, Zambia, and Zimbabwe. Unlike the plan which entailed a unitary union, as stated, the second plan related to a federal union, probably due to its vast territorial vastness. This particular plan coincided with Cecil Rhodes’ long-held dream of building the Cape-to-Cairo railway.²¹

2.2. Frustration of the Unitary Union Plan

The Paris Peace Conference was the next major post-war political event that brought all states that participated in the hostilities and many others that did not. The conference deliberated a host of issues, but the fate of

¹⁸ Joseph F. Zimmerman, *Contemporary American Federalism: The Growth of National Power*, (2nd ed, State University of New York Press 2008), p. 2.

¹⁹ Ramesh D. Dikshit, “Geography and Federalism,” (1971) *Annals of the Association of American Geographers*, p. 99; also cited in John Jingu, “The Union of Tanganyika and Zanzibar: In Search of a Viable Structure,” (2014) *The African Review*, p. 94.

²⁰ Michael D. Callahan, “NOMANSLAND: The British Colonial Office and the League of Nations Mandate for German East Africa, 1916-1920”, (1993) *Albion: A Quarterly Journal Concerned with British Studies*, p. 454.

²¹ H. Wilson Fox, “The Cape-to-Cairo Railway and Train Ferries,” (1920) *The Geographical Journal*, p. 73.

former German and Ottoman Empire colonies took centre stage. There were two opposing camps on the issue. On one side, the French, Italians and the British, supported by their various dominions, wanted such colonies to be annexed. On the other side, the USA was diametrically opposed to the annexation proposal. Instead, it proposed two alternative options as solutions to the matter. The first option was a proposal for the self-determination of the natives of the colonies. In other words, the USA wanted the natives in the colonies to be granted full independence. Major colonial powers (Britain, France and Italy) rejected the idea of self-determination. For instance, the British Foreign Secretary (1916-1919), Arthur James Balfour, argued that Britain would not accept a broad principle such as self-determination to be applied to the people who are “wholly barbarous, undeveloped, and unorganised black tribes, whether they be in the Pacific or Africa.”²² The second option proposed that the League of Nations, the body that the Conference formed, should be given the responsibility to govern the colonies. The debate went on for months without a consensus.

To break this stalemate, General Jan Smuts, who formed part of the South African delegation, came up with what he called “practical suggestions”.²³ One of the practical solutions was the creation of the “mandates system.”²⁴ According to him, direct international control had never worked in the past. Thus, a practical solution was to allow a single power to occupy a territory under the supervision of the League of Nations. This was agreed and became the compromise position of the two contrasting sides and, therefore, resulted in the mandates system. The Conference gave entire German East Africa to Britain as the mandate power. Also, the Conference formed the Permanent Mandates

²² William Roger Louis, “Great Britain and the African Peace Settlement of 1919” (1966) *The American Historical Review*, p. 880.

²³ Naomi Howerton Coryell, *Jan Christian Smuts at the Paris Peace Conference, 1919*, (MA Thesis Submitted to University of Nebraska, 1963), p. 52.

²⁴ William Roger Louis, “Great Britain and the African Peace Settlement of 1919” (1966) *The American Historical Review*, p. 885.

Commission and the Administration of Mandates (simply referred to as “the Mandates Commission”) to sort out various territorial claims and oversee the mandates system.²⁵ Later, through separate negotiations, Britain ceded the Kionga Triangle to the Portuguese and Ruanda-Urundi (modern Rwanda and Burundi) to Belgium. The Mandates Commission and, subsequently, the Supreme Council of the Principal Allied Powers affirmed the decision on 30 May and 23 September 1919.²⁶ Apart from the two decisions to chip away part of the territory, the British also renamed the territory “Tanganyika Territory”, the name which became effective on 1 February 1920.²⁷ The process of separating Ruanda-Urundi from Tanganyika was completed in 1922.

The rejection of the annexation proposal frustrated the British idea of unitary fusion of Tanganyika and British East Africa, which was renamed “Kenya” on 23 July 1920.²⁸ This was the first problem and a blow to their union intentions. Nonetheless, the British never lost hope of realising their dream. Initially, they hoped that the mandates system would collapse and give them an opportunity to proceed with the unitary union.²⁹ The reason for the hope was that members of the US Senate had refused to ratify the Versailles Treaty because they disliked the US involvement in European affairs.³⁰ Unfortunately for the British, although President Woodrow Wilson had political problems at home, the mandate system did not collapse immediately, as they had hoped.

²⁵ Article 22 of the Covenant of the League of Nations, p. 1919.

²⁶ H.B. Thomas, “The Kionga Triangle” in J.P. Moffett (ed.), *Tanganyika Notes and Records*, (No.31, 1951), p. 49.

²⁷ John Iliffe, *A Modern History of Tanganyika*, (CUP 1979), p. 247.

²⁸ Chanan Singh, “The Republican Constitution of Kenya: Historical Background and Analysis” (1965) *The International and Comparative Law Quarterly*, p. 883.

²⁹ Michael D. Callahan, “NOMANSLAND: The British Colonial Office and the League of Nations Mandate for German East Africa, 1916-1920” (1993) *Albion: A Quarterly Journal Concerned with British Studies*, p. 462.

³⁰ *Ibid.*, p. 458.

2.3. The British Mandate for East Africa 1922 and the Federal Union

In 1922, the Supreme Council of the Principal Allied Powers issued *the British Mandate for East Africa 1922*. This was a contractual document of international character that indicated the British mandate or authority in German East Africa. In other words, it was a treaty between the League of Nations and Britain on the way the territory would be managed. The provisions of the Mandate still used the name “German East Africa,” something which indicated that the British had renamed the territory without informing or getting permission from the League of Nations. Furthermore, it did not make any reference to Article 22 of the Covenant of the League of Nations 1919, which was the legal basis for the mandates system. This was possible because the British took a central role in the drafting of the document and, as noted, they still hoped that the mandates system, which was established under the Covenant of the League of Nations 1919, would collapse at a certain future point and avail them an opportunity to merge Kenya and Tanganyika. This meant that the British were determined to ignore or circumvent the Covenant. Article 10 of the Mandate provided as follows:

The Mandatory shall be authorized to constitute the territory into a *customs, fiscal and administrative union or federation* with the adjacent territories under his own sovereignty or control; provided always that the measures adopted to that end do not infringe the provisions of this mandate [Italics added].

The article indicates at least three things. First, the British knew that a unitary union, which was their original intention, would be clearly violative of the Covenant of the League of Nations 1919 but still harboured hopes that things could change in their favour. Second, as an alternative to the unitary union, they resorted to customs, fiscal, administrative or federal union. Thus, the idea of a federation and administrative union came to be a Plan B when annexation and unitary union were ruled out. Third, the provision indicated that the British had changed their initial idea of just merging Kenya with Tanganyika and

expanded it to encompass “adjacent territories” such as Uganda, Nyasaland, and Northern Rhodesia.

The significance of the provision was that it documented the idea of a federal union in East Africa for the first time. It was Leo Amery, the British Colonial Undersecretary at the time, who drafted the provision after seeking permission from his boss, Alfred Milner (the Secretary of State for Colonies).³¹ The fact that the drafter of the provision sought permission first before he drafted it indicates that he was aware of its patent illegality. The last German Governor in German East Africa, Heinrich Schnee, argued that the provision violated the Covenant of the League of Nations, 1919.³² This argument can hardly be faulted. While the Covenant permitted Southwest Africa (modern Namibia) to be administered conjunctively with South Africa, it disallowed such a thing in respect of German East Africa and other colonies.³³ Neither did the Covenant sanction the territory to be fused with others. The intention to administer Class B mandate territories separately was not only clear in the provisions of the Covenant but it was also thoroughly discussed in the Paris Peace Conference.

Despite its blatant illegality, Article 10 of the British Mandates for East Africa, 1922, which declared the British intention to unite Tanganyika with other territories, is of huge historical and political significance. As shown earlier, the British bureaucrats in East Africa and politicians in London started to discuss the union idea during and immediately after the conclusion of the war. Thus, as noted, the provision became the first legal declaration which concretised the union idea. The provision laid down the foundation for future unity. It is incorrect to regard the colonially created boundaries as permanently fixed and sacrosanct. Thus,

³¹ D. Wadada Nabudere, “The “Closer Union” Issue and Its Implications for the Evolution of British Colonial Policy in East Africa: 1923-1931”; a Paper presented for discussion at the History Department Seminar on 9 November 1978, p. 13.

³² Heinrich Schnee, “The Mandate System in Germany's Lost Colonies” (1930) *Current History* (1916-1940), p. 77.

³³ See the Covenant of the League of Nations, 1922, art. 22.

the British intention to merge Kenya and Tanganyika initially, and then later with Uganda and Zanzibar, into one political unit was, undoubtedly, a noble political objective. Certainly, the British had their own colonial intentions such as the reduction of the administration costs and, as Nabudere advances, “a larger market in order to exploit and oppress the people of East Africa”.³⁴ However, the amalgamation of the territories would have a beneficial impact on the natives as it had potential for socio-political development and economic prosperity. As the Report of the British East Africa Commission remarked, “East Africa can only progress economically and socially on the basis of full and complete co-operation between all races”.³⁵ A federal union would have allowed the people in the region to share resources, increase trading activities, expand their market and, ultimately, hasten economic growth and prosperity. Furthermore, at independence a federal union would have created a powerful state with more influence on international affairs and with a greater capability to defend itself from external aggression. Thus, the newly established EAC in 1999, which envisions a federal union as its ultimate objective, traces its origin to the idea which was put down in writing in 1922.

Having seen how the idea of a federal union came about in East Africa, it is necessary to examine the nature of federalism, albeit briefly. Three famous definitions provide a good starting point. In the 1859 US Supreme Court case *Ableman v. Booth*³⁶, Roger B. Taney, CJ, described federalism in the following terms: “The powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignty, acting separately and independently of each other, within their respective spheres.”³⁷ Wheare stated a definition that is often cited, especially in the

³⁴ D. Wadada Nabudere, *Imperialism and Revolution in Uganda*, (Onyx Press and TPH 1980), p. 36.

³⁵ The Report of the East Africa Commission, 1925, pp. 22-23.

³⁶ 62 U.S. 506 (US, 1859).

³⁷ Cited in Daniel J. Elazar, “Federal-State Collaboration in the Nineteenth-Century United States” (1964) *Political Science Quarterly*, pp. 248-249.

Commonwealth: federalism is “the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent.”³⁸ Riker stated a slightly different definition. According to him, federalism is “a political organisation in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions”.³⁹

From the above definitions and others,⁴⁰ it can be deduced that federalism is a political or constitutional system that bears at least four salient features. First, there are two levels of government, that is, the general and regional governments, all of which are constitutionally established and deal with citizens directly. Second, each level of government is autonomous or independent from, and coordinate to, the other. This means that, as Fenna observes, “neither level can unilaterally alter the status or roles of the other.”⁴¹ The arrangement is normally constitutionally fixed, and it can be changed through a constitutional amendment or replacement. Third, internal sovereignty or governmental power is constitutionally divided and shared functionally and territorially. While it is possible for the two levels to share certain powers, ordinarily “each government retains, at least in principle, certain areas of decision-making as unique of authority.”⁴² Lastly, external sovereignty, that is, the power to engage in international relations is ordinarily unified and

³⁸ Kenneth C. Wheare, *Federal Government*, (Clarendon Press 1947), p. 11; cited in Gregory Gleason, “The Federal Formula and the Collapse of the USSR” (1992) *Publius*, p. 143.

³⁹ William H. Riker, “Federalism”, in Fred I. Greenstein and Nelson W. Polsby (eds.), *Handbook of Political Science: Governmental Institutions and Processes*, (Addison-Wesley 1975), p. 101; also cited in Sujit Choudhry and Nathan Hume, “Federalism, devolution and secession: from classical to post-conflict federalism” in Tom Ginsburg and Rosalind Dixon, (eds.), *Comparative Constitutional Law*, (Edward Elgar Publishing Ltd 2011), p. 357.

⁴⁰ Daniel J. Elazar, *Exploring Federalism*, (The University of Alabama Press 1987), p. 12; Arthur W. Macmahon, “The Problems of Federalism: A Survey” in Arthur W. Macmahon (ed.), *Federalism: Mature and Emergent*, (Doubleday 1955), p. 4.

⁴¹ Alan Fenna, “Benchmarking in federal systems,” in Alan Fenna and Felix Knüpling (eds.), *Benchmarking in Federal Systems*, (Productivity Commission 2012), p. 17.

⁴² Gregory Gleason, “The Federal Formula and the Collapse of the USSR,” [1992] *Publius*, p. 143.

reserved for the entire state and the general government exercises this power on behalf of the state as a whole.

As noted, colonies, protectorates and mandate territories were not states.⁴³ Instead, they were appendages of the metropolises where sovereignty belonged.⁴⁴ Nonetheless, the British sought to create a constitutional arrangement that corresponded with that of a federal state. In other words, they wanted to establish a system in which governmental power was divided between the central or general government and regional governments. On the one hand, the general government would have exercised government powers in respect of certain matters throughout East Africa and, on the other hand, semi-autonomous subunit governments or regional governments would have exercised control over certain matters within their territorial boundaries.

2.4. Inquiry on the Possibility and Modality of Union

The British Undersecretary for Colonies, Leo Amery, who had the East African federation project “very much at heart”, wanted its immediate implementation.⁴⁵ However, his boss, Minister for Colonies (usually designated as “the Secretary of State for Colonies”), would not allow him. According to Amery, “He let me draft a clause in the Tanganyika Mandate expressly providing for federation with the neighbouring territories, but was inclined to let things in East Africa settle down before taking action.”⁴⁶ Thus, two years passed without taking any significant step towards the realisation of the federal union idea. It was in 1924 when British politicians kickstarted the process of the integration. The East

⁴³ B. Sen, *A Diplomat's Handbook of International Law and Practice*, (Martinus Nijhoff 1965), p. 10.

⁴⁴ Ibid.

⁴⁵ D. Wadada Nabudere, “The “Closer Union” Issue and its Implications for the Evolution of British Colonial Policy in East Africa: 1923-1931,” A Paper Presented for Discussion at the History Department Seminar on 9 November 1978, p. 13.

⁴⁶ Leo S. Amery, *My Political Life*, (Vol. II, Hutchison 1955) 360. in D. Wadada Nabudere, “The “Closer Union” Issue and its Implications for the Evolution of British Colonial Policy in East Africa: 1923-1931,” A Paper Presented for Discussion at the History Department Seminar on 9 November 1978, p. 13.

African Committee under the chairmanship of Lord Southborough, which sat in London, recommended to the British government to form a commission on East Africa.⁴⁷ Consequently, in the same year, the government set up the East Africa Commission (famously known as “the Ormsby-Gore Commission”) under the Chairmanship of William Ormsby-Gore, who was a Member of Parliament.⁴⁸ The chief mission of the Commission was to inquire into “the measures to be taken to accelerate the general economic development of the British East African Dependencies and the means of securing closer co-ordination of policy on such important matters as transportation, cotton-growing, and the control of human, animal, and plant diseases.”⁴⁹ It was required to visit “Northern Rhodesia, Nyasaland, Tanganyika Territory, Uganda, and Kenya” but it also visited Zanzibar for two days on the invitation of the Sultan of Zanzibar and the Zanzibar Chamber of Commerce.⁵⁰ Two comments are pertinent in this regard. First, the wide coverage of the inquiry indicated that the British still had ambitions for a gigantic federalised colonial territory running from South Africa all the way to Egypt. Second, while the main purpose of the Commission was to explore the possibility of federating Tanganyika with the neighbouring territories, as noted, the Commission’s terms of references entirely excluded the word “federation”.⁵¹ As noted earlier, Germans and especially the last Governor had raised complaints against the British intentions of integrating Tanganyika with the neighbouring territories. It would seem that the exclusion of the word from the terms of reference was a strategy to ensure that the Germans would not obtain documentary evidence and file a complaint in the Permanent Mandates Commission.

⁴⁷ Report of the Select Committee of the House of Lords and House of Commons to Consider the Reports on Closer Union in East Africa, 1930, p. 8.

⁴⁸ See Report of the East Africa Commission, 1925.

⁴⁹ Ibid., p.1.

⁵⁰ Ibid.

⁵¹ Ibid.

When the Commission reported in 1925, Leo Amery was himself the Secretary of State for Colonies.⁵² The Commission recommended the postponement of a federal union project and it assigned two major reasons for its recommendation.⁵³ First, the territories had different legal statuses.⁵⁴ From 1920 to 1963, Kenya was a zonkey with both brown colour and stripes blended together, so to speak. It was both a colony and protectorate. While the coastal strip, which was leased from Zanzibar in 1895, was a protectorate, the rest of the mainland was a colony.⁵⁵ Nonetheless, this dual character never troubled the British. Tanganyika was a mandate territory as explained. Northern Rhodesia, Nyasaland, Uganda and Zanzibar were protectorates. The biggest complication came from the Tanganyika's status of being a mandate territory for which the Covenant of the League of Nations 1919 forbade its integration with other territorial units. The Commission thought that this difference was a hindrance to the formation of a perfect federation.⁵⁶

It is necessary to examine, albeit briefly, the difference between a colony, protectorate and mandate territory. From the international law standpoint, on the one hand, a protectorate is a state, which has submitted itself to a stronger state for protection.⁵⁷ On the other hand, a colony is a geopolitical entity that lacks sovereignty but a mere appendage to, and under the sovereignty of, a metropole.⁵⁸ Thus, while a colony is usually bereft of any sovereignty, a protectorate would retain its internal sovereignty.⁵⁹ Ordinarily, the protectorate cedes its external sovereignty

⁵² Ibid.

⁵³ See the Report of the East Africa Commission, 1925, pp. 7-8.

⁵⁴ Jane Banfield, "Federation in East Africa" (1963) *International Journal*, p. 183.

⁵⁵ The lease was effected through the Agreement between Great Britain and Zanzibar Respecting the Possessions of the Sultan of Zanzibar on the Mainland and Adjacent Islands Exclusive of Zanzibar and Pemba, 1895.

⁵⁶ Jane Banfield, "Federation in East Africa" (1963) *International Journal*, p. 183.

⁵⁷ B. Sen, *A Diplomat's Handbook of International Law and Practice*, (Martinus Nijhoff 1965), p.11.

⁵⁸ Ibid. See also, L. Oppenheim, *International Law: A Treatise*, (Vol.1, Longmans, Green & Co.1905), p. 101.

⁵⁹ Ibid.; Malcolm N. Shaw, *International Law*, (6th ed, CUP 2008), p. 499.

to the protector that would deal with international relations.⁶⁰ Furthermore, like the colony, the mandate territory lacked both internal and external sovereignty which were vested in the British government and the League of Nations.⁶¹ Nonetheless, in real practice this legal difference was insignificant because the British simply treated protectorates as colonies. In Zanzibar, for instance, the Sultan lost to the British even the power to determine his own salary.⁶² It was classic colonialism rather than protectionism. While British legal and official documents acknowledged protectionism, the actual practice was nothing short of colonial administration, which was largely aimed at economic exploitation and social subjugation.

Second, the Commission indicated that opinion was against the federal union.⁶³ As it reported, the Kabaka (king) of Buganda was against it. Also, white settlers in Kenya viewed the idea of a federation with suspicion. They feared losing their privileged position in Kenya if the colony was integrated with the neighbouring territories.⁶⁴ Instead, they advocated for self-rule in the lines of white settlers' autonomy in Southern Rhodesia (modern Zimbabwe).⁶⁵ Furthermore, public opinion in Zanzibar was overwhelmingly hostile to the federal union. Again, various Indian associations were opposed to the proposal. Lastly, African and Asian communities feared that Kenyan white settlers could dominate a central authority, if it was established. In the end, the Commission concluded, "For all these reasons we feel bound to reject the idea of federation at present."⁶⁶ Instead, the Commission recommended "co-ordination and

⁶⁰ B. Sen, *A Diplomat's Handbook of International Law and Practice*, (Martinus Nijhoff 1965), p. 11; see also, L. Oppenheim, *International Law: A Treatise*, (Vol.1, Longmans, Green & Co. 1905), p. 101. Malcolm N. Shaw, *International Law*, (6th ed, CUP 2008), p. 499.

⁶¹ Quincy Wright, "Sovereignty of the Mandates" (1923) *The American Journal of International Law*, p. 702.

⁶² Mohamed Bakari, "Constitutional Development of Zanzibar, 1890 - 2005: An Overview" (Unpublished Paper), p. 3.

⁶³ The Report of the East Africa Commission, 1925, pp. 7-8.

⁶⁴ Godfrey K. Sang, "An Outline History of the East Africa Central Legislative Assembly (1948-1967)" (Unpublished Paper), p. 6.

⁶⁵ Ibid.

⁶⁶ Report of the East Africa Federation, 1925, p. 8.

co-operation among the units could be achieved by the convening of regular conferences of Governors of East Africa and of Northern Rhodesia and Nyasaland and the British Resident, Zanzibar.”⁶⁷ As a result, in 1926, Governors met for the first time in Nairobi. However, this body was a mere administrative organ formed without any backing by any ordinary legislation or order-in-council. Thus, the lack of consensus and the status of Tanganyika emerged as the earliest obstacles towards federating the East African territories.

Certainly, the Ormsby-Gore Commission’s recommendation must have hugely frustrated Leo Amery, who was the most passionate advocate for a federalist integration or a closer union at the time. Nonetheless, he never gave up. In early 1927, just two years after the Ormsby-Gore Commission had reported, Amery summoned the Governors of Kenya, Tanganyika and Uganda to London for the purpose of discussing with him a White Paper on the British policy in East Africa, titled “Future Policy in Eastern Africa”.⁶⁸ Apart from declaring British policy in the region, the 1927 White Paper indicated the intention to appoint another inquiry commission for further inquiry on a closer union or federation of three territories.⁶⁹ According to the Paper, the primary focus was Kenya, Tanganyika and Uganda.⁷⁰ However, according to it, Zanzibar and Nyasaland could join later.⁷¹ As will be seen later, Zanzibar did not frequently feature in the federation debate and British integration plans. It should be remembered that the Sultan of Zanzibar was a member of the Omani Al Busaidi dynasty. The British had already established close ties with the Al Busaidi dynasty in Oman as early as 1750.⁷² The

⁶⁷ Jane Banfield, “Federation in East Africa,” (1963) *International Journal*, p. 183.

⁶⁸ Report of the Select Committee of the House of Lords and House of Commons to Consider the Reports on Closer Union in East Africa, 1930, p. 9.

⁶⁹ Raymond Leslie Buell, “The Destiny of East Africa” (1928) *Foreign Affairs*, p. 420.

⁷⁰ Report of the Select Committee of the House of Lords and House of Commons to Consider the Reports on Closer Union in East Africa, 1930, p. 10.

⁷¹ *Ibid.*

⁷² M. Reda Bhacker, “Family Strife and Foreign Intervention: Causes in the Separation of Zanzibar from Oman: A Reappraisal” (1991) *Bulletin of the School of Oriental and African Studies*, pp. 269–280. See also Francis Owtram, “A Close Relationship: Britain

integration of Zanzibar with the mainland could be viewed as its annexation, something which could have disrupted diplomatic ties with the dynasty in Oman and, thus, endangering British interests in the oil-rich Oman.

Subsequently, Amery appointed the Commission on the Closer Union of the Eastern and Central African Dependencies (called “the Hilton-Young Commission”) under the chairmanship of Edward Hilton-Young, a journalist and MP for Norwich.⁷³ The name of the Commission and its terms of reference indicated that the British were still thinking in terms of the federal union of Kenya, Uganda, Tanganyika, Nyasaland, and Northern Rhodesia. One of the terms of references, which were set out in the 1927 White Paper, was “to make recommendations as to whether, either by federation or some other form of closer union” between governments of East and Central Africa could be established.⁷⁴ Another term of reference contained in the Paper required the Commission to consider which territories could be brought to a closer union or federated and particularly consider the best way to implement Article 10 of the Mandate of Tanganyika Territory (The British Mandate for East Africa 1922), which provided that, “the mandatory may constitute the Territory into a customs, fiscal and administrative union or federation with the adjacent territories under its own sovereignty or control, provided always that the measures adopted to that end do not infringe the provisions of the Mandate.”⁷⁵

Having visited East and Central Africa, the Commission reported in 1929. Professor Hayden characterises the Commission’s report as “one

and Oman Since 1750”, Qatar Digital Library, available at <<https://www.qdl.qa/en/close-relationship-britain-and-oman-1750>> (accessed 8 March 2023).

⁷³ Report of the Commission on the Closer Union of the Eastern and Central African Dependencies, 1929.

⁷⁴ Ibid., p. 267.

⁷⁵ Ibid.

of the constitutional landmarks of the British Empire.”⁷⁶ The Commission disfavoured the idea of a closer union or federation comprising all East and Central Africa territories. Instead, it recommended a gradualist approach towards a federation comprising Kenya, Tanganyika and Uganda. As the initial step, it proposed the establishment of a central organ styled “the Central Executive Authority,” under the leadership of a High Commissioner or Governor-General.⁷⁷ According to the report, the functions of such official would be essentially three.⁷⁸ First, to protect the interests of the British government in East Africa. In this connection, the official would supervise governments of the three subunits, intervene in respect of legislation, and ensure the implementation of the British policy.⁷⁹ However, the report said nothing about the exploitation of the natives, which was the central theme of colonialism. Instead, the responsibility of the British government was magnanimously described as the “trusteeship of the natives.”⁸⁰ Second, it would ensure justice and peaceful co-existence of various racial communities. The three major racial communities that existed at the time were Africans, European white settlers and Indian traders. Third, it would coordinate common services.

Also, it proposed the formulation of the main principles of imperial policy that would define the relationships between the natives and immigrants.⁸¹ The British were concerned with the protection of white settlers from political marginalisation. Furthermore, the report recommended the development of local governments and handling the

⁷⁶ Ralston Hayden, “Plans for the Union of Great Britain's Eastern and Central African Colonies” (1929) *British Empire*, p. 1022.

⁷⁷ Royal Institute of International Affairs, “The Hilton-Young and Wilson Reports on East Africa” (1929) *Bulletin of International News*, p. 273.

⁷⁸ Ralston Hayden, “Plans for the Union of Great Britain's Eastern and Central African Colonies” (1929) *British Empire*, p. 1024.

⁷⁹ Royal Institute of International Affairs, “The Hilton-Young and Wilson Reports on East Africa” (1929) *Bulletin of International News*, p. 273.

⁸⁰ *Ibid.*, p. 1024.

⁸¹ *Ibid.*, p. 273.

issue of the representation of Indians and blacks in the Kenyan Legislative Council.⁸² Furthermore, the Commission recommended the establishment of what came to be called “common services”.⁸³ These were inter-boundary or interterritorial services which included (a) transport (comprising “railways, ports, harbours, roads, mechanical transport, aviation, posts and telegraphs”); (b) customs; (c) defence; (d) research, and (e) an East African service.⁸⁴ In other words, these matters constituted the jurisdiction of the central authority or the future federal government.

The Report of the Hilton Young Commission indicated that its chairman had differed with other members in certain points.⁸⁵ To clear the air, in March 1929, Amery ordered Sir Samuel Wilson, the Permanent Undersecretary for Colonies to visit East Africa in April 1929 to discuss the recommendations of the Hilton Young Commission and then report on the outcome of his consultations.⁸⁶ Wilson visited East Africa, consulted various stakeholders and then submitted a report with detailed recommendations on the closer union.⁸⁷ One of the remarks in the report was that “all the communities, with the exception of some in Tanganyika, appeared to be frightened of any idea of closer political

⁸² Ibid.

⁸³ Ralston Hayden, “Plans for the Union of Great Britain's Eastern and Central African Colonies” (1929) *British Empire*, p. 1024.

⁸⁴ Ibid., p. 1023.

⁸⁵ Report of the Select Committee of the House of Lords and House of Commons to Consider the Reports on Closer Union in East Africa, 1930, p. 10.

⁸⁶ The terms of reference stated as follows: “You are to proceed to East Africa in order to discuss the recommendations of the Hilton Young Commission for the closer union of Kenya, Tanganyika and Uganda (and such possible modifications of these proposals for effecting the object in view as may appear desirable) with the governments concerned, and also with any bodies or individuals representing the various interests and communities affected, with a view to seeing how far it may be possible to find a basis of general agreement. You are to ascertain on what lines a scheme for a closer union will be administratively workable and otherwise acceptable, and to report the outcome of your consultations.” [Report of the Select Committee of the House of Lords and House of Commons to Consider the Reports on Closer Union in East Africa, 1930, p. 10].

⁸⁷ Report of Sir Samuel Wilson on his visit to East Africa. Presented to Parliament, September 1929.

union”.⁸⁸ Nonetheless, it recommended the establishment of the office of a High Commissioner in East Africa. The High Commissioner would be the chief representative of the Secretary of State for Colonies.⁸⁹ More significantly, he would be charged with the coordination and oversight of legislation and policy issues in Kenya, Tanganyika and Uganda. The House of Lords, the British upper legislative house, was informed that harmonisation of various policies in the three territories was necessary.⁹⁰ In the pursuit of the harmonisation policy, the Secretary of State for Colonies, Lord Passfield, gave the example of the Maasai who inhabited Kenya and Tanganyika and, therefore, called for the harmonisation of immigration policies and laws.⁹¹ As previous reports, Wilson’s report distanced itself away from the federal union issue although it did not completely disappear from British political debates. Once again, consultations indicated a lack of consensus.

In October 1929, Lord Passfield, the Secretary of State for Colonies for the Labour Party government, submitted a memorandum to the British Cabinet which contained three proposals.⁹² First, making a comprehensive declaration on the native policy in East Africa. Second, preparing an instrument for the establishment of the office of a High Commissioner and a legislative council in East Africa. Third, laying the declaration and instrument in Parliament with a resolution for the appointment of a joint committee of the House of Lords and House of Commons to consider the proposals.

The Cabinet briefly discussed the proposals and, subsequently, a joint select Committee was formed in 1930 to consider the matter.⁹³ Instead

⁸⁸ Royal Institute of International Affairs, “The Hilton-Young and Wilson Reports on East Africa” (1929) *Bulletin of International News*, p. 276.

⁸⁹ See Hansards, available at <Hansards, <https://hansard.parliament.uk/Lords/1930-07-03/debates/2ee2eb9c-3a83-47df-8bae-f3a9dabbd1d6/EastAfrica>>.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Cabinet, “Conclusions of Meetings of the Cabinet” 7 October – 23 December 1929, p. 156.

⁹³ Report of the Select Committee of the House of Lords and House of Commons to Consider the Reports on Closer Union in East Africa, 1930, p. 12.

of acting on pre-existed reports and recommendations, the Committee decided to collect views of various people, organisations and authorities both in Britain and East Africa.⁹⁴ Martin Kayamba, one of the founders of the Tanganyika African Association (TAA), was a Tanganyika native who went to London to express his opinion on the closer union of East African territories.⁹⁵ Subsequently, the Committee reported on the views that it had received. According to it, there were people who objected to the idea of a closer union for three reasons. First, the project of forming a closer union would be expensive considering the poor economic situation facing the territories at the time. Second, natives in Tanganyika and Uganda showed great reluctance to be integrated with Kenya. It would appear that a sizeable population of white settlers in Kenya was the source of the fear as the union would give them an opportunity to extend their land acquisition interests beyond Kenya. Interestingly, even white settlers in Uganda disfavoured the proposal. In this regard, the Committee noted: “The European witnesses from Uganda, both official and unofficial, consider any union with Kenya would be most unpopular, and the native evidence was very hostile to it.”⁹⁶ Third, natives also objected to any suggestion to establish any authority which would have acted as an intermediary between colonial governments in the territories and the British government. As the Committee remarked, the interests of the largest majority of the natives were confined to their tribalist and territorial affairs, not the regional ones.⁹⁷

Apart from objections, some opinions supported integration. For instance, some people proposed a quasi-federal amalgamation of Kenya and Uganda. The opinions excluded Tanganyika due to its mandate status complication as its integration would have necessarily required a permission of the League of Nations which was likely to be denied. The

⁹⁴ Jane Banfield, “Federation in East Africa” (1963) *International Journal*, p. 184.

⁹⁵ J. Cameron and W.A. Dodd, *Society, Schools and Progress in Tanzania*, (Pergamon Press, 1970), p. 82.

⁹⁶ Report of the Select Committee of the House of Lords and House of Commons to Consider the Reports on Closer Union in East Africa, 1930, p. 15.

⁹⁷ *Ibid.*, p. 14.

opinion indicated that at least three benefits would accrue from a quasi-federal union of Kenya and Uganda. First, as Uganda was land-locked, its integration with Kenya would have assured her of other forms of transport, especially road transport and thereby reducing its overreliance on railway transport. Second, the union would do away with intergovernmental and legal barriers to management, transport and fishing in Lake Victoria. Third, the union would ease the formulation of common policies to control diseases such as “sleeping sickness, plague, rinderpest, etc.” which existed across borders.⁹⁸

The Committee’s report is silent on the reasons for the quasi-federal union proposal instead of a classic federal one. Quasi-federalism is the most complex and undesirable governmental or constitutional system for which weighty reasons must exist for it to be adopted. To substantiate this assertion, some explanation of quasi-federalism becomes necessary.

Briefly, “quasi-federalism” or “semi-federalism” may be described as a constitutional system that combines both unitary and federal features.⁹⁹ In other words, it is something in the midway between unitarianism and federalism. It is an asymmetry—the system in which governmental power is distributed unequally among various units of a state. For instance, at independence, the Constitution of Uganda, 1962, provided a complex asymmetry or quasi-federal constitutional system. On the one hand, kingdoms of Ankole, Buganda, Bunyoro, and Toro and the District of Busoga had self-governments and, thus, the governmental power was divided between each of them and the central government.¹⁰⁰ On the other hand, the central government directly governed the rest of the administrative units of the country. As if this complexity was not enough, Buganda had more powers than other kingdoms. It had its own executive, parliament vested with power to make laws “for the peace,

⁹⁸ Ibid., p. 15.

⁹⁹ Sujit Choudhry and Nathan Hume, “Federalism, devolution and secession: from classical to post-conflict federalism” in Tom Ginsburg and Rosalind Dixon, (eds.), *Comparative Constitutional Law*, (Edward Elgar Publishing Ltd 2011), p. 358.

¹⁰⁰ The Constitution of Uganda, 1962, s. 2 (2).

order and good government”, a High Court and police force.¹⁰¹ This was the most complex constitutional system. In short, quasi-federalism is a constitutional system characterised by three hallmarks. Firstly, governmental power is divided and, thus, at least two levels of the government exist. Secondly, there is a disproportionate division and distribution of governmental powers among the various subunits of the state. In other words, the division is asymmetrical in nature because, as already noted, some regions may be given federal autonomy while others are directly and exclusively governed by the central government. Also, while some regions might exercise certain powers, others might be bereft of such powers. Thirdly, both federal and unitary features exist and are significant.

To revert to the Committee’s report, the Committee, after considering all views, noted that it was not the right time to take a far-reaching step towards making the union.¹⁰² Therefore, it rejected the idea of establishing a central authority in East Africa.¹⁰³ Thus, once again, the process of unification hit yet another snag due to the lack of broad-based consensus. As an alternative to the central authority, it recommended that the East African governments should explore means to enhance closer cooperation and coordination in “transport, customs duties and administration, scientific and technical services, posts and telegraphs, defence and commercial law.”¹⁰⁴ Furthermore, the Committee recommended the use of the Governors’ Conference in advancing all issues relating to a closer cooperation. Following this particular recommendation, the Secretary of State for Colonies, Phillip Cunliffe-Lister, issued a detailed administrative despatch to Governors of Kenya, Tanganyika and Uganda on 22 December 1931.¹⁰⁵ Five of his directions

¹⁰¹ The Constitution of Uganda 1962, s. 74 (1); read together with schedule 7 and ss. 80 and 94.

¹⁰² Report of the Select Committee of the House of Lords and House of Commons to Consider the Reports on Closer Union in East Africa, 1930, p. 14.

¹⁰³ Jane Banfield, “Federation in East Africa” (1963) *International Journal*, p. 184.

¹⁰⁴ *Ibid.*

¹⁰⁵ Correspondence Arising from the Report of the Joint Select Committee on Closer Union in East Africa, 1931-1932, pp. 6-12.

can be highlighted here: (i) the conference should meet annually in Nairobi; (ii) a permanent secretariat should be established in Nairobi; (iii) the secretary to the conference should be a Higher Commissioner for Transport for Kenya and Uganda; (iv) a statistician should be included in the secretariat; and (v) Governors of Northern Rhodesia, Nyasaland and the British Resident in Zanzibar could be invited to the conferences.

2.5. Deceleration of the Integration Process

The integration process through the preferable common services slowed down in the 1930s and early 1940s. At least two major factors are attributable to this deceleration. First, the 1929 British election saw the Tory Party's loss of power, on the one hand, and the takeover by the Labour Party, on the other. Due to this political change of guards, Leo Amery, who was a Tory politician, left office. As Banfield notes, Amery was the most "energetic promoter and supporter" of the East African integration process.¹⁰⁶ Although integration was the British government's policy, no one else at the time pushed the agenda so strongly and passionately as Amery.¹⁰⁷ Thus, his departure from office decelerated the process. As shown above, the successor government was hesitant to act on pre-existed plans. The Committee rejected the idea of creating a central organ and, instead, preferred integration of the three territories through interconnectedness of transport systems.

Second, the political situation in Germany complicated the process. As already mentioned, in 1930, the last German Governor in German East Africa, Heinrich Schnee, opposed the British efforts to integrate Tanganyika with the neighbouring territories.¹⁰⁸ This stance was shared among many Germans. The Nazi movement, which began in 1921 and gained immense popularity in the late 1920s, advocated for the return of

¹⁰⁶ Jane Banfield, "Federation in East Africa" (1963) *International Journal*, p. 183.

¹⁰⁷ Ibid.

¹⁰⁸ Heinrich Schnee, "The Mandate System in Germany's Lost Colonies" (1930) *Current History (1916-1940)*, p. 77.

the dispossessed German colonies.¹⁰⁹ Adolf Hitler and other Nazi adherents were openly against the dispossession of German colonies through the Versailles Treaty of 1919 and argued in favour of the renunciation of this treaty.¹¹⁰ Partly due to this policy the movement gained enormous support among the Germans and, eventually, Hitler took over as the German Chancellor in 1933.¹¹¹ The news that Hitler had taken over as the German Chancellor in 1933 hit a panic button in the British corridors of power and the media. Debate erupted in the British Parliament and press on the possibility of returning the dispossessed colonies to Germany.¹¹² To calm things down, on 23 March 1933, the British Secretary for Colonies made a public statement that “His Majesty’s Government has never contemplated any surrender of the Tanganyika Mandate.”¹¹³ Subsequently, on 7 March 1936, the German government expressed its hope that there would be “colonial equality.”¹¹⁴ Also, the President of the German Imperial Bank (*Reichsbank*), Hjalmar Schacht, expressed the view that Germany was suffering from food shortage, lack of raw materials and experienced difficulties in paying reparations due to the loss of colonies.¹¹⁵ Hitler himself was quiet but it was obvious that these officials represented his stance. These statements were ominous signals to the British who knew quite well that Hitler was preparing for war. On 9 March 1936, the British Prime Minister formed a committee to consider the issue of returning Cameroon, Togo and Tanganyika to Germany to appease Hitler.¹¹⁶ One

¹⁰⁹ Mary E. Townsend, “The German Colonies and the Third Reich” (1938) *Political Science Quarterly*, p. 186.

¹¹⁰ A. J. Nicholls, *Weimar and the Rise of Hitler*, (2nd ed, Macmillan Press Ltd 1979), p. 72.

¹¹¹ Hett, B.C., *The Death of Democracy: Hitler’s Rise to Power and the Downfall of the Weimar Republic*, Allen Lane, New York, 2018, p. 2.

¹¹² Andrew J. Crozier, *Appeasement and Germany’s Last Bid for Colonies*, (MacMillan Press 1988), p. 55.

¹¹³ Ibid.

¹¹⁴ William Roger Louis, “Colonial Appeasement, 1936-1938” (1971) *Revue Belge de Philologie Et D’Histoire*, p. 1176.

¹¹⁵ Andrew J. Crozier, *Appeasement and Germany’s Last Bid for Colonies*, (MacMillan Press 1988), p. 55.

¹¹⁶ William Roger Louis, “Colonial Appeasement, 1936-1938” (1971) *Revue Belge de Philologie Et D’Histoire*, p. 1180.

of the issues that prominently featured in the debate was the legality of such a move in view of the Versailles Treaty, 1919, which dispossessed all German and Turkish colonies.¹¹⁷ The British Colonial Secretary, who expressed his opinion to the Committee through a memorandum, said: “I feel the return of Tanganyika with its five million natives and its strategic position in the heart of our Imperial position the whole way from Cape Town to Wady Halfa, is and must remain out of the question on political and strategic grounds as well as economic.”¹¹⁸ Tanganyika particularly featured in the debate as the most important territory for both the British and Germans. In the end, the British concluded that the option was untenable partly because the consent of other powers was needed.¹¹⁹ This decision meant that the British had opted for war instead of returning Tanganyika to Germany.

The British fear that Germany would retake Tanganyika put many steps regarding the integration process on hold until the conclusion of war in 1945. A few examples to support this statement would suffice. Tanganyika’s Customs Department was not amalgamated into the pre-existed similar department for Kenya and Uganda until 1949.¹²⁰ Again, while the Kenyan and Ugandan railways and ports were joined in 1926, Tanganyika remained with its separate system until 1948.¹²¹ Similarly, Kenyan and Ugandan departments for posts and telegraphs were combined in 1924 and Tanganyika’s one was added in 1933 but was not completely merged with its Kenyan and Ugandan counterparts until 1948.¹²² Furthermore, the establishment of the office of the High Commissioner as the Hilton-Young Commission recommended remained unimplemented until 1948.¹²³ It should also be remembered

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Andrew J. Crozier, *Appeasement and Germany's Last Bid for Colonies*, (MacMillan Press 1988), p. 56.

¹²⁰ Jane Banfield, “Federation in East Africa” (1963) *International Journal*, pp. 182-183.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Augustus M. Akiwumi, “The Development of the Legislative Process in East African Integration” (1972) *Africa Spectrum*, p. 30.

that apart from the retardation of the integration process, the British apprehension that Hitler could ultimately regain Tanganyika coupled with its mandate status and possibility of the revocation of the mandate authority adversely affected the territory.¹²⁴ Of the three British East African territories (Kenya, Uganda and Tanganyika), Tanganyika was, as Sir Arthur Kirby notes, the Cinderella, the neglected wife, so to speak.¹²⁵ As two British colonial administrators attest, the British did virtually nothing to develop the territory economically for over two decades until 1948 when they enunciated some groundnuts-growing projects, which also failed.¹²⁶ They formulated no development plan until World War II.¹²⁷ Even the legislative council met in a small building that an Indian businessman donated because British administrators refrained themselves from carrying out any infrastructural development. They never build schools and industries to the extent they did in Kenya. By 1950, nearly 90% of Tanganyika's population was still illiterate "and tsetse fly infested five-sixths" of the territory.¹²⁸ Unfortunately, while the British refrained themselves from undertaking development projects in Tanganyika, they exercised no similar restraint in exploiting the territory's resources. Instead of being the "white man's burden" as it was touted, colonialism was truly a black man's disaster as the Tanganyika's case indicated.¹²⁹ This partly accounts for the fact Tanganyika was the poorest of three East African countries at independence in the early 1960s.

¹²⁴ Report of the Select Committee of the House of Lords and House of Commons to Consider the Reports on Closer Union in East Africa, 1930, p. 8.

¹²⁵ Arthur Kirby, "Tanganyika Triumph" (1962) *African Affairs*, p. 114.

¹²⁶ Ibid.; C.C. Harris, C.C. and Julius Nyerere, "Tanganyika Today" (1960) *International Affairs* (Royal Institute of International Affairs 1944-), p. 36; and Edward Twining, "The Situation in Tanganyika" (1951) *African Affairs*, p. 297; see also, Benjamin W. Mkapa, *My Life, My Purpose: A Tanzanian President Remembers*, (Mkuki na Nyota Ltd 2019), p. 18.

¹²⁷ Margaret L. Bates, "Tanganyika: The Development of a Trust Territory" (1995) *International Organisation*, p. 34.

¹²⁸ Ibid.

¹²⁹ Alfred Milner, a former British Secretary for Colonies once remarked that colonialism was a "Whiteman's burden". He meant that the British benefited nothing from their colonies. Instead, the incurred costs, time and energy in civilising the barbaric and backward races; cited in William Roger Louis, "Great Britain and the African Peace Settlement of 1919" (1966) *The American Historical Review*, p. 878.

2.6. Post-World War II Developments and the East Africa High Commission

When World War II broke out in 1939, the British shifted their attention to fighting Hitler and, thus, until 1945 when hostilities ceased, not much was done regarding the integration project. War victors (Britain, France, the Soviet Union and the United States) and China adopted the Charter of the United Nations, 1945, which established the United Nations (UN). The Charter, therefore, replaced the Covenant of the League of Nations 1919 and its constituent organisation—the League of Nations. The Charter of the United Nations, 1945, supplanted “the mandates system” with “the trusteeship system”.¹³⁰ Thus, “mandate territories” became “trust territories.” The Charter also established the Trusteeship Council to deal with all issues connected with trust territories including Tanganyika.¹³¹ Following these changes, on 13 December 1946, the UN General Assembly approved a Trusteeship Agreement for Tanganyika, 1946. This replaced the British Mandate for East Africa, 1922. Unlike the previous document, the Trusteeship Agreement provided for more rights for the natives of Tanganyika, including political, social and economic rights.¹³² Accordingly, Article 5 (b) of the Agreement stipulated that Britain shall be entitled to constitute Tanganyika into a customs, fiscal or administrative union or federation with adjacent territories under its sovereignty or control and to establish common services between such territories and Tanganyika where such measures are not inconsistent with the basic objectives of the international trusteeship system and with the terms of this Agreement.

This provision kept the intention to integrate Tanganyika with other territories alive. It was similar to Article 10 of the British Mandate for East Africa, 1922, except that it included “common services between such

¹³⁰ See Chapter VII of the United Nations Charter, 1945.

¹³¹ See Chapter VIII of the United Nations Charter, 1945.

¹³² The Trusteeship Agreement for Tanganyika, 1946, arts. 6-10.

[adjacent] territories and Tanganyika”, which was not part of the previous provision. As noted, common services existed since 1899 between Kenya and Uganda, and, subsequently, as already noted, the Hilton-Young Commission recommended to include Tanganyika.

The culmination of World War II meant that Hitler and Germany had ceased to be a troubling factor any more. This gave the British a free hand to integrate Tanganyika with neighbouring territories without difficulties. The only remaining impediment for them was Tanganyika’s status as a trust territory. Thus, in 1946, the East African Airways Corporation was established. Also, as noted earlier, in 1948, Tanganyika joined the Kenya-Uganda Railway to form the East African Railways and Harbours Corporation. More significantly, it was in 1948 when the East Africa High Commission was established. This was done through a constitutional document styled “the East Africa (High Commission) Order in Council, 1947” which had been enacted a year earlier. The Commission became effective on 1 January 1948 and replaced the East African Governor’s Conference.¹³³ By British constitutional practice, orders-in-councils were a form of subsidiary legislation that Parliament had delegated its making to the monarch.¹³⁴ The Order and its High Commission concerned “the Colony and Protectorate of Kenya, the Trust Territory of Tanganyika and the Protectorate of Uganda”.¹³⁵ Its Section 4(1) stipulated as follows: “There shall be established an East Africa High Commission, the headquarters of which shall be situated at Nairobi in Kenya, and which shall consist of the Governors of Kenya, Tanganyika and Uganda.” The headquarters of the Commission was not

¹³³ Augustus M. Akiwumi, “The Development of the Legislative Process in East African Integration” (1972) *Africa Spectrum*, p. 30.

¹³⁴ See, for instance, *the Foreign Jurisdiction Act, 1890*, ss. 8, 9 and 10; see also, Hendry, I. and Dickson, S., *British Overseas Territories Law*, (2nd ed, Hart Publishing 2018), p. 14; and Margaret A. Banks, “Privy Council, Cabinet, and Ministry in Britain and Canada: A Story of Confusion” (1965) *The Canadian Journal of Economics and Political Science*, pp. 193-205.

¹³⁵ Preamble to the East Africa (High Commission) Order in Council, 1947.

only in Nairobi but also the Governor of Kenya was designated as the Chairman of the Commission.¹³⁶ The Commission was vested with the administration of common services (railways, harbours, posts and telecommunications, civil aviation, the collection and management of income tax and customs and excise duties, various research organisations, merchant shipping, loans for the purposes of the East Africa High Commission, financial appropriation Acts for the administration of the common services, and the staff of the East Africa High Commission including pensions, etc.).¹³⁷

Also, the Order established the East Africa Central Legislative Assembly with the mandate to enact laws. Its lawmaking powers were essentially two-fold. First, it was clothed with the power to make laws with respect to common services, which have been listed above. Second, it could make laws with respect to other matters apart from the common services when given authority to make any law “for the peace, order and good government of the Territories” by the respective legislative councils of the three territories.¹³⁸

The phrase “peace, order and good government” was a common phraseology in several legal documents in British dependencies. It was used for the first time in the Proclamation of British Columbia, 1858.¹³⁹ This was the first attempt to create a cross-boundary legislative institution with power to make law throughout the East African region. Overall, the establishment of the East African High Commission was a great leap towards the integration goal.

¹³⁶ The East Africa (High Commission) Order-in-Council, 1947, s. 5(1).

¹³⁷ Augustus M. Akiwumi, “The Development of the Legislative Process in East African Integration”, (1972) *Africa Spectrum*, p. 30.

¹³⁸ *Ibid.*, p. 31.

¹³⁹ See the Preamble to the Proclamation of the British Columbia, 1858.

3. Institutional and Legal Reforms During Decolonisation

As noted, the defeat of Hitler and Germany had given the British a glimmer of hope to dictate things around without substantial hindrances. However, the reality was that the war had condemned colonialism to its downward trajectory. Most seriously, the war had weakened Britain and other European powers economically and militarily.¹⁴⁰ The war led to an abrupt upsurge of nationalism in various colonies.¹⁴¹ In 1952, the *Mau Mau* insurgency broke out in Kenya, which caused them a great deal of trouble. The USA and Soviet Union also put pressure on the colonial powers and helped nationalist movements in the colonies.¹⁴² As a result, the British conceded decolonisation.¹⁴³

When it became clear that East African territories had to be granted independence, the British adopted rushed-up programmes to prepare the region for a federal union at independence. One of the initiatives they took was to take steps towards the establishment of a federal university styled “the University of East Africa.”¹⁴⁴ It was to take the model of the University of West Indies, which was established in 1948, for the purpose of serving the British Caribbean colonies.¹⁴⁵ The University of East Africa was constituted of three major campuses: Dar es Salaam, Kampala and Nairobi. Each campus would take a leading role in teaching one of the three major professions,

¹⁴⁰ See generally, Rudolf von Albertini “The Impact of Two World Wars on the Decline of Colonialism” (1969) *Journal of Contemporary History*, pp. 17-35.

¹⁴¹ Robert M. Maxon, *East Africa: An Introductory History*, (3rd rev. ed., West Virginia University Press 2009), p. 224.

¹⁴² Derek Brown, “1956: Suez and the End of Empire”, *Guardian*, available at <<https://www.theguardian.com/politics/2001/mar/14/past.education1>> (accessed 12 January 2020).

¹⁴³ Frank Myers, “Harold Macmillan’s ‘Wind of Change’ Speech: A Case Study in the Rhetoric of Policy Change” (2000) *Rhetoric and Public Affairs*, p. 565.

¹⁴⁴ H.M. Hyslop, “The University of East Africa” (1964) *Minerva*, p. 286.

¹⁴⁵ See, the Report of the Commission on Higher Education in the Colonies (known as “the Asquith Commission”), 1945, p. 95, which recommended the establishment of the University of West Indies.

namely, Dar es Salaam (law), Nairobi (engineering) and Kampala (medicine). Thus, the Nairobi Technical College was converted to a University College in 1958.¹⁴⁶ Another step was the establishment of the Dar es Salaam University College in 1961.¹⁴⁷ It is to be noted that while the Dar es Salaam and Nairobi colleges were specifically established for the purpose of forming the University of East Africa, Makerere University or “the Oxford of Africa” as it was then fondly called, pre-existed these efforts as it existed since 1922.¹⁴⁸ As Iliffe asserts, “one reason for developing Makerere was to prevent East Africans from absorbing subversive ideas at foreign universities.”¹⁴⁹ Another manipulative British policy excluded legal training locally and categorically denied sponsorships to Africans for legal studies abroad.¹⁵⁰ The exclusion and denials were based on the British fear of lawyers.¹⁵¹ It was thought that African lawyers would turn into potent politicians who could trouble the colonial administration as was the case in India.¹⁵² In pursuance of this policy, the British denied scholarship to Milton Obote in Uganda and Ali Mazrui in Kenya, both of whom wanted to study law.¹⁵³ Nyerere took a risk of losing his scholarship when he opted for constitutional law as one of his subjects in the third year of his study at Edinburgh University in Scotland.¹⁵⁴ Fortunately for him, as it would appear, the University did not report this fact to his sponsor—the Tanganyika government.

¹⁴⁶ J.M. Hyslop, “The University of East Africa” (1964) *Minerva*, p. 287.

¹⁴⁷ David Court, “The Experience of Higher Education in East Africa: The University of Dar es Salaam as a New Model?” (1975) *Comparative Education*, p. 194.

¹⁴⁸ Carol Sicherman, *Becoming an African University: Makerere 1922-2000*, (Fountain Publishers 2005), p. 9.

¹⁴⁹ John Iliffe, *A Modern History of Tanganyika*, (CUP 1979), p. 446.

¹⁵⁰ Yash Ghai, “Law, Development and African Scholarship” (1987) *the Modern Law Review*, pp. 751-752.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ Fauz Twaib, *The Legal Profession in Tanzania: The Law and Practice*, (LawAfrica 2015), p. 33.

¹⁵⁴ Saida Yahya-Othman, et al., *The Making of a Philosopher Ruler: A Biography of Julius Nyerere: Rebellion Without Rebels*, (Book One, Mkuki na Nyota, Dar es Salaam 2020), p. 77.

Instead, the British government simply reported to the Tanganyika government, rather generally, that Nyerere was “in every way a satisfactory student,” and his tutor, Margaret Bell, had also reported, that “the style of Nyerere’s essays was the best” in the group that she supervised.¹⁵⁵

One incident, which is interesting and of huge historical significance, deserves a mention in this regard. As noted earlier, the British had virtually done nothing in Tanganyika. While Kenya had the Nairobi Technical College and Makerere was already a well-established academic institution in Uganda, Tanganyika had nothing comparable to the two. Thus, there was no infrastructure to accommodate the Dar es Salaam College. For this reason, the British had to initiate construction of the campus, the work which could have taken three to five years. While making initial arrangements, the unexpected happened. On 25 May 1961, the British received alarming news through a letter from one Englishman who was teaching law at Yale University in the USA.¹⁵⁶ He revealed that Yale University was intending to open a law school in Dar es Salaam and other African commercial centres.¹⁵⁷ The British panicked as they never wanted to compete with the Americans and their keenest interest was to maintain the English common law in their former colonies. Thus, it was instructed that “a faculty of law should be started in Tanganyika with all possible speed.”¹⁵⁸ British bureaucrats rushed to ask Nyerere for help in looking for a building to house the programme. They ended up renting a TANU building at Lumumba Street in Dar es Salaam where the Faculty of Law of the University of East Africa

¹⁵⁵ Thomas Malony, *Nyerere: The early Years*, (James Currey 2014), p. 113.

¹⁵⁶ John A. Harrington and Ambreena Manji, “Mind with Mind and Spirit with Spirit: Lord Denning and African Legal Education” (2003) *Journal of Law and Society*, p. 383

¹⁵⁷ Ibid.

¹⁵⁸ William Twining, W., “Legal Education Within East Africa” (1966) *International and Comparative Law Quarterly Supplementary Publication*, p. 120.

began in October 1961.¹⁵⁹ As several school graduates at the time had obtained scholarships to study in the US, it was difficult to recruit students.¹⁶⁰ The first Dean, Arthur W. Weston, had even considered abandoning the project altogether.¹⁶¹ However, as he states, it was ultimately decided to start with a paltry 14 students, coincidentally, the same number as Makerere's first intake way back in 1922.¹⁶² The students were drawn from Tanganyika, Kenya and Uganda. William Twining, a son of Sir Edward Twining, who had served as a Governor of Tanganyika (1949-1958), gave the historical first lecture on 8 October 1961.¹⁶³ Unfortunately, as will be seen later, the federal university project collapsed after a few years and each country maintained its own separate university.

Another step that the British took was to reorganise the East Africa High Commission into the EACSO in 1961. It was Julius Kambarage Nyerere, whose details are given below, who proposed the formation of the EACSO to the British.¹⁶⁴ The reason for the change was the impending independence of Tanganyika as the former institution was entirely a colonial institution.¹⁶⁵ The three territories established the

¹⁵⁹ See, Michael K. Wambali, "The Teaching of the Constitutional Law During the Past 50 Years", in Gamaliel M. Fimbo (ed.), *Fifty Years of Legal Education in Tanzania*, (UDSM School of Law 2011), p. 92.

¹⁶⁰ Arthur W. Weston, "Legal Education in East Africa" (1963) *The University of Toronto Law Journal*, p. 188.

¹⁶¹ Ibid.

¹⁶² Ibid.; and Saida Yahya-Othman, et al., *Development as Rebellion: A Biography of Julius Nyerere: The Making of a Philosopher Ruler*, (Book One, Mkuki na Nyota Publishers Ltd 2020), p. 53. The students were: 1. Bakilane, Peter G.; 2. El-Kindy, Z.N.; 3. Kakuba, Gerald; 4. Khaminwa, John M.; 5. Kilewo, Arnold; 6. Kisse, Marco; 7. Kivuitu, S.M.; 8. Kwikima, Musa H. Hamadi; 9. Manning Julie (Miss); 10. Miruka, James G.; 11. Njenga, Francis; 12. Ouma, Alikipo, O.; 13. Tibamanya, Aloysius; and 14. Mponda.

¹⁶³ William Twining, W., "Legal Education Within East Africa" (1966) *International and Comparative Law Quarterly Supplementary Publication*, p. 120.

¹⁶⁴ Joseph S. Nye, *Pan-Africanism and East African Integration*, (Harvard University Press 1967), p. 177.

¹⁶⁵ See, the preamble to An Agreement Between the Government of Tanganyika, the Government of Kenya and the Government for the Establishment of the East African Common Services Organisation, p. 1961.

EACSO through an agreement of international character.¹⁶⁶ They also adopted the Constitution of the East African Common Services Organisation, 1961. As the British planned, this institution would be transformed into a federal government once the three territories gained their independence and then federated. The functions of the Organisation were threefold: management of the common services, coordination of governmental activities and lawmaking.¹⁶⁷ It was constitutionally organised as a government with a complete set of the three traditional branches. The executive branch consisted of the East African Common Services Authority, ministerial committees and secretariat.¹⁶⁸ The Authority was composed of the ministers of each territory's government.¹⁶⁹ The major function of the Authority was to manage common services: railways and harbours, posts and telecommunications, civil aviation, meteorological services, and many others. A Central Legislative Assembly was the legislative branch.¹⁷⁰ It was composed of the speaker, 12 ministerial members, two *ex-officio* members (the Secretary-General and the Legal Secretary), 27 elected members and an unspecified number of temporary ministerial members.¹⁷¹ The legislative power of the Assembly essentially related to customs and excise, income tax, pensions and common services including the constituent colleges of the University of East Africa.¹⁷² The judicial branch consisted of the Court of Appeal for Eastern Africa.¹⁷³ The provisions of the Constitution were silent on its

¹⁶⁶ Ibid.

¹⁶⁷ Art. 1.

¹⁶⁸ Article 3.

¹⁶⁹ Article 4.

¹⁷⁰ Art. 16 (1).

¹⁷¹ Art. 16(2).

¹⁷² Second Schedule to the Constitution of the East African Common Services Organisation, 1961.

¹⁷³ Art. 45.

jurisdiction but the implication was that it would continue to hear appeals from the three territories.

Another preparatory step towards a federal union that the British took was the writing of independence constitutions in such a way that would support the envisaged federation. The independence constitutions were negotiated between the British and nationalist leaders through talks known as “constitutional conferences,” which were held in London except the one for Tanganyika that was held in Dar es Salaam.¹⁷⁴ Again, the constitutional conferences for Kenya, Uganda and Zanzibar were all conducted at Lancaster House in London except the second constitutional conference for Uganda (Independence Conference), which was held at Marlborough House in London from 12 to 29 June, 1962.¹⁷⁵ The first and foremost British aim in such conferences was to make sure that such constitutions adopted a British prototype parliamentary government or “Westminster constitutional model” as it is famously characterised.¹⁷⁶ Consequently, all independence constitutions for Kenya, Tanganyika, Uganda and Zanzibar adopted a parliamentary form of government. Three major hallmarks of parliamentary government can be pointed out. First, the executive and legislature are normally fused. The chief executive (usually called “the prime minister”) and ministers are ordinarily drawn from the legislature. Second, the legislature ordinarily wields the power

¹⁷⁴ George W. Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to the Present*, (2nd ed, LawAfrica 2010), 50-55; and Robert M. Maxon, *Britain and Kenya's Constitutions, 1950- 1960*, Cambria Press, New York, 2011 (electronic version which does not include page numbers).

¹⁷⁵ George Okello, “How 1962 London conference paved way for Uganda’s independence”, PML Daily, available at <<https://www.pmldaily.com/investigations/special-reports/2019/10/how-1962-london-conference-paved-way-for-ugandas-independence.html>> (accessed 11 March 2023).

¹⁷⁶ Jenny S. Martinez, “Horizontal Structuring” in Michael Rosenfeld and Andreas Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, (OUP 2012), p. 556; and Alfred Stepan and Cindy Skach, “Constitutional Frameworks and Democratic Consolidation: Parliamentarianism versus Presidentialism” (1993) *World Politics*, p. 3.

to pass a vote of no confidence against the chief executive. Third, the chief executive is also clothed with power to dissolve the legislature and call for snap elections.

Another goal that the British desired to achieve was the inclusion of the provisions that supported the envisioned federal union. To achieve this and other objectives, British lawyers monopolised the drafting task.¹⁷⁷ Accordingly, Section 62 of the Independence Constitution of Tanganyika, 1961, partly stipulated that appeals should “lie from decisions of the High Court to another court in East Africa.” Also, Section 18 (1) of the Independence Constitution of Uganda, 1962, partly provided that “until Parliament otherwise provides, Her Majesty’s Court of Appeal for Eastern Africa shall be the court of appeal for Uganda.” Furthermore, Section 176 (1) (a) of the Independence Constitution of Kenya, 1963, enacted that “the Court of Appeal for Eastern Africa established by the Act of the East African Common Services Organisation entitled the Court of Appeal for Eastern Africa Act 1962 or by or under any law amending or replacing that Act that has effect for the purposes of this paragraph.” The Government of Zanzibar stoutly resisted the inclusion of a similar provision, the effect of which is explained below.

3.1. Nyerere and Unification Efforts in the 1960s

As we have seen, the British were undoubtedly committed integrationists. Although they were decolonising in the 1950s and 1960s, they never gave up their integration dream. Neither did they

¹⁷⁷ Interestingly, the Kenyan nationalist leaders sought to break such monopoly. They asked Thurgood Marshall, a famous Black-American lawyer and civil rights activist at the time, to accompany them to the London constitutional negotiations or talks as their legal adviser and draftsman. The talks are historically known as “the First Lancaster House Constitutional Conference for Kenya”, which were held between 18 January and 21 February 1960. The British were shocked and sought to prevent Marshall from entering the Lancaster House. After long bickering, Marshall was allowed to attend; see, Mary L. Dudziak, “Working toward Democracy: Thurgood Marshall and the Constitution of Kenya” (2006) *Duke Law Journal*, p. 746.

ditch the project after they had granted full independence. They continued to support the integration efforts. In this endeavour, they found one reliable ally—Julius Kambarage Nyerere. He was the President of the Tanganyika African National Union (TANU) and, subsequently, the Prime Minister and the President of Tanganyika, which later became part of the United Republic of Tanzania (simply called here “Tanzania”). Nyerere became the most passionate supporter of the East African integration process since Leo Amery in the 1920s. How did Nyerere's love of federalist integration evolve? It was in the debating halls of the Makerere University in Uganda, which he joined in January 1943, where he was exposed to debates on various issues including the idea of creating an East African Federation, the idea which, it would seem, he disliked initially.¹⁷⁸ He left Makerere in 1945 with a Diploma in Education and then started a teaching career at St. Mary's School in Tabora (currently “Mirambo Secondary School”). While there, in 1946, he wrote a letter to the British Undersecretary for Colonies, Arthur Creech Jones, to oppose the formation of the East African Federation.¹⁷⁹ As he argued, Tanganyikan resources, especially minerals, had to be used for education and general development of the people of Tanganyika.¹⁸⁰ Thus, he thought of the federation as a project designed to divert away Tanganyikan mineral resources. However, Nyerere's interest in reading about federations ultimately caught up with him and turned him into a staunch supporter of a federal union. Thus, when Job Lusinde, who later became a TANU politician, arrived at Tabora School in 1948, he found Nyerere busy supervising an inter-school debate on the formation of the East African Federation.¹⁸¹ The

¹⁷⁸ Saida Yahya-Othman, et al., *Development as Rebellion: A Biography of Julius Nyerere: The Making of a Philosopher Ruler*, (Book One, Mkuki na Nyota Publishers Ltd 2020), pp. 53-66.

¹⁷⁹ Thomas Malony, *Nyerere: The early Years*, (James Currey 2014), p. 86.

¹⁸⁰ Ibid.

¹⁸¹ Cited in Mark J. Mwandosya and Juma V. Mwapachu, (eds. and contrs.), *38 Reflections on Mwalimu Nyerere*, (Mkuki na Nyota Ltd 2022), pp. 195-196.

debate involved students of Tabora School and nearby St. Mary's School where he was teaching.¹⁸² In the debate, Nyerere was the most zealous proponent of the motion while Dismas Mdachi, another teacher, opposed it.¹⁸³

Again, while he was studying at the University of Edinburgh in Scotland (1949-1952), he attended several meetings and debates on the proposal to establish a Central African Federation.¹⁸⁴ On one occasion, he opposed the mechanism of forming the federation without consent of the African people although he wholeheartedly supported the idea of federating Northern Rhodesia, Southern Rhodesia and Nyasaland into one geopolitical unit.¹⁸⁵ In 1951, he co-authored an article titled "Central African Federation" with John Keto which was published in the Edinburgh students' magazine.¹⁸⁶ In the article, they expressed fear that if the federation was rushed without building democratic institutions first, it would be a white-dominated one.¹⁸⁷ Also, as noted, Nyerere studied constitutional law as an optional course at Edinburgh, which must have exposed him to writings and theories of federalism. Moreover, according to Keto, who was also at Edinburgh, Nyerere spoke more about the East African Federation than Tanganyika independence.¹⁸⁸ Therefore, these interactions and engagements in debates, classes, readings and writings converted Nyerere into a devout federalist and integrationist.

¹⁸² Cited in *ibid.*, pp. 195-196; see also Saida Yahya-Othman, et al., *Development as Rebellion: A Biography of Julius Nyerere: The Making of a Philosopher Ruler*, (Book One, Mkuki na Nyota Publishers Ltd 2020), p. 65.

¹⁸³ Cited Mark J. Mwandosya and Juma V. Mwapachu, (eds. and contrs.), *38 Reflections on Mwalimu Nyerere*, (Mkuki na Nyota Ltd 2022), pp. 195-196.

¹⁸⁴ Saida Yahya-Othman, et al., *Development as Rebellion: A Biography of Julius Nyerere: The Making of a Philosopher Ruler*, (Book One, Mkuki na Nyota Publishers Ltd 2020), p. 88.

¹⁸⁵ *Ibid.*

¹⁸⁶ Thomas Malony, *Nyerere: The early Years*, (James Currey 2014), pp. 138-139.

¹⁸⁷ *Ibid.*

¹⁸⁸ Cited in *ibid.*, p. 137.

Having highlighted how Nyerere developed an absorbing interest in the regional federal integration, it is now opportune to highlight his efforts. First, when he quitted teaching and joined active politics, Nyerere kept close ties with all nationalist movements in East Africa. For instance, in 1956, he went to Zanzibar to encourage the amalgamation of the African Association and the Shirazi Association to consolidate unity.¹⁸⁹ Thus, he kept close ties with Afro-Shirazi Party (ASP) in Zanzibar, which was established on his advice and in his presence.¹⁹⁰ In his interaction with Abeid Aman Karume and other ASP leaders, he emphasised on a union after independence. This was in the context of the East African Federation, not really about Tanganyika and Zanzibar.¹⁹¹ Second, Nyerere worked closely with Tom Mboya, a Kenyan nationalist leader, to forge an alliance for future East African unity. For example, in 1958, Nyerere and Tom Mboya met with representatives of the Ugandan political parties in Mwanza to reconcile their differences and convince them of the idea to federate in the future.¹⁹² Nyerere knew that if political parties were divided, it would be difficult to find consensus on the federal union. However, Nyerere and Mboya failed to attain both objectives.¹⁹³ Third, in 1960, while attending a meeting in Addis Ababa, Nyerere declared that Tanganyika could be willing her independence to be delayed and then granted simultaneously with Kenya, Uganda and

¹⁸⁹ Michael Lofchie, "Party Conflict in Zanzibar" (1963) *The Journal of Modern African Studies*, 187 and Abdul Sheriff, "Race and Class in the Politics of Zanzibar" (2001) *Africa Spectrum*, p. 310.

¹⁹⁰ Ibid.; ASP, *Afro-Shirazi Party: A Liberation Movement*, (Vol. 2, Printing Press Corporation 1973), p. 13; and Ali Hassan Mwinyi, *Mzee Rukhsa: Safari ya Maisiba Yangu*, (Mkuki na Nyota 2020), p. 22.

¹⁹¹ Aili Mari Tripp, *Joan Wicken: A Lifelong Collaboration with Mwalimu Nyerere*, (Mkuki na Nyota Ltd 2023), p. 145.

¹⁹² Joseph S. Nye, *Pan-Africanism and East African Integration*, (Harvard University Press 1967), p. 98.

¹⁹³ Ibid.

Zanzibar to simplify the creation of the federation.¹⁹⁴ He believed that if each state became independent separately, it would be much more difficult to federate; it would lead to “the balkanization of East Africa.”¹⁹⁵ When it was reported, Nyerere’s statement utterly shocked other TANU politicians in that the party had not adopted such a resolution and, thus, they attributed the statement to his personal views. Fourth, when he was campaigning for TANU during the 1960 elections, Nyerere took the opportunity to popularise the idea of East African unity. For instance, on one occasion he retorted: “What is Tanganyika after all—East Africa makes more sense.”¹⁹⁶ Some TANU leaders and trade unions were opposed to Nyerere’s obsession with the East African Federation.¹⁹⁷ However, these oppositions did not deter Nyerere to continue campaigning and popularising the idea. The idea was pegged on Pan-Africanism, the philosophy which advocated for unity of the whole African continent and African peoples. Apart from Pan-Africanism, Nyerere’s desire for regional unity was also predicated on his penchant for suppressing tribalism.¹⁹⁸ As theorised, in a larger political unit, tribalism would disappear as the people of each federation’s constituent unit would compete with people of another unit instead of fighting on the tribalist basis at home.¹⁹⁹ Fifth, from 1961, Nyerere initiated negotiations with nationalist leaders in Kenya, Uganda and Zanzibar, involving the British who supported all his efforts, for the purpose of forming the

¹⁹⁴ William E. Smith, *Nyerere of Tanzania: The First Decade 1961–1971*, (African Publishing Group 2011), p. 72; and John Iliffe, *A Modern History of Tanganyika*, (CUP 1979), p. 574.

¹⁹⁵ Aili Mari Tripp, *Joan Wicken: A Lifelong Collaboration with Mwalimu Nyerere*, (Mkuki na Nyota Ltd 2023), p. 146; and Joseph S. Nye, *Pan-Africanism and East African Integration*, (Harvard University Press 1967), p. 180.

¹⁹⁶ Cited in the Report of the Select Committee on the East African Federation, 1975.

¹⁹⁷ John Iliffe, *A Modern History of Tanganyika*, (CUP 1979), p. 572.

¹⁹⁸ Joseph S. Nye, *Pan-Africanism and East African Integration*, (Harvard University Press 1967), p. 204.

¹⁹⁹ Ibid.

federation.²⁰⁰ When Uganda became independent in 1962, Nyerere kept close ties with Apollo Milton Obote, who was the Prime Minister, to form a united front to push for the agenda. However, the Kenyan situation was different and complex as political competition between KANU and KADU was very intense.²⁰¹ Thus, initially, it was difficult for Nyerere to choose an ally as who was destined to be the eventual political leader was unclear.

In 1962, Nyerere succeeded in adopting a new Republican Constitution in Tanganyika, which did away with monarchism thereby replacing it with republican presidentialism. An election was held at the end of the year; he won and became the first President of Tanganyika. In 1963, Nyerere barely worked in Tanganyika. He frequently travelled to London, Kampala, Nairobi and Zanzibar to negotiate for the federation.²⁰² On 26 May 1963, an election was held in Kenya and KANU emerged the winner. On 1 June 1963, the British granted Kenya internal government with Jomo Kenyatta, the leader of KANU, as the Prime Minister. This election gave Nyerere somebody to work with, and, thus, he initiated close correspondence between him, Obote and Kenyatta. In sharp contrast, the ZPPP and ZNP coalition government in Zanzibar was lukewarm and disinterested in the integration project. Since 1962, Nyerere had been negotiating with the British to grant independence to Kenya and Zanzibar at the same time. When Kenyatta became the Prime Minister, he and Obote urged the British to grant independence to Kenya and Zanzibar immediately and at the same time.²⁰³ The British

²⁰⁰ Anaïs Angelo, *Power and the Presidency in Kenya: The Jomo Kenyatta Years*, (CUP 2020), p. 116.

²⁰¹ Ibid., p. 118.

²⁰² Joseph S. Nye, *Pan-Africanism and East African Integration*, (Harvard University Press 1967), pp. 183-200.

²⁰³ The Kenya Sessional Paper No. 2 of 1963 cited in Chanan Singh, "The Republican Constitution of Kenya: Historical Background and Analysis" (1965) *The International and Comparative Law Quarterly*, pp. 897-898.

agreed to this idea as well.²⁰⁴ Thus, constitutional and independence talks for Kenya and Zanzibar were held simultaneously at Lancaster House in London.²⁰⁵ Another reason for the simultaneity was to discuss the fate of the Kenyan coastal strip which, as already remarked, had been leased from the Sultan of Zanzibar in 1895.

One challenge needs to be pointed out here. As noted earlier, the idea of forming a federation was conceived in 1922 when the British realised that a unitary amalgamation of Tanganyika with contiguous territories would be illegal in the view of the provisions of the Covenant of the League of Nations, 1919. Thus, it was for this reason that a unitary union was ruled out. When Tanganyika became independent in 1961, this impediment ceased to exist and one would have expected that the political narrative would change from a federal to unitary union. However, this was not the case. The British, Nyerere and others proceeded with the same federation narrative. British bureaucrats who occupied major positions in the civil services of the three territories were about to leave at independence. This provided good prospects for a unitary union. Civil servants usually present a stumbling block to any union as it threatens their posts and vested financial and social interests.²⁰⁶ In short, unitary government is a far more superior form of government than the federal one. It ensures

²⁰⁴ Ibid.

²⁰⁵ The second Kenyan constitutional conference for Kenya started at the Lancaster House in London started on 14 February 1962 and the first conference for Zanzibar began on 19 March 1962 at the same Lancaster House but in a separate hall. All of them were closed on the same day, 6 April 1962. Subsequently, the second conference for Zanzibar was also conducted at the Lancaster House between 20 and 24 September 1963. The third conference for Kenya was held in a separate hall of the same venue from 15 September 1963 to 19 October 1963. [T.P. Ofcansky, *Historical Dictionary of Kenya*, (2nd ed, Scarecrow Press 2000), p. 146; Chanan Singh, "The Republican Constitution of Kenya: Historical Background and Analysis" (1965) *The International and Comparative Law Quarterly*, p. 898; Juma, A.S. *Zanzibar Hadi Mwaka 2000*, (Rafiki Publishers 2007), p.118].

²⁰⁶ E.R. Walker, *The Australian Economy in War and Reconstruction*, (OUP 1947), p. 89 cited in A.J. Brown, "Federalism, Regionalism and the Reshaping of Australian Governance" in A.J. Brown and J.A. Bellamy (eds.), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (ANU E-Press 2007), p. 18.

political and social solidarity of citizens; secures a state from possible disintegration; avoids intergovernmental disputes, which are a chronic problem of a federal government; guarantees centralised economic planning and, therefore, balanced economic and social development throughout the state's territory; and provides the potential for rapid social and economic development.²⁰⁷ China is a unitary state from which East Africa can take a leaf out of her book.

3.2. The Nairobi Declaration 1963 and the Draft Constitution 1963

Serious negotiations on the federation began on 1 June 1963 in Arusha.²⁰⁸ Three Kenyan ministers, Tom Mboya, Joseph Murumbi, and Achieng Oneko, arrived in Arusha to ask Nyerere to put pressure on the British to expedite Kenya's independence.²⁰⁹ Nyerere seized that opportunity to discuss the federation. Subsequently, Obote was informed and it was agreed to meet in Nairobi on 4 June 1963 to which he agreed to attend.²¹⁰ Wednesday, 5 June 1963, was probably the most memorable and glorious moment for Nyerere, other federation protagonists and the integration project as a whole. It was the day when Nyerere, Obote and Kenyatta made a joint public declaration in Nairobi on their intention to federate their countries at the end of that year.²¹¹ Although it was kept secret, it was tentatively agreed that Jomo Kenyatta would be President, Nyerere (Vice-President), and Obote (Minister of Foreign Affairs).²¹² Despite being invited, the Government of Zanzibar

²⁰⁷ Baron Montesquieu, *The Spirit of the Laws*, (Vol. 1, rev. ed, the Colonial Press 1748), p. 142; W.F. Willoughby, *An Introduction to the Study of the Government of Modern States*, (the Century Company 1919), p. 194; and Daniel J. Elazar, "Contrasting Unitary and Federal Systems" (1997) *International Political Science Review*, pp. 243-244.

²⁰⁸ Joseph S. Nye, *Pan-Africanism and East African Integration*, (Harvard University Press 1967), p. 183.

²⁰⁹ Ibid.

²¹⁰ Ibid., p. 184.

²¹¹ Colin Leys, "Recent Relations Between the States of East Africa" (1965) *International Journal*, p. 510.

²¹² Godfrey Mwakikagile, *Africa After Independence: Realities of Nationhood*, (3rd ed, New Africa Press 2009), p. 134; Godfrey Mwakikagile, *Post-Colonial Africa: A General Survey*, (New Africa Press 2014), pp. 175-176.

did not send a representative.²¹³ The Nairobi Declaration of 1963 did not only pronounce the intention to federate but also articulated the reasons for the envisioned union. Judging by its tenor and tone, whoever drafted it must have read the American Declaration of Independence of 1776. The Nairobi Declaration partly proclaimed thus, “We, the leaders of the people and governments of East Africa assembled in Nairobi on June 5, 1963, pledge ourselves to the political federation of East Africa.”²¹⁴ It further stated, “Our meeting today is motivated by the spirit of Pan-Africanism and not by mere selfish regional interest. We are nationalists and reject tribalism, racialism or inward-looking policies.”²¹⁵ These were, and still are, words of weighty significance signifying commitment among the leaders themselves to the cause of unity and promise to the people of East Africa generally. The Declaration also sought to allay fears of white settlers and assure them that they would not be discriminated against under the expected political association.

The population was instilled with enthusiasm and high expectations in the period that followed the Declaration. The only major step before the realisation of the federation was the independence of Kenya and Zanzibar. The Declaration also partly stated that “a working party is being established which will prepare a framework of a draft constitution for the Federation of East Africa.”²¹⁶ The working party was required to undertake minimum consultations with the respective governments, involve the EACSO in the discussion and then proceed to draft it.²¹⁷ The working party actually drew up the Draft Constitution of the Federation.²¹⁸ In our considered opinion, the Draft Constitution was a

²¹³ Report of the Select Committee on East African Federation, 1975, p. 17; and Godfrey Mwakikagile, *Post-Colonial Africa: A General Survey*, (New Africa Press 2014), p. 143.

²¹⁴ Report of the Select Committee on the East African Federation, 1975, p. 12.

²¹⁵ *Ibid.*, pp. 12-13.

²¹⁶ *Ibid.*, p. 16.

²¹⁷ Report of the Select Committee on East African Federation, 1975, p. 17.

²¹⁸ The Working party was initially composed of six members, two from each country: Tanganyika (Oscar Kambona and Amir Jamal); Kenya (Tom Mboya and Joseph

poor work as it was a mere reproduction of the Constitution of Tanganyika 1962, the US Constitution 1787 and other federal constitutions. To show this, a bit extended discussion on its salient features is salutary. The Draft Constitution proposed the name of the envisioned state to be “the Federal Republic of Eastern Africa.”²¹⁹ Also, it proposed that the Federation was a sovereign and indissoluble union of four states: Kenya, Tanganyika, Uganda and Zanzibar.²²⁰ The proposition to call the federal constituent units “states” as in the US and other countries was not only inelegant but also problematic.²²¹ Typically, a state is a sovereign political unit.²²² Thus, in this case the proposed state was the Federal Republic of Eastern Africa, not its constituent units. It was undesirable to imitate the American confusion of calling constituent federal units “states” although legally they are not states. It is opined that preference of such terms as “provinces”, “regions”, “territories”, “governorates”, “counties,” etc. would have been proper. Another notable aspect of the proposal was that like any state a constituent unit of the Federation would have no legal option to withdraw from the union as the union was indissoluble. The only implied withdrawal mechanism was war or other revolutionary means.²²³ Also, the Draft Constitution left open for other states to join the proposed Federation.²²⁴

It proposed a government with the traditional three branches. First, the President and Vice-President would head the executive branch. These two leading executive officials would be indirectly elected by MPs, not by the people.²²⁵ Indirect elections are less democratic. Democracy partly

Murumbi); and Uganda (John Kakonge and Godfrey Binaisa). Later, Zanzibar members (Ali Muhsin and A.A. Baalawy joined. [Joseph S. Nye, *Pan-Africanism and East African Integration*, (Harvard University Press 1976), p. 184.

²¹⁹ Art. 1.

²²⁰ Arts. 2 and 3 (1).

²²¹ Art. 3 (1).

²²² The Montevideo Convention on Rights and Duties of States, 1933, art. 1.

²²³ Art. 2.

²²⁴ Art. 3 (2).

²²⁵ Art. 7.

means that all citizens must participate in making major decisions including installing the republic's chief executive. The President was designated as "the Head of State and Commander-in-Chief of Armed Forces."²²⁶ Although the Vice-President's main role was that of a president-in-waiting or a spare-man or woman waiting to take over when the presidency fell vacant for any reason, it was proposed that they would be the principal assistant to the President and was additionally clothed with the power to be the leader of the executive business in the House of Representatives.²²⁷ Furthermore, it proposed that "the executive powers of the Federation shall be vested in the President."²²⁸ This provision, which has been blindly treated as standard in many state constitutions, traces its origin to the American Constitution, 1787.²²⁹ Although presidentialism, as distinguished from parliamentarianism, has traditionally been a one-man show, modern executive functions are multifarious and, thus, cannot be performed by one man or woman. In 1748, Montesquieu enumerated executive functions as follows: to make war and peace; send and receive ambassadors; make treaties, leagues and alliances with foreign states and princes; regulate fleets and armies; and to erect, man and manage all forts in the realm.²³⁰ Such was the simplicity of the executive functions at the time. Today, there is a lot more than this simple list. Thus, it is absurd for all executive powers to be vested in one official in the same way it would be irrational for the entire legislative powers to be vested in the Speaker of a national assembly or all judicial powers to be entrusted with the chief justice. It also reproduced the infamous provision which was exclusively found in the Constitution of Ghana 1960 and the Constitution of Tanganyika 1962: "... in the exercise of his functions the President shall act in his own discretion and

²²⁶ Art. 4 (1).

²²⁷ Art.5.

²²⁸ Art. 4 (2).

²²⁹ The Constitution of the United States of America, 1787, art. II, s. 1, para. 1.

²³⁰ Cited in Richard J. Ellis (ed), *Founding the American Presidency*, (Rowman & Littlefield Publishers Inc., 1999), pp. 156 and - 157.

shall not be obliged to follow advice tendered by any other person.”²³¹ This provision was against the concept of institutional presidency which requires the presidents to be advised by officials and institutions and actually relegates the presidency into a personal enterprise. Moreover, it proposed the establishment of a Cabinet whose chief function was to advise the President.²³² According to the proposal, the Cabinet would consist of the Vice-President and ministers.²³³ The President would chair its meetings but in the case of his absence, the Vice-President would preside over.

As to the legislative branch, the Draft Constitution proposed a bicameral parliament consisting of the House of Representatives and Senate.²³⁴ In other words, it proposed a “legislative bigamy,” to borrow from Enright’s contention that bicameralism breeds “a form of electoral bigamy.”²³⁵ Again, the relevant provision was drafted in an anachronistic British style as the Federal Parliament comprising “the President of the Federation, a Senate and a House of Representatives.”²³⁶ In the British constitutional traditions, the monarch is part of Parliament based on British history which is irrelevant to the East African context. It also contravenes the principle of the separation of powers. Furthermore, federal bicameralism has been imitated from the American constitutional design almost throughout the world. As it is said, on the one hand, the upper house (the Senate) represents the federal units and, on the other hand, the lower house (the House of Representatives) represents the people.²³⁷ However, it may be questioned, is legislative bicameralism

²³¹ Art.4 (3).

²³² Art. 14 (1).

²³³ Ibid.

²³⁴ Art. 18.

²³⁵ Christopher Enright, *Studying Law*, (Branxton Press 1983), p. 20.

²³⁶ Art. 18.

²³⁷ Martha Arrete, “Federalism, Bicameralism, and Institutional Change: General Trends and Case-Study” (2010) *The Brazilian Political Science Review*, p. 12; and Robert A. Dahl, *How Democratic Is the American Constitution?* (Yale University Press 2001), p. 45.

indispensable in a federal constitutional design? It is opined that the worldwide imitation of American bicameralism has been done without appreciating its historical roots. The American bicameral system was an imitation of the British system which most of the American constitution-makers were aware of. The British Parliament is a bicameral one consisting of the House of Lords and the House of Commons. While the House of Commons represents “the commoners”, “The historical function of the upper house [the House of Lords] has been to represent the upper class”, the privileged aristocrats²³⁸ The American constitutional system was initially predicated on the philosophy of serving different interests for distinct social classes. While the House of Representatives represented the people, the Senate was initially designed to be the chamber of the rich, wise and educated elite.²³⁹ It was not about representing the federal units but to serve certain aristocratic interests. The system was changed through the 17th Constitutional Amendment which was passed in 1912 and ratified in 1913.²⁴⁰ The Australian Federation also maintains the American-rooted federal bicameralism. However, Enright observes that the Australian experience has shown that the upper house is redundant.²⁴¹ The senators, as he says, do not regard themselves as the representatives of their states (federal subunits) but their political parties.²⁴² To him, as noted, to have two elections for the two chambers is unnecessary and amounts to “a form of electoral bigamy.”²⁴³ As the 1963 Kenyan Independence Constitution did, the Constitution of Kenya 2010 adopted a quasi-federal constitutional system with a bicameral legislature comprising the National Assembly

²³⁸ Dennis C. Mueller, *Constitutional Democracy*, (OUP 1996), p. 198.

²³⁹ Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*, (OUP 2006), p. 32.

²⁴⁰ Sara Brandes and John R. Hibbing, “A Not-so-distant Mirror: the 17th Amendment” (1997) *American Political Science Review*, p. 844.

²⁴¹ Christopher Enright, *Studying Law*, (Braxton Press 1983), p. 20.

²⁴² Ibid.

²⁴³ Ibid

and the Senate.²⁴⁴ The Senate is designated as the custodian of the county governments.²⁴⁵ However, there is a substantial opinion that the Senate is redundant as its members do not have enough work to do.²⁴⁶ Therefore, the National Assembly could carry out the functions which are constitutionally assigned to the Senate.

The third branch, the judicature or judiciary, consisted of three main tiers.²⁴⁷ At the top of the hierarchy was the Federal Supreme Court.²⁴⁸ Below the Federal Supreme Court was the High Court and, lastly, inferior courts.²⁴⁹ It was proposed that the Federal Supreme Court would have both original and appellate jurisdiction. Federalism is a constitutional system which is ordinarily replete with disputes. This is so because federal constituent units and the central government normally compete and, thus, result in myriad jurisdictional disputes.²⁵⁰ Therefore, it was necessary to establish the guardian of the federal constitution by resolving disputes or, as Dikshit puts it, “the ark of the federal covenant”²⁵¹ or, “balance wheel of the system” as Woodrow Wilson described the US Supreme Court.²⁵² Thus, it was proposed that the jurisdiction to resolve disputes between federal units (called “states”) and between states and the federal government was vested in the Federal Supreme Court.²⁵³ Of the three proposed branches, the judiciary was designed in the most satisfactory terms. As mentioned earlier, it consisted of only three tiers

²⁴⁴ The Constitution of Kenya, 2010, art. 93 (1).

²⁴⁵ Ibid., art. 96 (1).

²⁴⁶ The present author conducted research in 2019, 2020 and 2021 in which many respondents expressed an opinion that the Senate is redundant and senators have not enough work to do.

²⁴⁷ Arts. 43-56.

²⁴⁸ Art. 43 (1).

²⁴⁹ Arts. 47 and 50.

²⁵⁰ Richard C. Schragger, “Decentralization and Development” (2010) *Virginia Law Review*, p. 1853.

²⁵¹ Ramesh D. Dikshit, “Geography and Federalism” (1971) *Annals of the Association of American Geographers*, p. 98.

²⁵² M. Ramaswamy, *The Creative Role of the Supreme Court of the United States of America*, (Stanford University Press 1956), p. 6.

²⁵³ Art. 44 (1).

and, thus, short. A long judicial hierarchy serves nothing good but wastes the time of citizens and corporations. Instead of engaging in endless litigation, citizens should dedicate their time to productive activities.

The Draft Constitution contained a rudimentary form of a Bill of Rights, extensive provisions on citizenship and proposed the establishment of the Federal Central Bank.

Ideally, a state constitution must be largely autochthonous. In other words, it must be a perfect reflection of the state's history, culture, established political traditions, economic system, future aspirations, and other local circumstances as well as an attempt to resolve the existing socio-economic and political problems. Forming a new state out of different states, each of which is composed of multifarious ethnic identities, ordinarily brings social factionalism, social solidarity, political unity and other nation-building issues to the fore. The federal constitution was supposed to address such anticipated complexities and challenges but not merely to reproduce constitutions of other countries whose circumstances are vastly different from those obtained in East Africa. Thus, the 1963 Draft Constitution seriously failed on this score.

3.3. Emergence of Fissures and Negotiations Breakdown

Between June 1963 when the Nairobi Declaration was made and December 1963 when Kenya and Zanzibar gained full sovereignty, several meetings were held in Dar es Salaam, Kampala, Nairobi, and Zanzibar.²⁵⁴ They comprised meetings of the Working Party, the heads of state and ministers. Various letters and diplomatic correspondences supplemented such meetings.²⁵⁵ It was in the course of these negotiations that intractable problems arose. The most serious one was

²⁵⁴ Joseph S. Nye, *Pan-Africanism and East African Integration*, (Harvard University Press 1967), pp. 183- 200.

²⁵⁵ See, Ng'wanza Kamata, "Julius Nyerere: from a Territorial Nationalist to a Pan African Nationalist" (2019) *The African Review*, pp. 315-320.

the change of heart by the Ugandan politicians.²⁵⁶ First, Ugandans raised a condition that if the whole project was to proceed then Kampala or Entebbe had to be the capital city. Second, the whole federation process was being rushed but Uganda needed time to resolve its internal unity woes especially with regard to the Buganda Kingdom. Apart from having its self-government, as noted earlier, Buganda had also secessionist ambitions. Third, Buganda was opposed to federation. Kabaka of Buganda had been a pain in the necks of integrationists since the 1920s. Fourth, Uganda was concerned that the formation of the East African Federation would impede African continental unity. This position was drawn from Kwame Nkrumah's stance who wrote to Nyerere in 1963 warning that Nyerere's regional federation project would foil efforts to unite Africa as a whole.²⁵⁷ The letter was copied to Jomo Kenyatta, Milton Obote, Kenneth Kaunda (Northern Rhodesia) and Dr Kamuzu Banda (Nyasaland).²⁵⁸ Furthermore, at about the same time, the Ghanaian High Commissioner in Uganda addressed Makerere students urging them to refrain from supporting regional federations that were likely to thwart the continental unity.²⁵⁹ On the one hand, Nkrumah advocated for the formation of "the United States of Africa" (USA) or "Union of African States" (UAS).²⁶⁰ On the other hand, while Nyerere essentially supported Nkrumah's idea, he disfavoured his one-swoop approach as he thought it would not be easy to achieve.²⁶¹ Instead, he preferred a gradualist unification modality starting with regional blocs.²⁶² Nkrumah disapproved of this approach.²⁶³ However, according to Nye,

²⁵⁶ Joseph S. Nye, *Pan-Africanism and East African Integration*, (Harvard University Press 1967), p. 196.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ibid., p. 183.

²⁶⁰ Chinedu T. Ekwealor and Khondlo Mtshali, "United States of Africa and the Conundrums" (2018) *Journal of African Foreign Affairs*, p. 27.

²⁶¹ Ibid., p. 28.

²⁶² Ibid., p. 27.

²⁶³ Ibid.

Uganda had taken this position not really because they genuinely desired continental unity but, rather, as a fig-leaf to avoid joining the federation.²⁶⁴

Another challenge was the reluctance on the part of Zanzibar politicians. Ali Muhsin, an influential minister in the coalition government, once previously declared that they preferred to form a loose union with Somalia, Sudan and Egypt instead of federating with mainland East Africa.²⁶⁵ Also, as already noted, the Government of Zanzibar failed to send a representative in the June 1963 Nairobi meeting although it was invited. Furthermore, it was not until August 1963 when Zanzibar representatives attended the fourth meeting of the Working Party for the first time.²⁶⁶ After joining, they sided with Uganda, held joint private meetings and put conditions against Kenya and Tanganyika.²⁶⁷ Moreover, as it was hinted earlier, the Government of Zanzibar indicated its unwillingness to federate during the debate on a constitutional draft in the Constituent Assembly, which was held in mid-November, 1963. British lawyers had inserted a provision in the constitutional draft to the effect that appeals would lie from the Zanzibar High Court to the East African federal court.²⁶⁸ While the ASP supported the provision, the ZNP-ZPPP coalition government objected to it.²⁶⁹ This move had serious political ramifications on the coalition government. The British, who had all along supported the coalition government, backed out and, consequently, a *coup d'état* occurred on 12 January 1964. It would be naïve for one to think that ASP and its allies or the Government of Tanganyika could have overthrown the Government of Zanzibar without the

²⁶⁴ Joseph S. Nye, *Pan-Africanism and East African Integration* (Harvard University Press 1967), pp. 196-197.

²⁶⁵ William E. Smith, *Nyerere of Tanzania: The First Decade 1961-1971*, (African Publishing Group 2011), p. 92.

²⁶⁶ Joseph S. Nye, *Pan-Africanism and East African Integration*, (Harvard University Press 1967), p. 186.

²⁶⁷ *Ibid.*, p. 195.

²⁶⁸ Special Reporter, "Zanzibar: Constitution Debate" in *Reporter: East Africa's Newsmagazine*, (30th Nov. 1963), p. 12.

²⁶⁹ *Ibid.*, pp. 12-13.

permission of the British. Therefore, in a recently published work, Joan Wicken, Nyerere's life-long personal secretary, highlights the reason for the occurrence of the coup. She states: "it took place in the context of the attempt to set up a Federation of East Africa, which is what Mwalimu [Nyerere] was really after."²⁷⁰

As for Kenya, Tom Mboya, like Nyerere, frankly wanted a federation.²⁷¹ However, the same cannot be said of Jomo Kenyatta. Obote seemed to have known that Kenyatta was not into it, a fact which Nyerere might have been oblivious of. For instance, Obote told MPs who visited him that "the idea of federation had been put forward as an argument to speed [up] Kenya's independence."²⁷² Subsequently, Kenyatta confirmed that he never really wanted to federate but pretended to support Nyerere so that the latter could help Kenya to gain its independence quickly.²⁷³ At the end of the year, ministers met for negotiations in the course of which intractable issues came up. Whereas Kenya demanded a foreign affairs portfolio, Uganda argued that the process of unification was being rushed.²⁷⁴ Thus, as pointed out, Uganda repeated its demand for more time to resolve her internal unity challenges especially with regard to Buganda Kingdom that demanded its status in the envisaged Federation to be clarified first before Uganda decided to federate.²⁷⁵ On account of these differences, the negotiations for the federation collapsed in December 1963.²⁷⁶ Following the failure, debate

²⁷⁰ Aili Mari Tripp, *Joan Wicken: A Lifelong Collaboration with Mwalimu Nyerere*, (Mkuki na Nyota Ltd 2023), p. 145.

²⁷¹ William E. Smith, *Nyerere of Tanzania: The First Decade 1961–1971*, (African Publishing Group 2011), p. 89.

²⁷² Report of the Select Committee on East African Federation, 1975, p. 30.

²⁷³ William E. Smith, *Nyerere of Tanzania: The First Decade 1961–1971*, (African Publishing Group 2011), p. 146.

²⁷⁴ Godfrey Mwakikagile, *My Life as an African: Autobiographical Writings*, (New Africa Press 2009), p. 224.

²⁷⁵ Special Reporter, "Letter from the Editor" in *Reporter: East Africa's Newsmagazine*, (14 Sept. 1963), p. 1.

²⁷⁶ William E. Smith, *Nyerere of Tanzania: The First Decade 1961–1971*, (African Publishing Group 2011), 88.

turned to the possibility of Kenya and Tanganyika federating alone. For his part, Obote noted, “If Tanganyika and Kenya wished to go ahead and federate now, Uganda would wish them well, but would not be forced into any hasty union.”²⁷⁷ However, he cautioned the MPs who visited him: “I don’t believe that the question of federation between Tanganyika and Kenya is as easy as you think.”²⁷⁸ As it turned out later, Obote was right.

When the negotiations collapsed, Nyerere turned to Kenyatta. In one of their meetings, they excluded everybody else including their personal secretaries.²⁷⁹ In the meeting, Nyerere laid all his cards on the table and made a famous offer: since Ugandans were dragging their feet, Kenya and Tanganyika should go forward and federate and Kenyatta would be the first President of the new Federal Republic.²⁸⁰ As Nyerere revealed in later years, his ambition was to become the Federation’s Permanent Representative in the United Nations. Kenyatta thought for a moment and then rejected.²⁸¹ Wicken theorises that Kenyatta might have declined for two reasons, first, the inconvenience of relocating to Arusha and, second, he feared for the Kikuyu people as leaving Kenya would mean leaving them in the hands of the Luo politicians such Tom Mboya and Jaramongi Oginga Odinga.²⁸² Charles Njonjo, a powerful Attorney General and Kikuyu, was also opposed to the federation project.²⁸³

²⁷⁷ Report of the Select Committee on East African Federation, 1975, p. 28.

²⁷⁸ Ibid.

²⁷⁹ Aili Mari Tripp, *Joan Wicken: A Lifelong Collaboration with Mwalimu Nyerere*, (Mkuki na Nyota Ltd 2023), p. 147.

²⁸⁰ Ibid.

²⁸¹ Nyerere’s statement can watched on https://www.youtube.com/results?search_query=Nyerere+-+alitaka+Kenyatta+awe+Rais. Accessed on 8 January 2024.

²⁸² Aili Mari Tripp, *Joan Wicken: A Lifelong Collaboration with Mwalimu Nyerere*, (Mkuki na Nyota Ltd 2023), pp. 147-148.

²⁸³ Ibid., p. 147.

However, these reasons remain just a speculative theory as neither Kenyatta nor Nyerere ever disclosed the reasons for the refusal.

Nyerere characterised “the failure to achieve federation [as] the major disappointment of the year.”²⁸⁴ Nonetheless, Nyerere never lost hope. After the 1964 *conf d'état* in Zanzibar, Nyerere and Abeid Karume started negotiations for a possible union. It should be understood that the initial context of the negotiations was about a union of Kenya, Tanganyika and Zanzibar, not just Tanganyika and Zanzibar as it ended up later. When Karume indicated his readiness to federate, Nyerere rushed to Nairobi to meet Kenyatta. Basically, his message was: “Mzee Kenyatta, Karume is ready. Let the three of us go forward and federate!” Unfortunately for Nyerere, once again, Kenyatta declined.²⁸⁵ When he returned, Nyerere told Karume: “Kenyatta is not ready; do you want to go ahead?”²⁸⁶ Karume replied positively, the result of which Tanganyika and Zanzibar federated in 1964 thereby creating “the United Republic of Tanganyika and Zanzibar”.²⁸⁷ However, this designation was changed in October 1964 to “the United Republic of Tanzania.”²⁸⁸ Nevertheless, Nyerere still hoped for the future formation of the East African Federation. For this reason, he rejected Karume’s proposal for a unitary union. As a result, they settled for a quasi-federal constitutional arrangement in which Zanzibar retained its government with limited powers. This left open for the future formation of the East African federal union and avoided anticipated complications of untangling merged governments.

²⁸⁴ William E. Smith, *Nyerere of Tanzania: The First Decade 1961–1971*, (African Publishing Group 2011), p. 89.

²⁸⁵ Aili Mari Tripp, *Joan Wicken: A Lifelong Collaboration with Mwalimu Nyerere*, (Mkuki na Nyota Ltd 2023), p. 148.

²⁸⁶ Ibid.

²⁸⁷ The Union of Tanganyika and Zanzibar Act, 1964, s. 4 and the Union of Tanganyika and Zanzibar Law, 1964, s.4.

²⁸⁸ The United Republic (Declaration of Name) Act, 1964, s. 2(1).

Once again consensus that the British searched for since the 1920s was still unachievable. As highlighted earlier, many factors played part in the falling apart of the negotiations. The change of heart by Ugandan politicians and Buganda's opposition drastically overturned what looked to be imminently achievable. Nyerere attributed the change to the foreign interference for which he meant Nkrumah's intervention.²⁸⁹ However, Adoko Nekyon, a Ugandan prominent politician and minister at the time, stated: "I am not prepared to throw my nation into darkness."²⁹⁰ Differently stated, Ugandan politicians feared the possibility of the failure to secure power in the anticipated federal government. Nyerere's approach has also been blamed for the failure of the federation project. As Wicken disclosed, the British sought consensus so that the federation could be formed earlier before Kenya and Uganda became independent but Nyerere stoutly declined: "they were not going to do it under the British."²⁹¹ Nyerere was an excellent political engineer and physician who sought to construct a positive image of the envisaged federation and also sanitise it against possible future accusations of being the colonially formed political association. This philosophy was proclaimed in the 1963 Nairobi Declaration, which partly stated: "For 40 years the imperialists and local settler minorities tried to impose political federation upon us. Our people rightly resisted these attempts. Federation at that time would quickly have led to one thing—a vast white-dominated dominion."²⁹² The statement was a political masterclass blended with a diplomatic irritation considering the tenacious British pursuit of regional integration. It attempted to disassociate the federation with the British colonialists to boost its popular legitimacy. However, within its underlying noble

²⁸⁹ Ng'wanza Kamata, "Julius Nyerere: from a Territorial Nationalist to a Pan African Nationalist" (2019) *The African Review*, p. 320.

²⁹⁰ Joseph S. Nye, *Pan-Africanism and East African Integration*, (Harvard University Press 1967), p. 186; and Report of the Select Committee on East African Federation, 1975, p. 34.

²⁹¹ Aili Mari Tripp, *Joan Wicken: A Lifelong Collaboration with Mwalimu Nyerere*, (Mkuki na Nyota Ltd 2023), pp. 145-146.

²⁹² Report of the Select Committee on East African Federation, 1975, p. 14.

philosophy one serious mistake was wrapped in the approach. It was not going to be easy for the newly sworn leaders to surrender power and cede sovereignty. Nyerere was the only leader who was willing to surrender his post. Thus, as Singh asserts, the federation could have been realised before Kenya and Uganda gained independence, not thereafter.²⁹³ Singh's assertion still holds good as consensus eluded Nyerere and subsequent protagonists of the federal union.

4. The EAC (1967-1977)

In 1967, the EAC was established by the Treaty of the East African Cooperation of the same year. Before proceeding further, a brief background to this new arrangement is imperative. The failure to federate in 1963 and 1964 hugely frustrated Nyerere. In April 1964, he complained of trade imbalance in East Africa indicating that Tanganyika had tolerated the situation in anticipation of a federal union. Consequently, he threatened that Tanganyika could pull out of the EACSO.²⁹⁴ The threat ignited yet another series of negotiations in Dar es Salaam and Kampala.²⁹⁵ In 1965, Nyerere stated that the British colonialists had built industries in Kenya and, in contrast, did nothing in Tanganyika thereby making Tanganyika a free market for Kenyan goods.²⁹⁶ As he further stated, this situation, which was inherited at independence, made it difficult for Tanzania to develop its own industries without protection as they could not compete with the well-established Kenyan industries and firms.²⁹⁷ In simple words, as he stated, it was

²⁹³ Chanan Singh, "The Republican Constitution of Kenya: Historical Background and Analysis" (1965) *The International and Comparative Law Quarterly*, pp. 897-898.

²⁹⁴ Lubega, H., "Nyerere threatens to pull out of East African common market over imbalances" in Monitor, 29 November 2020, available at <<https://www.monitor.co.ug/uganda/magazines/people-power/nyerere-threatens-to-pull-out-of-east-african-common-market-over-imbalances-3213258>> (accessed 11 January 2024).

²⁹⁵ Ibid.

²⁹⁶ Julius K. Nyerere, *Freedom and Socialism: A Selection from Writings and Speeches 1965-1967*, (OUP 1968), p. 64.

²⁹⁷ Ibid., pp. 64-65.

necessary for Tanzania to restrict the importation of Kenyan goods to promote its own industrial sector. As he concluded: “Kenya clearly feels extremely bitter about Tanzania’s pressure to restrict the freedom of entry into Tanzanian markets. Tanzania, on her side, feels that if East Africa does not federate there must be some effort to accept the inevitable consequences of that failure.”²⁹⁸ Therefore, it was in the same year when Tanzania and Uganda imposed tariffs on Kenyan goods.²⁹⁹

Again, in the same year, 1965, each of three states announced to establish its own central bank. This marked the beginning of the collapse of the East African Currency Board and a common currency. Thus, the establishment of the EAC was meant to rescue the EACSO from unceremonious breakup and address the complaints. Consequently, a preamble to the Treaty of the East African Cooperation, 1967, summed up the spirit behind the cooperation, which was to deal with industrial imbalances and “to foster and encourage the accelerated and sustained industrial development” of Kenya, Tanzania and Uganda. Another major aim was the establishment of the Common Market. These aims were detailed and amplified in Article 2 of the Treaty, which enumerated the abolition of trade restrictions; establishment of common tariffs, the East African Development Bank, a common market, common services, a coordinated economic planning, and a coordination of transport policy. Thus, the initial EAC was designed to deal with economic issues only. The divisive political union issue was completely excluded. Probably, it was not discussed at all in the negotiations that preceded the establishment of the initial EAC due to resentments that it had generated. As a result, the political narrative changed from “East African integration” to one of “East African cooperation.”

²⁹⁸ Ibid., p. 66.

²⁹⁹ Sena Eken, “Breakup of the East African Community” 38, available at <<http://www.elibrary.imf.org/article-A010en>> (accessed 30 December 2023).

The institutional framework of the initial EAC was spelled out under Article 3 (1) of the Treaty. It established the following institutions: the East African Authority; the East African Legislative Assembly; the East African Ministers; the Common Market Council; the Common Market Tribunal; the Communications Council; the Finance Council; the Economic Consultative and Planning Council; and the Research and Social Council. Most of these institutions were just the continuation of the pre-existed ones under the EACSO. Other fields of cooperation were in areas of “education with a uniform curriculum and a shared examination body (East African Examinations Council), as well as the East African University, the Inter-University Council of East Africa, and a publishing house (the East African Literature Bureau).”³⁰⁰

In its initial years, the first EAC was a rare success story on the continent. The common services were operating perfectly well. Citizens were freely travelling across the region. In the words of Kiraso, the “Community had made great strides and was considered the world’s model of successful regional integration and development.”³⁰¹ However, its success was short-lived in that serious problems surfaced. The University of East Africa disintegrated in 1970 and each state maintained its own university college. Eventually, the Community broke up in 1977. As discussed in Chapter One, many factors contributed to its collapse. One of them is economic differences and trade imbalance, which, as already explained, caused diplomatic tensions, on the one hand, between Kenya and Tanzania; and between Kenya and Uganda, on the other. Variation in political ideologies is another frequently mentioned challenge. Kenya maintained a capitalist market economy. For its part, Tanzania pursued Ujamaa or African socialism in which the state controlled the

³⁰⁰ Joana Bar, “East African Communities (1967-1978, 1999-) and their Activity for Political Stability of the Region” (2018) *Politeja*, p. 253.

³⁰¹ Beatrice B. Kiraso, “EAC Integration Process and the Enabling Peace and Security Architecture”, a Paper Presented at the EAC Peace and Security Conference - Kampala, Uganda, 5 October, 2009, 2.

commanding heights of the economy. In contrast, Uganda was neither capitalist nor socialist. This ideological incompatibility negatively impacted the smooth running of the Community. Furthermore, the Community was elitist as ordinary people were never really involved. For instance, people never had an opportunity to elect officials of the Community's institutions. Political elites handled everything and the participation of ordinary citizens was reduced to listening on the state radio stations about what had happened. Moreover, the disruption of diplomatic relations between Tanzania and Uganda from 1971 onwards became the last straw that broke the camel's back. General Idi Amin, then the Chief of Ugandan Defence Forces, overthrew Obote on 25 January 1971 when Obote and Nyerere were attending a Commonwealth meeting in Singapore. According to Benjamin W. Mkapa, Nyerere might have felt guilty because he was the one who impressed on Obote to attend the meeting.³⁰² Nyerere declared that Tanzania would not recognise Amin's military government and gave Obote asylum status in Dar es Salaam. Tanzania also kept Yoweri K. Museveni, who led a failed attempt to attack Amin from Tanzania in 1972.³⁰³ These diplomatic tensions meant that it became difficult for the Community's heads of state to meet regularly until the Community broke up in July 1977.³⁰⁴ In October 1978, Amin's troops invaded Tanzania and claimed the annexation of the Kagera salient (the territory between the Kagera River and the Tanzania-Uganda boundary). This action ignited a war between the two countries. When the BBC announced that Kampala had fallen into the hands of Tanzanian troops and Ugandan groups early in the morning on 11 April 1979, Nairobi was gripped with panic.³⁰⁵ It was

³⁰² Benjamin W. Mkapa, *My Life, My Purpose: A Tanzanian President Remembers*, (Mkuki na Nyota Ltd 2019), p. 94.

³⁰³ *Ibid.*, p. 88.

³⁰⁴ Eken, S., "Breakup of the East African Community", 38, available at <<http://www.elibrary.imf.org/article-A010en>>

³⁰⁵ Benjamin W. Mkapa, *My Life, My Purpose: A Tanzanian President Remembers*, (Mkuki na Nyota Ltd 2019), p. 93.

feared that Kenya would be next on account of ideological differences.³⁰⁶ It might also have been thought that Nyerere had finally resolved to adopt Otto von Bismarck's state-making modality of smacking uncooperative political units and, ultimately, coercing them into a federal union. This, however, was not the case. Nyerere promptly sent Mkapa, the Minister for Foreign Affairs at the time, to Nairobi to assure Moi's government that Tanzania had no such sinister intentions.³⁰⁷

Although the initial EAC was not designed for a political union, as pointed out, its breakup was a major blow to the integration efforts. The common services, which, to a great extent, had worked perfectly, had unified East Africans. They had shared offices, crossed borders, traded among themselves and others had intermarried. Thus, the disintegration of the Community meant a serious setback to the tremendous progress that had been achieved. Through the EAC Mediation Agreement, 1984, the three states agreed to divide among themselves the assets and liabilities of the collapsed Community. Nonetheless, it was not all doom and gloom as the breakup did not destroy the spirit of cooperation altogether. Therefore, Article 14.02 of the Agreement stipulated that "the States have agreed to explore and identify further areas for future cooperation and work out concrete arrangements for such co-operation."³⁰⁸ Nyerere retired in 1985 and, therefore, others would take over his mantle.

5. Re-Establishment of the EAC (1999 - Present)

A Commonwealth meeting of heads of state, which was held in Harare, Zimbabwe, between 16 and 21 October 1991, brought together Presidents Daniel arap Moi (Kenya), Ali Hassan Mwinyi (Tanzania) and

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ Cited in Agreement for the Establishment of a Permanent Tripartite Commission for Co-Operation Between the Republic of Kenya, the United Republic of Tanzania and the Republic of Uganda, 1984.

Yoweri Kaguta Museveni (Uganda).³⁰⁹ They seized the occasion to consider a revival of the East African cooperation.³¹⁰ This brief encounter was followed by a meeting in Nairobi in November 1991.³¹¹ In 1993, they adopted an Agreement to establish a “Tripartite Commission” whose responsibility was “to promote cooperation in various fields including political, social, cultural and security among states for the mutual benefit.”³¹² The next step was the establishment of a small Secretariat in Arusha in 1996.³¹³ In 1999, Moi, Museveni and Mkapa signed the Treaty for the Establishment of the EAC for Kenya, Tanzania, and Uganda, which became effective in 2000. Since then, more states have joined the Community: Burundi (2007), Rwanda (2007), South Sudan (2016), the DRC (2022) and Somalia (2023).

Unlike the initial EAC, the current EAC envisages an integration process that will end up in a federal union. Although the current Treaty carries DNA strands inherited from the EAHC, the EACSO and the initial EAC, its comprehensiveness is unprecedented in the region. It envisions economic and social integration, which, ultimately, will lead to a federal union. The Treaty is supplemented by a number of protocols, each of which addresses a specific subject matter.³¹⁴ Its Article 5 (2) spells out four key stages of the integration process, which are ordinarily referred to as “the integration pillars.” They include the Customs Union, the

³⁰⁹ Report of the Committee for Fast Tracking the East African Federation, 2005, p. 16.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² The Agreement for the Establishment of a Permanent Tripartite Commission for Co-Operation Between the Republic of Kenya, the United Republic of Tanzania and the Republic of Uganda, 1984, art. 1.

³¹³ Report of the Committee for Fast Tracking the East African Federation, 2005, p. 17.

³¹⁴ Some protocols include the Protocol on the Establishment of the East African Community Customs Union, 2004; the Protocol on the Establishment of the East African Kiswahili Commission, 2007; the Protocol on the Establishment of the East African Community Common Market, 2009; and the Protocol on the Establishment of East African Community Monetary Union, p. 213.

Common Market, the Monetary Union and the Political Federation. So far, some progress has been made with respect to the first two stages.

Articles 6 and 7 of the Treaty stipulate fundamental and operational principles of the Community, which are a remarkable and celebrated feature of the Treaty. In summary, these principles can only be listed: popular centricity (people-centredness); subsidiarity; complementarity; variable geometry; asymmetry; mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; peaceful settlement of disputes; equitable distribution of benefits; co-operation for mutual benefit; and good governance, 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 (African Charter).

Article 9 (1) of the Treaty enumerates the major institutions of the current EAC: “(a) the Summit; (b) the Council; (c) the Co-ordination Committee; (d) Sectoral Committees; (e) the East African Court of Justice; (f) the East African Legislative Assembly; (g) the Secretariat; and (h) such other organs as may be established by the Summit.” Various protocols to the Treaty establish other institutions. As already pointed out, to a large extent, both institutional design and nomenclature of the current EAC draw its originality from predecessors: EAHC, EACSO and initial EAC. The Summit, which is composed of the heads of state, is the major executive and policy-decision-making body. The Council is the equivalent of a Cabinet as it is composed of ministers and the Attorneys General of member states. The EALA is the legislature and the EACJ is the legislative branch. The Secretariat is the engine of the current EAC as it runs it on a day-to-day basis.

5.1. Museveni and Fast-Tracking the Process Towards the Federal Union

After the retirement and demise of Leo Amery and Julius K. Nyerere, Yoweri Kaguta Museveni has taken over as the most ardent supporter of the integration project in the last three decades. Museveni heard about the East African Federation for the first time when he joined Ntare Senior Secondary School in Uganda in 1961.³¹⁵ In 1963, while in Form Three at the same school, he heard about the Nairobi Declaration.³¹⁶ Unlike Nyerere, who initially disliked the idea, Museveni's story is that of "love at first sight" because he was instantly thrilled, started reading newspapers searching for news on the federation and became a Nyerere zealot at once.³¹⁷ As he states, "That is how I became a Nyerereist because of my desire for a Federation of East Africa."³¹⁸ According to Nyerere, Museveni is "a committed pan-Africanist, and it is my hope that our leaders in East Africa will want to take another look at regional cooperation".³¹⁹

Having seen how Museveni became interested in Pan-Africanism and regional integration, it befits to briefly consider his contribution to the integration process. Firstly, he played a big role in initiating negotiations for the revival of the current EAC and, eventually, in its establishment.³²⁰ Secondly, Museveni has consistently advocated for the adoption of Kiswahili as the language of the Community. In the 1989 speech, he partly stated, "we must encourage the African languages that can be easily spoken by a wide range of the African population. In East Africa, I would

³¹⁵ Mark J. Mwandosya and Juma V. Mwapachu, (eds. and contrs.), *38 Reflections on Mwalimu Nyerere*, (Mkuki na Nyota Ltd 2022), p. 158.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid.

³¹⁹ Nyerere's foreword in Yoweri Museveni, *What is Africa's Problem?* (University of Minnesota Press, 2000), (xv).

³²⁰ Ibid., (xxvii).

recommend Kiswahili.”³²¹ Consequently, although the Treaty recognises English as the Community’s official language, it instructs the member states to develop and promote Kiswahili as the Community’s *lingua franca*.³²² Thirdly, Museveni successfully pushed for the adoption of the protocol on cooperation in defence affairs and another on peace and security as well as establishing the EACRF, which has been operating in the DRC since 2022 to protect civilians in war-ravaged areas and enforce peace agreements.³²³ Fourthly, one of Museveni’s significant contributions has been the articulation of the rationale for the integration. To him, the rationale is encapsulated in the trinity of economic prosperity, social fraternity and strategic defence. A brief exposition of these reasons is imperative. In the first place, integration is necessary to achieve economic prosperity. According to him, integration means an increase in population; expansion of the market; removal of the existing trade barriers; increase in employment; rise in individuals’ incomes; and, ultimately, economic prosperity for all. In the second place, regional integration is essential for strategic defence reasons. A joint defence is crucially necessary for the protection of life, freedom, territorial integrity and sovereignty of the East African region and Africa as a whole. On the contrary, as he ordinarily contends, balkanisation (maintenance of several fragmented, small and insignificant geopolitical units) cannot help the East African people to protect themselves. In the third place, regional integration is crucial for fraternity reasons. In this regard, he normally argues that the East African ethnic groups are interrelated and exist across national borders. Thus, according to him, integration would do away with the divisive, illogical and colonially-created boundaries and reunite the separated kins.

³²¹ Ibid., p. 176.

³²² Arts. 119(a) and 137 (1) and (2) and 119 (a).

³²³ The East African Community Protocol on Co-operation in Defence Affairs, 2012 and the East African Community Protocol on Peace and Security, 2013.

Fifthly, Museveni has always been instrumental in the expansion of the membership of the current EAC. It was through his efforts that Burundi and Rwanda were admitted in 2007. Although Kenya was also influential in the accession of South Sudan, the DRC and Somalia to the Community, Museveni strongly advocated for their admission. On the one hand, this membership expansionism entails enlarging the population and expanding trade markets. On the other hand, as discussed in subsequent sections, expansionism makes unification practically difficult.

Sixthly, it was Museveni who strongly pushed for the fast-tracking of the integration process so that the federal union could be realised earlier than originally anticipated. The slow pace of the integration process worried him. As a result, in 2004, a committee, under the chairpersonship of Amos Wako, who was the Attorney General of Kenya, was appointed to look into the matter and then recommend ways of fast-tracking the integration process into a federal union.³²⁴ The Wako Committee, as it is famously known, consulted with stakeholders and then reported in November 2004. It recommended three alternative options.³²⁵ One was to compress the four stages (customs union, common market, monetary union and political federation), shorten the time of implementation and then create a federal union earlier. Another was what the Committee called “overlapped and parallel process” which meant that the four processes could be implemented simultaneously instead of observing the sequential order so that the political federation could be formed earlier. The last one was the immediate establishment of the East African

³²⁴ Members of the Committee were as follows: Hon. Amos Wako, Chairman (Kenya); Prof. Haidari Amani - Vice Chairman (Tanzania); Dr. Ezra Suruma - Secretary (Uganda); Prof. Sam Tulya Muhika - Member (Uganda); Ms Margaret Chemengich - Member (Kenya); Mr. Mohamed Fakihi Mohamed - Member (Tanzania).

³²⁵ Report of the Committee for Fast Tracking the East African Federation, 2005, p. 59.

Federation. This proposal meant that the sequential order of stages as laid down in the Treaty needed to be jettisoned.

5.2. Fears and Concerns

The consultation that the Wako Committee undertook came up with what the Committee called “fears and concerns.” These entailed worries, uncertainties and reservations expressed by the people on the fast-tracked federation. Museveni’s urgent desire to form the federal union might not have been openly objected to, but certainly not wholeheartedly supported by other political leaders. One of the findings of the Wako Committee was that bureaucrats and other elites in the member states were hesitant to embark on the formation of a federal union.³²⁶ The fears and concerns included economic and trade imbalance; loss of sovereignty and national identity; loss of revenue; loss of jobs for members of professional bodies; loss of market due to being subjected to wide competition; and loss of land. One fear is usually apparent but rarely mentioned publicly or in official meetings: the possible loss of political power and its associated benefits.

Having considered the Wako Report, the Summit decided in 2005 that each national government should form a consultative committee to consult its stakeholders on the concerns and fears and then recommend ways to address them. Kenya, Tanzania and Uganda reported in 2007, while Burundi and Rwanda did in 2008. These reports indicated that there were not only “fears and concerns” to federate, but also “challenges”. From there on, the language changed from just “fears and concerns” to “fears, concerns, and challenges” (FCCs). On the basis of these reports, in 2009, the Summit directed that a team of experts should be appointed and commissioned to study the FCCs and then recommend the ways to address them so that the federation can be realised as soon as possible. The first 15-member team of experts was

³²⁶ Ibid., pp. 52 -58.

appointed in 2010.³²⁷ After conducting field research and studying literature, the Team reported in August 2010 and thereby made recommendations. The gist of its recommendations was that a federation should not be formed until various steps, including the observation of the sequential order of stages as stipulated in the Treaty, are taken.³²⁸

The Summit found the first Team's report unsatisfactory for being loaded with more theories than practical suggestions.³²⁹ Consequently, like Leo Amery did way back in 1927, the Summit ordered another Team of Experts to be appointed to undertake substantially a similar study. As a result, another 15-member team designated as “the Team of Experts on Addressing the Fears, Concerns and Challenges of the East African Federation” was appointed in 2011.³³⁰ In its report, the Team made a number of recommendations, five of which can be mentioned.³³¹ First, the Summit should initially establish the following institutions: the Customs Union Authority, the Common Market Authority, and the Economic Union Commission. Second, the fundamental stages of the integration process should be implemented. Third, a treaty for the establishment of the Monetary Union should be negotiated. Fourth, a treaty for a political federation should be negotiated. Fifth, EAC

³²⁷ Members of the Team were as follows: Mr. Job D. Masima, Prof. Palamagamba J. Kabudi, Mr. Othman M. Othman, Hon. Henry M. B. Makmot, Dr. Stephen B. Akabway, Hon. Irene Ovonji – Odida, Prof. Anastasc Shyaka, Dr. Emmanuel Ugirashebuja, Mr. Prudence Sebahizi, Dr. Adams Oloo, Hon. Rose Waruhiu, Dr. Mukhisa Kituyi, Amb. Jeremie Ndayiziga, Mr. Jean Baptiste Mpawenayo, and Ms. Angele Barumpazako.

³²⁸ Report of a Team of Experts on the fears, concerns raised and challenges identified on the East African Political Federation, 2010, (vi)- (vii).

³²⁹ A phone interview with one of the Team's members on 16th January 2024.

³³⁰ Members of the Team were as follows: Burundi (Amb. Jeremie Ndayiziga, Ms. Angele Barumpozako and Amb. Jean Baptiste Mpawenayo); Kenya (Hon. Rose Waruhiu, Hon. Dr. Mukhisa Kituyi, and Dr. Adams Oloo); Rwanda (Prof. Anastase Shyaka, Dr. Emmanuel Ugirashebuja, and Mr. Serge Kamuhinda); Tanzania (Prof. Palamagamba J. Kabudi, Mr. Uledi A. Mussa, and Mr. Asaa Ahmad Rashid); and Uganda (Prof. Sam Tulya-Muhika, Mr. Henry Makmot, and Hon. Irene Ovonji-Odida).

³³¹ Report of the Team of Experts on Addressing the Fears, Concerns and Challenges of the East African Federation, 2011, (viii)- (ix).

institutions, especially the EALA, EACJ and the Secretariat, needed to be reformed for deeper integration. Again, the thrust of the second Team of Experts' recommendations was that a number of steps were to be taken first before a federal union was formed. In short, reports of the two teams disfavoured Museveni's proposal regarding the immediate formation of the federation. Essentially, they indicated that hesitancy and trepidation about the idea were still manifest and evident, much to the dismay of Museveni. Therefore, as happened previously, consensus to form a federation could not be found; it was still elusive.

6. Political Confederation

Museveni's fast-tracking project was frustrated but his commitment remained steadfast. On 20 May 2017, Museveni chaired the Summit's meeting in Dar es Salaam. In that meeting, the Summit decided to adopt a political confederation as a transitional model to a full-fledged federal union.³³² The confederation became Museveni's "Plan B". Consequently, the same Summit "directed the Council to constitute a team of constitutional experts to draft the Constitution for the Political Confederation and report to the 19th Summit."³³³ The Team of Constitutional Experts was appointed in 2018 and 2019.³³⁴ This Team, to which the present author is a member, has consulted stakeholders in Burundi, Kenya and Uganda. It expects to conduct consultations in the DRC, Somalia, South Sudan and Tanzania in 2026. It would appear that

³³² Joint communiqué of 18th Ordinary Summit of Heads of State of the East African Community, 20 May 2017.

³³³ Ibid.

³³⁴ The team is composed of constitutional experts and drafting persons. Constitutional experts: Burundi (Mrs. Aimee Laurentine Kanyana and Mr. Valentin Bagorikunda); Kenya (Hon. S. Amos Wako and Mr. Peter Nginga Kiguta); Rwanda (Justice Emmanuel Ugirashebuja and Dr Usta Kayitesi); South Sudan (Ms. Mary James Ajith and Dr Elifaki Chol Lual Deng); Tanzania (Prof. Alexander Makulilo and Dr. Idd R. Mandi); Uganda (Hon. Justice Dr Benjamin Josés Odoki and Prof. Murindwa Rutanga). Draftspersons: Burundi (Mr. Liboire Nkurunziza); Kenya (Ms. Linda M. Murila); Rwanda (Mr. Fredouard Munyangabe); South Sudan (Mr. James Gore Lado Jumi); Tanzania (Mr. Saleh Said Mubarak); and Uganda (Sarah Mitanda). However, experts for Burundi and Rwanda have been frequently changed.

the Council of Ministers had recommended this integration model to the Summit. However, a valid charge could be laid against the decision that it is illegal as the Treaty nowhere mentions the formation of the confederal union or confederacy. To this charge, three quick alternative rejoinders could be advanced. First, the formation of the confederation is just a step towards the formation of the same federation in accordance with the Treaty. Second, if the authors of an instrument adopt a procedure that substantially departs from the one provided for in their own instrument, they should be presumed to have tacitly or impliedly amended the instrument. Thus, as the heads of state are the ones who adopted the Treaty, their unanimous decision to depart from it must be taken to be a conscious decision by them to tacitly or impliedly amend the Treaty. Ordinarily, a legal instrument is usually amended by its authors or, differently stated, by the same body that enacted it. Third, while the running of a state's government is a political activity that must be transacted within the letter of the law, state-making is a political activity of a different nature which is hardly carried out within the legal confines. Ordinarily, it is a revolutionary work which is guided by the pragmatic needs and prevailing political circumstances at the particular moment. Thus, the Summit's decision to form a confederacy, which is not legally recognised, is, nonetheless, a noble and prudent revolutionary decision which intends to expedite the unification of the East African peoples for the purpose of enhancing their economic welfare, social solidarity and political unity.

It now befits to conceptualise a confederation or confederacy. Professor Wheare considers a confederation as a “form of association between states in which the general government is dependent upon the regional governments.”³³⁵ Hague and Harrop state that “a confederation is a

³³⁵ Kenneth C. Wheare, *Federal Government*, (4th ed, OUP, London, 1963), p. 32 cited in Ramesh D. Dikshit, “Geography and Federalism” (1971) *Annals of the Association of American Geographers*, p. 99.

looser link between participating countries which retain their separate statehood.”³³⁶ They further cite Lister who notes, “a confederation does not create a new central government with a direct relationship to its citizens.”³³⁷ Furthermore, Professor Cuyvers partly observes that “the key characteristic [of a confederation] is that the different parts are not subsumed in or brought under a single superior authority. Instead, the central authority remains dependent on the constituent parts.”³³⁸ From these and other academic statements, the Team of Constitutional Experts identified and adopted the following as the hallmarks of a confederal political association.³³⁹ First, the constituent units of a confederation ordinarily retain their sovereignty. Second, the confederal government does not directly relate to people; it acts on the citizens only through the political institutions of the constituent units. Third, states or constituent units are free to join, and withdraw from, the confederation. Fourth, the confederal authority has the right to suspend or expel a constituent unit or state from the confederation. Fifth, operations of the confederal government depend on the goodwill of the governments of the constituent units. Sixth, the decision-making modality at the confederal level is based on consensus or unanimity. These six hallmarks will partly provide a basic framework upon which the confederal constitution and government will be designed and the relationship between the confederal government and those of constituent units will be defined.

³³⁶ Rod Hague and Martin Harrop, *Comparative Government and Politics: An Introduction*, (6th ed, Palgrave Macmillan, 2004), p. 229.

³³⁷ Frederick K. Lister, *The European Union, the United Nations and the Revival of Confederal Governance*, (Greenwood Press, 1996). Cited in Rod Hague and Martin Harrop, *Comparative Government and Politics: An Introduction*, (6th edn, Palgrave Macmillan, 2004), p. 229.

³³⁸ Daniel J. Elazar, *Exploring Federalism*, (University of Alabama Press, 2006), p. 7.

³³⁹ The Team of Constitutional Experts made this decision in its 3rd meeting which was held at Imperial Hotel in Entebbe, Uganda, Between 24 and 26 April, 2019.

Historically, many confederations have been formed. While some of them disintegrated, others were upgraded to federal states. The Confederation of Senegambia (1982-1989) and Fiji Confederacy (1865–1867) are instances of confederations that collapsed. The Swiss Confederation (1291–1847) and the USA Confederation (1781–1789) were upgraded to federal states. It is to be noted that regional economic organisations such as CARICOM, EAC, ECOWAS, EU and SADC are confederal in nature. Member states are sovereign and, therefore, retain the right to withdraw.³⁴⁰ In what is known as “Brexit,” the UK withdrew from the EU in 2016 by activating Article 50 of the Treaty on the European Union that permits withdrawal after observing a certain procedure. It could be questioned: If the EAC is already a confederal association, what is the point of transforming it into a confederation? This is a valid question for which two answers can be supplied. Firstly, the current EAC is basically an economic confederal association. Thus, the ongoing constitution-making process seeks to transform it into a political and economic association. Secondly, a confederation is ordinarily a pilot project, a transitory loose association towards a firmer federal union. It seeks to subject its constituent units to a common political authority to experiment a common administration, integrate the East African peoples and forge the sense of common identity, and, more importantly, observe and reflect on the emergent challenges before committing themselves into a firmer political association.

6.1. Progress and Challenges

The current EAC has made some viable strides. As the Kenyan President, Dr William Samoei Ruto, says, despite its problems, the EAC

³⁴⁰ See, the Treaty Establishing the Caribbean Community, 1973, art. 27; the Treaty for the Establishment of the Eastern African Community, 1999, art.145; the Revised Treaty of the Economic Community of West African States, art. 91; the Treaty on European Union, art. 50; and the Treaty of the Southern African Development Community, 2011, art. 34.

remains the most vibrant regional economic integration in the region.³⁴¹ There are others who hold the same idea.³⁴² The formation of the Customs Union in 2005 was a milestone. It entails “a Common External Tariff (CET) on imports from other countries outside the EAC; duty-free trade between the Partner States; and the adoption of common customs procedures.”³⁴³ Roads have been constructed for the facilitation of trade in the Community and integration cause. The Common Market Protocol, which was adopted in 2010 and came into force on 1 July 2010, allows free movement of goods, services and capital, persons, labour, and right of establishment and residence.³⁴⁴ This has resulted in the removal of visas and work permit fees for the East Africans. Furthermore, the Monetary Union Protocol was adopted in 2013 whose aim is to harmonise financial services and, ultimately, the adoption of a single currency.³⁴⁵ If this aim is realised, it will mark a huge step towards the federal union.

Nevertheless, there are challenges that impede the integration process. The implementation of the major steps (customs, common market, and monetary union) has been frustratingly slow. Hesitancy and delays that have all along characterised the integration process since the 1960s are still rampant and evident. Also, the Treaty adopted the principle of popular centricity (people-centredness) partly to avoid past faults which

³⁴¹ President Ruto spoke to members of the Team of Constitutional Experts tasked with the responsibility to draft the Constitution of the East African Confederation at the State House, Nairobi, on 24 May 2023.

³⁴² See, for instance, Tomasz Milej, “East African Community (EAC) – Inspiring Constitutional Change by Promoting Constitutionalism?” (2023) *International Organizations Law Review*, p. 160.

³⁴³ EAC, “Progress of the EAC Integration Process”, available at <<https://www.eac.int/sgforum/regional-integration-progress>> (accessed 15 January 2024).

³⁴⁴ The Protocol, art. 2 (4) read together with the Treaty for the Establishment of the East African Community, 1999, arts. 76 and 104.

³⁴⁵ The Protocol on the Establishment of the East African Community Monetary Union, 2013, arts. 4(2) (h), 18 and 19.

led to the disintegration of the initial EAC. Nonetheless, political elites have neither done much to involve the people nor popularise the idea of the federal union among ordinary people. Members of EALA are indirectly elected and, thus, are almost completely unknown to ordinary people in the region. The adoption of the EAC anthem is certainly a great idea intended to popularise the EAC and instil a sense of common belonging in the region but it is usually played in small and insignificant elitist occasions. Again, the most troubling industrial and trade imbalance that has scared some members especially Tanzania and Uganda from uniting with Kenya since the 1960s and 1970s still exists. Fears are frequently expressed that the Customs Union, Common Market and the ultimate federal union would grant Kenya a free and wide market and dwindle industrial development elsewhere. Furthermore, while some political leaders regard membership expansionism as a success, a strong opinion exists that it is disruptive and renders the realisation of a federal union almost impossible. It is thought that the admission of states with chronic security challenges, such as Somalia, would shift the Community's attention from federating to a protracted peace-building project. Apart from being disruptive, expansionism delays the achievement of the ultimate aim. For instance, upon joining the Community, the DRC demanded the recognition of French as one of the Community's official languages. This means that the Community should initiate a negotiation process for the adoption of a protocol that will recognise French. Somalia is likely to front similar demands for the recognition of Somali and trigger a similar protracted process. Nation-building will be impossible if multiple languages are used and officially recognised. Furthermore, expansionism also means the inclusion of members whose political cultures are vastly distinct from others. Certainly, this renders the formation of the federal union enormously difficult, if not impossible.

Another obstacle to the successful unification of the member states is the varied political and constitutional systems. There are three distinct groups in this regard. First, Burundi, Rwanda, the DRC and Uganda are unitary states. Second, Somalia and South Sudan are federal states. Third, Kenya and Tanzania are quasi-federal states (or semi-federal states). The unitarist constitutional systems of the first group of states are conducive to the unification project without many complications. In each case, there is only one level of government—the central government with its branches known as “local governments.” The same cannot be said of the second and third groups. Central governments in Somalia and South Sudan cannot constitutionally or legally dissolve the autonomous regional governments. Also, the 2010 Kenyan Constitution established county governments. As the central government is bereft of the power to abolish them, county governments are not typical local governments. Rather, they are a species of what are called “regional governments” which ordinarily enjoy a certain degree of autonomy from the central government. However, county governments lack financial independence since they depend on the central government for finance and the central government is given certain powers over them. For instance, the central government is bestowed with impeachment powers over county executive officials designated as “governors” and the President is also clothed with power to temporarily suspend county governments for certain reasons. These features make the system more quasi-federalist than a classic federal constitutional system. Similarly, in Tanzania, Zanzibar has its own autonomous government of a regional nature. Thus, the central government lacks constitutional power to dissolve the Zanzibar government. While governmental power is divided in the territory of Zanzibar, on the mainland only one government operates, making the system quasi-federal one as in the case of Kenya. It will not be easy for regional governments in Kenya, Tanzania, Somalia and South Sudan to be dissolved to pave way for the formation of the federal union. A classic federal constitutional design requires two levels of government.

A three-level federal government is something which is unknown. It will be the case of “federations within a federation.” Systemic challenges of a federal government and its inferiority, when compared with a unitary government, have already been pointed out in this chapter. The federal government is usually an inherently inefficient governmental system. A state with one general federal government constituted of subunits with federalised governments as well will be much worse; it will be a state with the most inefficient government. For instance, it can take 10 years to negotiate for consensus to construct a road across various constituent units.

7. Conclusion

As noted, the search for unity in East Africa dates back to the early parts of the last century. It started with the British colonialists who enthusiastically pursued the objective. Initially, they sought to annex German East Africa (Tanganyika, Burundi, Rwanda and Kionga Triangle) and then merge the territory with Kenya. However, in the Paris Peace Conference (1919-1920), the USA frustrated the British by rejecting their annexation proposal and actually called for the independence of the natives of the former German colonies. For their part, the British, French and other colonial powers were diametrically opposed to the American independence proposal. As a compromise, a mandates system was established. Since the planned merger or unitary union was ruled out, the British came up with the idea of a federal union as the alternative to the unitary union. Several factors also frustrated this particular aim. First, natives and white settlers were not interested in the idea of forming a closer union or federation. Second, Adolf Hitler slowed down the process of integration by demanding the return of Tanganyika which was a former German colony. Third, the status of Tanganyika as a mandate territory and, subsequently, a trust territory impeded integration. Consequently, Leo Amery, a British politician who ardently

supported and pursued the integration objective, could not secure a consensus.

At decolonisation, Nyerere took the mantle to promote the idea. Certainly, although there were others who desired regional unity as he did, he remains the only one who pledged his presidency for unity. In 1963, it came closest for the federal union to be formed, but consensus failed at the last moment. However, this time around, the reasons for the failure were slightly different. Loss of power in the wider regional political association scared political elites.

In 1999, the EAC was established with the ultimate aim to form a federal union. Museveni is the driving force of these latest integration efforts. However, apart from the process being sluggish, it is beleaguered by fears and concerns. It means hesitancy and reservations that political elites hold and, thus, they want to buy more time before they could agree to federate. The decision to form a confederal union first as a transitory arrangement towards a federal union is intended to give political elites more time to reflect upon the idea before committing themselves to a federal amalgamation. Thus, Amery, Nyerere and Museveni's holy grail, that is, a federal union, remains elusive.

Although consensus has been difficult to come by, hopes exist that the East African Federation can be achieved if certain steps are taken. First, substantial investment in the popularisation of the idea is needed. The inclusion of regional integration in education curricula at all levels of education can suppress fears and concerns and, consequently, overturn the present hesitancy in the long run. Civil society organisations need to rise up to the task and provide an alternative solution by popularising the envisaged federal union if state actors' reluctance persists. Also, the issue of balanced economic development should be addressed to remove existing fears of dominance. While balanced economic development is crucially vital, the fears are, to some extent, misconceived and, thus, it

needs propagation of civic education. For instance, why should one be worried by the Kenyan goods and not the Chinese ones which have flooded all markets in East Africa? Furthermore, in dealing with economic disparities, political differences and constitutional system variations, a gradualist approach rather than a one-swoop one is recommendable. Thus, a federation could be formed first and then the central or federal government would deal with problems of harmonisation, economic and trade imbalance, distinctive political and constitutional structures and embark on the serious project of nation-building. Nation-building entails taking efforts to integrate populations by suppressing divisive nationalistic and ethnic loyalties; ensuring harmonious co-existence of the people; creating the sense of common belonging; and enhance popular legitimacy, obedience and loyalty to the federal government. Furthermore, to avoid hasty processes that can throw the region into a political turmoil and instability, “one at a time problem-solving modality” is the most appropriate one. All problems cannot be solved at once. Nyerere, who was a far-sighted, visionary and unselfish statesman, sagaciously cautioned that the federation would be afflicted by many problems once it is formed; there should not be illusions of a smooth start or an easy ride.³⁴⁶ Cakes, candies, milk or honey cannot be guaranteed in the short run. As he said, the federation must be formed for “our children’s children;” they are the ones whose lives will prosper, not us.³⁴⁷ In other words, the message of the great statesman was: the East Africans should not selfishly think of themselves; they need to unite for the benefit of their posterity.

³⁴⁶ Report of the Select Committee on the East African Federation, 1975, p. 26.

³⁴⁷ Ibid.

PART II

GENERAL PRINCIPLES OF LAWS IN THE EAC, HUMAN RIGHTS AND THE EACJ'S PRELIMINARY RULING PROCEDURE

Chapter Three

Commitment in Vain? Reflection on Human Rights Protection as the General Principle of Law in the EAC

*Petro Protas**

1. Introduction

Just as it is difficult for a human being to live in isolation, so it is for States. The driving forces for states wanting to live and cooperate revolve around the concept of interdependence. This means that states need one another for a variety of reasons, such as maintaining common peace and security, promoting economic, social, and cultural ties, fighting poverty, and raising the living standards of the people within their territories.¹

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¹ For reasons that cause States to form themselves into regional integration see Gnatiuk Mykola, “Integration and the European Security Solution: Overcoming the Security Dilemma” (2022) UP, 18 See also Czarny Elzbieta and Jerzy Menkes, “European Union and European Germany” (2015) OC, p. 7. See also Martha B Hailu, “Regional Economic Integration in Africa: Challenges and Prospects” (2014) MLR, p. 299.

Because of such reasons, some states have moved a step further to form themselves into a REC, emphasising freedom of trade among member states. The ambition to achieve freedom of trade has seen countries in REC settings create customs territories, common markets, and monetary unions. However, studies indicate that freedom of trade cannot fully be realised in the absence of legal and practical steps to protect and promote human rights in any regional integration project.² The theoretical narrative behind this conclusion appears to be influenced by two essential facts: First, human rights form part of the general principles of law in most RECs, and for that reason, their promotion and protection are vital to achieving the community's objectives.³ Second, freedom of trade is essential in advancing the economic development of member states, thereby contributing to the improvement of human rights standards and quality of life for the people in the REC.⁴

Despite the above identified facts, the practice in most African RECs is condemned for inclining more towards economic development and paying less attention to the principle of promotion and protection of human rights. As a result, the present chapter examines the extent to which the 'promotion and protection of human rights' as the general principle of law is reflected in the Treaty for the Establishment of the EAC, 1999 (EAC Treaty) and its realisation in practice. The discussion goes beyond the mere jurisprudence of the EACJ, as is the case for most literature reviewed in this chapter. The chapter establishes that the EAC member states have legally committed themselves to respecting and promoting human rights in accordance with acceptable African and global standards. However, the struggle to give practical touch to these

² Moses R Phooko, "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" (2015) PELJ, p. 430; see also Chris M. Peter, *the Protectors: Human Rights Commissions and Accountability in East Africa*, (Fountain Publishers 2008), p. 317.

³ Khoti C. Kamanga and Ally Possi, "General Principles Governing EAC Integration" in Emmanuel Ugirashebuja, et al., (eds), *East African Community Law* (BRILL 2017), p. 205.

⁴ Clair Gammage, "Protecting Human Rights in the Context of Free Trade? The Case of SADC Group Economic Partnership Agreement" (2014), p. 780.

commitments is suffocated by factors such as a lack of political will and tactical delays in the implementation of the Treaty obligations by the member states. Lastly, the chapter offers recommendations on how best to improve the implementation of the EAC Treaty on the promotion and protection of human rights as one of the general principles of law.

2. Brief Overview of the EAC

The EAC is understood as the intergovernmental organisation⁵ of the eight member states, namely Tanzania, Kenya, Uganda, Rwanda, Burundi, South Sudan, the DRC and Somalia. If history is anything to go by, the formal initiatives of bringing the EAC into existence are linked with the British rule in East Africa.⁶ Immediately after the conclusion of the Berlin Conference on the scramble for and partition of Africa (1884–1885),⁷ Uganda and Kenya were placed under British colonialism, while German East Africa, which included today's Mainland Tanzania, Rwanda and Burundi, was put under German colonialism.⁸ It is recorded that the British had commenced integration initiatives between Kenya and Uganda by constructing the Uganda Railway in 1901, establishing the common currency (shilling) between Kenya and Uganda in 1905, the

⁵ To understand the intergovernmentalism mode in Africa and EAC in particular see Tomasz P Milej, “What is Wrong about Supranational Laws? The Sources of East African Community Law in Light of the EU's Experience” (2015) *ZaöRV*, p. 579; Elvis M. Binda, “The Legal Framework of the EAC” in Emmanuel Ugirashebuja, et al., (eds), *East African Community Law* (BRILL 2017), p. 103; see also Kennedy Gastorn, “The Legality of the Appellate Division and Human Rights Jurisdiction of the East African Court of Justice of the East African Community” in Kennedy Gastorn, *Essays in East African Community Law* (M/S AP Computers 2016), p. 32; see also Babatunde Fagbayibo, “Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview” (2013) *PER*, p. 32.

⁶ Khoti C. Kamanga, “An Enquiry into the Achievements and Challenges of the East African Regional Integration” (2016) *AF*, p. 52.

⁷ Joanne Yao, “the Power of Geographical Imaginaries in the European International Order: Colonialism, the 1884-85 Berlin Conference and Model International Organizations” (2022) *IO*, p. 901; see also Matthew Craven, “Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade” (2015) *LRIL*, p. 32.

⁸ Andreas Greiner, “Colonial Schemes and African Realities: Vernacular Infrastructure and the Limits of Road Building in German East Africa” (2022) *JAH*, p. 328.

Court of Appeal of Eastern Africa in 1909, the Postal Union in 1911 and the Customs Union in 1919.⁹ The conclusion of World War I in 1918 saw further changes to this arrangement, whereby Germany lost the war and her colonies.¹⁰ The German East Africa was divided between two superpowers, Britain and Belgium. Britain renamed their portion “Tanganyika”, while the remaining portions of Rwanda and Burundi went to Belgium.¹¹ Thereafter, Britain started integrating Tanganyika into Kenya and Uganda’s already existing integrational arrangements.

In 1948, the British rule in the territories of Tanganyika, Kenya, and Uganda strengthened the integration initiatives by establishing the EAHC. The EAHC fortified the integration arrangements of the three British territories by ensuring that common services such as post, railway, and harbours were supervised and administered together.¹² In the 1960s, liberation movements in the British territories of East Africa reached their peak, the result of which Tanganyika attained her independence in 1961, Uganda in 1962 and Kenya in 1963. This led to the collapse of the EAHC and the birth of the EACSO in 1961. The EACSO ensured the management of the common services continued despite the governors being replaced by the presidents of the newly independent East African states. Most scholars thought the EACSO would lead to a political federation between Tanganyika, Kenya and Uganda. However, the failure to meet this goal saw the dismantling of the EACSO and the creation of the defunct EAC in 1967.¹³ This Community collapsed in

⁹ Wanyama Masinde and Christopher O Omolo, “The Road to East African Integration” in Emmanuel Ugirashebuja, et al., (eds), *East African Community Law* (BRILL 2017), p. 15.

¹⁰ See the Versailles Peace Treaty, 1919, art. 10.

¹¹ Kadir Ozkose, “The Humanity Crisis Caused by Colonial Administrations in Rwanda” (2022) *Tetkik* 2, p. 579.

¹² See Frederick O. Ogola, et al., “A Profile of the East African Community” (2015) 1 *AJM* 4, p. 333.

¹³ See Joshua M. Kivuva, “East Africa’s Dangerous Dance with the Past: Important Lessons the New East African Community has not Learned from the Defunct” (2014) 10 *ESJ* 34, p. 359; see also Peter O’Reilly, “African Regionalism, Economic Nationalism

1977 for reasons such as a lack of political will, inadequate involvement of the private sector and civil society in the integration project, as well as uneven benefit sharing among the member states due to their varying levels of development.¹⁴ Nevertheless, the three founding members worked on their differences, resulting in the new EAC Treaty being signed in 1999 and entered into force in 2000. This marked the complete revival of the current EAC. It is pertinent to point out that, for over two decades now, the Community has expanded from three to eight members, including Rwanda and Burundi, which joined in 2007, South Sudan (2016),¹⁵ the DRC (2022)¹⁶ and Somalia (2023).¹⁷

The current EAC intends to achieve several objectives drafted within the EAC Treaty. These include deepening and widening cooperation among member states in politics, economic, social, cultural, defence, security, research, technology, legal, and judicial affairs.¹⁸ These goals are set to attain economic growth and improve the living standards of the Community's residents.¹⁹ In addition to achieving the goals, the Community is set to undergo four stages of integration, starting with a customs union, common market, monetary union, and political federation.²⁰ To achieve the goals and the envisaged stages, the general principles of laws enshrined under the EAC Treaty are considered the blueprints to the promised land. The subsequent part of this chapter

and the Contested Politics of Social Purpose: The East African Community and the New Developmentalism" (2023) 61 JMAS 1, p. 53.

¹⁴ The Treaty for the Establishment of the East African Community 1999, preamble.

¹⁵ EAC, "Overview of EAC", available at <<https://www.eac.int/overview-of-eac>> (accessed 5 April 2024).

¹⁶ EAC, "The Democratic Republic of Congo Joins EAC as its 7th Member" (EAC Press Release 29 March 2022), available at <<https://www.eac.int/press-releases/2402-the-democratic-republic-of-the-congo-joins-eac-as-its-7th-member>> (accessed 5 April 2024).

¹⁷ EAC, "Somalia Finally Joins EAC as the Bloc's 8th Partner State", (EAC Press Release 4 March 2024); Sarah Cole, "Virtual Friend Fires Employee" (Naked Law, 1 May 2009) accessed 19 November 2009.

¹⁸ The Treaty for the Establishment of the East African Community 1999, art. 5 (1).

¹⁹ Ibid, art. 5 (3) (b).

²⁰ Ibid, art. 5 (2).

delves into the general principles of laws under the EAC and thereafter narrows the discussion to human rights as a general principle of law in the Community.

3. The General Principles of Law in the EAC

The general principles of law have long been applied for multiple purposes under the international law. This includes the application as a source of law, interpretation tools, or even a fundamental rule, the breach of which leads to the rise of the claim of right to the affected person and liability to the wrongdoer.²¹ In the EAC, the general principles of law play an important role as a source of law, an aid in interpreting the EAC Treaty, and a guide in the achievement of the Community's objectives, which all EAC partner states must observe.²² Under the EAC Treaty, these principles are categorised into two main groups: the fundamental and operational principles.²³ The major difference between the two categories is that the fundamental principles enjoy the status of general applicability, while the operational principles are specifically codified to govern the practical achievement of the EAC objectives.²⁴

²¹ Guido Alpa, "General Principles of Law" (1994) 1 ASIC, p. 2; see also Malgosia Fitzmaurice, "The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present" in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OA 2017), p. 181; see also Bjorge, Eirik, "General Principles of Law Formed within the International Legal System" (2023) 72 ICLQ 1, p. 867.

²² Gastorn Kennedy, "Variable Geometry, Coalition of the Willing and the Destiny of the East African Community" in Gastorn Kennedy, *Essays in East African Community Law*, (M/s A P C 2016), p. 132; see also Kamanga Khoti Chilomba, "General Principles Governing EAC Integration" in Ugirashhebujia, E., et al., (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, (BRILL NIJHOFF 2017), p. 202.

²³ Refer to Article 6 and 7 of the Treaty for the Establishment of the East African Community, 1999 (as amended on 14 December 2006 and 20 August 2007).

²⁴ Gastorn Kennedy, "Variable Geometry, Coalition of the Willing and the Destiny of the East African Community" in Gastorn Kennedy, *Essays in East African Community Law*, (M/s A P C 2016), p. 132; see also Petro Protas and Theophil Romward, "Reflections on "People Centered Principle" in the East African Community: The Current Legal Controversy" (2015) 42 EALR p. 2.

Therefore, the EAC fundamental and operational principles lie at the heart of the EAC integration agenda. The absence of the principles thereof means that the Treaty objectives cannot be achieved. In emphasising this point, the EACJ in the case of *Attorney General of the Republic of Uganda v. Tom Kyaburwenda*²⁵ stated that “the failure to enforce the provisions of the EAC Treaty providing for fundamental and operational principles by the EACJ, national courts and tribunals, amount to a breach of the Treaty and impairment towards achieving objectives of the community”.²⁶ A similar position is seen in the case of *Samuel Mukira Muhochi v. The Attorney General of Uganda*, in which the EACJ stated that “the fundamental and operational 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.”²⁷

Against this background, one can safely conclude that the general principles of law, in the form of fundamental and operational principles, enjoy a special status in the EAC. The EAC partner states are obliged to observe the said principles as a matter of law, and failure to do so amounts to a violation of the EAC Treaty.

4. Human Rights as the General Principle of Law in the EAC

As a general principle of law, human rights are uniquely codified in the EAC Treaty to portray the seriousness of the partner states on the subject matter. The first and, perhaps, profound message of the EAC partner states to the world on the general principle of human rights is enshrined under Article 3 (3) (b) of the Treaty. In this provision, the partner states are notifying third states wishing to become members of the EAC to show *inter alia* that they abide by the universally acceptable human rights

²⁵ Case Stated No. 1 of 2014, [EACJ].

²⁶ Ibid., p. 27.

²⁷ Reference No.5 of 2011 [EACJ].

standards. Failure to do so constitutes one of the factors for the EAC member states to reject the membership application of the third state.

Second, the general principle of human rights is contained in both the fundamental and operational principles of the EAC under Articles 6 (d) and 7 (2) of the Treaty. This implies that the EAC partner states intended the general principle of human rights to be used both as a rule of general applicability and a practical guide to achieving the Community's objectives. In other words, the partner states agreed that a meaningful Community could not exist without its partner states respecting and adhering to acceptable human rights standards. To that end, it requires the partner states to recognise, promote and protect human rights in accordance with the African Charter on Human and Peoples' Rights (African Charter), as well as to maintain the universally accepted standards of human rights.²⁸

Stressing the level of recognition, promotion and protection of human rights entered to by the EAC partner states through ratification of the EAC Treaty, the EACJ, in the case of *Democratic Party v. the Secretary General of the East African Community and four others*, stated that:

The wording “in accordance with the provisions of the African Charter on Human and Peoples' Rights” creates an obligation for the EAC Partner States to act in good faith and in accordance with the provisions of the Charter. Failure to do so constitutes an infringement of the EAC Treaty. Such a violation can be legally challenged before the EACJ.²⁹

The EACJ went on to elaborate that, under Article 7 (2) of the EAC Treaty, partner states have bestowed on the EACJ the power to apply the provisions of the Vienna Convention on the Law of Treaties and

²⁸ The Treaty for the Establishment of the East African Community, [1999] arts 6 (d) and 7 (2).

²⁹ Appeal No. 1 of 2014, para 64.

other relevant international instruments explicitly or implicitly referred to in the EAC Treaty.³⁰

Analysis of the above EACJ decision and the provisions of the EAC Treaty depicts that the EAC partner states have vowed to promote, protect and adhere to human rights standards as per the African human rights system (regional standards) and the universally acceptable human rights standards (global standards). In that regard, the sky is not the limit as far as the commitment of the partner states to promote, protect and comply with human rights standards is concerned. Nevertheless, the remaining question is whether such legal commitments are reflected in the practice of the partner states. The preceding sub-part below provides an analysis of this question.

4.1. Commitment in Line with Regional Standards

As already shown, the EAC partner states included Article 6 (d) to the EAC Treaty, which obliges them to observe human rights as stipulated in the African human rights system or as referred to in this chapter as regional standards. Such standards are contained in several regional legal instruments, including the African Charter, 1981, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), 1998 and the Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa, 2024, to mention a few. The African human rights standards affirm that human rights have become a matter of concern not for individual African States but for the whole continent.³¹

³⁰ Ibid, para 69.

³¹ Morris Mbondenyi, *International Human Rights and their Enforcement in Africa*, (LawAfrica Publishing (K) Ltd, 2011), p. 5.

Furthermore, the regional standards represent a departure from the culture of impunity where some governments in Africa would abuse the rights of their citizens by killing, torturing, enforced disappearance and sailing through without condemnation or interference from other states.³² Such a culture was made possible by the old AU legal principle of non-interference in the internal affairs of other states.³³ Currently, however, human rights violation in one state is the business of other African states.³⁴ The African Charter, which entered into force in 1986, designated the African Commission on Human and Peoples' Rights (the Commission) as a regional mechanism for redressing human rights violations on the continent.³⁵ Additionally, in 1998, African countries decided to move a step further to create a body that would issue binding decisions related to the violation of human rights in the continent. This was materialised through the adoption of the African Court Protocol. This, therefore, means that the EAC, through the EAC Treaty, requires its members to respect the regional human rights standards and subject themselves to the jurisdictions of the commission and the African Court. It is pertinent to note that all the EAC partner states have ratified the African Charter, and six out of eight have ratified the African Court Protocol, as divulged in Table 1.

³² Chris Maina Peter (ed), *The Protectors: Human Rights Commissions and Accountability in East Africa*, (Fountain Publishers 2008), p. 318.

³³ Ibid.

³⁴ Morris Mbondenyi, *International Human Rights and their Enforcement in Africa*, (LawAfrica Publishing (K) Ltd, 2011), p. 5.

³⁵ For details on African Mechanisms for the redress of Human Rights, see Eleni Polymenopoulou, "African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights v. Great Socialist Peoples of Libyan Arab Jamahiriya, Order for Provisional Measures 25 March 2011" (2012) 61 ICLQ 3, pp. 767-775; see also Felix M Ndahinda, "Peoples' Rights, Indigenous Rights and Interpretative Ambiguities in Decisions of the African Commission on Human and Peoples' Rights" (2016) 16 AHRLJ 2, pp. 29-57; see also Robert D. Nanima, "Revisiting the Normative Framework of the African Commission on Human and Peoples' Rights in the Context of Evidence Obtained through Human Rights Violations: Has it Served its Purpose?" (2018) 18 AHRLJ 1, pp. 1-26.

Table 1: Ratification Status of EAC Partner States to the Charter and the African Court's Protocol

SN	EAC Partner States	African Charte of 1981 (Ratification/Acce ssion Date)	The African Court Protocol of 1998 (Ratification/ Accession Date)
1.	Tanzania	18 February 1984	07 February 2006
2.	Kenya	23 January 1992	04 February 2004
3.	Uganda	10 May 1986	16 February 2001
4.	Rwanda	15 July 1983	05 May 2003
5.	Burundi	28 July 1989	02 April 2003
6.	The DRC	20 July 1987	08 December 2020
7.	South Sudan	23 October 2013	24 January 2013 (Signed Only)
8.	Somalia	31 July 1985	23 February 2006 (Signed Only)

Source: AU 2024

Despite the ratification, the EAC partner states appear to be lagging in giving full effect to their commitments emanating from the regional instruments. This dilutes their obligation under the EAC Treaty, which requires them to abide by the regional human rights standards. The dilution is revealed in the sections below.

4.1.1. EAC Partner States and the Commission

It is noteworthy to point out that the African Commission is the creation of the African Charter, which entered into force on 21 October, 1986.³⁶ Theoretically, the Commission's mandate appears to be broad, including interpretation of the Charter, promotion and monitoring of state compliance with the provisions of the Charter, and recommendations to states on communications received from individuals and non-governmental organisations (NGOs).³⁷ In practice, however, the institutional mechanism for protecting and enforcing human rights through the Commission is still weak. The Commission does not have the ability to issue 'binding decisions' on the communications brought before it.³⁸ This leaves the compliance of the 'recommendations' issued at the 'political mercy' of the countries concerned.

Scholarly works divulge that a weak institutional mechanism to address human rights violations within the African Charter is one of the reasons for its many ratifications among the African states.³⁹ Remarking on the African Charter's weaknesses and its vast number of ratifications by the African states, Mbondenyei said the following: "Perhaps this explains why, despite the African Charter's ratification by all the OAU/AU member

³⁶ See Gina Bekker, "The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations" (2013) 13 HRLR 3, p. 500.

³⁷ Ibid; see also the African Charter on Human and Peoples' Rights, 1986, art. 45.

³⁸ Chairman Okoloise, "Circumventing Obstacles to the Implementation of Recommendations by the African Commission on Human and Peoples' Rights" (2018) 18 AHRLJ 1, p. 29.

³⁹ All 54 African States except South Sudan have ratified the AfCHPR. See Ratification Table: African Charter on Human and Peoples' Rights, available at <<http://www.achpr.org/instruments/achpr/ratification/>> (accessed 22 December 2023). For the challenges on Enforcement mechanisms of human rights in Africa, see Michele Olivier, "Enforcement Mechanisms in AU Human Rights Treaties: Lessons for the Wider AU Law", in Olufemi Amao, Michele Olivier and Konstantinos D. Magliveras (eds), *The Emergent African Union Law: Conceptualization, Delimitation and Application*, (Oxford 2022); see also Kofi Oteng Kufuor, "Safeguarding Human Rights: A Critique of the African Commission and Peoples' Rights" (1993) 18 AD 2, p. 71.

states, human rights have continued to be relentlessly violated on the continent.”⁴⁰

Like Mbondeniyi, this chapter sadly argues that the weaknesses in implementing and enforcing human rights under the African Charter appear to be one of the reasons for the EAC partner states to be attracted by the Charter and ratify the same. This is especially true when one analyses the ‘intolerant behaviour’ of the EAC partner states towards the binding regional and subregional human rights mechanisms. For instance, in 2010, the EAC partner states, Tanzania and the DRC, which are also members of the SADC, participated in suspending the SADC Tribunal.⁴¹ The decision to suspend the tribunal came as a result of its ruling in the case of *Mike Campbell (PVT) Ltd and others v. the Republic of Zimbabwe*,⁴² where the land-grabbing policy against white commercial farmers in favour of the war veterans by the government of Zimbabwe was held to be a violation of human rights. Following the decision, the SADC states, including Tanzania and the DRC, disciplined the ‘misbehaving’ SADC Tribunal by ousting its jurisdiction through a resolution which stated *inter alia*: “... the new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States”.⁴³

Similarly, the EAC partner states neither allow individuals and NGOs to access the African Court for human rights litigations nor have they extended the jurisdiction of the EACJ to address human rights violations

⁴⁰ Morris Mbondeniyi, *International Human Rights and their Enforcement in Africa*, (LawAfrica Publishing (K) Ltd, 2011), p. 6.

⁴¹ For the suspension of the SADC Tribunal see Laurie Nathan, “The Disbanding of the SADC Tribunal: A Cautionary Tale,” (2013) 35 HRQ 4, p. 870; see also Tapiwa Shumba, “Rising from its Ruins? The Southern African Development Community (SADC) Tribunal”, (2022) 26 LDD 1, p. 1.

⁴² SADC Tribunal No. 2 of 2007.

⁴³ For the SADC Resolution to Suspend the SADC Tribunal, see Michelo Hansungule, “The Suspension of the SADC Tribunal”, (2013) 35 SRSA 1, p. 135.

within the Community. The subparts below reveal detailed elaborations of the intolerant behaviours of the Community partner states towards human rights mechanisms with binding legal effects.

4.1.2. EAC Partner States and the African Court

The African Court is another mechanism for protecting human rights in Africa. It was established by the African Court Protocol of 10 June 1998.⁴⁴ The Court did not instantly become operational; it had to wait until the Protocol entered into force on 25 January 2004.⁴⁵ The establishment of the Court marks another step towards strengthening the protection of human rights in Africa. It does not replace the protective mandate of the African Commission but complements it.⁴⁶ The Court is vested with the power to hear cases submitted to it by state parties to the Protocol, the Commission, NGOs and individuals whose states are parties to the Protocol.⁴⁷

However, the Court's power to admit cases from individuals and NGOs is limited. The Protocol requires that the Court only receive cases from individuals and NGOs whose countries have made a declaration under Article 34 (6). The declaration under this Article gives individuals and NGOs *locus standi* before the Court.⁴⁸ The absence thereof means individuals and NGOs are barred from accessing the Court. Against this legal requirement, 34 African states have ratified the Protocol establishing the African Court. Out of the 34, only eight countries have deposited the

⁴⁴ See the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998, art. 1.

⁴⁵ See Activity Report of the African Court on Human and Peoples' Rights (AfCHPR), Delivered during the Thirty-Fourth Ordinary Session of the AU-Executive Council in Addis Ababa, Ethiopia, from 07 – 08 February 2019, p. 1.

⁴⁶ See Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

⁴⁷ *Ibid.*, art. 5 (1), (2) and (3).

⁴⁸ *Ibid.*, arts. 5 (3) and 34 (6); see also the African Court on Human and Peoples' Rights, Rules of Court, 2019, rule 33 (1).

declaration in favour of individuals and NGOs.⁴⁹ Woefully, no single EAC partner state features in the list of the eight countries despite the Court having its permanent seat in the EAC.⁵⁰ Additionally, two EAC partner states, South Sudan and Somalia, have not moved beyond the signing of the Protocol. This makes the enforceability of human rights through the African Court a mere inspiration for future use in these two EAC states.

It is important to note, however, that out of the eight EAC partner states, only Tanzania and Rwanda initially signed the declaration allowing individuals and NGOs to access the African Court directly.⁵¹ Nevertheless, Rwanda withdrew her declaration in 2016, stating that genocide convicts had abused the declaration.⁵² Similarly, Tanzania withdrew its declaration in favour of individuals and NGOs' direct access to the Court in 2019. In doing so, Tanzania stated that her decision came as a result of the declaration being implemented by the African Court against the reservations made at the time of entering it.⁵³ This chapter does not detail the reasons given by each country at the time of withdrawing their declaration. Nevertheless, the chapter argues that

⁴⁹ The eight African countries that have deposited the declaration in favour of the individuals and NGOs include Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger, Burkina Faso and Tunisia. For more details see Faix, Martin, and Ayyoub Jamali, "Is the African Court on Human and Peoples' Rights in an Existential Crisis?", (2022) 40 NQHR 1, p. 63; see also Adjolohoun, Segnonna Horace, "A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights", (2020) 20 AHRLJ 1, p. 140.

⁵⁰ The African Court on Human and Peoples' Rights sits in Arusha, Tanzania.

⁵¹ Vicent Mtavangu and Agripina Mbilinyi, "Tanzania's 'Withdrawal' from the African Court and Its Effects on the Enforcement of Human Rights", (2023) 1 JCALS 2, p. 27.

⁵² See Republic of Rwanda, Ministry of Foreign Affairs and Cooperation, *Withdrawal for Review by the Republic of Rwanda from the Declaration made under Article 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of African Court on Human and Peoples' Rights*, available at <<https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Rwanda.pdf>> (accessed 12 December 2023).

⁵³ See the United Republic of Tanzania, *Notice of Withdrawal of the Declaration made under Article 34 (6) of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights*, available at <https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf> (accessed 12 December 2023).

denying individuals and NGOs to have direct access to the African Court by the EAC partner states has not come as a surprise. Through the EAC Treaty, the partner states have long ago done the same thing by denying the EACJ the jurisdiction to entertain human rights petitions. Henceforth, this chapter argues that the commitment to recognise, promote and protect human rights in accordance with the African Charter by the EAC partner states is not fully adhered to.

4.2. Forlorn Enforcement of Human Rights by the EACJ

The EACJ is the judicial body of the EAC established under Article 9 of the EAC Treaty. Its prominent role is to ensure that partner states comply with the community law by enforcing its interpretation and application mandate.⁵⁴ The EACJ has powers to entertain references brought to it by partner states, the Secretary General of the Community, as well as legal and natural persons who are residents of the partner states.⁵⁵ It is vital to note that individuals or legal persons are not required to ‘exhaust local remedies’⁵⁶ to refer the matter to the EACJ.⁵⁷ Despite friendly provisions on access to the Court by individuals and legal persons, 25 years have passed without EAC partner states extending ‘human rights jurisdiction’ to the EACJ.⁵⁸

⁵⁴ The Treaty for the Establishment of the East African Community, 1999, Art. 23 (1).

⁵⁵ Ibid., arts. 28, 29 and 30.

⁵⁶ For more details on the principle of Exhaustion of Local Remedies in international law, see Chittharanjan F. Amerasinghe, “Exhausting Local Remedies”, Diplomatic Protection, Oxford Monographs in International Law (Oxford Academic 2009); see also Silvia D’ascoli and Kathrin Maria Scherr, “The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection”, (2007) 02 EUI Law; see also Matthew H. Adler, “Exhaustion of the Local Remedies Rule after the International Court of Justice’s Decision in *ELSI*”, (1990) 39 ICLQ 3, p. 641.

⁵⁷ *Media Council of Tanzania and two others v. The Attorney General of the United Republic of Tanzania*, [2017] EACJ, Reference No. 2. See also *Prof. Anyang’ Nyong’o and others v. The Attorney General of Kenya and others*, [2006] EACJ Reference No. 1. The non-requirement for the exhaustion of local remedies is also seen in the case of *Malcom Lukwija v. The Attorney General of the Republic of Kenya*, [2015] Reference No. 6.

⁵⁸ Petro Protas and Theophil Romward, “Reflections on ‘People-centred Principle’ in the East African Community: The Current Legal Controversy” (2015) 42 EALR 2, p. 22.

Since the EAC revival in 1999, partner states have been invited under Article 27 (2) of the EAC Treaty to conclude a protocol conferring human rights jurisdiction on the EACJ.⁵⁹ The EAC Sectoral Council on Legal and Judicial Affairs took the first initiative to honour the invitation. In April 2004, the Sectoral Council decided that it was appropriate to extend the jurisdiction of the EACJ to cover human rights-related issues, among other things.⁶⁰ This decision received the support of the Council of Ministers, which, in 2005, instructed the EAC Secretariat to draft a Protocol to implement the Sectoral Council's decision. Three months later, the Secretariat finished the task and returned the draft to the Council.

Nevertheless, finalising the Draft Protocol and giving it the force of law has been at a standstill. Literature raises contributing factors for the standstill such as prolonged consultations due to the admission of new members, the 2007 post-election violence in Kenya and the overall lack of political will.⁶¹ The EACJ, in the case of *Hon. Sitenda Sebalu v. the Secretary General of the EAC and three others*, condemned the standstill by remarking that “the delay in extending the jurisdiction of the court by the Council of Ministers has a negative effect on good governance, democracy, the rule of law and human rights in East Africa”.⁶² Nevertheless, the EACJ's remark does not change the fact that it has no human rights jurisdiction.⁶³

⁵⁹ See Philomena Apiko, “Understanding the East African Court of Justice: The Hard Road to Independent Institutions and Human Rights Jurisdiction” (2017) ECDPM, p. 8.

⁶⁰ See Kennedy Gastorn, “Variable Geometry, Coalition of the Willing and the Destiny of the East African Community” in Kennedy Gastorn, *Essays in East African Community Law*, (M/s A P Computers, 2016), p. 44.

⁶¹ Ally Possi, “Striking a Balance between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice”, (2015) 15 AHRLJ, pp. 192 - 213; see also Tasco R. Luambano, “Litigating Human rights through the East African Court of Justice: Overview and Challenges” (2018) 71 JPG, p. 80.

⁶² Reference No. 1 of 2010 [EACJ].

⁶³ Lack of explicit human rights jurisdiction by EACJ is also explained in Victor Lando, “The Domestic Impact of the Decisions of the East African Court of Justice” (2018) 18 AHRJ 2, p. 466.

If learning from other RECs is valuable, then the ECOWAS experience is worth revisiting. Since its establishment in 1975,⁶⁴ ECOWAS, like the EAC, has maintained the practice of restricting the ECOWAS Community Court of Justice (ECCJ) from having human rights jurisdiction. The ECCJ itself was a product of the 1991 Protocol Relating to the Establishment of the ECOWAS Community Court of Justice. It was adopted on 6 July 1991 and entered into force on 5 November 1996.⁶⁵ The Protocol did not confer the ECCJ with human rights jurisdiction but had an express provision giving the member states discretionary power to extend the Court's jurisdiction.⁶⁶ Unlike the EAC, ECOWAS member states exercised this mandate by adopting a Supplement Protocol in January 2005, which amended the ECCJ Protocol to confer human rights jurisdiction to the Court.⁶⁷ Whether the Court has been effective in implementing the extended human rights jurisdiction goes beyond the scope of this chapter, and the subject matter is left for other researchers. What is significant, therefore, is that ECOWAS member states have honoured their commitment to protecting human rights under the ECOWAS Treaty by words and deeds.

In contrast, East Africans have been left to the bold innovation of the EACJ, which adjudicates human rights cases based on the fundamental

⁶⁴ See The Treaty of the Economic Community of West African States (adopted on 28 May 1975). ECOWAS also revised its Treaty in 1993; see also the Revised Treaty of the Economic Community of West African States (adopted on 24 July 1993, which entered into force on 23 August 1995).; for a brief history of ECOWAS see Amos O. Enabulele, "Reflections on the ECOWAS Community Court Protocol and the Constitutions of Member States" (2010) 12 ICLR 1, p. 111.

⁶⁵ See Horace S. Adjolahoun, "The ECOWAS Court as a Human Rights Promoter? Assessing Five Years' Impact of the Koraou Slavery Judgment" (2013) 31 NQHR 3, p. 343.

⁶⁶ See The Protocol A/SP1/12/01, art. 39 cited in Solomon T. Ebobrah, "Critical Issues in the Human Rights mandate of the ECOWAS Court of Justice" (2010) 54 JAL 1, p. 1.

⁶⁷ Ibid, p. 2. See also Enyinna S. Nwauche, "The ECOWAS Community Court of Justice and the Horizontal Application of Human Rights" (2013) 13 AHRLJ, p. 31.

and operational principles of the EAC Treaty.⁶⁸ Several cases confirm the EACJ's boldness. In *James Katabazi and 21 others v. Secretary-General of the East African Community and the Attorney General of Uganda*, the applicants challenged their arrest by the Ugandan security forces immediately after being granted bail by the High Court for treason-related charges.⁶⁹ Instead of focusing on Uganda's violation of the rights to the presumption of innocence and liberty under the Ugandan Constitution, the EACJ ruled that Uganda violated the principle of good governance and the rule of law guaranteed under the EAC Treaty.⁷⁰ According to the court, the EAC's fundamental and operational principles are vital to attaining the Community objectives. Therefore, the Court was not prepared to surrender its interpretative jurisdiction under the EAC Treaty merely because the reference alleged human rights violations.

Similarly, in the case of *Media Council of Tanzania and two others v. the Attorney General of the United Republic of Tanzania*,⁷¹ the EACJ was called upon to adjudicate whether the provisions of the then newly enacted law in Tanzania, the Media Service Act, No. 120 of 2016, unjustifiably restricted the freedom of expression and the right to access information. Although this was a purely human rights violation matter, the applicants argued successfully that the introduced provisions under the Media Service Act violated the EAC Treaty, especially the fundamental and operational principles of democracy, rule of law, accountability, transparency, good governance and adherence to human rights as provided under Articles 6 (d) and 7 (2) of the Treaty.

⁶⁸ On judicial activism of EACJ, see Juma V. Mwapachu, *Challenging the Frontiers of African Integration: The Dynamics of Policies, Politics and Transformation in the East African Community*, (E&D Vision Publishing 2012), p. 140.

⁶⁹ Reference No. 1 of 2007 [EACJ].

⁷⁰ See the Treaty for the Establishment of the East African Community, 1999, arts. 6 and 7.

⁷¹ Reference No. 2 of 2017 [EACJ]. The judgment of the Court was given on 28 March 2019.

The same trend is seen in the EACJ judgements in the *Plaxeda Rugumba* and *Venant Masenge* cases,⁷² where the Court, without hesitation, relied on the fundamental and operational principles to determine these cases despite having human rights elements. Although the EACJ innovation has given citizens and residents in EAC access to the Court, this chapter argues that the access is not wholly adequate. The *raison d'être* rests on the fact that the applications filed before the EACJ are not human rights petitions. Therefore, the burden of proof shifts to applicants as opposed to most human rights petitions, where states typically have a burden of proving that their actions are legal and conform to acceptable human rights standards.

4.3. Admission of New Members and General Principle of Human Rights

As noted earlier, the EAC was founded by three member States. Over time, the number of member states increased to eight. The criteria for admitting new members are laid down under Article 3 of the EAC Treaty. The Treaty framework requires member states to consider the following matters when determining a foreign country's membership application: namely, the readiness of the foreign country to accept the Community as set out in the EAC Treaty, geographical proximity, the readiness to establish and maintain the market-driven economy and the compatibility of socio-economic policies of the foreign country with those of the EAC.⁷³

Furthermore, a foreign country should adhere to the universally acceptable principles of human rights, social justice, good governance, democracy, and the rule of law. Above all, the state applying for EAC membership should not be a burden to the Community. Hence, before admitting a new member, the EAC Treaty requires member states to

⁷² *Venant Masenge v. the Attorney General of the Republic of Burundi* [2012] EACJ Reference No. 9.

⁷³ The Treaty for the Establishment of the East African Community, 1999, art. 3 (3).

consider the respective state's potential contribution to the EAC integration project.⁷⁴

Assessment of the admission criteria reveals that the EAC member states have taken the principle of human rights seriously as one of the general principles of law that must be proved to exist in the applicant state for it to be admitted. However, in 2007, when Rwanda and Burundi became new members of the EAC, reports indicated there were human rights violations in the two countries.

In Burundi, reports revealed that incidences of forced disappearances, harassment and arrest of journalists, torture and summary execution of some citizens by security organs, as well as overall silencing of the government's opposition were rampant.⁷⁵ In Rwanda, incidences of arbitrary arrests and detention, torture and forced disappearance of some people were registered.⁷⁶ Notwithstanding such reports, Burundi and Rwanda's membership applications were accepted in 2007.

Similarly, South Sudan, the DRC and Somalia were admitted as new members in 2016, 2022 and 2023 respectively. Like their predecessors, reports indicated that the three countries suffered from a deteriorating human rights situation before the admission. Incidences of unlawful killings by armed groups, sexual and gender violence, nepotism, extra-judicial killings and the shrinking of the freedom of expression and press were widespread in the three countries.⁷⁷ Therefore, this chapter argues

⁷⁴ Ibid.

⁷⁵ Human Rights Watch, "Human Rights World Report 2007 (Burundi) of 11 January 2007", available at <<https://www.refworld.org/reference/annualreport/hrw/2007/en/11392>> (accessed 9 February 2024).

⁷⁶ Bureau of Democracy, Human Rights and Labour, "2007 Country Reports on Human Rights Practices – Rwanda" (2008) US Department of State, available at <<https://www.refworld.org/reference/annualreport/usdos/2008/en/56891>> (accessed 12 September).

⁷⁷ See Amnesty International, "the Democratic Republic of the Congo", 2023, available at <<https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/democratic-republic-of-the-congo/report-democratic-republic-of-the-congo/>>

that the EAC member states inadequately enforce the principle of human rights in admitting new members.

4.4. The Buried Dream: The EAC Human and Peoples' Rights Bill

In 2011, Hon. Frederic Ngenzeshoro, a member of the EALA representing Burundi, initiated a Private Member Bill, urging the assembly to approve the EAC Bill on Human and Peoples' Rights.⁷⁸ The Bill intended to fulfil four primary objectives: first, to provide the EAC with the legal regime on human and people's rights; second, to give effect to the provisions of the EAC Treaty, which provide for the promotion and protection of human and people's rights; third, to designate a mechanism for promoting and protecting human and peoples' rights in the EAC; and fourth, to foster the process of deepening and widening integration in the EAC through guaranteeing human and peoples' rights in social, economic and political spheres.⁷⁹

The Bill conferred several rights to East Africans and residents within the EAC. They include the right to life, privacy, equality, freedom from discrimination, human dignity, security of person, protection against servitude, slavery and forced labour, freedom of conscience, religion, belief, opinion, expression, association, and access to information and media.⁸⁰ It further requires EAC member states to guarantee that refugees and asylum seekers are treated according to internationally

(accessed 12 March 2024); see also Amnesty International, "Somalia 2023", available at <<https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/somalia/report-somalia/>> (accessed 12 March 2024); see also Human Rights Watch, "South Sudan: Events of 2015", available at <<https://www.hrw.org/world-report/2016/country-chapters/south-sudan>> (accessed 12 March 2024).

⁷⁸ EALA, The EAC Human and Peoples Rights Bill, 2011 by Hon. Frederic Ngenzeshoro, available at <<https://www.eala.org/documents/view/the-eac-human-and-peoples-rights-Bill2011>> (accessed 13 September 2024).

⁷⁹ The East African Community Human and Peoples' Rights Bill, 2011, Memorandum, available at <https://www.eala.org/uploads/Eac_human_14-Sep-2016_11-11-55-ilovepdf-compressed.pdf> (accessed 13 September 2024).

⁸⁰ Ibid., part II.

accepted standards for protecting forcibly displaced persons.⁸¹ Similarly, the Bill required that EAC consumers be provided with reasonably quality products.⁸² This, therefore, obliged the EAC member states to focus on deterring substandard products by implementing proper quality control and checks.

The Bill further created a realistic enforcement mechanism by conferring adjudicatory powers on the domestic courts of the EAC member states.⁸³ This chapter views the adopted mechanism as more realistic because domestic courts have better enforcement mechanisms for their judgements than the EACJ. It is significant to note that the EALA saw the vital role and revolution in promoting and protecting human and people's rights, which the Bill would bring to the EAC. As a result, the EALA debated and passed the Bill for approval by the EAC Heads of State in April 2012.⁸⁴

According to Article 63 of the EAC Treaty, a Bill passed by the EALA must, within three months, receive the assent of the Heads of State to become the law of the Community. Suppose the Bill is submitted to the Heads of State and does not receive the assent within three months. In that case, the EAC Treaty requires the respective Head of State to return it to the EALA, giving reasons and requesting that the Bill or a specific provision therein be reconsidered. If the Bill is resubmitted to the respective Head of State after reconsideration and the consent is still withheld, it lapses.⁸⁵

Sadly, this is the fate the EAC Human and Peoples' Rights Bill, 2011, went through. Since its approval by the EALA in April 2012, it has not

⁸¹ Ibid., s. 28.

⁸² Ibid., s. 40.

⁸³ Ibid., ss. 48 and 49.

⁸⁴ EALA, Sessions Ends in Nairobi, 16 – 26 April 2012, available at <<https://www.eala.org/media/view/eala-sessions-end-in-nairobi>> (accessed 13 September 2024).

⁸⁵ The Treaty for the Establishment of the East African Community, 1999, art. 63 (4).

received consent from the EAC Heads of State, causing it to lapse. This officially buried the dream of having an Act of the Community regulating human and people's rights in the EAC.

5. Conclusion

This chapter reflected on the protection of human rights as a general principle of law in the EAC. It aimed to establish the extent to which this principle is exhibited in the EAC Treaty and achieved in practice. The chapter revealed that the codification of human rights as a general principle of law under the EAC Treaty is in two ways. First, it is a fundamental principle of the Community to be adhered to in accordance with the African Charter on Human and Peoples' Rights, and second, it is an operational principle to guide the practical achievement of the objectives of the EAC.

Despite the broad codification of the principle of human rights, the chapter indicated that its practical realisation, as envisaged under the EAC Treaty, remains inadequate. Member states continue to shield themselves with a lack of political will to give effect to the African and global human rights standards, which they have committed to by ratifying the EAC Treaty. The chapter further depicted that the EACJ has intentionally been denied human rights jurisdiction, and some member states that are also members of other RECs are prepared to disassociate themselves from regional bodies with human rights jurisdiction. Moreover, the chapter revealed that the lack of implementation of human rights as the general principle of law is severe to the extent of being overlooked when considering applications from states wanting to join the EAC. The severity is further shown with the lapsing of the EAC Human and Peoples' Rights Bill of 2011 for the failure to receive assent from the EAC Heads of State.

Based on the discussion in this chapter, several recommendations are provided. First, the EAC member states should expedite the process of concluding the protocol to extend human rights jurisdiction to the EACJ.

Expediting the process ensures that the EAC member states adhere to their obligation under the EAC Treaty and advance the human rights, good governance, rule of law, and democratic values the Community aspires to achieve. Second, all EAC member states should deposit a declaration under Article 34 (6) of the African Court Protocol of 1998. This is vital to implementing the EAC Treaty, which requires EAC member states to adhere to the African human rights standards. It is also essential that East Africans not only stare at the African Court on Human and Peoples' Rights, which is, fortunately, in East Africa, but also have access to it. It is degrading to see the court designated for protecting human and people's rights denied the opportunity to receive applications from the same humans it is meant to protect.

Third, apart from just signing it, Sudan and the Federal Republic of Somalia should ratify the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples Rights. Ratification is essential to ensure that the Protocol acquires the force of law in the two countries. Lastly, civil society should initiate and run awareness campaigns and urge the EAC member states to adhere to their commitments under the EAC Treaty. Such campaigns will strengthen the culture of abiding by the Community laws, regulations, decisions, and directives by the member states, which will benefit the EAC regional integration project.

Chapter Four

Challenges to the Realisation of Women's Political Rights in the EAC

*Victoria Melkisedeck Lihiru**

1. Introduction

In 2024, the EAC turns 25 since its rebirth in 1999. At its quarter century, women occupy more than 60% of the EAC region population.¹ The Treaty for the Establishment of the EAC² requires partner states to attain gender equality in all spheres of life. The partner states have also committed to enhancing women's role in cultural, social, political, economic, and technological development.³ Gender equality, as provided for under Article 6 of the EAC Treaty, is among the key fundamental principles guiding the Community's functioning. In 2018,

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¹ EAC, Gender and Women, available at <<https://www.eac.int/gender/gender-and-women>> (accessed 26 July 2024).

² The Treaty was signed on 30 November 1999 and entered into force on 7 July 2000. "Tanzania overview of EAC", available at <<http://www.eac.int/about/overview>> (accessed 27 December 2021).

³ Under section 3 (c) and Article 121 (a) of the Treaty.

the EAC adopted the East African Gender Policy.⁴ The Policy calls upon the partner states to realise equal participation of men and women in all aspects of life, including political spheres.⁵ While, on average, women occupy 32% of parliamentary seats in the EAC block, a significant disparity is witnessed in partner states' parliaments. At the top is Rwanda, leading the East African region and the globe, with 61% of women in its Parliament. The other four East African countries almost have identical percentages of women in their parliaments, with women comprising 38% of the Burundian Parliament, followed by Tanzania (37%), Uganda (34%), and South Sudan (32%). At the tail end are Kenya, Somalia, and the DRC, with 23%, 19.6% and 11% of women, respectively.⁶

From this background, this chapter dives into the subject of women's political participation in the EAC partner states' decision-making positions and provides an account of why the disparities exist. The chapter analyses the EAC Treaty and the East African Gender Policy to determine their strengths and gaps in advancing women's political rights in the region. The chapter also reviews the literature on the applicable electoral systems and election reports to understand the context through which women participate in the EAC partner states' governance structures.

2. Background and Context of Women's Political Participation in the EAC

While democracy is not limited to conducting elections, the participation of women as voters and candidates in an election is one of the leading

⁴ EAC launches Gender Policy, available at <<https://www.eac.int/press-releases/146-gender-community-development-civil-society/1217-eac-launches-gender-policy>> (accessed 22 January 2024).

⁵ Under Objective 4.5 (c) of the EAC Gender Policy, Partner States commit to promoting women's participation in politics and decision-making at all levels.

⁶ Women constitute 25.9 of Somalia's Upper House. IPU, Monthly Ranking of Women in National Parliaments, available at <https://data.ipu.org/women-ranking/?date_month=4&date_year=2024> (accessed 20 May 2024).

indicators of the quality of democracy in any country.⁷ There is also a direct link between women's participation in politics and efforts to achieve inclusive and effective governance, social justice, peaceful societies, as well as economic and social prosperity.⁸ The presence of women in positions of power enables a better representation of the solutions that address the challenges women grapple with in all spheres of life. Evidence shows that women policymakers are more likely to support policies that advance equality and equitable access to social services such as health, education, employment, family welfare, and economic opportunities than their male counterparts.⁹

The presence of women in positions of power further enables them to demonstrate their long-overlooked leadership competencies, thus demystifying gender biases, promoting gender transformative policies, and providing young girls with female role models.¹⁰ The regional integration process is not gender-neutral. It manifests through the social, economic and political conditions and institutions that tend to be shaped by gender norms that, among other things, embrace male dominance and marginalise women. Literature depicts that East African women have, since time immemorial, been underrepresented in positions of power. While the role of women in pre-colonial East Africa is scarcely available, the region was largely patriarchal, with women deprived of the rights to free movement, ownership of land, and inheritance.¹¹ Women were placed under the ownership, control, and discretion of a male figure, usually a father, uncle, brother, or husband.¹² Traditions and norms

⁷ Jose Alvaro Moises, "Quality of Democracy and Political Inclusion", in Mino Vianello and Mary Hawkesworth (Editors), *Gender and Power* (Palgrave Macmillan, London 2016), p. 236.

⁸ Marie O'Reilly, "Why Women? Inclusive Security and Peaceful Societies" (2015) Inclusive Security, p. 2, available at <<https://www.inclusivesecurity.org/wp-content/uploads/2015/10/Why-Women-Brief-10.12.15.pdf>> (accessed 8 May 2024).

⁹ Zohal Hessami and Mariana Lopes da Fonseca, "Female Political Representation and Substantive Effects on Policies: A Literature Review" (2020) IZA DP No. 13125, p. 8.

¹⁰ *Ibid.*, p. 2.

¹¹ Susan Geiger, *TANU Women: Gender and Culture in the Making of Tanganyikan Nationalism, 1955-65* (Portsmouth NH: Heinemann, 1997).

¹² *Ibid.*

dictated communities' ways of being, thinking, working and ruling. Decisions were made by chiefs, kings, village assemblies, and or council of elders, platforms that women rarely participated in, given their set roles in domestic and private spheres.¹³ Where monarchy existed, such as in Uganda and Burundi, the role of women, especially queen mothers, was glorified; their roles were limited to providing unbinding counsel to their sons, the kings.¹⁴

The slave trade, the introduction of Islam and Christianity, and later, the arrival of colonial rule continued to push women further into marginalisation.¹⁵ The colonial rule intensified and rigidified the pre-colonial patriarchal ways of community configuration, with women's roles limited to food production and offspring reproduction.¹⁶ It was the preference of the colonial masters for women to stay in the villages, produce family food, and reproduce while their husbands were forced to town to serve as cheap labour.¹⁷ The colonial era capacity-building initiatives for women, such as housekeeping, motherhood, sewing and cooking classes, were meant to keep them in private spheres.¹⁸ Also, during colonial rule, decision-making positions were male-dominated. They were first opened to Europeans, extended to Asian men, and later to African men. A strong push from women led to the tokenisation of women in critical decision-making organs, such as Legislative Councils (LEGCO).¹⁹ In 1961, Priscilla Ingasiani Abwao became the first woman

¹³ RG Abrahams, "Neighbourhood organisations: A major sub-system among the northern Nyamwezi" (1965) *Africa*, pp. 168-86.

¹⁴ Niara Sudarkasa, "The status of women in Indigenous African societies" (1986) *Feminist Studies Inc*, Vol. 12, No. 1.

¹⁵ Frederick Jjuuko and Sam Tindifa, *A People's Dialogue: Political Settlements in Uganda and the Quest for a National Conference*, (Fountain Publishers 2018).

¹⁶ Marie Saiget, "Women in Burundi" (2020), Oxford Research Encyclopedia of African History, available at <<https://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-573>>.

¹⁷ Susan Geiger, *TANU Women: Gender and Culture in the Making of Tanganyikan Nationalism, 1955-65* (Portsmouth NH: Heinemann, 1997).

¹⁸ Ibid.

¹⁹ Aili Mari Tripp, "Women and politics in Africa", (2017) Oxford Research Encyclopaedia of African History, available at

to serve in the Kenya Legislative Council. In Tanganyika, the first women to serve in the LEGCO were of European and Asian descent.²⁰ It was only until 1955 when Tanganyika obtained the first Tanganyikan woman in the LEGCO, Mkamangi Elifuraha Marealle, followed by Ndigwako Bertha Akim King'ori in 1957.²¹

Fuelled by colonial oppression and their lower positions in the communities, women played a critical role during the independence struggles between the 1950s and 1960s. Women like Muthoni Kirima, Mekatilili wa Menza, Wambui Otieno, and Mary Muthoni Nyanjiru in Kenya,²² Bibi Titi Mohamed in Tanzania, and Queen Ririkumutima in Burundi have been documented for their enormous contribution to achieving independence in their countries. The role of women's freedom frontiers was enormous but could have been impactful if women could equally access leadership roles as their male counterparts. However, the participation of women in the independence struggle was limited to meal preparations, mobilising resources for freedom fighters and undertaking public awareness campaigns to push more people to join the liberation movements.²³

Women rarely appeared at the main independence deliberations table between African leaders and the colonisers. For example, in Kenya, Priscilla Abwao, a woman present during independence talks between

<[https://oxfordre.com/africanhistory/oso/viewentry/10.1093\\$002facrefore\\$002f9780190277734.001.0001\\$002facrefore-9780190277734-e-192;jsessionid=69C37B1169DCFA5C21ED6BADD11BC5F6](https://oxfordre.com/africanhistory/oso/viewentry/10.1093$002facrefore$002f9780190277734.001.0001$002facrefore-9780190277734-e-192;jsessionid=69C37B1169DCFA5C21ED6BADD11BC5F6)> (accessed 7 June 2024).

²⁰ Mrs. Walker (European) and Mrs. Kika (Asian).

²¹ Victoria Lihiru, "Participatory Constitutional Reforms vs. Realisation of Equal Representation of Men and Women in the Parliaments: A Study of Kenya, Rwanda and Tanzania" (PhD Thesis, University of Cape Town 2019).

²² Audrey Masitsa, "Four Kenyan Women who Joined the Fight for Independence" Standard Media, available at <<https://www.standardmedia.co.ke/evewoman/achieving-woman/article/2001346173/four-kenyan-women-who-joined-the-fight-for-independence>> (accessed 5 March 2024).

²³ Susan Geiger, *TANU Women: Gender and Culture in the Making of Tanganyikan Nationalism, 1955-65* (Portsmouth NH: Heinemann, 1997).

Kenya and the British, mainly provided copying and typing services. Jael Mbogo was rejected to join the liberation negotiations because she did not own property.²⁴ In Tanganyika, Bibi Titi Mohamed never accompanied fellow freedom fighters during independence negotiations in the UK and the USA.²⁵ Accordingly, women could not have a say on the content of the independent constitutions and, similarly, in the subsequent law-making and decision-making processes.

Although the 1960s independence among East African countries meant that both women and men could vote and seek to be elected, it did not change how East African women participated in the decision-making processes. They continued to be excluded from the public life. For example, the post-independent Parliament in Rwanda did not have any woman. Women composed 1.5% of the Kenyan independence Parliament. By 1965, six women (10%) were in the Tanzania's post-independent Parliament.²⁶ High-level political leaders preferred appointing and nominating fellow men to positions of power; women were left behind. For example, Julius Nyerere, the first Tanganyikan Prime Minister, appointed an all-men cabinet after independence. When asked, he opined that, despite their active role in the independence struggle, women lacked the necessary leadership skills compared to their male counterparts.²⁷

Notably, the period between 1960 and 1970 witnessed most East African countries transitioning from multiparty to single-party systems. During this period, women's participation in political processes was limited to

²⁴ Diana Nyakairu, "Women in Politics: The 50-Year Journey in Kenya", available at <https://www.academia.edu/24038426/WOMEN_IN_POLITICS_THE_50_YEAR_JOURNEY_IN_KENYA?auto=download> (accessed 6 May 2024).

²⁵ Susan Geiger, *TANU Women: Gender and Culture in the Making of Tanganyikan Nationalism, 1955-65* (Portsmouth NH: Heinemann, 1997).

²⁶ Victoria Lihuru, "The 2020 CHADEMA Special Seats Dispute in Tanzania: Does the National Electoral Commission Comply with the Law?" *Journal of African Elections*, 20, 2 (2021), pp. 102–19.

²⁷ Angela Kairuki, "The role of women in politics in Tanzania" (2018) available at <https://www.hss.de/download/publications/AMZ_90_Frauen_05.pdf> (accessed 10 March 2023).

single party's women wings, such as *Umoja wa Wanawake wa Tanzania* (The Union of Tanzanian Women) in Tanzania, *Maendeleo ya Wanawake* (Women Development) in Kenya, *Union Culturelle des Femmes Barundi* (Cultural Union of Barundi Women), and later the *Union des femmes du Burundi* (Union of Women of Burundi) in Burundi.²⁸ The women's wings aimed to safeguard the interests of the single party and monitor women as one of the key social groups. Through their wings, women were the cheerleaders, engaged in the party's mobilisation initiatives, recruiting party members and facilitating party meetings. At the national level, the women's wings were framed as the leading aggregators and representers of women's interests.²⁹ There was limited space for women to organise outside the party structures, and space for civil society was almost non-existent.³⁰ For example, in Tanzania, during a one-party system, non-partisan organisations such as the *Baraza la Wanawake Tanzania* (BAWATA),³¹ which was seen as an alternative to the UWT, were banned by the government.³² Overall, during one party system, women either had to join the only party to engage in politics or stay apolitical. The party leadership was male-dominated, and few women competed and won elections. In Tanzania, it took two decades after independence for the first woman to win a parliamentary seat in 1985.³³

On the other hand, the period between 1960 and 1970 saw the East African countries striving to realise their British colonial master's goal to

²⁸ Rwagasore, leader of the Burundian "nationalist" party Parti de l'Unité et du Progrès National (UPRONA) created the Union Culturelle des Femmes Barundi (UCFB) (Cultural Union of Barundi Women). The UCFB was conceived as a sub-organisation of the UPRONA, which stayed in power for the next thirty years.

²⁹ Rose Shayo, "Women Participation in Party Politics During the Multiparty Era in Africa the Case of Tanzania" (2005), EISA, available at <<https://media.africaportal.org/documents/OP34.pdf>> (accessed 17 January 2023).

³⁰ Ibid.

³¹ Loosely translated as The Women Council of Tanzania.

³² In *Baraza la Wanawake Tanzania & Others v. Registrar of Societies & Others*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 27 of 1997 (Unreported), the High Court found such a ban unconstitutional.

³³ The number increased to two in 1985. Bernadeta Killian, "A Policy of Parliamentary Special Seats for Women in Tanzania: Its Effectiveness" [1996] UFAHAMU.

have the countries integrated.³⁴ The establishment of the first EAC in 1967 took a more statist approach,³⁵ without citizen's involvement. The fact that most leaders of the post-independence EAC countries were mainly men and the lack of citizen involvement in the integration process meant that the people, including women, were not part of the design of the Corporation. Further, the fact that the Corporation focused on connecting the partner states towards economic integration signals that advancing human rights, including women's rights, was the least of the EAC's priorities. Nonetheless, mainly due to external factors, East African countries signed and ratified key international and regional human and women's rights conventions.

At the international level, Kenya and Tanzania ratified the International Convention on Civil and Political Rights (ICCPR) in 1972 and 1976.³⁶ Article 1 (1) of the ICCPR recognises that all peoples have the right to self-determination, and, by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. Article 25 provides for a general right to take part in the conduct of public affairs and a right to vote or to be elected. In 1977, the first EAC was dissolved due to political instability, the protectionist approach among EAC members, and the Cold War's impact.³⁷ A few years later, its former partner states, Kenya, Uganda and Tanzania, individually ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1984, 1985 and 1986,

³⁴ During colonial rule in East Africa, the British established the East African Currency in 1905, the Postal Union in 1901, the East African High Commission and the East African Central Legislative Assembly in 1948.

³⁵ Emmanuel Matambo, "Synergy, ambition and challenges in the expanded East African Community" in David Monyae, Sizo Nkala (Editors), *The Quest for Unity: An Appraisal of Regional Integration in Africa*, (Fanele 2023).

³⁶ Uganda signed the International Convention on Civil and Political Rights in 1995. Cherif, Feryal M Myths About Women's Rights: How, Where, and Why Rights Advance (2015) Oxford: Oxford University Press p. 271.

³⁷ Emmanuel Matambo, "Synergy, ambition and challenges in the expanded East African Community" in David Monyae, Sizo Nkala (Editors), *The Quest for Unity: An Appraisal of Regional Integration in Africa*, (Fanele 2023).

respectively.³⁸ Article 4 of CEDAW requires states parties to adopt temporary special measures to accelerate de facto equality between men and women.

In addition, Article 7 of the CEDAW requires state parties to take all the appropriate measures to eliminate discrimination against women in political and public life. Member states are required to ensure that women, on equal terms with men, have the right to vote in all elections and public referenda, participate in the formulation and implementation of government policy, hold public offices, and perform public functions at all levels of government.³⁹ At the regional level, in 1986, African countries, including Uganda, Kenya, and Tanzania, signed the African Charter on Human and Peoples' Rights (African Charter).⁴⁰ Article 13 (1) of the African Charter provides for the right of every citizen to participate freely in the government of their country, either directly or through freely chosen representatives, in accordance with the provisions of the law.

In line with the international conventions, some East African countries adopted affirmative action measures to increase the participation of women in positions of power in the single-party system. In 1985,

³⁸ Ibid.

³⁹ Article 7 of CEDAW reads that 'States parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organisations and associations concerned with the public and political life of the country.'

⁴⁰ On 27 June 1981, at its 18th General Assembly Meeting in Nairobi, Kenya, the Heads of State and Government of the OAU adopted the African Charter on Human and Peoples' Rights. It came into force on 21 October 1986. The African Charter promotes and protects human rights and fundamental freedoms in the African continent. A protocol to the Charter was subsequently adopted in 1998. Articles 2 and 3 of the ACHPR provided that the enjoyment of the rights and freedoms recognised in the Charter apply equally without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any opinion, national and social origin, fortune, birth or other status.

Tanzania reserved 15 seats for women alongside those reserved for other groups such as trade unions and the army. Affirmative action measures were maintained after the reintroduction of a multiparty system in the early 1990s.⁴¹ For examples, the Tanzanian Constitution introduced a 15% gender quota in the Parliament in 1992. However, the transition to the multiparty system in other EAC countries, such as Kenya, did not go hand in hand with the adoption of measures to increase women's participation in political processes. Accordingly, despite adopting the multiparty system in 1991, the number of women in the Kenyan Parliament remained at 3.0% by 1995.⁴²

With the demise of the first EAC in 1977, its partner states continued to work behind the scenes and explored possibilities for future cooperation to address, among other things, security issues that emerged after the Cold War.⁴³ Henceforth, the new EAC was formed in 1999, rebranding itself from a Corporation to a Community. The Treaty on the Establishment of the EAC was signed in November 1999 and came into being in July 2000. The Community also expanded and admitted new members. The Republic of Rwanda and Burundi became full members in 2007, South Sudan in 2016, the DRC in 2022, and Somalia in 2023.⁴⁴ Like the first EAC, the second also took a statist approach, where citizens, including women, were barely involved in its reconceptualisation and actualisation. This notwithstanding, the 1999 EAC Treaty requires partner states to mainstream the equality of men and women in all spheres of life. Members also commit to enhancing the role of women

⁴¹ Kenya in 1991, Tanzania in 1992.

⁴² Aili Mari Tripp, "Women and politics in Africa", (2017) Oxford Research Encyclopaedia of African History, available at <[https://oxfordre.com/africanhistory/oso/viewentry/10.1093\\$002facrefore\\$002f9780190277734.001.0001\\$002facrefore-9780190277734-e-192;jsessionid=69C37B1169DCFA5C21ED6BADD11BC5F6](https://oxfordre.com/africanhistory/oso/viewentry/10.1093$002facrefore$002f9780190277734.001.0001$002facrefore-9780190277734-e-192;jsessionid=69C37B1169DCFA5C21ED6BADD11BC5F6)> (accessed 7 June 2024).

⁴³ Emmanuel Matambo, "Synergy, ambition and challenges in the expanded East African Community" in David Monyae, Sizo Nkala (Editors), *The Quest for Unity: An Appraisal of Regional Integration in Africa*, (Fanele 2023).

⁴⁴ EAC Partners, available at <<https://www.eac.int/eac-partner-states>> (accessed 22 January 2024).

in cultural, social, political, economic, and technological development. Gender equality, as provided for under Article 6 of the Treaty, is among the key fundamental principles guiding the functioning of the Community.

Similarly, in 2003, African countries, including the East African partner states, adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol).⁴⁵ Article 9 of the Maputo Protocol calls states parties to take specific positive actions to promote participative governance and equal participation of women in politics through affirmative action, enabling national legislation and other measures to ensure that: women participate without any discrimination in all elections; women are represented equally at all levels with men in all electoral processes; women are equal partners with men at all levels of development and implementation of state policies and development programmes. Article 9 (2) of the Maputo Protocol requires the states parties to ensure increased and effective representation and participation of women at all levels of decision making. In 2018, the EAC adopted the East African Gender Policy, which calls upon the partner states to realise equal participation of men and women in all aspects of life, including in political spheres.⁴⁶ This notwithstanding, 25 years after the re-establishment of the EAC, there is a significant disparity in levels of women's representation among EAC partner states, caused by several factors as expounded in the following section.

⁴⁵ Article 66 of the African Charter on Human and Peoples' Rights provides for making special protocols or agreements where necessary to supplement the provisions of the African Charter. This gave power to the Assembly of Heads of State and Government of the Organization of African Unity in its Thirty-First Ordinary Session in Addis Ababa, Ethiopia, in June 1995 to endorse by resolution AHG/Res.240 (XXXI), the recommendation of the African Commission on Human and Peoples' Rights is to elaborate on a Protocol on the Rights of Women in Africa.

⁴⁶ EAC launches Gender Policy, available at <<https://www.eac.int/press-releases/146-gender-community-development-civil-society/1217-eac-launches-gender-policy>> (accessed 22 January 2024).

3. Challenges in Advancing Women's Political Rights in the EAC in Light of the 25th Anniversary

As noted in the introduction, Rwanda is leading in the East African region and globally for having the largest percentage of women in its Parliament, currently at 61%. The other four East African countries have almost identical levels of women's participation in their parliaments, with women comprising 38% of the Burundian Parliament, followed by Tanzania (37%), Uganda (34%), and South Sudan (32%). At the tail end are Kenya, Somalia, and the Democratic Republic of the Congo, with 23%, 19.6% and 11% of women, respectively.⁴⁷ It is argued that the disparity in the percentage of women's political representation in the EAC partner states is caused by the silence of the EAC Treaty and the Gender Policy in providing numerical targets, timelines and strategies that member states can employ to create a friendly environment for women's political participation.

Evidence shows that setting actual numerical targets is profound in ensuring women have critical mass and can impact policymaking.⁴⁸ This notwithstanding, the Treaty and the Policy mainly require the partner states to promote the participation of women in positions of power without providing a numerical target and timeline to guide the states' efforts. Accordingly, it remains the decision of the partner states to decide the targets for women's representation in positions of power. The status quo is different from other regional integrations around the African continent. For example, in the SADC, Article 5 (1) (k) of the SADC Treaty of 1992 recognises gender mainstreaming as one of its objectives. From 1997 to 2005, the target for women's political representation was set at 30%. In 2016, the target was revised and increased to 50%. The SADC has given a timeline for partner states to achieve the 50%

⁴⁷ Women constitute 25.9 of Somalia's Upper House. IPU, Monthly Ranking of Women in National Parliaments, available at <https://data.ipu.org/women-ranking/?date_month=4&date_year=2024> (accessed 20 May 2024).

⁴⁸ Zohal Hessami and Mariana Lopes da Fonseca, "Female Political Representation and Substantive Effects on Policies: A Literature Review" (2020) IZA DP No. 13125, p. 17.

women's representation goal in decision making by 2030. Further, the SADC Framework for Achieving Gender Parity in Political and Decision-Making Positions of 2008 provides strategies and guidelines to push the implementation of the SADC Protocol on Gender and Development to ensure at least 50% of all decision-making positions at all levels are held by women by 2030.

Although the SADC partner states are at different levels of implementation, the bloc has a stipulated numerical target for female representation in positions of power and has set a timeline to guide member states' actions.⁴⁹ The numerical target for women's political representation is also seen at the AU level. The Solemn Declaration on Gender Equality in Africa⁵⁰ and the African Agenda 2063 calls for 50:50 representation of men and women in positions of power. The African Agenda envisions a continent with full gender parity, with women occupying at least 50% of elected public offices by 2063.⁵¹ Unlike the SADC and the AU, the 1999 EAC Treaty and the 2018 Gender Policy do not provide a numerical target and timeline for women's political representation to guide the partner states. The EAC Treaty has two provisions related to women's political representation, but none provides specific numerical targets. Under Section 3 (e) of the Treaty, the Community is set to ensure the mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic and technological development. Also, under Article 121 (a) of the Treaty, partner states are supposed to promote the empowerment and effective integration and participation of women at

⁴⁹ The average percentage of women in SADC parliaments increased from 22.2% in 2009 to 25% in 2020. Other SADC members have reached 45%, and some are still at less than 10%.

⁵⁰ The Solemn Declaration on Gender Equality in Africa was adopted by the AU Assembly in 2004. It calls for member states to continue taking action to achieve gender equality and reinforce their commitment to international and regional women's rights instruments.

⁵¹ The African Agenda 2063, African Union Commission.

all levels of socio-economic development, especially in decision-making, through appropriate legislative and other measures in the Treaty.

In the same vein, the 2018 EAC Gender Policy has three objectives about women's political representation. However, like the EAC Treaty, none of the objectives carries numerical targets to guide women's political representation efforts by the partner states. Under Objective 4.5 (c) of the Policy, partner states are required to promote women's participation in politics and decision making at all levels. In addition, Objective 4.6 (i) requires the partner states to commit to promoting equitable access to socio-economic opportunities and political participation for women. Similarly, under Objective 4.6 (iv) of the Policy, partner states are supposed to commit to creating a supportive socio-cultural, economic and political environment that will empower women to be active partners in key decision-making processes in the region's political, economic and socio-cultural development.

In the absence of numerical targets from the Treaty and the Policy, the EAC partner states has adopted, through constitutions and other electoral laws, their own targets for women's political representation, albeit with a number of ramifications. Except for Rwanda, the women's political representation targets adopted by the EAC partner states are below 50%. In Rwanda, while 30% of the Senate comprises women,⁵² the percentage is beyond 50% for the House of Deputies. The Rwandan Constitution establishes the House of Deputies, which is composed of 80 Deputies,⁵³ and requires 30% of the 53 elected Deputies to be women.⁵⁴ The Constitution also provides for an additional 24 seats of

⁵² The senate has 26 members; 12 represent the provincial government councils, and 2 represent academic institutions. The other members are nominated, eight by the President and four by the Parties' Forum. At least 30 per cent of the 26 senators must be women, but no formula is provided for obtaining the 30 % of women—Article 82 of the 2003 Rwandan Constitution.

⁵³ Article 75 (2) of the 2003 Rwandan Constitution (Revised in 2015).

⁵⁴ Bauer, Gretchen and Burnet, Jennie E, "Gender Quotas, Democracy and Women's Representation in Africa: Some Insights from Democratic Botswana and Autocratic Rwanda" (2013) Anthropology Faculty Publications.

women in the House of Deputies who are elected through women's councils.⁵⁵ These complimentary measures have brought about more women in Rwanda's House of Deputies. After the 2018 general election, women comprise 49 of 80 seats (61%) of the House of Deputies, making Rwanda a global leader in women's political representation in the parliament. At the sub-national level, Article 155 of Law 27/2010⁵⁶ on elections provides that 'at every Sector, one female member and one male member of Council shall be elected through direct and secret ballot.' In addition, according to Article 156 Law 27/2010, at least thirty 30% of all District Council members shall be women and shall be elected through indirect and secret ballot as well as by the members of the Council Bureau of Sectors.⁵⁷ Similarly, the absence of numerical targets from the Treaty and the Policy has brought about women's representation targets in other EAC partner states to range from 22% of women district representatives in Uganda,⁵⁸ 30% of gender rule in the DRC,⁵⁹ and 35% of affirmative action in South Sudan.⁶⁰ Tanzania applies a 30-40% special seats

⁵⁵ Article 75(2) of the 2003 Rwandan Constitution (Revised in 2015). The constitution codified into law the women's councils created at each level of government administration, from the cell up to the national level, and gave them a role in voting for the women representatives. The district-level councils vote for the 24 women for the House of Deputies. While the reserved women's seats represent specific geographic regions, they may not necessarily live in the region they are elected to represent; Bauer, Gretchen and Burnet, Jennie E. "Gender Quotas, Democracy and Women's Representation in Africa: Some Insights from Democratic Botswana and Autocratic Rwanda" (2013) Anthropology Faculty Publications 2, available at <https://scholarworks.gsu.edu/anthro_facpub/2>.

⁵⁶ Of 19/06/2010.

⁵⁷ Ibid.

⁵⁸ Article 8 of the Parliamentary Elections Act, 2005.

⁵⁹ Article 17 of the DRC Constitution, amended through 2022.

⁶⁰ Article 16 of the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) provides for a 35% gender quota in appointments to all transitional government institutions of national unity. R-ARCSS 2018, Article 1.4.4.: "Provisions of the Transitional Constitution of the Republic of South Sudan and ARCSS on the participation of women (35%) in the Executive shall be observed. In particular, in their nomination to the Council of Ministers, Incumbent TGoNU shall nominate no fewer than six (6) women, SPLM/A-IO shall nominate no fewer than three (3) women, and SSOA shall nominate no less than one (1) woman.

system,⁶¹ Burundi employs the 30% gender rule,⁶² Kenya has a two-thirds gender rule of 33-67%,⁶³ while Somalia has a 30 per cent quota.⁶⁴

On the other hand, the electoral system of a country is key in facilitating and/or hindering women's political representation.⁶⁵ Research shows that Proportional Representation is four times more effective in promoting women's political representation than the First-Past-the-Post (FPTP) system.⁶⁶ For example, the change from the FPTP system in Sierra Leone in 2022 increased the number of women from 12.32% obtained in the 2018 elections to 30.37% after the 2022 general elections.⁶⁷ However, neither the EAC Treaty nor the Policy provides guidance on the favourable electoral system partner states should apply to facilitate increased women's representation. Consequently, EAC partner states integrate their discretionary set women's representation targets into the electoral systems of choice. Partner states that apply the Proportion Representation system have better women's political representation modalities and outcomes than those that apply FPTP. Burundi and Rwanda employ a Proportional Representation electoral system and require political parties to ensure that 30% of the candidates

⁶¹ "Every Political Party which contests Parliamentary elections may propose and submit the Commission names of eligible women candidates for the nomination of Members of Parliament for Women Special Seats" (Elections Regulations 2010, Article 86A (2)); also, see Article 67 (1) of the 2010 Zanzibar Constitution.

⁶² Articles 129, 164, 182(2)) of the 2005 Burundi Constitution. "15 Years of Gender Quotas in Burundi: What's the Impact?", available at <<https://giwps.georgetown.edu/15-years-of-gender-quotas-in-burundi-whats-the-impact/>> (accessed 10 July 2023).

⁶³ Article 27 (8) and 81 (b) of the 2010 Kenyan Constitution.

⁶⁴ Mukenyi Badibanga, "Antonetta Hamandishe and Ilona Tip, Why Gender Quotas Don't Work In Somalia? The Influence of the Electoral System and Clan Politics" (2022) EISA, p. 6.

⁶⁵ Katrine Beauregard, "Gender, political participation, and electoral systems: A cross-national analyses" (2014) *European Journal of Political Research* 53/3, pp. 617–634.

⁶⁶ Victoria Lihuru, "Exploring Suitable Electoral Systems for Promotion of Women's Representation in Tanzania and Rwanda" (2022) *African Studies Quarterly*.

⁶⁷ Akanji Olajide, "Reconstruction, Peacebuilding and Elections in Post-war Sierra Leone: A Critical Note" (2013).

are women. The Elections Law in Rwanda requires that at least 30% of candidates closed list in a political party be women.⁶⁸

Similarly, in Burundi, the gender quota at the lower and upper house and sub-national levels is exercised through Proportional Representation via a closed-list electoral system.⁶⁹ The National Assembly is composed of at least 100 deputies, 60% of whom must be Hutu and 40% Tutsi, and a minimum of 30% must be women.⁷⁰ The Electoral Code states that party lists must take gender balance and ethnic representation into account and that one in three candidates must be a woman.⁷¹ Accordingly, of three candidates registered on a list, only two can belong to the same ethnic group, and at least one of the three must be a woman. The advantages of the Proportion Representation system as employed in Rwanda and Burundi lie on the fact the representation system takes into account the requirement to elect women candidates right in the political parties. Hence, women leaders obtained through the Proportional Representation system attain electability status like other elected leaders. This is different from partner states that employ the FPTP system.

Uganda, Kenya, and Tanzania apply the FPTP system and have in place the dedicated women-only seats, obtained through districts, counties, and party processes, respectively. Through this arrangement, only women vie, and ultimately, women with the most votes win. For example, the 2010 Kenyan Constitution reserves 47 seats for women from 47 counties in the National Assembly.⁷² Also, the 238-member Ugandan Parliament is composed of 112 (22%) district women representatives directly elected by all voters on a special ballot in each district (for women candidates only).⁷³ The Rwandan Constitution establishes the Chamber of Deputies, which is composed of 80 Deputies, including twenty-four (24)

⁶⁸ Section 87(2) of Elections Law.

⁶⁹ Articles 129, 164, 182(2)) of the 2005 Burundi Constitution.

⁷⁰ Article 108 (1) of the Electoral Code, 2019.

⁷¹ Article 127 (3) of the Electoral Code, 2019.

⁷² Article 97 1 (b) of the Kenyan Constitution, 2010.

⁷³ Article 8 of the Parliamentary Elections Act, 2005.

women elected in women-only constituencies according to the country's administrative entities.⁷⁴ In Tanzania, women must make up at least 30% of the National Assembly members through special seat arrangements.⁷⁵ The 113 special seats for women are distributed among the political parties in proportion to the number of parliamentary votes obtained by them after a general election.⁷⁶ Women under the special seat system are nominated by their political parties and are not directly voted for by the citizens.

Overall, women who access the parliament through women-only seats face several challenges that affect the quality of their representation. Often, such women are considered weak, vulnerable and in need of extra or 'special' arrangements to participate in political decision-making processes.⁷⁷ There have been instances of name-calling, shouting, and acts of discrimination towards them because they are not representatives from competitive constituencies. In Kenya, when it comes to constituency financial support, each elected member of Parliament receives KSh 60 million (USD 600,000) annually for development projects in their constituency. However, representatives from women-only countries receive only seven million shillings.⁷⁸ In Tanzania, elected members of Parliament receive about 40,000,000 TZS (about USD

⁷⁴ Article 75 of the 2003 Rwandan Constitution.

⁷⁵ Articles 66 1(b) and 78 (1) of the Constitution of the United Republic of Tanzania, CAP 2 R:E 2002. Since 2015, the representation of women in the special seats has been increased to 40 % following the government's instruction to the National Elections Commission; Victoria Lihuru, "The 2020 CHADEMA Special Seats Dispute in Tanzania: Does the National Electoral Commission Comply with the Law?" (2021) *Journal of African Elections*, 20, 2 pp. 102–19; also, see Article 67 (1) of the 2010 Zanzibar Constitution.

⁷⁶ "Every Political Party which contests Parliamentary elections may propose and submit the Commission names of eligible women candidates for the nomination of Members of Parliament for Women Special Seats" (Elections Regulations 2010, Article 86A (2)).

⁷⁷ Tendai Mangena, "Narratives of women in politics in Zimbabwe's recent past: The case of Joice Mujuru and Grace Mugabe" (2022) 56 *Canadian Journal of African Studies*, pp. 407–425.

⁷⁸ Katharine Houreld, "Women candidates face curses and worse in Kenyan elections" Reuters, available at <<https://www.reuters.com/article/us-kenya-election-women/women-candidates-face-curses-and-worse-in-kenyan-elections-idUSKBN1AK1E1>> (accessed 1 June 2023).

20,000) as constituency funds. However, women in special seats are not eligible for these funds based on the presumption that they do not have constituencies. Also, in Tanzania, women in special seats do not qualify to be appointed prime ministers, as only elected members of Parliament are eligible.⁷⁹ In Kenya's Senate, female senators obtained through women's seats are not qualified to vote in any motion because only elected senators can vote. On the other hand, other EAC partner states, such as Somalia, employ a hybrid of traditional and modern electoral systems, with traditional clan elders selecting delegates who then elect members of Parliament. The hybrid system makes it difficult for women to access political power because of cultural and social norms that have, since time immemorial, kept Somali women in private spheres.⁸⁰

Further, the representation of diverse groups in positions of power is key to any thriving inclusive democracy. However, neither the EAC Treaty nor the Policy provides guidance on ways partner states can embrace the representation of diverse groups of population in decision-making positions and processes. This notwithstanding, some EAC partner states have taken actual steps to include provisions in their constitutions that specifically allow the representation of diverse community members in positions of power. In Kenya, for example, each party list representing special interests (youth, persons with disabilities, and workers) must comprise the appropriate number of qualified candidates and alternate between male and female candidates in the priority in which they are

⁷⁹ Article 51 (2) of the 1977 Constitution of the United Republic of Tanzania provides that as soon as possible, and in any case within fourteen days after assuming office, the President shall appoint a Member of Parliament elected from a constituency of a political party that has a majority of members in the National Assembly or, if no political party has a majority, who appears to have the support of the majority of the Members of Parliament, to be Prime Minister of the United Republic, and he shall not assume office until his appointment is first confirmed by a resolution of the National Assembly supported by a majority vote of the Members.

⁸⁰ Somali Dialogue Platform, "Enabling women's representation and participation in political dialogues in Somalia" (2023), available at <<https://reliefweb.int/report/somalia/enabling-womens-representation-and-participation-political-dialogues-somalia>> (accessed 13 June 2024).

listed.⁸¹ Similarly, the Parliament of Uganda has 238 constituency representatives; 112 district women representatives are directly elected by all voters on a special ballot in each district (for women candidates only); 10 representatives of the Uganda People's Defence Forces, of whom two must be women; five youth representatives, of whom one must be a woman; five representatives of persons with disabilities, of whom one must be a woman; and five representatives of workers, of whom one must be a woman.⁸² Apart from Kenya and Uganda, provisions for representation of young people, persons with disabilities and other excluded groups in positions of power are not seen in other EAC Partner States.

Likewise, efforts to promote the representation of women should not only be limited to the parliamentary level but should cut across all governance structures of a country. Due to the silence of the EAC Treaty and Policy, there is disparity on ways countries extend the gender quota measures beyond the parliaments, councils and local governance structures. In Burundi, Article 33 of the law governing political parties requires a minimum of 30% of women in national and provincial executive committees of political parties. The 2005 Burundian Constitution also mandates "gender equilibriums" for the executive and other public life positions under Articles 135, 208 and 255. Similarly, the Kenyan political parties are required to ensure their leadership composition complies with the two-thirds gender rule, and in Rwanda, political parties must ensure 30% of their leaders are women. While positive trends are seen in Burundi, Kenya, and Rwanda, this feature is not witnessed in other EAC countries such as Tanzania, where there is no gender quota for political parties' leadership positions or the positions in the executive branch.⁸³

⁸¹ Article 97 1 (c) of the Kenyan Constitution, 2010.

⁸² Article 8 of the Parliamentary Elections Act, 2005.

⁸³ Victoria Lihuru, "Political Parties Act as a Stumbling Block to Women's Political Leadership in Tanzania" (2023), *African Review*, p. 12.

It is also noted that some EAC countries, such as Kenya, Rwanda, Uganda, South Sudan, Somalia, and Burundi, have allowed independent candidates in their electoral systems. For example, Article 85 of Kenya's 2010 Constitution allows independent candidates to run for elections. In the 2022 general election, a young independent female candidate was elected to be a county governor.⁸⁴ The option to run as an independent candidate provides an additional pathway for citizens to access positions of power beyond the realm of political parties.⁸⁵ This feature is, however, not present in other EAC countries such as Tanzania where the prohibition persists despite the decision of the African Court directing Tanzania to take measures to allow independent candidates. In 2011, through the case of *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania*,⁸⁶ the Applicants claimed that the restriction of independent candidates in Tanzania is a violation of the rights guaranteed under Article 31 (1) of the African Charter, which provides that “every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law”. The Court held that the prohibition of independent candidates is a violation of the African Charter and directed Tanzania to “take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken”. The Court further argued that the rights guaranteed under the Charter, as stated in Article 13 (1), are individual rights which are not meant to be enjoyed only in association with some other individuals or groups of individuals, such as political parties. Over a decade has passed since the African Court directed Tanzania to make efforts to allow independent candidates. Nonetheless, the country has yet to allow independent candidates and continues to restrict citizens' participation in elections through political parties. The status quo affects the choices that

⁸⁴ Cynthia Muge won Meru County as an independent candidate.

⁸⁵ Churchill Ewumbue-Monono, “Independent Candidature and The Electoral Process In Africa” (2006) *Journal of African Elections*, p. 2.

⁸⁶ (2011) 1 AfCLR 32.

citizens, including women, have when deciding to participate in politics and elections.

Furthermore, accountability is critical in ensuring commitments to attain gender equality in positions of power are respected and implemented.⁸⁷ Nonetheless, the EAC Treaty and the respective Gender Policy do not provide guidance on how partner states can adopt and implement accountability mechanisms to realise their gender commitment. However, some EAC countries have implemented measures to ensure gender quotas are respected and implemented. For example, the Burundi law provides ranking order in the party list to ensure the gender quota is reached.⁸⁸ Only two of the three candidates registered on a list can belong to the same ethnic group, and at least one of them must be a woman. The law also provides for a co-optation procedure in case the gender quota is not attained at the lower house, the upper house, and communal councils after an election.⁸⁹ If the election results do not fulfil the quota requirements, a process of co-optation will follow. Under these circumstances, the electoral administration will add more members from the underrepresented ethnic group or gender from the candidate lists that have obtained at least 2% of the votes cast until the quota requirements are met.⁹⁰

The ranking order and co-optation mechanisms applied in Burundi are not found in other EAC countries. It is, however, noted that Kenya employs incentives and penalties to promote women's representation in positions of power. The public subsidies to political parties are tied to the political parties' commitment to advance gender equality among candidates and leaders of the parties. The Political Parties Act 2011 states that money allocated to a registered political party from the Political Party

⁸⁷ Somali Dialogue Platform, "Enabling women's representation and participation in political dialogues in Somalia" (2023), available at <<https://reliefweb.int/report/somalia/enabling-womens-representation-and-participation-political-dialogues-somalia>> (accessed 13 June 2024).

⁸⁸ Article 127 (3) of the Electoral Code, 2019.

⁸⁹ Articles 142.2, 181 (2) of the Electoral Code, and Article 185 of the Constitution also allow co-optation procedures.

⁹⁰ According to Article 108 of the Electoral Code.

Fund shall be used for purposes compatible with democracy, including promoting the representation in the Parliament and the county assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities.⁹¹ Section 25 (2) (b) of the Political Parties Act 2011 further states that a political party shall not be entitled to receiving funding from the Political Party Fund if more than two-thirds of its registered office bearers or elected officials are of the same gender.⁹²

Generally, public funding is used to sanction political parties, which do not comply with gender equality requirements. This feature is not seen in the legal framework for promoting women's political participation in Tanzania, Burundi, the DRC, South Sudan, Somalia, and Uganda. Despite using party subsidies to incentivise political parties to promote the participation of women in politics, the two-thirds gender rule established in the 2010 Kenyan Constitution has never been met in either the lower or upper house. The 2010 Kenyan Constitution and the political parties' law do not provide accountability mechanisms if the two-thirds gender rule is not reached. The lack of accountability for the gender quota is also seen in the DRC, Somalia and South Sudan. Somalia lacks a clear mechanism for implementing the 30% quota both at the lower house (the House of the People) and the upper house (the Senate).⁹³

Despite the 2015 adoption of a law that encourages women's candidacies in the DRC, efforts to attain gender parity remain elusive. The DRC constitutional provisions on gender parity are not effectively implemented. Although the 2006 electoral law established a gender parity ratio for candidate lists, noncompliance with this provision did not render party lists inadmissible. Following the modification of Article 13 (ii) of the electoral law in December 2017, the law no longer requires gender parity

⁹¹ Section 26 of the Political Parties Act, 2011.

⁹² As per section 25(2) (b) of the Political Parties Act, the Political Parties Act 2011 states that

⁹³ Somali Dialogue Platform, "Enabling women's representation and participation in political dialogues in Somalia" (2023), available at <<https://reliefweb.int/report/somalia/enabling-womens-representation-and-participation-political-dialogues-somalia>> (accessed 13 June 2024).

but only encourages political parties to consider women in their candidate lists. Nonetheless, the non-inclusion of women in party lists does not render the list incompetent. In South Sudan, although the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) provides a 35% gender quota for appointments to all transitional government institutions of national unity, the quota is not consistently adhered.⁹⁴

Overall, due to adopting varied strategies and measures, EAC partner states have achieved varied percentages of representation in their decision-making structures. For example, at parliamentary levels, Rwanda is leading in the East African region and the globe, with 61% of women in the Parliament.

4. Conclusion

This chapter examined the realization of women's political rights in the EAC region as the bloc marks its 25th anniversary since its re-establishment in 1999. It provided a historical and contextual analysis of women's political participation across EAC Partner States, assessed the legal and policy frameworks governing gender equality—particularly the 1999 EAC Treaty and the 2018 EAC Gender Policy—and identified key drivers of disparity in women's political representation.

The chapter has shown that, while EAC Partner States have made notable strides—averaging 32% women's representation in parliaments, above the Sub-Saharan average of 27%—significant disparities persist. Rwanda leads with 61% women in parliament, while other countries like the Democratic Republic of the Congo, Somalia, and Kenya lag behind. These inconsistencies stem largely from the absence of binding numerical targets, policy harmonisation, and accountability mechanisms within the EAC Treaty and Gender Policy.

⁹⁴ Aluel Atem and Eva Lopa, “Young Women In Political Institutions In South Sudan: Lessons From Lived Experiences” Friedrich-Ebert-Stiftung South Sudan Office, p. 1, available at <<https://library.fes.de/pdf-files/bueros/suedsudan/20021-20230221.pdf>>.

Furthermore, the chapter revealed that the EAC institutional framework is largely silent on critical enablers of women's political participation. These include the lack of specific numerical targets for women's representation; absence of clear guidance on electoral system reforms that facilitate equitable participation; limited strategies for including other marginalised groups such as youth and persons with disabilities; lack of incentive structures to encourage political parties to field women candidates; and the absence of accountability mechanisms to enforce compliance and sanction non-performance.

In contrast, other regional blocs and normative frameworks such as the SADC, the Maputo Protocol, and the African Union's Agenda 2063 provide more progressive commitments. These include concrete targets for gender parity in decision-making structures (often 50:50), practical implementation strategies, and monitoring frameworks. The comparison demonstrates that the EAC is falling behind in matching its stated commitments with practical, enforceable tools to advance gender parity.

In light of these findings, the chapter proposes that the EAC revises both the Treaty and the Gender Policy to set binding minimum targets for women's representation across all governance levels. It further recommends that the EAC provide clear guidance on adopting favorable electoral systems—such as proportional representation—that have demonstrated greater success in achieving gender parity. Additional measures should include reforms to encourage inclusive nomination, appointment, and electoral processes; recognition of independent candidates as a legitimate pathway to leadership; and the establishment of enforceable accountability and incentive mechanisms to ensure compliance by Partner States and political parties.

As the EAC celebrates 25 years of regional integration, the need for a more transformative, measurable, and binding gender equality agenda is both timely and urgent. The chapter concludes that future research should critically examine women's representation within EAC decision-making organs themselves to assess whether the institutional structure of the Community aligns with the equality commitments it espouses.

Chapter Five

‘Friends or Foes?’ Reflecting on the EAC Preliminary Ruling Mechanism as an Interaction Area Between the East African Court of Justice and the National Courts

Jebby Romanus Gonza and Gotrib Mgaya***

1. Introduction

“And the two shall become one flesh!” This famous phrase can be echoed in Article 34 of the EAC Treaty, 1999 (EACT) to contemplate how the drafters envisioned the relationship between the national courts of the member states and the EACJ. National courts should be part and parcel of the EAC dispute settlement system and the EACJ. This relationship is characterised by unity and cooperation, with the two judicial systems carrying out adjudicatory functions within separate legal orders. They intersect in two distinct ways. First, national courts, like the

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EACJ, can adjudicate on matters of EAC law. Mainly, they have jurisdiction to apply and enforce provisions of the EACT and its Protocols in domestic cases where individuals seek to implement their Community rights.¹ Second, national courts synergise with the EACJ via the reference of judicial dialogue or preliminary ruling procedure (PR).² A preliminary ruling is an interlocutory procedure in which a judge presiding over a domestic case in a national court refers a question to the regional community court, the EACJ requesting an interpretation of a provision of community law relevant to the case at hand. It is not an appeal system but rather: (i) questions are sent to the EACJ, (ii) it provides an interpretation on the matters referred, and (iii) the case is then sent back to the national court for it to apply the interpretation of EAC law to the case at hand.

However, the enchantment of the law on paper may not reflect the law in practice. The envisioned interactive relationship between the EACJ and the national courts since establishing the PR mechanism under the EACT in 1999 has not yielded visible success. It remains dormant or dead. Since the promulgation of the EACJ in 2001, the Court has received only one request for a PR reference from the High Court of Uganda.³ It is worth noting that it took thirteen years for the EACJ to receive its first request for the PR, and since then, no reference has ever knocked its corridor of justice. Undeniably, the PR reference mechanism is dormant, not to mention extinct or dead. While drafters of the EACT intended that the national courts would function in a cooperative, interactive relationship with the EACJ, this relationship has hit rock bottom. The EAC dispute settlement system is practically a ‘one man’s show’ whereby the EACJ has taken the central dominant adjudicatory

¹ See Articles 27, 30, and 33 of “The Treaty for the Establishment of the East Africa Community 1999”; see Article 54 (2) of the “Protocol on the Establishment of the East African Community Common Market” [2010].

² See Article 34 of the Treaty for the Establishment of the East African Community 1999.

³ See EACJ, Case Stated No. 1 of 2014 (Arising from Miscellaneous Application No. 558 of 2012, in Civil Suit No. 298 of 2012 of the High Court of Uganda, Kampala, Civil Division), *Attorney General of Uganda v Tom Kyaburwenda* (2015), p. 54.

role in interpreting and applying provisions of the EACT. On the other hand, the national courts appear to be doing what can be regarded as ‘minding their own business’—acting at the periphery of the EAC’s institutional framework of judicial protection and regional integration. Little can be testified regarding their role in applying and adjudicating on provisions of the EACT and the paradigm of the judicial dialogue with the EACJ.

Against this background, this chapter addresses legal issues concerning the dormant functioning of the preliminary ruling mechanism (PRM). Indeed, scholars point out that the dormant functioning of the EAC PR cannot be attributed to the unavailability of cases at national courts where individuals seek to invoke EAC law. Undoubtedly, many contemporary events under the EAC regime could attract individuals’ invocation of community rights at national courts and consequently trigger a national judge to send references to the EACJ.⁴ Various scholars have attributed the poor functioning of the EAC PRM to a lack of knowledge and awareness concerning the capability and existence of the legal system.⁵ This chapter takes the discussion further by conducting an in-depth socio-legal analysis of the factors that pose barriers to a cooperative relationship between the EACJ and the national court and, consequently, a dormant functioning EAC PRM. According to this chapter, a ‘dormant, or unsuccessfully’ functioning PRM is demonstrated where the national courts and the Community Court, that is the EACJ, do not demonstrate a steady judicial dialogue. This is evidenced by the scanty or complete absence in the regional community court’s docket of references from the national courts for PRs on the interpretation of provisions of EACT or Protocols.

⁴ John Eudes Ruhangisa, “Judicial Protection under EAC Law: Direct Actions”, *East African Community Law* (Brill | Nijhoff 2017), p. 242; also see Jebby R Gonza, *Examining the Role of Regional Community Courts in Integration: Case study of the East African Court of Justice with lessons from the Court of Justice of the European Union* (Schriftenreihe zum internationalen Einheitsrecht und zur Rechtsvergleichung Band 72, Verlag Dr. Kováč 2023), p. 276.

⁵ Ibid., p. 242.

2. PRM as a Novel System of Interaction with the National Courts after a Defunct EAC

A judicial structure whereby a court at the regional community court interacts with national courts is not a novel construction of the EACT. The first early traces of interaction between national courts and provincial community courts started as far as 1902. Established by the British colonialists, the 'Britannic Majesty's Court of Appeal of East Africa' of 1902 and later reformed into 'His Majesty Court of Appeal for East Africa' in 1909 served as a higher appeal court for national courts in Kenya, Seychelles, Somalia, Tanganyika, Uganda, and Zanzibar.⁶ It was meant to be a higher appeal court from the national courts of the colonial states.

Another phase of interaction between a court at the East African level and national courts can be traced to the period after the EAC member states attained independence. Under the defunct EAC (1967-1977), the Court of Appeal for Eastern Africa (later transformed into the Court of Appeal for East Africa)⁷ acted as an appellate court on cases from the national courts. The court had jurisdiction to hear and determine appeals from member states on civil and criminal law (except for constitutional matters and the offence of treason in Tanzania).⁸ Precedents from the Court of Appeal for East Africa are still very significant and persuasive in the East African judicial systems today.⁹

The third phase of interaction between the EAC judicial legal framework and the national courts was established by the EACT. A newfound manner of interaction between the EACJ and the national courts can be traced under Article 34 of the EACT, which establishes the PRM as an

⁶ Justice Harold R. Nsekela, "Overview of the EACJ Justice Harold Nsekela" (2011), p. 2.

⁷ Article 80 "Treaty for the East African Cooperation" (1967).

⁸ East African Court of Justice, EAC, "Court Manual: A Practical Guide to the Law and Practice of the East African Court of Justice" (2020), p. 18.

⁹ Ally Possi, "An Appraisal of the Functioning and Effectiveness of the East African Court of Justice" (2018) 21 PER 1, p. 3.

integral aspect of the functioning of the EACJ. Article 34 of the EACT states that national courts or tribunals have jurisdiction to decide on cases invoking the EACT provisions or its Protocols. Specifically, a judge or a magistrate who is presiding on a case at a national court may seek assistance from the EACJ concerning the interpretation of the EACT and its Protocols or where a question on the validity and application of the regulations, directives, decisions and acts of the organs or institutions of the EAC arises. It is worth noting that the PRM is a novel and distinctive relationship from that of the defunct Court of Appeal for East Africa. Unlike the previous relationship where the Court served as an appellate forum for cases from national courts, the EACT 1999 abandons the appellate jurisdiction. It establishes the PRM, which serves as a forum of assistance from the EACJ to the national judge or magistrate in interpreting the EACT law. The EACJ attempts in every effort to give a reply to the questions of the national judge or magistrate in a manner that will assist them in resolving the dispute.¹⁰ Specifically, the national courts or tribunals have the privilege to seek a preliminary ruling from the EACJ, not the parties to the case.¹¹ Consequently, where the EACJ is called to rule on a question brought by courts or tribunals of the partner states, its mandate is limited to the request at hand without labouring itself to applying the law to the factual situation or dwell on the merit of a matter underlying the national court or tribunal.¹² Indeed, it is for the referring court to draw the appropriate conclusions from that reply of the EACJ.¹³

Even the purpose at which the interaction between the EACJ and national courts was established under the EACT demonstrates its novelty from that under the defunct EAC. Indeed, during the defunct

¹⁰ Rule 8, East African Court of Justice, “Court Users Guide: Guidelines on A Reference from National Courts for a Preliminary Ruling” (2014), p. 2.

¹¹ Rule 10, East African Court of Justice, “Court Users Guide: Guidelines on A Reference from National Courts for a Preliminary Ruling” (2014), p. 21.

¹² Rule 7, East African Court of Justice, “Court Users Guide: Guidelines on A Reference from National Courts for a Preliminary Ruling” (2014), p. 1.

¹³ Rule 8, *ibid.*, p. 2.

East African Cooperation, the Court existed as part of the hierarchy of the judicial system of the member states to review whether the courts of the last instance have correctly applied the law. However, the PRM, established under Article 34 of the EACT, takes cognisance of the mischief likely to occur due to the shared jurisdiction between the EACJ and the national courts on applying the Community law. Thus, the purpose of Article 34 EACT, the PRM, is to ensure uniform application of the law across the partner states of the Community. As previously stipulated, Article 34 enhances a cooperative relationship between the EACJ and the national court, each with its competence in ensuring judicial protection under the EAC law. The EACJ has exclusive jurisdiction in interpreting the EAC law, including the exclusive authority to declare regulations, directives, decisions, or actions of the EAC invalid.¹⁴ Similarly, the national courts only have jurisdiction to apply national law.

Yet, another striking difference between the PRM under the EACT and the defunct EACT refers to the stage of proceedings at which the two judicial systems can relate. During the defunct EAC, the aggrieved party approached the Appellate Court as a final remedial forum when aggrieved by the decision of the final court of appeal in a member state. However, a PRM is an interlocutory proceeding whereby a national court, at any stage of the proceedings before giving the judgement, stays the proceedings of the case to await a ruling from the EACJ.¹⁵

3. Jurisprudence of the EACJ Regarding Its Interaction with the National Courts

The introduction of the PRM under the EACT demonstrates that treaties are a ‘traité-cadre’, only mere frameworks. They give mere descriptions of negotiations of the contracting member states, are ambiguous, and will give space for further details to be desired regarding

¹⁴ Rule 13, *ibid.*

¹⁵ Rule 16 and 23, *ibid.*, p. 3.

the regulation of some practical aspects of the integration process.¹⁶ Similarly, apart from introducing the PRM under Article 34, no additional information can be obtained about the *modus operandi* upon which the EACJ shall interact with the national courts in the judicial dialogue. It may be possible to rely upon the EACJ Guidelines on a Reference from National Courts on how to institute the requests; however, they are not legally binding. Thus, examining the EACJ jurisprudence that guides its interaction with the national courts is pertinent.

Early jurisprudence of the EACJ does not unequivocally elaborate on various rules applicable to the PRM. However, they demonstrate the EACJ endeavours to shed light on the context of interaction with the national courts and the applicability of the principle of direct effect under the EACJ legal order. Indeed, the principle of direct effect is regarded as the cornerstone for a functioning PRM. Yet a quizzical aspect within the EAC legal framework has been contextualising the role of the national courts within the context of the jurisdiction of the EACJ to interpret and apply provisions of the EACT. This bafflement is evident under a 2013 decision of the EACJ, *The East African Law Society v. The Secretary General of the East African Community* when applicants sought to challenge, among other aspects, Article 54 (2) of the Protocol for the Establishment of the East African Common Market, 2010. The applicants challenged Article 54 (2) CMP for purporting to oust the jurisdiction of the EACJ by granting partner states' national courts, administrative and legislative bodies, or committees' precedence over the EACJ in matters relating to common market disputes.¹⁷ Accordingly, this infringed Articles 27 (1), 33 (2), 38 (1), and (2) of the EACT that confers jurisdiction of the EACJ in matters relating to the interpretation and application of the Treaty.¹⁸

¹⁶ Henri de Waele, "The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment" (2010) 6(1), p. 9.

¹⁷ *The East African Law Society v The Secretary General of the East African Community* (2013) Reference No. 1 of 2011, (2013) (East African Court of Justice, First Instance Divisions), p. 9.

¹⁸ *Ibid.*, p. 3.

The EACJ rejected the applicants' position by confirming that the jurisdiction provided to national courts does not oust its jurisdiction.¹⁹ It supported the incorporation of national courts as part and parcel of the EAC dispute settlement system by illustrating that individuals must only invoke their rights from community law before national courts.²⁰ The EACJ confirmed the applicability of the principle of direct effect under the EAC law based on the following grounds. First, the EACJ drew inspiration from the CJEU's case, *Van Gend en Loos*, to conclude that since the Common Market Protocol (CMP) confers rights onto the individuals within the EAC, they should be entitled to invoke them before their national courts.²¹ At this stance, the EACJ remarked that the CMP offers a broad scope for partner states to establish forums for settling disputes.²² Specifically, member states can develop judicial authorities-tribunals and quasi-judicial bodies, including legislative and administrative bodies.²³

Second, the EACJ utilised the principle of “competence” to confirm the applicability of the doctrine of direct effect. Predominantly, national courts have the competence to receive immediate matters from individuals on the CMP because they are designated within the partner states, the main users of the CMP daily. Thus, they are primarily obligated to ensure the implementation of Community legal instruments. Third, based on the principle of *effet utile*—effective application and implementation of community law would be rendered helpless if individuals were prohibited from invoking their rights before national courts.²⁴

Regarding the PRM, the EACJ conceptualised Article 54 (2) of the CMP as not ousting its interpretative function. The judgment portrays how the

¹⁹ Ibid., p. 31.

²⁰ Ibid., p. 28.

²¹ Ibid.

²² Ibid., p. 30.

²³ Ibid.

²⁴ Ibid., p. 27.

EACJ vigorously emphasises its exclusive jurisdiction in interpreting the CMP, 2010. It holds that the national courts “power to rule on disputes of persons seeking redress does not and should not include final determination over questions of interpretation of the Protocol”.²⁵

This case can also be marked as one of the early jurisprudences of the EACJ that shed light on the obligations of the national courts under the PRM. The EACJ makes an interrelation between Article 54 (2) CMP, 2010 and Article 34 EACT. It states:

We also think that the duty imposed upon national courts to refer matters to this Court for a preliminary ruling under Article 34 of the Treaty continues to exist even when the issue before them is a Common Market-related one. We, therefore, find that the fact that persons whose rights and liberties are recognised under the Common Market Protocol can seek redress in their respective Partner States does not oust or infringe upon the jurisdictional interpretation of this Court.²⁶

In the above passage, the EACJ emphasises the obligation of national courts to seek a preliminary ruling from the EACJ in common market disputes. Similarly, the Court is keen to stress its monopoly over the interpretation of the EAC law even where jurisdiction for redress is conferred in the partner states. Yet, a question is left lingering. The EACJ submitted that the CMP, 2010 allows broad categories of bodies, not necessarily judicial bodies in *strictu sensu* but may include tribunals, quasi-judicial bodies, legislative, and administrative authorities, as permitted to preside on aspects of the common market.²⁷ Did it intend to pave a path

²⁵ Ibid., p. 30.

²⁶ Ibid.

²⁷ Ibid.

that allows a broad category of bodies to seek a preliminary ruling from itself in aspects of the common market?

Similar aspects of contestation appeared in a later filed case, *the East African Centre for Trade, Policy and Law v The Secretary General of the East African Community*.²⁸ While the applicants contested the validity of the 2007 amendments to the EACT, they also challenged, among other aspects, the establishment of the dispute settlement mechanisms under CMP, 2010, as ousting the jurisdiction of the EACJ.²⁹ The EACJ reiterated its earlier position that its jurisdiction is not ousted and further confirmed the applicability of the principle of direct effect.³⁰ The EACJ provided another justification for incorporating national courts into the EAC's judicial system. The purpose is to ensure the division of labour between the EACJ and national courts or tribunals. Mainly, national courts and tribunals serve as “parallel and alternative” dispute resolution mechanisms to the EACJ, enhancing a speedy and effective resolution of trade disputes by experts in technical and specialised areas.³¹ The EACJ further held that the role of national courts in the EACJ judicial protection is essential since they will prevent the EACJ from being overburdened by nitty-gritty disputes in case the integration process is likely to deepen. This is in areas of trade, customs, immigration, and employment that are bound to arise regularly in the integration process.³²

The only request for a PRM, *The Attorney General of the Republic of Uganda v Tom Khyarwenda*,³³ from the High Court of the Republic of Uganda, is

²⁸ *The East African Centre for Trade, Policy and Law and The Secretary General of the East African Community* (2013) Reference No. 9 of 2012 (East African Court of Justice, First Instance Divisions).

²⁹ *Ibid.*, p. 7.

³⁰ *Ibid.*

³¹ *Ibid.*, p. 39.

³² *Ibid.*

³³ *The Attorney General of the Republic of Uganda and Tom Khyarwenda (Reference for a Preliminary Ruling under Article 34 of the Treaty Made by the High Court of the Republic of Uganda, Arising from Miscellaneous Application No. 558 of 2012, in Civil Suit no. 298 of the High court of Uganda at Kampala-Civil Division)* (2015) (East African Court of Justice, Appellate Decision).

very illustrative in providing valuable insights on Article 34 EACT and principles or rules on the functioning of the PRM in the EAC. First, the EACJ clarified Article 34 of the EACT by providing guidance on what constitutes ‘any court or tribunal of a partner state’ within the context of Article 34 of the EACT. It drew six standards for bodies endowed with jurisdiction to request a preliminary ruling from the EACJ: established by law, have a permanent existence, endowed with compulsory jurisdiction, can entertain procedures inter-parties, apply rules of law, and be endowed with functional independence.³⁴

Second, the EACJ addressed the context of the phrase “the 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 matters” as stipulated under Article 34 EACT. Particularly, it examined the scope and nature of the obligation of the national courts to refer disputes under the PRM. The phrases ‘if’ and ‘shall’ under Article 34 EACT make it questionable whether the duty to request a preliminary ruling is discretionary or mandatory after a national court considers a ruling on a question necessary. The EACJ clarified the above by referring to Article 234 EC Treaty (now Article 267 TFEU), from which Article 34 of the EACT was drawn. The EACJ took cognisance that Article 34 EACT utilises the compulsive word ‘shall’ but omits to incorporate a clause on a mandatory obligation to refer to courts of the last instance (as it is done under Article 234 (3) EC).³⁵ Similarly, the Court distinguishes that Article 234 EC uses the permissive phrase ‘may’ to stipulate a discretion to refer to the lower courts and “shall” under 234 (3) EC to stipulate a mandatory obligation on national courts against whose decisions there is no judicial remedy under national law.³⁶ It concluded that the EACT drafters purposely did such differentiation with Article

³⁴ Ibid., paragraph 40.

³⁵ Ibid., paragraph 47.

³⁶ Ibid., paragraphs 45 and 46.

234 EC to place a mandatory obligation to refer upon all EAC national courts—irrespective of their judicial hierarchy.³⁷

Under Khyrwenda's case, the EACJ declared its exclusive jurisdiction in declaring the invalidity of community acts, regulations, directives, and actions.³⁸ By relying on the CJEU's case, *Foto Frost v Hauptzollamt-Ost*,³⁹ the EACJ emphasised its exclusive jurisdiction to annul Community Acts and the mandatory obligation upon all national courts of member states to refer a question on the validity of Community Acts to the EACJ.⁴⁰

Furthermore, the EACJ examined the scope of national courts' discretion to refer to the EACJ under Article 34 of the EACT. Notably, the discretion is narrow and limited only to circumstances where⁴¹ (i) the question is irrelevant, (ii) the EACJ has already, in its previous judgement, made clarification of the similar issue (*acte éclairé*), (iii) or the correct interpretation of the Community is obvious (*acte clair*).⁴² It is worth noting that the declaration of a mandatory obligation to refer to national courts irrespective of their judicial hierarchy is a bold step taken by the EACJ.

³⁷ Ibid., paragraph 47.

³⁸ EACJ, case Stated No. 1 of 2014 (*Arising from Miscellaneous Application No. 558 of 2012, in Civil Suit No. 298 of 2012 of the High Court of Uganda, Kampala, Civil Division*), Attorney General of Uganda v Tom Kyahurwenda (2015), para 49.

³⁹ Case 314/85, *Foto Frost v Hauptzollamt-Ost* (1987) ECR I-419.

⁴⁰ *The Attorney General of the Republic of Uganda and Tom Khyahurwenda (Reference for a Preliminary Ruling under Article 34 of the Treaty Made by the High Court of the Republic of Uganda, Arising from Miscellaneous Application No. 558 of 2012, in Civil Suit no. 298 of the High court of Uganda at Kampala-Civil Division)*, para 48, 49 and 50.

⁴¹ EACJ, Case Stated No. 1 of 2014 (*Arising from Miscellaneous Application No. 558 of 2012, in Civil Suit No. 298 of 2012 of the High Court of Uganda, Kampala, civil Division*), Attorney General of Uganda v Tom Kyahurwenda (2015), para 56.

⁴² This study notes that the principles with regards to the scope of discretion of national courts to make a reference to the EACJ have been adopted from the jurisprudence of the CJEU, particularly under *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*. Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (1982) ECR 333. The foregoing prominent case was introduced by the CJEU to set standards upon which courts of the last instance may be relieved of the mandatory obligation to refer as required under Article 234 (3) EC (now Article 267 TFEU). Under Kyahurwenda's ruling, the EACJ incorporates the above-mentioned criteria from the CJEU (CILFIT's case) into the EAC legal order in a rather 'silent' manner- that is, without expressly stipulating so.

This measure will ensure increased requests for preliminary rulings from national courts if well followed.

Third, the EACJ provided details on the division of competence between itself and the national courts. The Court emphasises that it has exclusive jurisdiction in the role of interpretation of provisions of the EACT.⁴³ Similarly, under Article 34 EACT, national courts have a role in applying the Treaty.⁴⁴ Especially in seeking to apply the Treaty, the EACJ declares another obligation for the national courts—the jurisdiction of national courts to award compensation and or damages. Thus, national courts must examine the facts, determine if there is a breach and damage, and then award relief and remedies arising from and justifiable according to the loss.

It is significant to note that in declaring itself to be the exclusive interpreter of the EAC law, the EACJ relied on the following grounds: first, when Article 34 of the EACT utilises the mandatory word ‘shall’ to enforce a mandatory obligation upon national courts to refer, it brings the inference that only the EACJ can perform interpretative functions; and second, that the *raison d’être* of the preliminary ruling procedure requires so.⁴⁵ The EACJ took cognisance of the fact that since the 2007 amendments of the EACT, there has been a change in the focus of the drafter’s intention (contracting member states) in granting absolute and exclusive interpretative jurisdiction to the EACJ. Initially, the drafters aimed to give exclusive interpretive jurisdiction to the EACJ.⁴⁶ However, such purpose is watered down by the 2007 amendments, whereby the second subparagraph of Article 27 and Article 33 (2) of the EACT demonstrate a change in the intention of the drafters of the Treaty to “contract out”

⁴³ *The Attorney General of the Republic of Uganda and Tom Khyaburwenda (Reference for a Preliminary Ruling under Article 34 of the Treaty Made by the High Court of the Republic of Uganda, Arising from Miscellaneous Application No. 558 of 2012, in Civil Suit no. 298 of the High court of Uganda at Kampala-Civil Division)*, para 51.

⁴⁴ *Ibid.*, para 51 and 54.

⁴⁵ *Ibid.*, para 50.

⁴⁶ *Ibid.*, para 59.

of the general form of giving the EACJ such absolute power and allocating interpretative jurisdiction to the national courts.⁴⁷ Thus, Khyarwenda's case reinstates the exclusive interpretive jurisdiction on provisions of the EACT. This is, therefore, demonstrated as an aggressive approach of the EACJ to protect its interpretation function against encroachment of the member states or partial allocation to the national courts.

Furthermore, the EACJ asserts its hierarchical position within the EAC judicial system when it illustrates the effects of the PRM upon the national courts. It implies that the EACJ holds a Supreme Court's position above the national courts. The EACJ held that the effect of a preliminary ruling from the Court is binding upon the national court that sent the question.⁴⁸ It is also binding *erga omnes* upon other national courts and tribunals within the member states.⁴⁹ The foregoing-mentioned effects of the PRM bring about some impacts. First, from a common law lens, the hierarchical authority of the EACJ above national courts is established. Thus, preliminary rulings of the EACJ have a precedential value on all national courts. Second, the PRM preserves certainty and uniformity in the interpretation and application of EAC law. Third, it provides a forum at which national courts are informed, advised, and persuaded on how to apply community law and thus guarantees effective implementation of community law. Fourth, through preliminary judgments, national courts can easily accept the EACJ ideational orientation on the EAC law, its judicial philosophy, and the attainment of economic integration goals in the region. Consequently, this promotes the legitimacy of the EACJ in the Community. Finally, preliminary rulings are an effective tool that the

⁴⁷ Ibid., para 60.

⁴⁸ Ibid., para 58.

⁴⁹ Ibid.

EACJ can use to introduce supranational concepts within the EAC law framework.⁵⁰

4. A Non-Functioning EAC PRM

4.1. EAC PRM as a Failed Legal Transplant of EU Law

An attempt to explore the failure of a functioning PRM in the EAC legal framework must consider all anomalies that revolve around the processes of its transplantation from the EU legal system to the EAC. This chapter regards legal transplantation as a process that involves translocating legal norms (rules, ideas, institutions, and structures) from a foreign jurisdiction, in this case (the EU legal framework), into a host jurisdiction—the EAC legal framework.⁵¹ The following section seeks to understand the extent to which the EAC-PRM was transplanted from the EU legal framework.

As previously alluded to, Article 34 EACT is a transplant of the EU Article 234 EC (now Article 267 TFEU). This emulation of Article 234 EC is evidenced in the following ways. First, Article 34 EACT takes a word-to-word emulation of Article 234 EC. However, it is worth noting that some features in Article 34 EACT can be distinguished from its founder text, as it was drafted in a manner that compounds Article 234 (a) and (b) into the second paragraph of Article 234. Similarly, Article 34 EACT takes no cognisance of Article 234 (c) nor includes the third paragraph of Article 234 EC that provides for a mandatory obligation upon courts and tribunals of the last instance to refer to the Court of Justice of the European Union (CJEU). Also, in specifying the obligation of national courts to refer to the EACJ, Article 34 EACT uses the term ‘shall’ instead of the term ‘may’ as stipulated by the second paragraph of Article 234 EC. The drafters of the Treaty intentionally established these

⁵⁰ Tomasz P. Milej, “What is wrong About supranational laws? The sources of East African community law in light of the EU's experience” (2015) 75, p. 593, available at <https://www.zaoerv.de/75_2015/75_2015_3_a_579_618.pdf>.

⁵¹ Jebby R Gonza, *Examining the Role of Regional Community Courts in Integration: Case study of the East African Court of Justice with lessons from the Court of Justice of the European Union* (Schriftenreihe zum internationalen Einheitsrecht und zur Rechtsvergleichung Band 72, Verlag Dr. Kovač 2023, p. 277.

noticeable changes under Article 34 EACT to place a mandatory obligation to refer upon all national courts and tribunals irrespective of their place in their national judicial hierarchy.⁵²

Second, in drafting the instructions that direct national courts to initiate a reference for a preliminary ruling, the EACJ emulated the Guidelines of the CJEU that were initially developed via its case law.⁵³ Third, the fact that Article 34 EACT is a transplant of the PRM from the EU law is underscored by the EACJ under Kyahurwenda's ruling when the EACJ referred to Article 234 EC to devise principles on the functioning of the EAC PRM. The EACJ held that:

In answering that question, the Court finds guidance in the meaning and application of a similar provision that introduces the identical mechanism of preliminary reference in the European Community (EC) Treaty and was one of the major reference points when developing the EAC Treaty⁵⁴.

The preceding section indicates that drafters of the EACT utilised Article 234 of the EC when introducing an 'identical mechanism' in the EAC legal framework. This suggests that, and as is the case, the EACJ has adopted and incorporated specific rules for the PR system functioning in the EAC legal framework, similar to those in the European Union. Similarly, the paragraph is essential as it encapsulates the EACJ illustration of how Article 34 EACT was drafted. This is especially true when it is

⁵² *The Attorney General of the Republic of Uganda and Tom Khyahurwenda (Reference for a Preliminary Ruling under Article 34 of the Treaty Made by the High Court of the Republic of Uganda, Arising from Miscellaneous Application No. 558 of 2012, in Civil Suit no. 298 of the High court of Uganda at Kampala-Civil Division)*, para 41- 51.

⁵³ Compare rules and guidelines governing national courts on initiating preliminary references under the East African Court of Justice, East African Court of Justice, EAC, "Court Manual: A Practical Guide to the Law and Practice of the East African Court of Justice" (2020), p. 18; and Publications Office, *Court of Justice of the European Union: Recommendations to National Courts and Tribunals in Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings* (2019/C 380/01, 2019).

⁵⁴ Here, the emphasis is on the researchers.

difficult to get such illustrations from the legal drafters or their travaux préparatoires.

4.1.1. The Dormancy Syndrome

Comprehending the dormancy syndrome within the EAC context may require one to appreciate that this challenge was not uniquely manifested in the EAC jurisdiction. It may entail appreciating that the dormancy syndrome is a common problem in the humble beginnings of PRMs. This chapter regards the dormancy syndrome as a period—usually in the humble beginnings of establishing a preliminary ruling procedure when requests for a preliminary ruling from the national courts to the regional community courts are absent or may be scanty.

Predominantly, it is worth noting that when the contracting states sought to incorporate the system of the PR reference into the EAC legal framework, they were enticed by the success shown by the PRM in the EU judicial system. As highlighted by scholars, it is easy for a legal drafter to transplant a law from a foreign jurisdiction when enticed by the legitimacy and prestige of the foreign law within its jurisdiction, i.e., how the foreign law has proven to be an ideal and yielded successful results in solving a similar problem.⁵⁵ However, the EAC legal drafter might not have contemplated the fact that the EU-PRM was by itself a legal transplant in the supranational judicial framework of the EU and was also once a victim of dormancy syndrome during its humble beginnings.

The EU PRM is a legal transplant from the Italian constitutional system, which incorporated national courts to send questions to the Italian Constitutional Court of 1948.⁵⁶ Article 41 ECSC initially promulgated the EU-PRM, and later, a member of the *Group de rédaction*, Nicola Catalino, an Italian jurist, adjudicated its laudable articulation under Article 177

⁵⁵ Toby S Goldbach, “Why Legal Transplants?” (2019), pp. 591-592, available at <lawsocsci.annualreviews.org>; some legal transplants were externally conditioned by the International Monetary Fund or the World Bank who condition the adoption of certain legal reforms that have acquired prestige in order for the state to access loans.

⁵⁶ Morten Rasmussen, “The Origins of a Legal Revolution – The Early History of the European Court of Justice” (2008) 14(2) ZGEI 77, p. 89.

EEC Treaty in 1958.⁵⁷ It is worth noting that the CJEU did not receive any PR references until 1961. After that, references to the ECJ were scanty to the extent that the EACJ had received only 75 references by 1969.⁵⁸ Requests for PR from national courts continued to be few until there was a noticeable increase in the early 1990s.⁵⁹ Notably, by 1998—around the period when the EAC Treaty was being drafted, references to the CJEU from national courts had increased to 64% compared to a rate of below 4% in 1961.⁶⁰ Notably, the current trend is that the CJEU has specialised massively in the preliminary reference system by having an active and lively functioning relationship with the national courts. Questions from the national courts form most of the CJEU’s docket. For instance, in 2022, PR references counted for about 65% (546 cases of the 838 new cases) brought before the CJEU.⁶¹

The successful functioning of the EU-PRM is not a mere coincidence. Acknowledging the EU-PRM from the lens of a vertical transplant—a judicial system borrowed from a domestic level to an international level⁶²—requires acknowledging strategic efforts employed by different stakeholders to promote the interaction between national courts and the CJEU under Article 177 EEC (now Article 267 TFEU). The CJEU is highly appreciated for its role in encouraging national courts to send requests for interpretation in the early years of 1960 to the 1970s. One of the first tactics employed by the CJEU was “taking its show on the road” to disseminate education on EU law and the PRM to national courts

⁵⁷ Ibid.

⁵⁸ This averages about 9 cases every year from 1961 to 1968.

⁵⁹ Gradual increase was observed starting the SEA of 1986, where there was emphasis on liberalization of markets and abandonment of member national protection policies. Takis Tridimas, “Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure” (2010) 40(Issue 1) COLA 9, p. 25.

⁶⁰ Ibid.

⁶¹ CURIA, “Statistics of judicial activity - Court of Justice of the European Union”(14 November 2023), available at <https://curia.europa.eu/jcms/jcms/Jo2_7032/en/> (accessed 14 November 2023).

⁶² For more on horizontal and vertical transplantation see Jerneja Penca, “Transnational Legal Transplants and Legitimacy: The Example of ‘Clean’ and ‘Green’ Development Mechanisms” (2016) 36(4) Legal Studies, p. 706.

(judges).⁶³ This was achieved by establishing regular activities and organising working sessions with judges of national courts.⁶⁴ Furthermore, the CJEU established jurisprudence via its case law that cajoled national courts to participate actively in the integration project via the PRM. The Court founded various doctrines that guided how the PRM should be conducted.⁶⁵ It encouraged a higher number of preliminary references by allowing a broad category of member states' organs, be they judicial or quasi-judicial bodies, to reference it.⁶⁶ It declared a prohibition to national laws, rules, or procedures that limited a (lower) national court from referring and thus made the procedure of sending questions to the CJEU an absolute right of the national (judge) court.⁶⁷ Also, the CJEU overlooked the technical errors of the national courts when drafting the references to the CJEU, thus employing a lenient and flexible approach in admitting references from the national courts.⁶⁸

Indeed, an illustration of the triumphant story of Article 177 EEC (Article 234 EC, Article 267 TFEU) is not complete without acknowledging the role of the early legal fraternity and the European Commission's Legal

⁶³ Karen J. Alter (ed), *The European Court's Political Power: The Role of Euro-Law Associations in European Integration (1953-1975)* (Oxford University Press 2009), p. 69.

⁶⁴ Laurence R Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997) 107(2) *The Yale Law Journal* 273, p. 302.

⁶⁵ For instance, the CJEU gave life to the preliminary ruling mechanism by establishment of the principle of direct effect under *N.V. Algemene Transport—en Expeditie Onderneming van Gend & Loos and Nederlandse administratie der belastingen* [1963] 26/62, [1963] (Court of Justice of the European Union); see M. Rasmussen, "Revolutionizing European law: A history of the Van Gend en Loos judgment" (2014) 12(1) *International Journal of Constitutional Law* 136, p. 146.

⁶⁶ See for instance; *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf*. [1966] 61/65, [1966] (Court of Justice of the European Union).

⁶⁷ See for instance case, *Jozef Križan and Others v Slovenská inšpekcia životného prostredia* (2012) 416/10, paragraph. 68; also see Case, *Aziz Melki and Selim Abdeli* (2010), 188/10, p. 363.

⁶⁸ Takis Tridimas, "Knocking on Heavens Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure" (2003) 9, 21; also see *Schwarze and Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Frankfurt am Main* (1965) 16/65 (Court of Justice of the European Union), p. 886; it is appropriate for the Court to inform the national court at once of its view without compelling the national court to comply with purely formal requirements which would uselessly prolong the procedure under Article 177 and would be contrary to its very nature.

Service (ECLS). After the promulgation of the Rome Treaty in 1958, vibrant legal associations of jurists, lawyers, and legal scholars within all EU member states (then EEC Community)⁶⁹ developed an activist spirit in promoting the European integration project. Euro-law associations aimed to explore the capacity of EU law to foster self-expansion, including power influence beyond their state territories.⁷⁰ Thus, promoting the PRM aimed at obtaining rulings from the CJEU that would achieve pro-integration developments in EU law. Most of the activities aimed to disseminate information and legal education on developments of EU law. They published scholarly works that gave debates on developments of EU law or essential rulings of the CJEU.⁷¹ Euro-law associations facilitated the building of foundational jurisprudence of the CJEU in the 1960s by seeking opportunities to establish far-reaching and novel legal positions on EU law.⁷² This was achieved by collaborating with their clients in sending references of ‘test’ cases. On the other hand, the ECLS supported efforts that aimed at constitutionalising the European Treaties. The ECLS was concerned with establishing a community legal order that would effectively implement the common market and specifically underpin enforcement of European Treaties under the national courts instead of relying solely on infringement actions from reluctant member states’ governments or the European Commission.⁷³

The ECLS played a prominent role in supporting the EU preliminary ruling procedure soon after establishing the EEC Treaty in 1958. Its most important strategy was to ensure education campaigns on EU law to the

⁶⁹ From 1950s up through 1961, member states had the following Euro-law Associations: *Wissenschaftliche Gesellschaft für Europarecht*, *Association Belge pour le Droit Européen*, *Association Française des Juristes Européens*, *Associazione Italiana dei Giuristi Europei*, *Association Luxembourgeoise des Juristes Européens*, *Nederlandse Vereniging voor Europees Recht*; Karen J. Alter (ed), *The European Court's Political Power: The Role of Euro-Law Associations in European Integration (1953-1975)* (Oxford University Press 2009), p. 63.

⁷⁰ *Ibid.*, p. 62.

⁷¹ *Ibid.*, p. 67.

⁷² *Ibid.*, p. 69.

⁷³ Morten Rasmussen, “The Origins of a Legal Revolution – The Early History of the European Court of Justice” (2008) 14(2) ZGEI 77, pp. 146 and 149.

legal fraternity.⁷⁴ It promoted the preliminary ruling mechanism by encouraging lawyers (and the people) within the EU community to use the preliminary references system under EU law.⁷⁵ The ECLS, via Gaudet, Director of the Commission's Legal Service 1958-70, founded the *Fédération Internationale pour le Droit Européen* (FIDE) in 1961.⁷⁶ It was an umbrella organisation that united all Euro-lawyers' associations within the member states. The FIDE acted (and still serves) as a meeting point for pro-integration lawyers by hosting conferences every two years.⁷⁷ The FIDE organised conferences that discussed pressing matters in EU law and legitimised and promoted the case law of the ECJ.⁷⁸ Additionally, the ECLS ensured that Euro-law associations based within member states could carry out their activities by supporting their financial budgets.

As detailed above, one can rightly submit that the EU preliminary reference system could still be dormant or extinct had the CJEU, the pro-integration Euro-Law Associations, the ECLS, and other stakeholders not proactively supported the EU legal integration process and the PRM.

4.1.2. Challenges with Transplanting the EAC PRM from the EU PRM

Indeed, it is one thing for a legal drafter to borrow a judicial system from a foreign jurisdiction; it is yet another that the law should yield successful outcomes. Contextualist scholars warn legal drafters about blind mimicry

⁷⁴ Ibid., p. 148; also see Karen J. Alter (ed), *The European Court's Political Power: The Role of Euro-Law Associations in European Integration (1953-1975)* (Oxford University Press 2009), p. 67.

⁷⁵ Karen J. Alter (ed), *The European Court's Political Power: The Role of Euro-Law Associations in European Integration (1953-1975)* (Oxford University Press 2009), p. 67.

⁷⁶ Morten Rasmussen, "The Origins of a Legal Revolution – The Early History of the European Court of Justice" (2008) 14(2) ZGEI 77, p. 82; also see Karen J. Alter (ed), *The European Court's Political Power: The Role of Euro-Law Associations in European Integration (1953-1975)* (Oxford University Press 2009), p. 66.

⁷⁷ Morten Rasmussen, "The Origins of a Legal Revolution – The Early History of the European Court of Justice" (2008) 14(2) ZGEI 77, p. 148; also see Karen J. Alter (ed), *The European Court's Political Power: The Role of Euro-Law Associations in European Integration (1953-1975)* (Oxford University Press 2009), p. 66.

⁷⁸ See Morten Rasmussen, "The Origins of a Legal Revolution – The Early History of the European Court of Justice" (2008) 14(2) ZGEI 77, 148.

or copying, that is, transplanting law, while oblivious to the “organic elements”, such as the environment of the foreign legislation and the recipient’s contextual settings.⁷⁹ According to contextualist scholars, the translocation of laws, legal procedures, and legal institutions will likely encounter environmental obstacles—geographical, sociological, economic, cultural, and political—that will resist the transplanted law.⁸⁰ On this account, contextualists advocate for the need to observe the environmental contexts of the society of origin that sought to establish it and the recipient’s environment in which the law is meant to operate. Specifically, transplanting can yield successful results if the borrowed law is made to “fit”—adapted and made compatible with the social and political context of the new local setting.⁸¹ Failure to ensure compatibility between the foreign law and the domestic legal system may result in unintended consequences of the legal transplants in the recipient jurisdiction.⁸² The transplanted law acquires different meanings and produces different outcomes from those expected.⁸³ The transplanted law may result in distorted legal systems that do not ‘take hold at all’ or experience “‘fit-in” challenges where the law ‘on paper or books’ is rejected and ignored in practice or becomes a ‘legal irritant’”.⁸⁴

⁷⁹ Karen J. Alter, Laurence R. Helfer and Osvaldo Saldias, “Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice” (2012) 60(3) 629, p. 641; also see Toby S Goldbach, “Why Legal Transplants?” (2019), p. 592, available at <lawsocsci.annualreviews.org>; Mirjan Damaška, “The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments” (Autumn, 1997) 45(4) 839, p. 840.

⁸⁰ Kahn Freund, “On Uses and Misuses of Comparative Law” (1974) 37(1) 1, p. 8.

⁸¹ Amber Darr, “The Role of Institutions in Generating Successful Legal Transplants: a Comparative Analysis of the Adoption of Competition Laws in India and Pakistan” (2018), p. 5.

⁸² Elisabetta Grande, “Legal Transplants and the Inoculation Effect: How American Criminal Procedure has Affected Continental Europe” (2016) 64(3) *The American Journal of Comparative Law* 583, p. 587.

⁸³ Mirjan Damaška, “The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments” (Autumn, 1997) 45(4) 839, p. 840.

⁸⁴ The transplanted law triggers a whole series of new and unexpected events; brings about evolutionary changes in law to the effect that irritates law’s binding arrangements’, the meaning of the external rules and the internal context will be reconstructed and reformed respectively, see Gunther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law End Up in New Divergencies” (1998), p. 12. See how

In light of the preceding precept, this chapter brings to the fore various aspects of “mismatches” between the EAC PRM and the EU PRM. On this account, it is argued that the failure to consider legal, political, and ideological factors when transplanting the PRM from the EU legal order may have contributed to a dormant functioning of the PRM in the EAC legal system.

4.1.2.1. Variation in the Locus Standi of the Individual before the Courts

One of the principles for the successful functioning of the PRM is that there must be strict competence standards in terms of actions that can be invoked by the individual at the regional community court and the national courts. This implies that the *locus standi* of the individual to institute direct actions at the regional court may be limited. Still, rather broad accessibility to invoke judicial protection on community law is granted at the national courts.

This position is well demonstrated by the EU dispute settlement mechanism, which is based on the subsidiarity principle and maintains strict competencies between the community and national judicature. The fourth paragraph of Article 263 TFEU supports a restrictive approach to the *locus standing* of the individual at the CJEU when it comes to actions of annulment of regulatory acts (acts of general application) of the EU. Thus, direct actions for annulment against an act or a regulatory act by the individual at the CJEU must be of direct and individual concern and not an implementing measure. To enhance the strict separation of powers with national courts, the CJEU has interpreted the criteria ‘direct and individual concern’ in a manner that is restrictive and difficult for individuals to fulfil and have *locus standi* in direct actions for annulment before the CJEU.⁸⁵ From

transplanting a preliminary reference system has brought about a cooperative relationship between the judges of the Andean (ATJ) and administrative agencies (not courts) in reviewing matters of intellectual property and trademark, Karen J. Alter, Laurence R. Helfer and Osvaldo Saldias, “Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice” (2012) 60(3) 629, p. 664.

⁸⁵ “It must first be emphasized in this regard that the European Economic Community is a community based on the rule of law, in as much as neither its Member States nor its

the outset, the EU system of legal remedies is structured to enhance the role of national courts and the PRM in actions of control of legality by the individual or private litigants. At the national courts, individuals have *locus standing* to maintain an action to review the validity of implementing measures adopted by national authorities. Thus, if there is doubt about the validity of community legislation or administrative acts, the national court will request PR from the CJEU. This is based on the justification that the community directives provide the legal basis for national implementing measures. Similarly, the jurisprudence of the CJEU has sought to promote a ‘complete system of legal remedies’ within the judicial system framework by elevating the role of judicial protection of the national courts and the preliminary ruling mechanism.⁸⁶

A brief history of the drafter's intention that led to restricting the *locus standi* of the individual in acts of judicial review at the CJEU is also worth noting. The nature of the Paris Treaty (Article 33 ECSC Treaty) was such that it guaranteed a legal or natural person's *locus standi* for judicial review on general decisions of community institutions at the ECJ. During this period, direct access of the individual was the central litigation pattern of the Paris Treaty, and jurisprudence of the ECJ broadened the accessibility of the individual to the Court.⁸⁷ However, this practice was purposely restricted upon establishing the EEC treaty 1958. Restriction of direct access of the individual to the ECJ (under Article 173 EEC Treaty, former Article 33 ECSC) was based

institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.” *Parti écologiste 'Les Verts' v European Parliament* (1986) Case 294/83 Paragraph 23 (Court of Justice of the European Union).

⁸⁶ See *Plaumann & Co. v Commission of the European Economic Community* (1963) 25/62 107 (Court of Justice of the European Union). Also, see *Unión de Pequeños Agricultores v Council* (2002) C-50/00 P Paragraph 32-44 (Court of Justice of the European Union).

⁸⁷ Morten Rasmussen, “The Origins of a Legal Revolution – The Early History of the European Court of Justice” (2008) 14(2) ZGEI 77, p. 144.

on the notion that challenging the legality of regulatory acts is to be left to the member states and institutions of the EU and not the individual.⁸⁸ It was thought that the individual was already well represented by the Commission regarding actions of noncompliance of member states and by the member states in actions for infringement by the Community.⁸⁹

The EAC legal drafters did not consider the preceding aspects when transplanting the EAC PRM. The legal drafter designed the EACT so that legal practice in the EAC does not maintain strict conditions about the individual's access to direct actions before the EACJ. This aspect is demonstrated by Article 30 EACT, which provides for the *locus standi* of a legal or natural person, a resident of the EAC member state, to challenge the legality of any act, regulation, directive, decision, or any action of a member state or an institution, alleging that the above is unlawful or an infringement of provisions of the EACT. The EACJ jurisprudence has also promoted the easy admissibility of direct actions from individuals. It has maintained that immediate action by an individual before the Court should be admitted so long as they can allege triable issues concerning the infringement of relevant provisions of the Treaty and its interpretation.⁹⁰ The Court has dismissed conditions likely to limit the individual's access to the EACJ, such as the need for the individual to demonstrate a specific interest when instituting a case or exhausting local remedies.⁹¹ Indeed,

⁸⁸ Joined cases 16 and 17/62, *Producteurs de Fruits v. Council* (1962) ECR 901.

⁸⁹ Morten Rasmussen, "The Origins of a Legal Revolution – The Early History of the European Court of Justice" (2008) 14(2) ZGEI 77, p. 144.

⁹⁰ *British American Tobacco Ltd. v The Attorney General of the Republic of Uganda* (26 .2019) Reference No. 7 of 2017 (East African Court of Justice, First Instance Divisions) para 29-31. Also see *Burundian Journalists Union v The Attorney General of the Republic of Burundi & 10 Others (Amici Curiae)* (2015) Reference No.7 of 2013 Paragraph 43 (East African Court of Justice, First Instance Division).

⁹¹ See *The Attorney General of the Republic of Rwanda v Plaxeda Rugumba* (2012) Appeal No. 1 of 2012 14–15 Paragraph 35 (East African Court of Justice, Appellate Division). Also see *Malcom Lukwiya v The Attorney General of the Republic of Uganda (1)* (2018) reference No. 6 of 2015 18 to 19, para 41-45 (East African Court of Justice, First Instance Divisions).

the broad accessibility of individuals at the EACJ is good as it enhances access to justice, increases the number of cases at the EACJ, and strengthens the individual and the EACJ's role in promoting regional integration.⁹² However, it is detrimental to the preliminary ruling procedure. The EAC dispute settlement mechanism creates competition between the Community and national courts. For instance, individuals whose rights or liberties have been infringed on under the EAC CMP do not seek to invoke their rights at the national courts under Article 54 (2) of the CMP, 2010. Instead, they institute such proceedings directly at the EACJ.⁹³ This reduces the chances for a request for a preliminary ruling that could have been created via Article 54 (2) of the CMP, 2010. The tendency has been that individuals sideline the role of national courts in preference for invoking direct actions at the EACJ.

4.1.2.2. Variation in the Structure of Judicial Frameworks and the Position of National Courts

A contextualist scholar, Kahn Freund, warns against transplanting rules that organise judicial institutions and legal procedures.⁹⁴ Transplanting such rules is guided by the fact that judicial systems and legal procedures are more connected to the 'organic elements of the law'— the peculiar features of history, social structure, and political consensus of the jurisdiction that established it.⁹⁵ He refers to them as tough laws, likely to

⁹² *East African Law Society & 4 Others vs Attorney General of Kenya & 3 Others* (2008) 14 (East African Court of Justice): Residents of Partner States are vested with a right to access the Court for the purpose of challenging any form of infringement of the Treaty. This was a deliberate provision to ensure that East Africans for whose benefit the Community was established participate in protecting the integrity of the Treaty.

⁹³ The case, *Grand Lacs Supplier S.A.R.L & Others v the Attorney General of the Republic of Burundi* (19. 06 .2018) Reference No. 6 of 2016 (East African Court of Justice, First Instance Division) serves as modal where applicants allege infringement of their fundamental rights under Articles 2, 3, 4, 5, and 6 of the CMP, 2010 i.e., unlawful seizure of goods by the respondent in their country, Burundi. The applicant brought a direct action before the EACJ. However, an applicant can also initiate an action for infringement of common market rights at the national courts.

⁹⁴ Kahn Freund, "On Uses and Misuses of Comparative Law" (1974) 37(1) 1, p. 21.

⁹⁵ *Ibid.*, p. 18.

resist transplantation because they affect the distribution and expressions of power of the legal profession in the recipient jurisdiction. While the author does not entirely dismiss the possibility of successful transplantation of judicial institutions, he advocates for ensuring favourable conditions, including naturalisation into similar structures⁹⁶—*ordre de jurisdiction*, during transplantation in the host jurisdiction.⁹⁷

A fundamental question at hand is whether there is any chance that transplanting a preliminary ruling mechanism from a judicial framework of the EU could yield successful results in an EAC legal framework. The frameworks of the two regional community courts are very distinct. For instance, Article 19 (1) TEU enshrines the organisational structure of a ‘twin’ system composed of Union Courts and the national courts working in cooperation. The case is different in the EAC, composed of three dispute settlement organs—the national courts and the Committee for Trade and Remedies— that exist parallel to the EACJ. Based on the differentiation of the judicial system and the litigation structure between the EAC and the EU, the chances that a transplanted PRM will survive in the host jurisdiction are negligible.

Arguably, the EACT and its Protocols demonstrate the intention of the framers of the treaty to establish other organs of dispute settlement that exist parallel to the EACJ.⁹⁸ This is portrayed by Article 54 (2) of the CMP, 2010, and Article 24 (1) (e) of the Protocol establishing the EAC Customs Union Protocol (CUP), 2005. Similarly, Article 33 (2) of the EACT stipulates that ‘decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.’ The inference is that there could be chances where the EACJ and national courts have concurrent jurisdictions.⁹⁹ This

⁹⁶ Ibid., p. 19.

⁹⁷ Ibid., p. 20.

⁹⁸ See Part 3 above on cases of the EACJ that deliberated on the status of national courts and the Committee for Trade and Remedies in the EAC judicial system.

⁹⁹ Emmanuel Ugirashebuja, *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (John Ruhangisa, Tom Ottervanger and Armin Cuyvers eds, Brill 2017), p. 158.

has led to a tendency where litigation on EAC law or its Protocols has become a ‘one man’s show’ whereby most cases before the EACJ are instituted by natural and legal persons. Specifically, residents of EAC have chosen the EACJ as the most preferred litigation forum for EAC law—bypassing their national courts to invoke their rights at the EACJ. This is the case, even in matters of EAC law that national courts can handle. Intriguingly, suppose one can institute a direct action at the EACJ, why should they toil taking an indirect route of accessing the EACJ via the national courts and the preliminary ruling mechanism? Thus, establishing parallel structures to the EACJ not only subjects national courts to a peripheral role of judicial protection of community rights but also, regrettably, results in the demise of the EAC preliminary ruling mechanism.

4.1.2.3. Variations in Support Systems of Community Law

Scholarships establish the importance of assessing the forces external to law, power relations of society, and political and ideological factors that supported the existence or continued success of the transplanted law before translocating it into the recipient’s jurisdiction.¹⁰⁰ This relates to assessing the success of the legal transplant in correlation to its support system, i.e., organised groups, such as political groups or the legal fraternity.¹⁰¹ Markedly, it is easy to transplant a law into a foreign jurisdiction but difficult to transplant the ideological support it received from the various organised groups, political parties, labour groups, mass media, and the public. The interplay of political and ideological factors constitutes the ‘organic elements’ of law,¹⁰² closely linked to the society that founded the law and are the most difficult to transplant.¹⁰³

As expounded in Section 4.1.1 above, the EU-PRM was able to rejuvenate from its dormancy syndrome due to the pro-integration

¹⁰⁰ William Ewald, “Comparative Jurisprudence (II): The Logic of Legal Transplants: The Logic of Legal Transplants” (1995) 43(4) 489, p. 491.

¹⁰¹ Kahn Freund, “On Uses and Misuses of Comparative Law” (1974) 37(1) 1, p. 13.

¹⁰² *Ibid.*, p. 18.

¹⁰³ *Ibid.*, p. 21.

endeavours of the Euro law associations, the CJEU, and the ECJS. Mirjan has stated, ‘The music of law changes when the musical instruments and the players are not the same.’¹⁰⁴ Predominantly, the PRM has not been embraced in the East African jurisdiction by similar political and ‘pro-integration’ ideologies that have sought to promote its flourishing in the EU. Indeed, one of the problems the EAC faces is the lack of political will of the member states and their institutions towards enhancing greater integration in the EAC.¹⁰⁵ Similarly, ‘the pro-integration’ spirit of the legal fraternity within the member states is missing in the picture. Remarkably, the EAC legal fraternity, the mass media, and organised political groups have not played an influential role in supporting the processes of legal integration. This tendency has been attributed to the fact that they do not have knowledge of EAC law, the EACJ, the jurisdiction of national courts about EAC law, and the PRM in general.¹⁰⁶ Similarly, they are unfamiliar with litigation procedures at the EACJ. Thus, it is possible to regard the EAC PRM as a legal irritant—being ignored or rejected by the EAC legal fraternity and other stakeholders.¹⁰⁷

4.2. Technicalities Related to Bureaucracy and Hierarchy of National Courts

As stipulated by Article 34 EACT, “any court or tribunal” shall request the EACJ for a PR if it considers the interpretation or application of the Treaty necessary to enable it to give judgment. Specifically, as illustrated by the EACJ under Khyarwenda’s case, Article 34 of the EAC Treaty does not distinguish between the hierarchy of national courts and tribunals. It lumps all the “courts and tribunals” together in the phrase

¹⁰⁴ Mirjan Damaska, “The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments” (Autumn, 1997) 45(4) 839, p. 840.

¹⁰⁵ Karen J Alter, James T Gathii and Laurence R Helfer, “Backlash against International Courts in West, East and Southern Africa: Causes and Consequences: Table 1” (2016) 27(2) EJILAW 293, p. 296.

¹⁰⁶ Emmanuel Ugirashebuja, et al., (eds), *East African Community Law* (BRILL 2017), p. 274.

¹⁰⁷ Gunther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law End Up in New Divergencies” (1998), p. 12.

“any courts or tribunals”. Consequently, this implies that a national court or tribunal, irrespective of its positioning in the hierarchy of the member state’s judicial system, has absolute authority to refer a question to the EACJ.

However, the hierarchy of judicial systems of the member states displays another challenge in realising the PR procedure in the EAC legal system. The EAC law demonstrates a lacuna concerning how courts and tribunals within a national judicial hierarchy should relate to each other regarding the PR proceedings. The Treaty, and even the Guidelines on the PRM, contains no express provision stipulating how the superior and subordinate courts in the Member States should relate regarding referring questions for interpretation to the EACJ. Similarly, the EACJ has yet to explain how superior and subordinate courts should interact during the PR procedure.¹⁰⁸ Thus, superior courts, as well as subordinate courts, are at liberty to initiate requests for preliminary rulings. This standpoint is likely to defeat the objects of the preliminary ruling procedure where a superior court exercises its powers over subordinate courts, especially if a party to a case appeals before a superior court against the decision of the subordinate court to refer the matter for a preliminary ruling.¹⁰⁹ Indeed, a superior court supervises subordinate courts’ decisions through revisions or appeals. Thus, the superior court may dismiss an order of the subordinate court to refer the question for a preliminary ruling, consequently defeating the objects of the preliminary ruling mechanism, which acts as a fundamental tool of cooperation between national courts or tribunals and the EACJ.¹¹⁰

¹⁰⁸ Emmanuel Ugirashebuja, et al., (eds), *East African Community Law* (BRILL 2017), p. 278.

¹⁰⁹ Article 34 of the Treaty for the Establishment of the EACT does not preclude appeals arising from an order of the court to refer a question for the preliminary ruling.

¹¹⁰ Gotrib Mgaya, *Legal, Institutional and Practical Challenges of the Principle of People-Centred in East African Community*, (PbD Thesis 2021), p. 173.

4.3. Incorporation of the PR Procedure under Domestic Law

Certainly, EAC law, including Article 34 EACT, is directly applicable within the domestic law of member states.¹¹¹ This chapter highlights that the flow of requests for PR at the EACJ would have increased if member states explicitly stipulated rules and principles that regulate the functioning of the PRM within the member states laws or regulations on judicial procedures or proceedings. Mainly, it is essential to incorporate rules that guide magistrates or judges in initiating the preliminary reference as an interlocutory proceeding in domestic cases before them. This will not only bring awareness to the individuals, magistrates, judges, and lawyers regarding the legal proceedings but also increase the stakeholders' confidence and legitimacy of the usage of the mechanism. Germany demonstrates a seminal example in the EU by incorporating Article 267 TFEU in its legislation. Article 101 (1) of the German Constitution (*Grundgesetz, GG, Recht auf den gesetzlichen Richter*) recognises the CJEU as a “lawful judge” within the context of Article 267 (3) TFEU.¹¹² Thus, an individual can initiate proceedings at the Constitutional Court when a court of last instance refuses to send a request to the CJEU. Such endeavours demonstrate member states' initiatives to embrace the PRM, encouraging judges or stakeholders to make references to the EACJ.

4.3.1. Role of the Legal Fraternity in Promoting Regional Integration and the PR Procedure

The legal fraternity—lawyers or legal practitioners, law associations, legal academicians, judges, and magistrates—plays a significant role in realising

¹¹¹ Uganda has incorporated the EAC Treaty through the East African Community Act 2002, and Tanzania via the Treaty for the Establishment of the East African Community Act 2001. Kenya incorporated the EAC Treaty via the Treaty for the Establishment of the East African Community Act 2000. Furthermore, Article 2 (6) of the Constitution of Kenya 2010 allows incorporation into domestic law of any treaty or convention ratified by Kenya. Other member states: Burundi, Rwanda, and South Sudan being monist states incorporate the EACT directly via their constitutions. See for instance Articles 276 and 279 of the Burundi Constitution, 2018, Article 168 of the Rwandan Constitution 2003 R.E. 2015. See Articles 43 and 57 (d) of the South Sudan's Transitional Constitution 2011.

¹¹² Eva J Lohse, “The German Constitutional Court and Preliminary References—Still a Match not Made in Heaven?” (2015) 16(6) German Law Journal 1491, p. 1499.

the preliminary ruling procedure. Notably, they are the ‘whistleblowers’ who identify ambiguous or uncertain legal aspects under EAC law that require interpretation of the EACJ. Thus, pro-integration activities of the EAC legal fraternity may include making initiatives to refer issues for clarification to the EACJ, instituting cases at national courts on EAC law, publishing scholarly articles on EAC law, and disseminating education on EAC law, the EACJ and the PRM to the public at large. Mainly, legal practitioners should assist judges of the national courts in identifying a question for the preliminary ruling and cooperate in referring questions for the preliminary ruling.

The East African Law Society (EALS) has been playing an active, significant role in establishing workshops, seminars, research and making publications on EAC law.¹¹³ The Association has sought to play an important role in pursuing cases involving infringement of EAC law at the EACJ. However, the challenge faced by the EALS is that its membership is not compulsory. Thus, not all lawyers/member states get to be a part of the activities that aim to promote processes of legal integration. And yet, an ‘East African Centrism Ideology’ that aims to promote integration is missing even among the legal fraternities in East Africa. This is well demonstrated by various cases at national courts whereby institutions of member states discriminate against lawyers and residents of fellow member states from taking legal training or being admitted at the roll of advocates.¹¹⁴

¹¹³ Composed of Law Society of Kenya, Uganda Law Society, Tanganyika Law Society, Rwanda Bar Association, Burundi Bar Association, Zanzibar Law Society, and South Sudan Bar Association.

¹¹⁴ See cases: Petition Nos. 450, 448 and 461 (consolidated) of the HC of Kenya 2016, *Monica Wamboi Ng’ang’a & Others v Council of Legal Education, the Kenya School of Law, and the Ag. of Kenya & Law Council of Uganda & Another (Interested Parties)*. High Court Petition No. 393 of 2018, *Steven Isaac Kawai & 2 Others v Council of Legal Education & 2 Others* (2021) eKLR (30 May 2021). See also Petition of No. 29/2019, *Victoria Modong Taban V Ag. & 2 Others* (2021) 2KLR. *Jonnab Tusasirwe & 10 Others v Council of Legal Education & 3 Others* (2017) eKLR. Also, *Steven Isaac Kawai & 2 Others v Council of Legal Education & 2 Others* (2021) eKLR (30 May 2021).

The dormancy of the preliminary ruling procedure in the EAC, among other reasons, is attributed to the insignificant role the legal profession plays in promoting the application of the EAC law in the national courts. According to Gonza, the role of the legal fraternity in a regional community court can be metaphorised to electronic amplifiers that magnify the power of a current or voltage to produce a larger output.¹¹⁵ Thus, the legal fraternity has the capacity to support or promote the mission and objectives of a regional community court so that its impacts are highly experienced within the region. Unfortunately for the EACJ, the legal fraternity has not envisioned EAC law as an area of expansion in terms of legal practice or influence.

4.4. Initiatives of the EACJ in Promoting the PR Procedure

The EACJ has a fundamental role in ensuring that it nurtures the PRM and has an active judicial dialogue. Remarkably, the EACJ must cajole national courts and tribunals by building their confidence so that national courts can seek references for a PR from the EACJ. Notably, the EACJ demonstrates efforts to advance fundamental principles and rules regarding the functioning of the PRM via the EAC PRM recommendations (Guidelines on a Reference for National Courts). In addition, the EACJ has been conducting workshops to sensitise people on the EAC integration. Furthermore, Khyarwenda's case demonstrates well the role of a judge of the EACJ as judicial lawmakers who seek to take judicial cognisance of the absence of legal provisions that guide the functioning of the EAC PRM and breathe life into it by establishing various principles stipulating how the PRM legal system works.

Yet, more is required out of the EACJ. First, in playing an aggressive role towards fleshing out and charting out the various principles/rules for the functioning of the EAC PRM via its jurisprudence, A lot is yet to be desired, such as the applicability of the principle of direct effect or the

¹¹⁵ Jebby R Gonza, *Examining the Role of Regional Community Courts in Integration: Case study of the East African Court of Justice with lessons from the Court of Justice of the European Union* (Schriftenreihe zum internationalen Einheitsrecht und zur Rechtsvergleichung Band 72, Verlag Dr. Kovač 2023), p. 265.

legal remedy for a failure or reluctance of a national court to request for a PR where interpretation of the EAC is necessary. Second, by taking its 'show on the road.' The EACJ should employ more efforts to engage stakeholders to sensitise them on the procedure, especially the legal practitioners who should play an exceptional role in fostering the application of Community law in the national courts. The EACJ should pursue education campaigns on EAC law and the PRM with greater aggression. Such campaigns should target a larger population of the EAC member states- judges, magistrates, and the public. It is also noted that guaranteeing education campaigns on EAC law by the EACJ faces a fundamental impediment of financial constraints. The practice is that the EAC has not been able to support the EACJ's budget fully; thus, the court cannot fulfil its activities due to the absence of funds.¹¹⁶ This, therefore, calls for the EAC to support and prioritise the EACJ by guaranteeing that it has a sufficient budget to promote the smooth functioning of the Court's activities.

4. Conclusion

It takes two to Tango! It takes a cooperative relationship between the regional community courts and the national courts to promote regional integration in an economic bloc. In the EAC, the judicial dialogue between the EACJ and the national courts is non-existent. For the past twenty-two years, the EACJ has received only one request for a PRM. The causes for this challenge, 'the dormant' syndrome of the EAC PRM, can be traced back to the abnormalities portrayed by the EAC's drafters in 1999 when transplanting it from the EU legal order. Rules on the EAC PRM were blindly copied or mimicked in the EAC legal order, leading to a legal transplant that does not take up at all. Yet, other legal aspects, such as a poor support system from the legal fraternity of the member states and failure to incorporate rules in the member states domestic framework, have contributed to poor judicial dialogue and integration between the EACJ and the national courts. It is indeed possible to 'wake

¹¹⁶ East African Court of Justice, *EACJ Strategic Plan 2018-2023* (East African Court of Justice 2018).

the sleeping giant’ —the EAC PRM—, if various stakeholders, the EACJ, other institutions of the EAC, the legal fraternity, and governments of the partner states play a pro-integration role in supporting regional integration in the EAC and promoting a coordinative relationship in the functioning of the EACJ with the national courts. It is from this conclusion this chapter recommends the following:

Firstly, it is essential to perceive the PRM as a project of the regional community court. The EACJ must seek opportunities to nurture the PRM from a “toddler” into a “giant” legal being. This can be achieved by seeking opportunities for it to have regular contact with judges of the national courts. One of the ways of doing this is to organise judicial visits to the EACJ. The EACJ should establish creative ways to build and gain trust with the national courts.

Secondly, it is essential that the case law of the EACJ endeavours (whenever an opportunity can be found) to flesh out further doctrines that cushion the PRM and seek to tackle challenges in the EAC PRM legal framework. In doing so, it would not only promote judicial cooperation and consistency in the interpretation of EAC law but also enhance the authority and practical relevance of the PRM in the regional integration process.

Thirdly, in the role of disseminating and educating the public on EAC law, the EACJ’s jurisdiction should be taken up by various stakeholders, i.e., the Secretary-General, legal societies within partner states, legal and administrative authorities within member states, mass media, law academics at university faculties, etc. Member states must ensure that magistrates and judges are guided by incorporating elaborative rules within the domestic judicial framework that give instructions on sending questions to the EACJ on EAC law.

PART III

HUMAN TRAFFICKING, STATELESSNESS AND FORCED DISPLACEMENT

Chapter Six

Human Trafficking in the EAC: Almost Three Decades with a Weak Legal Framework

*Nicksoni Filbert Kahimba**

1. Introduction

The EAC is a regional intergovernmental organisation of eight countries: Burundi, the Democratic Republic of Congo, Kenya, Rwanda, Somalia, South Sudan, Uganda and the United Republic of Tanzania. The Treaty for the Establishment of the EAC founded the EAC with its headquarters in Arusha, Tanzania.¹ Official reports and statistics indicate that trafficking in persons is a serious problem within the EAC partner states. The Trafficking in Persons Report of July 2022 from the United States Office to Monitor and Combat Trafficking in Persons provides statistics indicating that between June 2021 and July 2022, Burundi investigated 92 cases of human trafficking, prosecuted 42 trafficking cases and convicted nine traffickers. It also pursued anti-trafficking collaboration with Saudi Arabia, Tanzania and Uganda and partnered with Tanzania in the repatriation of Burundian victims of trafficking from Tanzania. Similarly, Burundi asked the governments of Rwanda, Kenya, Tanzania, and Uganda to administer enhanced screening of Burundian

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¹ Treaty for the Establishment of the East African Community 2000, art 2. Hereinafter: the EAC Treaty or Treaty.

migrants aspiring to work in the Middle East who are passing through their borders.²

Concerning the DRC, the Report shows that the country suffers from internal trafficking for agriculture, artisanal mining sites, sexual and labour exploitation, and domestic servitude.³ It reports on the systemic trafficking of persons, especially children, for engagement in armed activities by rebel groups. The Report equally depicts not only the complicity and involvement of government officials in acts of trafficking but also shows the government's efforts in investigating and convicting suspected officials.⁴ Touching on Kenya, trafficking occurs primarily for fishing, agriculture, domestic servitude, street vending, forced begging, sexual exploitation, sex tourism and cattle herding. The Report implicates family members for their involvement in trafficking. Of the nearly 40,000 estimated victims of trafficking, 19,000 are children.⁵ Concerning Rwanda, the Report reveals that Rwandese women and girls are exploited in domestic services, bars, and restaurants, while men and boys are exploited for forced labour in mining, plantation and industrial services.

The Report indicates the trafficking of Rwandese citizens not only within Africa but also in the Middle East countries, where abuse, sexual exploitation, cruelty and even deaths have been part of their lot.⁶ Regarding South Sudan, the Report presents the trafficking of more than 199 children in 2021 alone for the engagement in armed conflict. From the Report, one learns that not only are rebel groups implicated, but

² United States Department of State, *Office to Monitor and Combating Trafficking in Persons: Trafficking in Persons Report June 2022*, (Department of State, 2022), p. 150.

³ United States Department of State, *Office to Monitor and Combating Trafficking in Persons: Trafficking in Persons Report June 2022*, (Department of State, 2022), pp. 181-183.

⁴ United States Department of State, *Office to Monitor and Combating Trafficking in Persons: Trafficking in Persons Report June 2022*, (Department of State, 2022), p. 184.

⁵ United States Department of State, *Office to Monitor and Combating Trafficking in Persons: Trafficking in Persons Report June 2022*, (Department of State, 2022), pp. 325-326.

⁶ United States Department of State, *Office to Monitor and Combating Trafficking in Persons: Trafficking in Persons Report June 2022*, (Department of State, 2022), p. 470.

South Sudan People's Defence Forces and South Sudan National Police Services are also actively engaged in recruitment. This has created the presence of between 7,000 and 19,000 child soldiers over the years in the country. The Report demonstrates the use of child and early marriages as a form of trafficking for sexual exploitation.⁷ For Tanzania, from June 2021 to June 2022, the government investigated almost 113 trafficking cases, initiated seven prosecutions of 18 traffickers and the conviction of 13 traffickers.⁸ Concerning Uganda, the Report showcases the use of radios to advertise fraudulent jobs to recruit persons for trafficking in Kampala. Trafficking for sexual exploitation in brothels, residential homes, bars, and the streets is also noted. The Report also indicates the predominance of victims from the Karamojong ethnicity. Notoriously, employment agencies stationed in Uganda recruit persons only to let them be subjected to forced labour, sexual exploitation and servitude in the Middle East, especially in Saudi Arabia, Oman, Qatar, Jordan and UAE.⁹

The international community, composed of States Parties to the Convention against Transnational Organised Crime,¹⁰ has taken concrete legal steps to criminalise trafficking in persons, protect victims of trafficking, prevent trafficking and usher in an international cooperation and collaboration framework against this crime. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (TIP Protocol), governs the combatting and prevention of the crime of trafficking in persons in international law.¹¹

⁷ United States Department of State, *Office to Monitor and Combating Trafficking in Persons: Trafficking in Persons Report June 2022*, pp. 504-506.

⁸ United States Department of State, *Office to Monitor and Combating Trafficking in Persons: Trafficking in Persons Report June 2022*, p. 535.

⁹ (United States Department of State, *Office to Monitor and Combating Trafficking in Persons: Trafficking in Persons Report June 2022*, pp. 560-561.

¹⁰ United Nations Treaty Series.

¹¹ UNTS (2000) 2237, p.319. Hereinafter: the TIP Protocol. The TIP Protocol's parent instrument is the United Nations Convention against Transnational Organised Crime (2000) UNTS 2222, 209. Hereinafter: UN Organised Crime Convention.

Several regional anti-trafficking specialty instruments supplement the TIP Protocol. The TIP Protocol and these instruments together form the international legal regime responsible for combatting and preventing the various manifestations of the crime of trafficking in persons.¹² The TIP Protocol provides the most internationally accepted principles and framework of action for understanding, defining, investigating, and preventing trafficking crimes, as well as protecting its victims. The near-universal ratification and adoption of regional legal frameworks giving effect to the provisions of the TIP Protocol is evidence of the Protocol's acceptance as such.¹³

Burundi, the DRC, Kenya, Tanzania and Rwanda are state parties to this Protocol. Uganda and South Sudan are yet to ratify or accede to the Protocol.¹⁴ Tanzania has enacted the Anti-Trafficking in Persons Act 2008. Kenya has passed the Counter Trafficking in Persons Act 2012. Uganda has enacted the Prevention of Trafficking in Persons Act 2009, and Rwanda has Law No 51/2018 of 13 August 2018 Relating to the Prevention, Suppression and Punishment of Trafficking in Persons and Exploitation of Others. Burundi has enacted Law No. 1/28 of 2014 on the Prevention and the Punishment of Trafficking in Persons and Protection of Victims of Trafficking. The DRC has passed *Loi No. 22-2019 du 17 Juin 2019 portant lutte contre la traite des personnes* (Law No. 22-2019 of 17 June 2019 Concerning the Fight against Trafficking in

¹² These include ASEAN Convention Against Trafficking in Persons, Especially Women and Children [2015] (ASEAN Convention); Council of Europe Convention on Action against Trafficking in Human Beings [2005] CETS-No. 197, Warsaw 16.V.2005 (Council of Europe Anti-Trafficking Convention); SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution [2000] (SAARC Convention); and Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, and Replacing Council Framework Decision 2000/629/JHA [2011] OJ L 101. 15.4.2011, p. 1 (European Union Anti-Trafficking Directive).

¹³ As of 8 November 2019, the TIP Protocol had 175 states parties. See United Nations Treaty Collection Series.

¹⁴ Ratification Status at the United Nations Collection Series.

Persons).¹⁵ South Sudan does not have specific anti-trafficking instruments at a domestic level.¹⁶

Anti-trafficking discourse is massive. Thus, covering every aspect in a book chapter is impossible. Therefore, the purpose of this chapter is only to analyse whether the EAC, almost three decades after its existence, has any serious legal or even policy framework criminalising trafficking in persons, protecting victims of trafficking and calling upon states to collaborate against trafficking in persons. The chapter examines the EAC's legal and policy instruments and provides critical remarks on the framework's potential against trafficking. The chapter hopes to inspire more dialogue and legal reforms at the regional and national levels for better criminalisation of trafficking and protection of victims. In the realisation of these aims, the chapter consists of four parts. Part I is this introduction. Part II examines the EAC Treaty as the Community's legal benchmark and foundational document. Part III analyses various Protocols, Acts of the Community and policy documents. In this analysis, the chapter gives particular attention to the 2016 Anti-Trafficking Bill on whether its provisions could assist the EAC according to the international law. Finally, Part V provides a conclusion and recommendations for the challenges identified.

2. EAC Treaty

The EAC Treaty was signed on 30 November 1999 and came into force on 7 July 2000.¹⁷ Since its establishment by the three founding states of Kenya, Tanzania, and Uganda, the EAC has marked 25 years of existence. Through the EAC Treaty, the partner states aim to establish a

¹⁵ Interpretation is mine.

¹⁶ This, in no way, does not mean that trafficking in persons as a crime cannot be punished or its victims protected in these territories, see for example Daniel Duom Kelei Ayak & Nicksoni Filbert Kahimba, "Legal Protection of Victims of Trafficking in Persons in South Sudan" (2022) EALR, p. 21.

¹⁷ The Treaty for the Establishment of the East African Community, Arusha. EAC: 2002 xiv, 111p.: 230mm (EAC Publication No. 1, 1999).

Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation. The purpose of taking this step was to strengthen their relations to achieve harmonised and balanced development where benefits flow not only to the partner states as legal persons under international law but also to all their citizens.¹⁸ The fundamental and operational principles of the Community clearly entrench this goal and are enumerated in an enforceable manner to achieve the EAC's objectives.¹⁹

Article 124 of the Treaty is dedicated to the peace and security of the Community. In Article 124 (5), partner states agree to cooperate to handle cross-border crime, provide mutual legal assistance to each other and exchange information on criminal activities in their jurisdictions. It is not difficult to see the impetus of this commitment. The partner states had already agreed to establish a Common Market.²⁰ In the economy of the Common Market, partner states allow, among others, a free movement of persons and labour, subject to certain limitations by the individual partner states. The legal right to the free movement of citizens and persons residing in these partner states might be used as an avenue to commit cross border and transnational organised crimes. Trafficking in Persons is a crime which features in this category, in addition to other crimes the Treaty and Protocols interdict.²¹ The Treaty, however, does not define a cross-border crime or mention the crime of trafficking in persons anywhere within its provisions. Notwithstanding, certain areas of cooperation are understood to form part of the legal obligations international anti-trafficking law

¹⁸ EAC Treaty, art 5(2).

¹⁹ EAC Treaty, arts 6, 7.

²⁰ EAC Treaty, art 76.

²¹ EAC Treaty, art 124 (illicit drug trafficking, terrorism).

imposes on states to prevent or criminalise trafficking in their territories.²²

For example, Article 124 (5) (b) and (c) requires partner states to strengthen joint operations and patrols against cross-border criminals as well as establish common communication channels to promote border security. In international anti-trafficking law, establishing communication channels and taking concerted measures to strengthen border security are considered international anti-trafficking obligations.²³ This obligation and understanding are implicit in Article 124 itself. The provision requires partner states to take concerted measures against terrorism, the problem of refugees and illicit drug trafficking. Terrorism and drug trafficking are chiefly transnational or cross-border organised crimes, while the problem of refugees and forced displacement, as is common in the EAC Community, is definitely a cross-border problem. Thus, the prevention and criminalisation of cross-border crimes, including trafficking in persons, seems implicitly and explicitly to be at the core of the security and peace agenda of the Community. Considering the limitations, the EAC Treaty exudes, especially touching on the many areas of strategic cooperation, partner states agreed to conclude necessary subsequent protocols in areas of cooperation where the Treaty is silent in the future.²⁴ As such, the following part discusses these Protocols and other Policy documents of the Community in a quest to discover their position concerning the crime of trafficking in persons on criminalisation and protection.

²² For analysis of these obligations, see Anne Therese Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010).

²³ TIP Protocol, arts 10-12.

²⁴ EAC Treaty, art 151(1).

3. Protocols and Policy Documents

3.1. Protocol on Peace and Security

The preamble to the Protocol on Peace and Security of the EAC draws its inspiration from the provisions of Article 124 of the EAC Treaty.²⁵ Article 2 of the Protocol enumerates several areas of cooperation, including the fight against piracy, terrorism, trafficking in stolen vehicles, money laundering, migrant smuggling, drug trafficking, arms smuggling or trafficking, trafficking in persons and cybercrimes. These crimes are somewhat accepted as cross-border and transnational, although this does not remove the fact that these crimes can be committed nationally.²⁶ The Protocol defines cross border crime as a crime committed across partner states that share a common border.²⁷ The Protocol further defines transnational crime as a crime committed across the border of the partner states that do not share a common border.

According to these definitions, a cross-border crime differs from a transnational crime. A cross-border crime happens only when two or more states share a common border. Thus, the crime of trafficking in persons can become a cross-border crime because Tanzania shares the border with Kenya, Rwanda, Burundi, the DRC and Uganda. This also means that if victims of trafficking from Kenya are trafficked in the DRC or if the perpetrators of trafficking in persons in South Sudan operate in the DRC, then trafficking in persons is a transnational crime and not cross-border because Kenya does not share any common borders with the DRC and the DRC does not share any common borders with South Sudan. Orlovskaya and Stepanova challenge this conceptualisation of the term “cross border” as limited to shared borders only.²⁸ Citing several

²⁵ Protocol on Peace and Security, para 4.

²⁶ United Nations Office on Drugs and Crime, *Legislative Guides for the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 2004).

²⁷ Protocol on Peace and Security, art 1.

²⁸ Natalya Orlovskaya and Julia Stepanova, “Cross-Border Crimes: Problems of Definitions and Features (Ukrainian Criminal Law Experience)”, (2021) 2 KSM, p. 113.

international Conventions to bolster their position, they posit that the term ‘cross border’ has been used in different contexts to mean bilateralism, physical cross-border transportation, physical cross border not unlimited by neighbours sharing the same border, or the involvement of at least two more states in what moves around. They thus consider “cross border” as focusing chiefly on the nature of operations meeting the needs and interests of more than one state, where the question of jurisdiction is not essential.²⁹ Thus, Tanzania could be a transit country for the crime touching on South Sudan and the DRC. The Protocol should have emphasised the regionality in which these crimes are committed rather than a shared common border. This is important as victims of trafficking across and outside the Community are not limited by a shared border. They move and get trafficked across several frontiers.

The definition of transnational crime in the Protocol is equally perplexing. I argue that its definition largely falls within what I consider should be a “cross border” crime, a definition clearly opposed to the Protocol’s. The Protocol’s definitional difference focuses on whether a border is shared. Thus, the difference between a cross border and a transnational crime is more physical than substantive. The difference emphasises whether the crime involves multiple borders or simply a shared common border. This limitation ignores the organised nature of trafficking in persons and related crimes. It downplays the interests affected. Simply stated, the definition undermines the organisation and multiplicity of actors in the commission of crimes and the irrelevance of physical borders or barriers.

This criticism is objectively warranted because the United Nations Convention against Transnational Organized Crime already defines the transnational nature of these crimes. The crime is transnational when its commission involves more than one state, where sharing a border is not a requirement. The crime is transnational when its

²⁹ Ibid.

substantial organisation takes place in one country, while its execution occurs in another. The crime is transnational, where it is committed in one state by an organised criminal group conducting its criminal activities in several states. Finally, the crime is transnational, where several states feel substantial effects despite one jurisdiction's commission.³⁰ The Protocol should have taken this wider perspective. To the credit of the Protocol, though, it considers trafficking in persons as a transnational crime and a cross-border crime.³¹ Unfortunately, the Protocol only obligates the partner states to take joint operations to prevent and control trafficking in persons. It lacks specific measures against trafficking, does not guide how the prevention and control of trafficking shall be conducted and does not obligate partner states to adopt an Act of the Community or a separate Protocol against trafficking in persons, as several other regional economic groupings have done. Legally speaking, therefore, the EAC has a weak regional mechanism against the crime of trafficking in persons.

3.2. Strategy on Regional Peace and Security

The EAC has adopted the Strategy on Regional Peace and Security.³² Like the Protocol on Peace and Security, the Regional Strategy also draws inspiration from Article 124 of the EAC Treaty. It categorises areas of collaboration mostly to prevent cross-border crimes. Goal 20 of the Regional Strategy spells out measures to enhance the combatting of trafficking in persons, illegal migration and migrant smuggling in the Community.³³ Goal 20 states that trafficking in persons affects all partner states, whether as source, transit or destination. Goal 20 finds that the seven partner states of the EAC

³⁰ UN Organised Crime Convention, art 3(2).

³¹ Protocol on Peace and Security, art 12.

³² Hereinafter: the Regional Strategy.

³³ East African Community, *East African Community Strategy on Regional Peace and Security*, goal 20.

have reported trafficking in persons as prevalent and rampant, affecting men, women and children without exception. Goal 20, however, notes that the challenge has been the difficulty in apprehending perpetrators while also protecting its victims who have suffered unimaginable hardships. The Regional Strategy recognises the existence of international legislation and initiatives against trafficking in persons and realises that several EAC partner states are parties or signatories to these international instruments, especially the United Nations Convention against Transnational Organised Crime and the TIP Protocol. While recognising that partner states have taken institutional and legal measures against trafficking, it finds their efforts wanting.

Consequently, Goal 20 lays down three strategies to alleviate the situation. First, it calls upon partner states to prevent trafficking in persons. Second, it requires partner states to protect and assist victims of trafficking, and finally, advocates for regional collaboration against trafficking in persons. The Regional Strategy identifies persons affected by trafficking and smuggling as victims of crimes. While international anti-trafficking law recognises persons affected by trafficking as victims, this has not been an easy case for those affected by the crime of migrant smuggling.³⁴ Even the legislation in these partner states does not necessarily treat smuggled migrants as victims of crime deserving of protection and assistance.³⁵ Thus, it is unclear why the Regional Strategy takes this approach.

Nonetheless, this approach is welcomed, considering the close correlation between trafficking and smuggling and its impact on the lives and rights of trafficked persons and smuggled migrants. Disappointingly, the Regional Strategy does no more than that. What

³⁴ Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime [2000] UNTS 2237, 319, [2000] UNTS 2241, 507, art 4 considers them objects of crimes than victims.

³⁵ Immigration Act 2016, ss 23, 24.

it enumerates as strategies against trafficking in persons do not appear as such. Legally, these are objectives that the TIP Protocol provides. Article 2 of the TIP Protocol calls for international and state action to prevent and combat trafficking, protect and assist victims of trafficking and take cooperation measures to achieve the first two objectives. The TIP Protocol does not stop here. It goes further to criminalise trafficking and state-specific measures states parties should take to prevent trafficking and protect the human rights of trafficked persons. The Regional Strategy should have taken a similar approach by enumerating concrete steps for the partner states.

3.3. The 2016 Anti-Trafficking Bill

In 2016, the East African Legislative Assembly, the law-making organ of the EAC,³⁶ adopted the EAC Counter-Trafficking in Persons Bill.³⁷ The 2016 Anti-Trafficking Bill is yet to be an Act of the Community because of the lack of assent from the heads of state of the EAC.³⁸ Although this is not yet a legal instrument and faces several problems because, among others, it was introduced as a Private Member Bill, a preliminary analysis is warranted. This is because, should the Bill be adopted and assented to, it will be an Act of the Community with the force of law. The 2016 Anti-Trafficking Bill, following the position of international law,³⁹ intends to provide a legal framework to prevent and counter-trafficking, protect and assist victims of trafficking, prosecute the perpetrators of trafficking and promote anti-trafficking co-operation and harmonised action of the

³⁶ Article 9 of the Treaty.

³⁷ The East African Community Counter-Trafficking in Persons Bill [2016] East African Community Gazette No. 8. Hereinafter: the 2016 Anti-Trafficking Bill, the 2016 Bill or the Bill.

³⁸ EAC Treaty, art 62 reads: “The enactment of legislation of the Community shall be effected by means of Bills passed by the Assembly and assented to by the Heads of State, and every Bill that has been duly passed and assented to shall be styled an Act of the Community.”

³⁹ TIP Protocol, art 2; European Union Anti-Trafficking Directive, art 1; Council of Europe Anti-Trafficking Convention, art 1; Article II of the SAARC Convention; and ASEAN Convention, art 1.

EAC partner states.⁴⁰ Its neutral nomenclature emphasises that all persons need protection of their human rights from trafficking because trafficking affects all without discrimination. With some exceptions,⁴¹ this reflects the current position under international law.

3.3.1. General Provisions

Most of the Bill's provisions, including those defining the various aspects of the trafficking crime, produce some of the provisions of the TIP Protocol verbatim.⁴² Unlike most specialty anti-trafficking instruments that clearly prohibit national and transnational trafficking,⁴³ the Bill is silent on the extent of its scope—on the nature of trafficking it criminalises and prohibits. Nonetheless, a proper reading of the Bill's objectives, its memorandum, and the fact that the Bill recognises trafficking within and outside the EAC jurisdiction implies an explicit prohibition of both national and transnational trafficking. Thus, it makes sense to interpret the Bill's scope widely so that it does not contradict the domestic anti-trafficking legal frameworks that outlaw both forms of trafficking or unnecessarily restrict the EAC partner states' ability to criminalise and prevent trafficking.

⁴⁰ Art 3. The memorandum to the Bill states as the Bill's objectives the 4Ps, namely, prevention of trafficking, prosecution of traffickers, protection of victims and partnership to fight trafficking.

⁴¹ Two legal instruments do not follow this position. The SAARC Convention, as its official nomenclature indicates, mostly intends to protect women and children only for prostitution. Likewise, the Inter-American Convention on International Traffic in Minors, 1994 focuses only on minors to the exclusion of other persons.

⁴² For a similar position, European Union Anti-Trafficking Directive, art 1; Article 4 of the Council of Europe Anti-Trafficking Convention; and ASEAN Convention, art 2.

⁴³ For example, while not affecting the sovereignty of the states to criminalise internal trafficking, the TIP Protocol and its parent Instrument, the UN Organised Crime Convention, prohibit the crime of human trafficking when it is "transnational in nature and involve an organized criminal group", art 4. ASEAN Convention, art 3 European Union Anti-Trafficking Directive, art 10 take similar position. Council of Europe Anti-Trafficking Convention, art 2 is very categorical that both national and transnational trafficking, irrespective of any connection to organised crime, must be prohibited and criminalised.

3.3.2. Criminalisation

Concerning the criminalisation of the crime of trafficking in persons, international law requires a comprehensive criminalisation of the crime of trafficking in persons.⁴⁴ This must be achieved by criminalising trafficking as a single crime comprising the action, means and purpose elements⁴⁵ committed intentionally even when actual exploitation does not take place but was the intended outcome.⁴⁶ The comprehensive criminalisation requires penalisation of trafficking as a crime affecting all persons while clearly differentiating trafficking of adults from that of children.⁴⁷ In addition, the criminalisation of trafficking has to cover several related-end purposes, extending beyond the exploitation of prostitution or sexual exploitation of women.⁴⁸ Finally, the definition and

⁴⁴ The chapter uses these terms interchangeably: trafficking in persons or human trafficking or simply trafficking.

⁴⁵ TIP Protocol, art 3(a) defines trafficking to mean: “the recruitment, transportation, transfer, harbouring or receipt of persons (*action element*), by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person (*means element*), for the purpose of exploitation (*purpose element*)” (emphasis supplied). Other international instruments take this position, with some slight modifications. European Union Anti-Trafficking Directive, art 2(1); Council of Europe Anti-Trafficking Convention art 2(1); and ASEAN Convention, art 2(a).

⁴⁶ In relation to the purpose of trafficking, the specialty anti-trafficking instruments refer to “the intended exploitation”, meaning the aim or the intention the perpetrator had in mind when he carried out the action element with any of the specified means of trafficking. See ASEAN Convention, art 2(b); Council of Europe Anti-Trafficking Convention, art 4(b); and TIP Protocol, arts 4(b), 3(b). In fact, European Union Anti-Trafficking Directive, art 2(4) is clearer when it uses the phrase “whether intended or actual.” For further support, see the European Union Agency for Law Enforcement Cooperation, *Situation Report: Trafficking in Human Beings in the EU* (Document Ref No: 765175, 2016), p. 5; Yvon Dandurandi, “International Cooperation” in John Winterdyk, Benjamin Perrin and Philip Reichel (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2012), p. 217; and Tom Obokata, *Trafficking in Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishers, 2006), p 20.

⁴⁷ ASEAN Convention, art 2(c); Council of Europe Anti-Trafficking Convention, art 4(c); European Union Anti-Trafficking Directive, art 2(5); and TIP Protocol, art 3(c). All these instruments indicate that trafficking is a crime against all persons and that trafficking in adults is different from that of children under international law.

⁴⁸ TIP Protocol, art 3(a) sets minimum forms of exploitation to include “exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or

criminalisation of the crime of trafficking in persons should be as precise and straightforward as possible without confusing it with other forms of human exploitation.⁴⁹

The 2016 Anti-Trafficking Bill largely follows this position of international law. The Bill criminalises trafficking when done within the territory of a partner state, from a partner state's territory to another jurisdiction and from other jurisdictions to the territory of the partner state.⁵⁰ The Bill outlaws trafficking as a single crime that comprises elements of action, means, and purpose.⁵¹ Under the Bill, a trafficker can commit trafficking even without actual exploitation taking place where the trafficker, by virtue of the action and the means used, intended exploitation to occur.⁵² The Bill protects all persons from trafficking and makes a clear difference between the trafficking of adults and that of children. While for adults there must be at least one constitutive component of the action, means and purpose elements for the crime of

services, slavery or practices similar to slavery, servitude or the removal of organs.” See European Union Anti-Trafficking Directive, art 2(3); Council of Europe Anti-Trafficking Convention, art 4(a); and ASEAN Convention, art 2(a). For studies indicating various end forms of trafficking in several jurisdictions, see May Ikeora, *Bilateral Co-operation and Human Trafficking: Eradicating Modern Slavery between the United Kingdom and Nigeria* (Palgrave Macmillan 2018), pp. 8-9; Organisation for Security and Co-operation in Europe, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Commentary to the OSCE Action Plan to Combat Trafficking in Human Beings* (PC.DEC/557), the 2005 Addendum Addressing Special Needs of Child Victims of Trafficking for Protection and Assistance (PC.DEC/55/Rev.1) and the 2013 Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later (PC.DEC/1107/Corr.1, 2015) 20; and Mirjam van Raisen, et al., “Tracing the Emergence of ICT-Enabled Human Trafficking for Ransom” in Ryszard Piotrowicz, Conny Rijken and Baerbel Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge Taylor & Francis Group, 2018), p. 146.

⁴⁹ Anne Therese Gallagher and Paul Holmes, “Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line” (2008) 318 ICJR, 18, p. 323.

⁵⁰ Art 4(1).

⁵¹ Art 4(1) when read together with art 2.

⁵² Art 4(1) partly states that a person commits trafficking “where, for the purpose of exploitation that person.” Impliedly, this indicates that trafficking is an intentional crime and does not need actual exploitation for commission.

trafficking to be committed, the Bill does not require the means element for the commission of the crime of trafficking in children.⁵³

The Bill contains purposes going beyond prostitution and sexual exploitation but not beyond the minimum stipulations of international law. Thus, the Bill considers as the purposes of trafficking the exploitation of the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery, practices similar to slavery, servitude and/or the removal of organs.⁵⁴ The Bill criminalises as well the crimes of facilitation of trafficking; commission or facilitation of trafficking by concealing, removing, withholding or destroying travel or identity documents of another person; and the knowing receipt or deriving of any financial or other benefit that results from trafficking.⁵⁵ Finally, the 2016 Anti-Trafficking Bill recognises and outlaws trafficking when committed by corporate bodies, in addition to natural persons.⁵⁶

In some respects, the 2016 Anti-Trafficking Bill seems to have more progressive, forward-looking provisions than other anti-trafficking specialty instruments under international law. For example, while it is the position of international law that the use of the means element

⁵³ Art 4(3) provides that: “Notwithstanding the absence of the use of the means specified in paras (a) to (e) of subs (2), a person who recruits, transports, transfers, harbours or receives a child for the purpose of exploitation of that child commits the offence of trafficking in persons.” For further support of this position, see Rachel Stevens, “The Trafficking of Children: A Modern Form of Slavery, Using the Alien Tort Statute to Provide Legal Recourse” (2006) 645 WJCF 5, p. 663; Alex Aronowitz, *Human Trafficking, Human Misery: the Global Trade in Human Beings* (Praeger Publishers, 2009), p. 2; Ryszard Piotrowicz, “States Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations” (2012) 181 IJRL 24, p. 190; Thorsten Müller, “Transnational Organised Crime and the Sale of Children, Child Prostitution, and Pornography” in Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organised Crime* (Oxford University Press, 2016), p. 287; and United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* (United Nations Publication, Sales No. E.13.IV.1, 2012), p. 15.

⁵⁴ Art 2.

⁵⁵ Art 4(5), 4(7), 4(8).

⁵⁶ Art 5.

nullifies the defence of consent against the trafficker, the Bill nullifies the defence of consent whether the means element has been used.⁵⁷ Further, while some authors have argued that the criminalisation of the knowing use of the services of the victims of trafficking is not a mandatory obligation under international law,⁵⁸ the Bill criminalises the offence nonetheless.⁵⁹ The Bill criminalises the action of a person who, with knowledge, receives a financial or other benefit. Therefore, the Bill goes beyond the limits of the “use of the services” to include other “unspecified means or ways” through which another person can knowingly take advantage of the trafficked person.

Notwithstanding, the 2016 Anti-Trafficking Bill is far from perfect in the criminalisation of trafficking. Most of its action elements of the crimes of trafficking lack any logical legal explanation or justification for their omissions. For example, while the first act of trafficking contains “recruitment, transportation, transferring, harbouring or receipt” as the action element, the second act of trafficking omits “harbouring” from its action element. Similarly, the third act of trafficking excludes “harbouring” and “receipts” from its action element.⁶⁰ Unlike the third act of trafficking, there is no means element associated directly with or linked to the first two acts of trafficking.⁶¹ More confusingly, Article 4 (2), which contains the means element of trafficking, assumes a general application to the whole of Article 4 (1) that criminalises the three acts of trafficking as being “referred.” The reference to the means element is only stated under Article 4 (1) (c) which criminalises the third act of trafficking.⁶²

⁵⁷ Art 4(4).

⁵⁸ Anna Therese Gallagher, *The International Law of Human Trafficking* (2010), pp. 441-442.

⁵⁹ Art 4(8). Other instruments that support a similar position include Article 18 (4) of the European Union Anti-Trafficking Directive, art 18(4); and Council of Europe Anti-Trafficking Convention, art 19.

⁶⁰ Art 4(1).

⁶¹ Art 4(1), 4(2).

⁶² Art 4(1)(c) criminalises the action of a person who “recruits, transports or transfers another person from another country into a Partner State, *by any of the special means in*

Although the Bill rightly criminalises acts of trafficking when carried “for the purpose of exploitation”, it does not make any direct reference to the “purpose of exploitation” defined under Article 2.

3.3.3. Protection and Assistance

The Bill also contains several provisions for the protection and assistance of victims of trafficking in persons.⁶³ It is understood that victims should be identified and that identification helps to accord protection, assistance and support to victims of trafficking as well as help law enforcement authorities prosecute trafficking effectively.⁶⁴ The 2016 Anti-Trafficking Bill does not contain any provision defining or identifying victims of trafficking unless considered contextually. Article 11 requires the exchange of information and training of law enforcement, immigration and other relevant authorities to include the identification of persons as perpetrators or victims of trafficking in persons.⁶⁵ Thus, the Bill implicitly requires EAC partner states to equip their law enforcement and other relevant authorities with skills and information on the identification of victims

subsection (2).” (Emphasis added). “By any of the special means in subsection (2)” phrase is absent in art 4(1)(a) and (b) which criminalises the first two acts of trafficking. Thus, art 4(1) and 4(2) is legally misleading and poorly drafted, although the intention is to make the means of trafficking applicable to all the acts of trafficking.

⁶³ Anna Therese Gallagher, *The International Law of Human Trafficking*, (2010), p. 276.

⁶⁴ Human Rights Council, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo* (UN Doc. A/HRC/20/18, 2012) para 31; Inter-Agency Coordination Group against Trafficking in Persons, *A Toolkit for Guidance in Designing and Evaluating Counter-Trafficking Programmes: Harnessing Accumulated Knowledge to Respond to Trafficking in Persons* (New York, 2016), p. 53; European Union, *Guidelines for the Identification of Victims of Trafficking in Human Beings, Especially for Consular Services and Border Guards, A Reference Document*, (European Union, 2013), p. 3; Organisation for Security and Co-operation in Europe, *Trafficking in Human Beings: Identification of Potential and Presumed Victims: A Community Policing Approach* (SPMU Publications Series Vol. 10, 2011), p. 18; see further Christal Morehouse, *Combating Human Trafficking: Policy Gaps and Hidden Political Agendas in the US and Germany* (VS Verlag Für Sozialwissenschaften, 2009), p. 41; Sanja Čopić and Biljana Simeunović-Patić, “Victims of Human Trafficking: Meeting Victims’ Needs”, in John Winterdyk, Benjamin Perrin and Philip Reichel (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press, 2012), pp. 273-277.

⁶⁵ Art 11(1) (a).

of trafficking. On the obligation not to punish victims of trafficking,⁶⁶ international law requires states not to punish, prosecute or criminalise victims of trafficking for crimes they have committed as a result of being trafficked or compelled.⁶⁷ This aims at ensuring that there will not be denial or violation of the victims' basic human rights while in the destination countries in the course of prosecuting trafficking.⁶⁸ The 2016 Anti-Trafficking Bill requires protection of the victims of trafficking in persons against prosecution where the crimes they committed are the direct result of their trafficking.⁶⁹ However, this non-prosecution obligation is dependent on the person claiming the status of the victim of trafficking through the "provision of evidence." This provision does not consider that due to the vulnerable position in which trafficked persons find themselves,⁷⁰ trafficked

⁶⁶ Generally, on this obligation, see Andreas Schloenhardt and Rebekkah Markey-Towler, "Non-Criminalisation of Victims of Trafficking in Persons – Principles, Promises, and Perspectives" (2016) 10 *GJIL* 4, pp. 10-38. Specifically, see Adam Weiss, "The Application of International Legislation: Is the Federalisation of Anti-Trafficking Legislation in Europe Working for Trafficking Victims?", in Margaret Malloch and Paul Rigby (eds), *Human Trafficking: The Complexities of Exploitation* (Edinburg University Press, 2016), p. 44; Marija Jovanovic, "The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance", (2017) 41 *JTH* 1, p. 46.

⁶⁷ Council of Europe Anti-Trafficking Convention, art 26; ASEAN Convention, art 14(7); European Union Anti-Trafficking Directive, art 14 (7); and UN Recommended Principles and Guidelines, principle 7.

⁶⁸ Working Group on Trafficking in Persons, *Non-Punishment and Non-Prosecution of Victims of Trafficking in Persons: Administrative and Judicial Approaches to Offences Committed in the Process of Such Trafficking* (UN Doc. CTOC/COP/WG.4/2010/4, 2009), para. 11(b); Ryszard Piotrowicz and Lilliana Sorrentino, "The Non-Punishment Provision with Regard to Victims of Trafficking: A Human Rights Approach", in Ryszard Piotrowicz, Conny Rijken and Baerbel Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge Taylor & Francis Group, 2018), p. 171; Marija Jovanovic, "The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance" (2017), pp. 41-42.

⁶⁹ Art 8: "Where a person provides evidence that he or she is a victim, that person shall not be liable to prosecution for any offence against the laws immigration or prostitution, that is a direct result of the offence of trafficking in persons committed against him or her".

⁷⁰ Anna Therese Gallagher and Klara Skrivankova, *Human Rights and Trafficking in Persons* (Background Paper, 2015), p. 8; Wendy Chapkis, "Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants" (2003) 923 *GS* 17, p. 931; Toine Spapens,

persons are afraid to come and report their situation for fear of prosecution, unlawful detention or even deportation.

Regarding the obligation to protect victims from further harm and privacy,⁷¹ states should take measures to protect the private lives of these groups of people from further harm.⁷² They should protect these vulnerable groups irrespective of their willingness or lack thereof to participate in the investigation or prosecution of trafficking cases.⁷³ Furthermore, there is a duty that states should protect the privacy and identity of these groups both in the context of their private life and during judicial proceedings.⁷⁴ The discharge of this duty entails considering the

“The Business of Trafficking in Human Beings”, in Ryszard Piotrowicz, Conny Rijken and Baerbel Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge Taylor & Francis Group, 2018), p. 540; Jane Nady Sigmond, “Combating Modern-Day Slavery: Issues in Identifying and Assisting Victims of Human Trafficking Worldwide”, (2008) 254 VO 3, pp 254-255; Anne Therese Gallagher, “Exploitation in Migration: Unacceptable but Inevitable” (2015) 55 JIA 68, pp. 61-62.

⁷¹ Rosa Raffaelli, “The European Approach to the Protection of Trafficking Victims: The Council of Europe Convention, the EU Directive, and the Italian Experience”, (2009) 205 GLJ 10, pp. 205-206; International Organization for Migration, *The IOM Handbook on Direct Assistance for Victims of Trafficking* (IOM, 2007), p. 3.

⁷² UN Organised Crime Convention, art 24(1), 24(2), 24(4), 25(1); TIP Protocol, art 6(5); ASEAN Convention, art 15(4); Council of Europe Anti-Trafficking Convention, arts 12(2), 28; European Union Anti-Trafficking Directive, arts 11(1), 12(3); and UN Recommended Principles and Guidelines, principle 2 and guideline 6(6).

⁷³ UN Recommended Principles and Guidelines, guideline 6(1); European Union Anti-Trafficking Directive, art 11(3); Council of Europe Anti-Trafficking Convention, art 12(6). Further, see European Commission, *The EU Rights of Victims of Trafficking in Human Beings* (Publications Office of the European Union, 2013), para. 1.3; Human Rights Council, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo* (UN Doc. A/HRC/26/37/Add.4, 2014), para. 58.

⁷⁴ Anne Therese Gallagher, *The International Law of Human Trafficking* (2010), 303-304; Chris Corrin, “Transitional Road for Traffic: Analysing Trafficking of Women from and through Central and Eastern Europe”, (2005) 543 EAS 57, p. 547; Marci Cottingham, et al., “Sociological Perspective Underlying Causes”, in Marcy Burke (ed), *Human Trafficking: Interdisciplinary Perspectives* (Routledge, 2013), pp. 69-70; see further, Human Rights Council, *Trafficking in Persons, Especially Women and Children: Access to Effective Remedies for Trafficked Persons and their Right to an Effective Remedy for Human Rights Violations* (UN Doc. A/HRC/RES/20/1, 2012), para. 4(f); UN Recommended Principles and Guidelines, guideline 6(6); Art. 6(1) of the TIP Protocol; ASEAN Convention, art 14(6); SAARC Convention, art V; Council of Europe Anti-Trafficking Convention, arts 11(1), 11(2), 11(3), 30; and European Union Anti-Trafficking Directive, arts 12-16.

special needs of various groups depending on their various statuses of vulnerability. In addition, international law requires “a consensual and informed basis” approach as a standard for the provision of these measures to victims of trafficking.⁷⁵ The Bill obligates the EAC partner states to protect victims’ private life and identity from further harm.⁷⁶ The Bill requires partner states to protect the privacy of the victims of trafficking during judicial proceedings without jeopardising the rights of the accused.⁷⁷ Furthermore, the Bill enjoins partner states to consider the special needs of the victims depending on their statutes of vulnerability.⁷⁸ The Bill treats this duty as a mandatory obligation, unlike the TIP Protocol which coaches this obligation on equivocal terms.⁷⁹

Since victims of trafficking also suffer human rights violations,⁸⁰ states must provide physical, social and psychological care and support to victims of trafficking.⁸¹ The 2016 Anti-Trafficking Bill requires partner states to adopt administrative, legal and other systems to effect measures

⁷⁵ Anne Therese Gallagher, *The International Law of Human Trafficking* (2010), pp. 313-315; see European Union Anti-Trafficking Directive, art 11(5); and Council of Europe Anti-Trafficking Convention, art 12(7).

⁷⁶ Art 15 (1), 15 (6).

⁷⁷ Art 15 (1), 15 (2) (b).

⁷⁸ Art 15 (5).

⁷⁹ TIP Protocol, art 6 (1).

⁸⁰ For a consideration of human trafficking as both a criminal offence and a violation of human rights, see United Nations General Assembly, *United Nations Global Plan of Action to Combat Trafficking in Persons* (UN Doc. A/RES/64/293, 2010), para 1; Ryszard Piotrowicz, “States Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations” (2012) 181 IJRL 24, p. 181; Ahmed Bachaka, “Human Trafficking, the Rights of Victims and Government Obligations under the International Laws” (2017) 34 JLP 67, pp. 34-36; Omelaniuk I, *United Nations Expert Group Meeting on International Migration and Development* (UN Doc. UN/POP/MIG/2005/15, 2005), 3; Cherrif Bassiouni, “International Recognition of Victims’ Rights” (2006) 2023 HRLR 6, pp. 206-207; Browne Onuoha, “The State of Human Trafficking and Human Rights Issues in Africa” (2011) 149 CJR, 14, p. 149.

⁸¹ UN Organised Crime Convention, art 25(1); TIP Protocol, art 6(3), 6(4); ASEAN Convention, art 14(9), 14(10); SAARC Convention, art XI(3); Council of Europe Anti-Trafficking Convention, arts 12(1), 12(3), 12(4), 12(5); European Union Anti-Trafficking Directive, arts 11, 13-16; and UN Recommended Principles and Guidelines, principles 8-10.

that implement this obligation.⁸² In particular, the Bill requires partner states to provide victims with information regarding court and administrative proceedings in relation to their rights and in the language the victims understand.⁸³ It calls on states to establish mechanisms enabling victims to claim compensation for the harm they suffered as a result of trafficking.⁸⁴ The Bill has a provision for appropriate housing, psychological counselling, medical and material assistance, employment, educational and training opportunities.⁸⁵ In implementing these measures, partner states must consider the special needs of vulnerable groups, especially children and their needs for education, housing and care.⁸⁶

Victims of trafficking also need legal assistance.⁸⁷ States should provide victims with information regarding their rights and the protective and supportive measures they are entitled to.⁸⁸ Where victims opt to participate in judicial proceedings as victims or witnesses, states should establish mechanisms for them to present their views and guarantee their safety and protection, even after the subsequent conclusion of the proceedings.⁸⁹ The 2016 Anti-Trafficking Bill obligates the EAC partner states to inform victims of relevant court and administrative proceedings.⁹⁰ Victims should receive counselling and information

⁸² Art 15 (2).

⁸³ Art 15 (2) (a), 15 (2) (b), 15 (4) (b).

⁸⁴ Art 15 (3).

⁸⁵ Art 15 (4).

⁸⁶ Art 15 (5).

⁸⁷ UN Organised Crime Convention, arts 24(1), 25(3); TIP Protocol, ARTS 6(2)(a), 6(2)(b), 8(2); Council of Europe Anti-Trafficking Convention, arts. 10(4) 12(1)(d), 12(1)(e), 16(2) and 28; ASEAN Convention, art 15(2); UN Recommended Principles and Guidelines, guideline 4(7); SAARC Convention, art V; and European Union Anti-Trafficking Directive, arts 12, 15, 16.

⁸⁸ ASEAN Convention, art 14(9); see as well Conny Rijken C, “Trafficking in Persons: A Victim’s Perspective’ System” in Ryszard Piotrowicz, Conny Rijken and Baerbel Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge Taylor & Francis Group, 2018), p. 246.

⁸⁹ Council of Europe Anti-Trafficking Convention, art 28.

⁹⁰ Art 15 (2) (a).

regarding their legal rights in the language they understand.⁹¹ Where victims participate in the trial, the Bill requires protection of their privacy, identity and safety after the conclusion of the proceedings while in the destination states.⁹² The Bill provides a mandatory obligation on states to ensure the right to remain for victims of trafficking in all appropriate cases.⁹³ In the realisation of the right to remain, the Bill admonishes states to consider “humanitarian and compassionate factors”,⁹⁴ thereby ensuring a guarantee of protection for their legal and humanitarian rights.

Concerning the repatriation of victims of trafficking, international law requires state cooperation. The obligation commits states to conduct voluntary repatriations, taking into account the safety and compassionate considerations as well as any legal factors that might otherwise operate to make repatriation undesirable or precarious.⁹⁵ The 2016 Anti-Trafficking Bill contains extensive provisions on the repatriation obligation akin to the TIP Protocol. The Bill imposes a mandatory obligation on the receiving states to accept their nationals or residents who are victims of trafficking in persons from destination states “without undue or unreasonable delay”.⁹⁶ The provision requires the receiving states to guarantee and provide protection or “safety” to the returned victims of trafficking. The Bill also obliges destination states to consider their safety and the status of any legal proceedings pending in the destination countries in relation to the to-be-returned victims.⁹⁷ Due to the

⁹¹ Art 15 (4) (b).

⁹² Art 15 (1), 15 (6).

⁹³ Art 16 (1).

⁹⁴ Art 6 (2); see further United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (UNODC, 2006), p. 380.

⁹⁵ For this international obligation, see TIP Protocol, art 8; ASEAN Convention, art 15 (2); UN Recommended Principles and Guidelines, principle 11 and guideline 6 (7); SAARC Convention, art XI (1); and Europe Anti-Trafficking Convention, art 16. See further, Anne Therese Gallagher, *The International Law of Human Trafficking* (2010), 343, pp. 349-351.

⁹⁶ Art 17 (1).

⁹⁷ Art 17 (2).

cooperation nature of the repatriation obligation, the Bill compels receiving states to act without undue or unreasonable delay when destination states request them to verify any information relating to the nationality or residence status of the to-be-returned trafficking victims.⁹⁸ This includes a duty on the receiving states to provide travel documents and other authorisation where this is necessary to effect their repatriation from the destination states.⁹⁹

Unfortunately, the 2016 Anti-Trafficking Bill follows similar weaknesses of the TIP Protocol and other instruments. Firstly, while imposing a mandatory repatriation obligation which takes into account the safety and other legal and compassionate factors of the victims, the Bill provides that the obligation “shall preferably be voluntary”, thereby allowing states the discretion even to repatriate victims of trafficking involuntarily. Second, the Bill subjects repatriation obligation to other national, bilateral or multilateral agreements or arrangements which, in whole or in part, govern the return of victims of trafficking in persons.¹⁰⁰ While possibilities exist that such other frameworks can provide for better provisions, the situation becomes precarious when such arrangements provide lesser protective measures and consideration for victims of trafficking in the context of repatriation. Although many provisions in the Bill impose mandatory obligations on the EAC partner states concerning victims and thus limit the effects of the involuntary repatriation clause, there was no reason for the drafters of the Bill to copy verbatim the shortcomings of the TIP Protocol in this regard.

4. Conclusion

This chapter has analysed the legal and policy framework of the EAC and its potential to criminalise trafficking in persons, protect victims of trafficking and call upon states to collaborate against trafficking. The

⁹⁸ Art 17 (3).

⁹⁹ Art 17 (4).

¹⁰⁰ Art 17 (5).

analysis focused on the EAC Treaty, the Protocol on Peace and Security, the Regional Strategy on Peace and Security and the 2016 Anti-Trafficking Bill. The chapter finds that the EAC Treaty already provides a collaborative framework for partner states to work together against trafficking in persons, even when the Treaty does not mention trafficking in persons as such. Touching on the Protocol on Peace and Security, the chapter reveals that the Protocol is unhelpful in several aspects. It fails to dedicate attention to the crime of trafficking and obfuscates the essence of cross-border and transnational crimes. The chapter uncovers that while adopted with good intentions, the Regional Strategy on Peace and Security fails on several important legal points. Apart from recognising trafficking as a severe problem in the EAC and the presence of international and domestic measures against trafficking, it fails to list any serious strategies to help partner states against trafficking.

Regarding the 2016 Anti-Trafficking Bill, this chapter finds that the Bill presents high expectations in spearheading anti-trafficking efforts at the EAC level while also supplementing the EAC partner states' domestic legal and institutional regimes. The protection and criminalisation provisions of the Bill follow most provisions of the international anti-trafficking law. Nonetheless, the chapter finds significant weaknesses in the language used and a lack of concrete provisions on individual obligations.

Generally, the chapter does not propose amendments to the Treaty. Instead, it makes several pertinent legal and policy changes that call upon the amendment of the Protocol on Peace and Security to accommodate the substance of the trafficking crime or adopt an anti-trafficking specific Protocol. The Protocol should dedicate a clear section on trafficking, its manifestation in the community, the substance of what it criminalises or recommends states to criminalise and a robust international, regional and community framework of cooperation and enforcement. Equally, the partner states can adopt a whole new protocol explicitly addressing the

problem of trafficking in persons. This recommendation is based on observing what other regions and communities have already done. Among others, the European Union, the Council of Europe and the Association of Southeast Asian Nations have all adopted community and regional specialty instruments against trafficking. Alternatively, the chapter recommends reworking the 2016 Anti-Trafficking Bill or enacting a new one to criminalise trafficking and protect victims of trafficking effectively. The reworked Bill, if it eventually becomes law, will have the force of law and precedence over partner states' frameworks. This will give the community a broader mandate to prevent trafficking and protect victims. The amended framework will consider the international elements of trafficking and account for the principle of legal certainty against the obscurity of certain provisions that introduce new aspects of crimes without any strong definitional or legal foundation. The chapter recommends reforming the Regional Strategy on Peace and Security to provide concrete strategies against trafficking in persons to help partner states strengthen peace and security in the community. Finally, the chapter proposes that the EAC should set programmes and institutions for greater state and non-state actors' engagement and cooperation. This final recommendation considers that the institutionalisation of anti-trafficking efforts seems less prioritised, while it forms an important anti-trafficking measure.

Chapter Seven

Leveraging the EAC Laws in Combatting Statelessness: Lessons from the ECOWAS

*Leonard Chimanda**

1. Introduction

According to the United Nations Statelessness Convention of 1954, a stateless person is a person “who is not considered as a national by any state under the operation of its law”.¹⁰¹ The situation pertaining to the preceding definition is known as statelessness. Some causes of statelessness are gaps and conflicts in nationality laws, arbitrary government decisions, non-registration of children at birth, discrimination against particular ethnic or social groups, the emergence of new states, and the transfer of territory between existing states.¹⁰² The application of the definition of a stateless person as provided under the 1954 Convention is currently beyond treaty obligation. The definition has

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¹⁰¹ The Convention Relating to the Status of Stateless Persons, 1954, art 1(1).

¹⁰² See C.A. Batchelor, “Statelessness and the Problem of Resolving Nationality Status” (1998) 10(1-2) International Journal of Refugee Law, pp. 156-182.

been widely accepted to have attained the status of customary international law.¹⁰³ Essentially, the words “under operation of its law” include the application of the law in practice. That is to say, if, for instance, a person qualifies to be a citizen under the law, but it happens that the State does not view them as a citizen, then such a person is stateless in terms of the 1954 Convention.¹⁰⁴ It is from this fact that there are two types of statelessness: *de jure* statelessness and *de facto* statelessness. While the former denotes “from the law”, the latter means “from the facts (or practice)”. The United Nations High Commissioner for Refugees (UNHCR) is the international organisation that has the express mandate to deal with stateless persons.¹⁰⁵

The concept of combatting statelessness has two perspectives. One is to ensure the prevention of statelessness to people who are not stateless (including those at risk of being stateless) or end statelessness to stateless people.¹⁰⁶ The other perspective is ensuring that those who are stateless are accorded their rights, including documentation, so that their enjoyment of human rights is not hampered.¹⁰⁷ According to the UNHCR, to fight statelessness effectively, three measures are key: resolving the current major statelessness situations, preventing the emergence of new cases of statelessness and improving the identification and protection of stateless persons.¹⁰⁸

This chapter mainly seeks to identify areas that the EAC can learn from the ECOWAS as far as combatting statelessness in the region is

¹⁰³ See the International Law Commission, “Articles on Diplomatic Protection with Commentaries” (2006), p. 49.

¹⁰⁴ See Jessica P. George and Rosalind Elphick, *Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner’s Guide* (Pretoria University Law Press, 2014), p. 2.

¹⁰⁵ UNHCR mandate to stateless persons was expanded in 1974 through General Assembly Resolution 3274 and 3/36 of 1976. Initially it only dealt with stateless persons who were also refugees (see paragraph 6 (A)(II) of the UNHCR Statute as well as art 1(A)(2) of the 1951 Convention Relating to the Status of Refugees).

¹⁰⁶ UNHCR, “Establishing Statelessness Determination Procedures to Protect Stateless Persons” *Ending Statelessness within 10 Year*, Good Practices Paper, action 6.

¹⁰⁷ *Ibid.*

¹⁰⁸ See UNHCR, “Global Action Plan to End Statelessness: 2023-2024” available at <<https://www.unhcr.org/ibelong/global-action-plan-2014-2024/>> (accessed 4 September 2023).

concerned. For manageability reasons and in recognition of their status as EAC founding members, the chapter uses the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda as selected case studies from the EAC. The chapter undertakes a comparative analysis of regional mechanisms of combatting statelessness between the EAC and the ECOWAS. In so doing, the thesis of the chapter is grounded on the fact that the EAC has significant mechanisms to learn from the ECOWAS. The chapter not only highlights gaps and/or situations that allow statelessness in the EAC but also identifies the populations that are either stateless or at risk of statelessness as well as points out best practices in the ECOWAS that can be conveniently picked as a lesson to the EAC. The chapter also identifies the strengths and weaknesses of the existing EAC mechanisms for combatting statelessness.

Despite some differences in integration goals and levels, the ECOWAS, just like the EAC, is also an intergovernmental regional bloc. It was established on 28 May 1975 after fifteen (15) member states concluded the Treaty of the Economic Community of West African States at Lagos, Nigeria. Its headquarters are located in the Federal Capital Territory, Nigeria. The founding members were Sierra Leone, Senegal, Togo, Benin, Burkina Faso, Cote d' Ivoire, the Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Nigeria and Niger. In 1977 Cape Verde joined the bloc making a total of sixteen member states until 2000 when Mauritania left the bloc and the number of member states was back to fifteen. The number remains fifteen to date.

Globally, by 2023, the number of stateless persons was estimated to be at 10 million.¹⁰⁹ While in the ECOWAS the count of stateless persons is estimated to be at 1 million,¹¹⁰ literature shows that while it is clear that

¹⁰⁹ UNHCR, “Statelessness around the World” 2023, available at <<https://www.unhcr.org/ibelong/statelessness-around-the-world/>> (accessed 27 September 2023).

¹¹⁰ Isabel Paolini, “Ending Statelessness in West Africa is Crucial for Domestic and Regional Security”, 25 February 2021, available at

there are many hundreds of thousands of stateless, so far it has not been tenable to establish the number of stateless persons in the EAC due to inadequate studies, statistics and data.¹¹¹

2. Regional and Global Legal Framework on Statelessness

In principle, the formation of a regional bloc does not render redundant other existing regional and global treaty obligations applicable to constituting partner states or member states.¹¹² That is to say, partner states and member states of the EAC and the ECOWAS, respectively, are still bound by other treaty obligations accruing from other international organisations such as the AU and the UN. Therefore, before making a comparative analysis of the legal frameworks of the EAC against that of the ECOWAS, it is judicious to highlight other existing regional and global treaty obligations applicable to EAC partner states in combatting statelessness. It should be noted that statelessness precisely means the absence of a legally recognised nationality. As a result, the law has been addressing the problem of statelessness by enhancing the protection of the right to a nationality. The right to nationality is therefore considerably key in examining any legal framework governing prevention and combatting of statelessness. Further, despite their discourse differences, the terms nationality and citizenship are used

<<https://blogs.lse.ac.uk/africaallse/2021/02/25/ending-statelessness.citizenship-nigeria-cote-divoire-domestic-regional-security/>> (accessed 2 September 2023); see also Raymond A. Atuguba, "Statelessness in West Africa: An Assessment of Stateless Populations and Legal Policy and Administration Frameworks in Ghana" (2020) 8(1) Journal on Migration and Human Security, p. 14.

¹¹¹ See East African Community, "International Migration Statistics Report", 1st ed, May 2022, issued by the EAC Secretariat; see also Bronwen Manby, *Statelessness and Citizenship in the East African Community* (a Study for UNHCR, September 2018), p. 1; Maja Lazic, "From Kenya to Kyrgyzstan: How Data can Help Eliminate Statelessness", Joint Data Centre on Forced Displacement", 8 March 2022, available at <<https://www.joint-datacenter.org/from-kenya-to-kyrgyzstan-how-data-can-help-eliminate-statelessness/>> (accessed 15 September 2023); and Mary Strode and Khanna Melanie, "Improving Official Statistics on Stateless People: Challenges, Solutions and Road Ahead" (2021) 37(4) Statistical Journal of the IAOS, pp. 1087-1101.

¹¹² Gabriele Marino Noberasco, "Balancing Fundamental Principles of the EU and the Primacy of the UN Law: In Search of Multilateral Approach to the Protection of Human Rights" (Master of Philosophy in Law Dissertation, University of Exeter, 2018).

interchangeably under the current jurisprudence of the UN and the AU. Equally, in this paper, citizenship and nationality are used to mean the same concept. The most acceptable definition that interchangeably conjoins nationality and citizenship is widely accepted to be that which was given in the 1955 *Nottebohm* case.¹¹³ In this case by the ICJ, nationality was defined to mean “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties”.¹¹⁴

2.1. AU Legal Framework

Under the AU, various treaties depict some significant obligations concerning fighting and preventing statelessness. To start with, the African Charter on Human and Peoples Rights, 1981, which is the AU mother human rights treaty does not have a specific provision that provides for the right to nationality. Nonetheless, the Charter has some provisions with rights that may be used to enhance fighting and combatting statelessness. The rights to non-discrimination,¹¹⁵ equality before the law¹¹⁶ and dignity¹¹⁷ signify the genuine intention of state parties to ensure that the welfare of stateless persons is preserved regardless of their status as stateless. They should not be disadvantaged due to their station of lives. The fact that being stateless does not render a person a non-human being should be key in ensuring the rights of stateless persons as human beings are protected. These rights may also be used to trigger all processes and measures geared towards preventing people from either being stateless or continuing to be stateless so that their equality before the law and dignity are achieved. Also, the right to leave and return to own country as provided by the Charter¹¹⁸ cannot be exercised by unprotected stateless persons hence, its realisation goes hand

¹¹³ See Jessica P. George and Rosalind Elphick, *Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner's Guide* (Pretoria University Law Press, 2014), p. 6.

¹¹⁴ *Lichtenstein v Guatemala* ICJ (1955) ICJ Reports, p. 23.

¹¹⁵ African Charter on Human and Peoples' Rights, 1981, art 2.

¹¹⁶ *Ibid.*, art 3.

¹¹⁷ *Ibid.*, art 5.

¹¹⁸ *Ibid.*, art 12.

in hand with the prevention and combatting of statelessness. This is because unprotected stateless persons normally lack necessary documents for their travel outside and sometimes within their country of residence.

The preceding Charter also provides for the right to protection of one's family.¹¹⁹ Primarily, a family includes one's spouse and children. There has been a nexus between lack of nationality and family welfare. A country which does not grant automatic citizenship to children born in its territory to non-citizen parents will always put the newborn at risk of statelessness especially where the parents' country of nationality requires a person to be born in its territory for automatic grant of citizenship. In this scenario, the welfare of the child born to non-citizen parents will be jeopardised and hence the Charter's right to protection of one's family will be infringed.

The Charter has also been key in enhancing the fight against statelessness by acting as the enabling statute for the operation of the African Commission. The establishment and functioning of the African Commission are governed by Articles 30-61 of the Charter. The African Commission has been handling several communications relating to the protection of persons against statelessness. Some of the landmark statelessness cases that were handled by the African Commission are *Nubian Community in Kenya v Kenya*,¹²⁰ *Modise v Botswana*,¹²¹ *Amnesty International v Zambia*,¹²² *Legal Resources Foundation v Zambia*,¹²³ *IHRDA v Angola*¹²⁴ and *IHRDA v Republic of Guinea*¹²⁵.

¹¹⁹ Ibid., art 18.

¹²⁰ *Nubian Community in Kenya v Kenya*, Communication No. 317/2006.

¹²¹ *John K. Modise v. Botswana*, Communication No. 97/93 (2000).

¹²² *Amnesty International v. Zambia*, Communication 212/98.

¹²³ *Legal Resources Foundation v. Zambia*, Communication No. 211/98 (2001).

¹²⁴ *Institute for Human Rights and Development in Africa v Angola*, Communication No. 292/04 (2008).

¹²⁵ *Institute for Human Rights and Development in Africa v the Republic of Guinea*, Communication No. 249/02 (2002).

Under the African Charter on the Rights and Welfare of the Child (ACRWC), 1990, a child has a right to a birth name, registration after birth and entitlement to nationality. This instrument requires state parties to ensure that their constitution's guarantee nationality to a child born in their territories, especially where the child is not granted nationality by any other State.¹²⁶ Another AU treaty relevant to combatting statelessness is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (Maputo Protocol). Under this instrument, a woman upon marriage has a right to retain his nationality or acquire that of her husband.¹²⁷ This provision is set to cure the problem of women's automatic loss of their nationalities upon being married to men of different nationalities. There are countries where when a woman is married to a man of a different nationality, such a woman automatically loses her nationality and is presumed to have attained that of her husband.¹²⁸ This puts women at risk of statelessness, especially where the procedures of acquiring the man's nationality are cumbersome or where such nationality is conditional to the existence of a marriage and later that marriage is broken. Such a woman is at high risk of being stateless where her former country of nationality does not have a legal provision for regaining lost nationality.¹²⁹ In some countries, the patriarchal system affected their nationality legislation. In these countries, a child can only be considered a national if they are born to a national father and not a mother.¹³⁰ As a result, children born to unknown fathers could be at high risk of statelessness. To cure this problem, the Maputo Protocol also provides for the equality of spouses in transferring their nationalities to their children.¹³¹

¹²⁶ The African Charter on the Rights and Welfare of the Child, 1999, art 6.

¹²⁷ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, art 6 (g).

¹²⁸ See for instance, art 23 of the Togolese Nationality Code of 1978.

¹²⁹ Togolese nationality laws present a good example of this.

¹³⁰ This is the case with regard to art 2(a) of the Burundian Nationality Code of 2000 though art 12 of the 2018 Burundian Constitution grants equality of men and women in transferring their nationalities to their children.

¹³¹ *Ibid*, art 6 (h).

Another instrument under the AU legal framework that has manifested to be significant in combatting statelessness is the African Court Protocol, 1998. The Protocol establishes the African Court with a mandate *inter alia* of handling human rights cases filed by individuals (both natural and legal persons) against states that have made a declaration accepting the competence of the Court to receive cases from NGOs with observer status before the African Commission and individuals.¹³² Unlike the African Commission whose recommendations are not binding, decisions of the African Court are binding. The African Court has adjudicated two landmark cases on statelessness: the case of *Anudo Ochieng*¹³³ and the case of *Robert Penesis*.¹³⁴

2.2. UN Legal Framework

Starting with the Universal Declaration of Human Rights (UDHR), 1948 which has been adopted by many UN member states in their constitutions,¹³⁵ the majority of its provisions were also adopted in the two UN binding human rights instruments. These are the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966. These developments have made most of the provisions of the UDHR to be accepted by the international community as customary international law.¹³⁶ This defeats the Declaration's soft law nature of non-bindingness. Therefore, a substantial number of the provisions of the UDHR are

¹³² Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998, arts 1, 5(3) and 34(6).

¹³³ *The Matter of Anudo Ochieng Anudo v the United Republic of Tanzania*, Application No. 012/2015.

¹³⁴ *Robert John Penesis v the United Republic of Tanzania*, Application No. 013/2015.

¹³⁵ See for instance the Constitution of the United Republic of Tanzania, 1977, art 9 (f).

¹³⁶ James W. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press, 1987), p. 54; see also Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law" (1995) 25(2) *Georgia Journal of International and Comparative Law*, (25), pp. 287-318; as well as Mary Ann Glendon, "The Rule of Law in the Universal Declaration of Human Rights" (2004) 2 *Northwestern University Journal of International Human Rights*, p. 22.

binding to all members of the United Nations regardless of any existence or non-existence of treaty obligation.

The UDHR, while recognising one's entitlement to the right to a nationality, calls for states not to arbitrarily deprive one's right to nationality.¹³⁷ The provision also bars states from denying a person the right to change their nationality.¹³⁸ This provision serves as a block against malicious state decisions depriving persons of their right to nationality rendering them statelessness. In principle, a decision is said to be arbitrary where it is repugnant to international law or where the same is inconsistent with more protective provisions of domestic law.¹³⁹ Another UN instrument relevant to combatting statelessness is the ICCPR, 1966 which provides for a range of civil and political rights applicable to all human beings. Under this instrument, every human being is entitled to the protection of his civil and political rights regardless of his status.¹⁴⁰ This implies that a stateless person, as long as one is a human being; is entitled to the enjoyment of their civil and political rights albeit pursuant to permissible human rights restrictions.

Specifically, to children, the ICCPR accords every child with a right to nationality.¹⁴¹ As a proactive measure towards preventing statelessness, the ICCPR requires state parties to immediately register a child upon birth.¹⁴² The same is provided by the Convention on the Rights of the Child (CRC), a treaty that exclusively applies to children.¹⁴³ The International Convention on the Elimination of All Forms of Racial

¹³⁷ The Universal Declaration of Human Rights, 1948, art 15.

¹³⁸ Ibid.

¹³⁹ UNODC, "Arbitrary Deprivation of life" (July 2018), available at <<https://www.unodc.org/e4j/en/terrorism/module-8/key-issues/arbitrary-deprivation-of-life.html#:~:text=%5BA%5D%20deprivation%20of%20life%20is,%2C%20reasonableness%2C%20necessity%20and%20proportionality>> (accessed 10 October 2023).

¹⁴⁰ International Covenant on Civil and Political Rights, 1966, art 2.

¹⁴¹ Ibid, art. 24 (2).

¹⁴² Ibid, art 24 (3).

¹⁴³ Convention on the Rights of the Child, 1989, art 7.

Discrimination (CERD) of 1965 is also relevant to this discussion. It calls for state parties to ensure that their laws and policies on nationality, citizenship and naturalisation do not discriminate based on nationality.¹⁴⁴ The convention also entitles every person to the right to nationality without racial discrimination.¹⁴⁵

Within the spirit of protecting women against statelessness, two UN instruments are also relevant; the Convention on the Nationality of Married Women (CNMW) of 1957 and CEDAW of 1979. The CNMW provides to the effect that the nationality of a wife shall not be affected by neither dissolution nor celebration of a marriage between such a wife and an alien husband.¹⁴⁶ The same shall not be affected by the change of nationality by the husband during marriage.¹⁴⁷ With regard to the CEDAW, a woman is accorded equal rights with a man in acquiring, changing and retaining nationality.¹⁴⁸ Just like the CNMW, the CEDAW also requires state parties to ensure that the nationality of a wife is not affected either by marriage to an alien or by a change of nationality by the husband during marriage.¹⁴⁹ Lastly, the CEDAW accords women equal rights to men concerning the nationality of their children.¹⁵⁰

The last UN statelessness instruments that are highlighted in this paper are two conventions that were adopted specifically to combat and prevent statelessness. These are the Convention Relating to the Status of Stateless Persons of 1954 and the Convention on the Reduction of Statelessness of 1961. The Convention of 1954 is the first UN treaty to define the term “stateless person”. As already seen above, this convention defines a stateless person as a ‘person who is not considered

¹⁴⁴ International Convention on the Elimination of All Forms of Racial Discrimination, 1965, art 1(3).

¹⁴⁵ Ibid.

¹⁴⁶ Convention on the Nationality of Married Women, 1957, art. 1.

¹⁴⁷ Ibid.

¹⁴⁸ Convention on the Elimination of All Forms of Discrimination against Women, 1979, art 9(1).

¹⁴⁹ Ibid.

¹⁵⁰ Ibid., art 9(2).

as a national by any state under the operation of its law'.¹⁵¹ The convention also provides for the category of persons who shall enjoy its protection and those who shall not.¹⁵² Significantly, the convention provides for various rights that are supposed to be enjoyed by stateless persons present in the territory of a state party. These include the right to non-discrimination¹⁵³, right to legal recognition¹⁵⁴, right to own property¹⁵⁵ right to artistic rights and industrial property¹⁵⁶, right to freedom of association¹⁵⁷, right to equal access to justice¹⁵⁸, right to work¹⁵⁹, right to education¹⁶⁰, right to social security¹⁶¹, right to freedom of movement¹⁶² and right to identity and travel documents¹⁶³. The convention further requires state parties to consider granting naturalisation where, without such a measure, a person or persons will be subjected to statelessness.¹⁶⁴

The Statelessness Convention of 1961 requires contracting states to grant nationality to a person who would otherwise be stateless.¹⁶⁵ More importantly, in recognition of children born to unknown parents, the convention provides that a foundling found in the territory of a state party should, in the absence of evidence to the contrary, be granted the nationality of that state.¹⁶⁶ The convention also provides to the effect that renunciation and deprivation of nationality should be conditional upon

¹⁵¹ Convention Relating to the Status of Stateless Persons, 1954, art 1.

¹⁵² Ibid., art 2.

¹⁵³ Ibid., art 3.

¹⁵⁴ Ibid., art 12.

¹⁵⁵ Ibid., art 13.

¹⁵⁶ Ibid., art 14.

¹⁵⁷ Ibid., art 15.

¹⁵⁸ Ibid., art 16.

¹⁵⁹ Ibid., arts 17 and 18.

¹⁶⁰ Ibid., art 22.

¹⁶¹ Ibid., art 24.

¹⁶² Ibid., art 26.

¹⁶³ Ibid., art 27 and 28.

¹⁶⁴ Ibid., art 32.

¹⁶⁵ Convention on the Reduction of Statelessness, 1961, art 1.

¹⁶⁶ Ibid., art 2.

the possession or acquisition of another nationality by the concerned person.¹⁶⁷

Preceding the above and in cognisance of the sources of international law, the majority of the principles and rights provided in the discussed legal instruments above have attained the status of customary international human rights and general principles.¹⁶⁸ Their bindingness is therefore highly compelling regardless of treaty obligation. See Table 1 on the ratification status for Tanzania, Kenya and Uganda.

Table 1: Statelessness Treaty Ratification or Obligation Status for Tanzania, Kenya and Uganda

SN	Treaty	Kenya	Tanzania	Uganda
1	The African Charter on Human and Peoples Rights, 1981	Acceded (23 January 1992)	Ratified (18 February 1984)	Ratified (10 May 1986)
2	African Charter on the Rights and Welfare of the Child, 1990	Acceded (25 July 2000)	Acceded (16 March 2003)	Ratified (17 August 1994)
3	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003	Acceded (6 October 2010)	Acceded (3 March 2007)	Acceded (22 July 2010)

¹⁶⁷ Ibid., art 5, 6 and 7.

¹⁶⁸ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press-Oxford, 1989), pp. 3-7; see also William A. Schabas, *The Customary International Law of Human Rights*, (Oxford Academic Books, 2021), p. 22; as well as Michael Wood, "Customary International Law and Human Rights", *Academy of European Law*, EUI Working Papers 2016/03, pp. 16-21.

SN	Treaty	Kenya	Tanzania	Uganda
4	African Court Protocol, 1998	● Ratified (4 February 2004) ● Not deposited declaration under Article 34 (6)	● Acceded (7 February 2006) ● Deposited declaration under Article 34 (6) in 2010 ● Withdrawn the declaration under Article 34 (6) in 2019	● Ratified (16 February 2001) ● Not deposited declaration under Article 34 (6)
5	International Covenant on Civil and Political Rights, 1966	Acceded (1 May 1972)	Acceded (11 June 1976)	Acceded (21 June 1995)
6	Convention on the Rights of the Child, 1989	Ratified (30 July 1990)	Acceded (10 July 1991)	Ratified (17 August 1990)
7	International Convention on the Elimination of All Forms of Racial Discrimination, 1965	Acceded (13 October 2001)	Acceded (26 November 1972)	Acceded (21 December 1980)
8	Convention on the Nationality of Married Women, 1957	Neither signed nor acceded	Acceded (26 February 1963)	Acceded (14 March 1965)
9	Convention on the Elimination of All Forms of Discrimination	Acceded (9 March 1984)	Ratified (20 August 1985)	(Ratified (22 July 1985)

SN	Treaty	Kenya	Tanzania	Uganda
	against Women,1979			
10	Convention Relating to the Status of Stateless Persons,1954	Neither signed nor acceded	Neither signed nor acceded	Acceded (14 July 1965)
11	Convention on the Reduction of Statelessness, 1961	Neither signed nor acceded	Neither signed nor acceded	Neither signed nor acceded

Source: United Nations Treaty Collection, available at <https://treaties.un.org/> (accessed 29 July 2024) and OAU/AU Treaties, Conventions, Protocols & Charters, available at <https://au.int/treaties> (accessed 29 July 2024)

3. Highlight of Domestic Laws

The above discussion of the regional and global legal framework reveals that Kenya, Tanzania and Uganda have existing international legal obligations to prevent and combat statelessness. Regarding the two main statelessness conventions; the 1954 and 1961 statelessness conventions, only Uganda is party at least to one of them, that is, the convention of 1954. This demonstrates the countries' lack of political will to legally commit themselves to combatting and preventing statelessness. Nonetheless, the existing obligations emanating from human rights treaties legally bind these States to develop measures towards realising the rights of either stateless persons or persons at risk of being stateless.

Concerning the domestic legal framework of these countries (Kenya, Tanzania and Uganda), their laws, while providing for the right to nationality at least for children born within their territories, do not provide

for an accruing obligation for states to fulfil such a right.¹⁶⁹ Further, laws from all three countries have discretionary systems for naturalisation, defeating the set conditions and requirements for a person to be naturalised.¹⁷⁰ No country provides for express constitutional protection against statelessness in deprivation cases. Moreover, no country in the EAC has a legal or institutional mechanism for the identification and protection of stateless migrants through either the grant of nationality or the status of a stateless person.

Specifically, in Tanzania, although under its law, every child has a right to nationality, the law does not provide for an accruing obligation of the state to protect children within its territory against statelessness.¹⁷¹ No wonder, due to such non-obligatory nationality rights to a child, no law in Tanzania provides for either recognition or protection of foundlings. That is to say, a child found in the territory of Tanzania whose parents cannot be traced is at risk of statelessness and this is because citizenship by birth in Tanzania is legally linked with that of a parent. For a person born in Tanzania to be a citizen, either of their parents must be a citizen.¹⁷² Further, the laws in Tanzania do not provide any nationality prospects for adopted children. This makes adopted children in Tanzania to be at risk of statelessness as well.

Another legal loophole that falls short of minimum international standards in Tanzania is the inequality between men and women in their capacity to pass nationality to their spouses upon marriage. In Tanzania, only women married to Tanzanian men qualify to apply for naturalisation by that status.¹⁷³ This means only Tanzanian men can cause their wives to be granted Tanzanian citizenship. This provision, apart from being against the principle of non-discrimination, puts non-citizen men married

¹⁶⁹ On this see Bronwen Manby, “Statelessness and Citizenship in the East African Community”, UNHCR, September 2018, p. 9.

¹⁷⁰ Ibid.

¹⁷¹ The Law of the Child Act No. 21/2009, s 6(1).

¹⁷² The Citizenship Act, 1995, Cap. 357 (R.E 2002), s 5(2)(a).

¹⁷³ Ibid., s 11.

to Tanzanian women at risk of statelessness especially where their country of origin deprives citizenship status upon marriage to a non-citizen. Essentially, even in circumstances where such a non-citizen is capable of retaining their country of origin's nationality, they can nonetheless not apply for Tanzanian citizenship since laws in Tanzania still do not allow for dual nationality, save for persons below 18 years.¹⁷⁴ On equal footing, a Tanzanian citizen who acquires another nationality automatically loses their Tanzanian citizenship. This provision is applicable even for persons in possession of citizenship by birth.

Coming to Uganda, just like Tanzania, a person cannot be a citizen solely by being born within the territory of Uganda. For such a person to be a citizen of Uganda, in addition to being born in Uganda, it must further be established that one of their parents or grandparents is a member of any of the indigenous communities.¹⁷⁵ If such a person's parents or grandparents do not belong to any of the indigenous communities, then they must be Ugandan citizens by birth.¹⁷⁶ This also applies to persons born outside Uganda but whose one of their parents or grandparents is a Ugandan citizen by birth.¹⁷⁷ Ordinarily, and especially where the naturalisation process is bureaucratic and discretionary, attributing citizenship by birth to that of a parent or grandparent puts children born within the territory to non-citizen parents at risk of statelessness.¹⁷⁸ Unlike Tanzania, in Uganda, a child aged five years or below who is found in Uganda and whose parents are nowhere to be found is presumed to be a Ugandan citizen by birth.¹⁷⁹ Moreover, a non-citizen child below 18 years who is adopted by a Ugandan citizen is entitled to

¹⁷⁴ Ibid., s 7.

¹⁷⁵ Ibid., art 10 (a).

¹⁷⁶ Ibid., art 10 (b).

¹⁷⁷ Ibid.

¹⁷⁸ See Bronwen Manby, "Statelessness and Citizenship in the East African Community", UNHCR, September 2018, p. 8.

¹⁷⁹ The Constitution of Uganda, 1995, art 11 (1).

be registered as a Ugandan citizen upon application.¹⁸⁰ Dual nationality in Uganda, unlike Tanzania, is recognised and allowed.¹⁸¹

Lastly, in Kenya, under the constitution, every child has a right to a name and nationality.¹⁸² Again, the constitution does not provide for an accruing state obligation to fulfil such a right.¹⁸³ The citizenship laws of Kenya, just like Tanzania and Uganda are based on a descent model (*jus sanguinis*). That is to say, for a person to be a citizen by birth in Kenya, either of their parents (or grandparent) must be a citizen.¹⁸⁴ The opposite of this is called *jus soli* where a person is entitled to a country's citizenship by being born in the territory of such a country regardless of whether one of their parents (or grandparents) is a citizen. As stated earlier, where citizenship laws are based on *jus sanguinis*, children born to non-citizens within the territory of a country are at risk of statelessness. On this fact, Kenya has been condemned to have failed to protect Nubian children born in the country against statelessness. This was similarly observed by the African Committee of Experts on the Rights and Welfare of the Child in 2009 following a communication brought by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative.¹⁸⁵ Arriving from the territory of the Sudan, Nubian people (currently at a population of over 100,000) have been in Kenya for more than a century without being naturalised as a result they are unable to access their basic services such as health, education and formal labour.¹⁸⁶

¹⁸⁰ Ibid., art 11(2).

¹⁸¹ The Citizenship and Immigration Control Act, Cap. 66, s 19 as amended by Act No. 5 of 2009.

¹⁸² The Constitution of Kenya, 2010, art 53 (1)(a).

¹⁸³ Ibid.

¹⁸⁴ Ibid., art 30.

¹⁸⁵ *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v the Republic of Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Communication No. 002/2009.

¹⁸⁶ See Elvis Fokala and Lilian Chenwi, "Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee" (2013) 6 *African Journal of Legal Studies*, pp. 357-373.

Despite the preceding, the citizenship laws of Kenya unlike Tanzania have some positive features in fighting statelessness. For instance, foundlings aged below eight, are entitled to Kenyan citizenship by birth.¹⁸⁷ Further, adopted children can also apply for Kenyan citizenship.¹⁸⁸ Furthermore, dual nationality is allowed in Kenya albeit limited to Kenyan citizens by birth only.¹⁸⁹ That is to say, it is only a Kenyan by birth who can get another citizenship.¹⁹⁰ For a non-citizen to be a Kenyan, they must renounce their former nationality.

4. Specific Stateless or Potential Stateless Populations in the EAC

Emanating from inter alia the features of the domestic legal framework above, the following populations in Tanzania, Kenya and Uganda are either stateless or at risk of statelessness:

4.1. The United Republic of Tanzania

One of the groups in Tanzania which is at risk of statelessness is composed of Burundian refugees who have self-settled in Kigoma villages since 1972. These refugees are still not naturalised and no avenue has been provided by the government for them to be naturalised. In essence, there is no political will from the government and there has been a ‘malicious’ misconception that this group is self-sufficient.¹⁹¹ Running from a Hutu-Tutsi civil war in Burundi, this group arrived in Tanzania in 1972. While some self-settled in Kigoma villages others were settled in Ulyankulu settlement in Tabora region. Those who settled in the Ulyankulu settlement were offered naturalisation in the 2010s and by

¹⁸⁷ The Constitution of Kenya, 2010, art 14(4).

¹⁸⁸ Ibid., art 15(3).

¹⁸⁹ Ibid., art 16, read together with the Kenya Citizenship and Immigration Act, Cap. 172 (R.E 2012), s 8.

¹⁹⁰ Ibid.

¹⁹¹ See the UDSM-CSFM, IRRI and SSRC, “Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania”, *Citizenship and Forced Migration in the Great Lakes Region*, Working Paper No. 1, November 2008, p. 23; see also Daniel Dickinson, “To Stay or Go Home?: Long-Term Burundian Refugees in Tanzania” European Commission Humanitarian Aid Department, June 2009, available at <<https://reliefweb.int/report/burundi/stay-or-go-home-long-term-burundian-refugees-tanzania>> (accessed 18 September 2023).

2014 more than 160,000 had been naturalised.¹⁹² The naturalised Burundian refugees in the 2010s became the second refugee population to be naturalised after the naturalisation of more than 25000 Rwandan refugees in 1981.¹⁹³ Refugees self-settled in Kigoma villages have disestablished themselves from Burundi (their country of origin) and hence majority of them if not all are unable to voluntarily return to Burundi hence the durable solution of voluntary repatriation cannot be applied to them.¹⁹⁴ They can equally not opt for resettlement to a third country after having a considerable establishment in Kigoma villages.¹⁹⁵ They are currently faced with various challenges such as a lack of legal identity due to lack of status documentation, something which makes their access to the labour market, health and education grim.¹⁹⁶ More unfortunately, lack of documentation makes their claim of either Burundian or Tanzanian nationality futile.¹⁹⁷ Hence, their risk of being stateless becomes high.

Another group that was at high risk of statelessness was the group of Comorians and Makonde in Zanzibar who arrived before independence from Comoro and Mozambique totaling about 3000 people.¹⁹⁸ Fortunately, on 5 September 2023, this group was granted Tanzanian citizenship.¹⁹⁹ Nonetheless, a strong political cum legal mechanism

¹⁹² See Amelia Kuch, “Naturalization of Burundian Refugees in Tanzania” (2016) 52 *Forced Migration Review*, pp. 64-65.

¹⁹³ See Charles P. Gasarasi, “The Mass Naturalization and Further Integration of Rwandese Refugees in Tanzania: Process, Problems and Prospects” (1990) 3(2) *Journal of Refugee Studies*, pp. 88-109.

¹⁹⁴ UD SM-CSFM, IRRI and SSRC, “Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania”, *Citizenship and Forced Migration in the Great Lakes Region*, Working Paper No. 1, November 2008, pp. 23-24.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ See Caroline Nalule and Anna Namboozee, “Report on Citizenship Law: Tanzania”, European University Institute-Robert Schuman Centre for Advanced Studies, April, 2020, p. 20.

¹⁹⁹ See Bethsheba Wambura, “Tanzania Grants Citizenship to Over 3,300 Immigrants”, *The Citizen*, Wednesday, 06 September 2023, available at: <<https://www.thecitizen.co.tz/tanzania/zanzibar/tanzania-grants-citizenship-to-over-3-300-immigrants--4359990>> (accessed 22 September 2023).

should be kept in place for the children (below 18 years) of persons emanating from this group to be assured of their nationality since they were born at a time when their parents were not citizens of Tanzania.

4.2. The Republic of Kenya

The Makonde were stateless for a long time in Kenya before being granted Kenyan citizenship. They arrived in Kenya between the 1930s and 1950s from Mozambique.²⁰⁰ Some settled in Tanzania, where, since Tanzanian independence, they have been recognised as Tanzanian citizens.²⁰¹ Those who settled in Kenya did not get registered as Kenyan citizens due to various reasons, such as inability to bear the costs of registration, expectation of returning to Mozambique and some due to lack of information.²⁰² Following their substantial establishment in Kenya, they were unwilling and unable to go back to Mozambique due to their disestablishment from Mozambique.²⁰³ For more than 50 years, they had been in a vulnerable situation in Kenya, being unable to access identity documents, hence unable to open bank accounts, register telephone SIM cards, acquire business licenses, access the formal labour market, enroll in the education system and access the health system.²⁰⁴ Following continuous pressure from the Makonde themselves and the civil society, in November 2016, the government of Kenya declared an opportunity for Makonde people to apply for Kenyan citizenship free of charge and in February 2017, about 1492 Makonde people were granted citizenship.²⁰⁵ President Uhuru Kenyatta (as he then was) declared Makonde a 43rd tribe in the Republic of Kenya.²⁰⁶ However, it appeared

²⁰⁰ See Modesta Ndubi, “The Makonde: from Stateless to Citizenship in Kenya”, UNHCR, 15 March 2017, available at <<https://www.unhcr.org/ke/10581-stateless-becoming-kenyan-citizens.html>> (accessed 10 August 2023).

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ See Kenya Human Rights Commission, “The Arduous Journey of the Makonde to Kenyan Citizenship”, 2016 available at <<https://citizenshiprightsafrika.org/the-arduous-journey-of-the-makonde-to-kenyan-citizenship/>> (accessed 3 September 2023).

²⁰⁵ Ibid.

²⁰⁶ Ibid.

that some still had Mozambique's voter registration cards and hence their citizenship applications were not granted and they were allowed to deactivate their voter registration cards and reapply.²⁰⁷

Another population that was granted citizenship and hence rescued from statelessness was the Shona people. The Republic of Kenya granted citizenship to over 1600 Shona people in July 2021.²⁰⁸ They arrived in Kenya in the 1950s from Zimbabwe.²⁰⁹ Another group is that of the Pemba Community, which arrived in Kenya in various periods. Some arrived after the Second World War and some after the Zanzibar revolution of 1964. Their migration from Zanzibar to Kenya was made easy by the then good relationship between Tanzania, Kenya and Uganda, which from 1967 to 1977 culminated in forming the defunct EAC. Following their long-lasting informal integration into the Kenyan Swahili population in July 2023, all 7000 members of the Pemba Community were granted Kenyan citizenship and President William Ruto issued birth certificates, identification cards and passports to individuals from the Pemba community who have been living in Kenya for decades.²¹⁰

Despite the positive progression and successive stories of alleviating statelessness in the Republic of Kenya, there are still populations that are either stateless or at risk of statelessness. The Comorian migrants from Comoro Island (Ngazija) are at high risk of statelessness in the Republic of Kenya. The Comorians who first settled in Zanzibar-Tanzania before migrating to Kenya are at high risk of statelessness, and to date, they are neither Kenyan nor Tanzanian. The majority of them cannot equally

²⁰⁷ Ibid.

²⁰⁸ See Andrew Wasike, "Stateless Shona Community gets Kenyan Citizenship" 28 July 2021, available at <<https://www.aa.com.tr/en/africa/stateless-shona-community-gets-kenyan-citizenship/2317077>> (accessed 21 September 2023).

²⁰⁹ Ibid.

²¹⁰ UNHCR, "UNHCR Applauds Kenya's Efforts to Resolve Stateless Situation of Pemba Community", 23 July 2023 available at: <<https://www.unhcr.org/uk/news/press-releases/unhcr-applauds-kenya-s-efforts-resolve-stateless-situation-pemba-community>> (accessed 11 September 2023).

claim Comorian nationality due to lack of proof of their birth in Comorians having been in exile for more than 70 years now.²¹¹ The government of Kenya has been lacking the political will to naturalise them, allegedly due to their existing nexus with Zanzibar, a neighbouring island to Mombasa Island in Kenya, where the majority of Comorians live.²¹² Currently, they are informally integrated into the Kiswahili speaking community in Kenya.²¹³ Comoro shares history with the Sultanate regime that occupied Mombasa, Kenya, and Zanzibar, Tanzania; hence, it has much in common historically and culturally with the Swahili community.²¹⁴ No wonder as already shown earlier, Comorians in Zanzibar were granted Tanzanian citizenship. The situation is however different to Comorians in Kenya who remain un-naturalised to date and as said, are potentially stateless.

Another group that is potentially stateless in Kenya is the group of Somali migrants and refugees. The majority live in Naivasha and Isiolo and the minority are scattered in other places within Kenya.²¹⁵ The majority of them fled to Kenya after the collapse of the Somali state in the 1990s and hence their nationality claim in Somalia is obsolete.²¹⁶ They are currently in exile for more than 30 years and are unwilling to voluntarily repatriate to Somalia. Due to a lack of documentation, some of them have been trapped in irregular migration status.²¹⁷ As of December 2022, their

²¹¹ See Gilliam Marie Shepherd, “The Comorians in Kenya: The Establishment and Loss of an Economic Niche”, PhD Thesis, London School of Economics, 1982, p. 4.

²¹² See Bronwen Manby, “Statelessness and Citizenship in the East African Community”, UNHCR, September 2018, p. 49.

²¹³ Ibid.

²¹⁴ See Gilliam Marie Shepherd, “The Comorians in Kenya: The Establishment and Loss of an Economic Niche”, PhD Thesis, London School of Economics, 1982.

²¹⁵ See Elizabeth H. Campbell, “Formalizing the Informal Economy: Somali Refugee and Migrant Trade Networks in Nairobi” (Global Migration Perspectives, Working Paper No. 47), September 2005, p. 3.

²¹⁶ See Canadian Immigration and Refugee Board, “The Horn of Africa: Multiple Citizenship of the Ethnic Somalis”, 1 January 1992, available at <<https://www.refworld.org/docid/3ae6a81120.html>> (accessed 2 September 2023).

²¹⁷ See Anna Lindley, “Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees in Kenya” (2011) 20(4) Refugee Survey Quarterly, pp. 14-49.

count was 279, 925 settled in Kenya's Nairobi, Turkana and Garissa regions.²¹⁸ At one moment in June 2016, Presidential contestant Raila Odinga proposed for a grant of citizenship to long-term Somali refugees in Kenya.²¹⁹

Further, the Nubian community and their resultant children and grandchildren have been in stateless limbo for quite a long time. Despite their continued advocacy under the auspices of civil society, their cry has gone unheard.²²⁰ They settled in Kenya before independence, arriving from present-day Sudan. Their migration to Kenya was pioneered by Great Britain after it conscripted them from Sudan into the British army. They were known as *Askaris* (Swahili/Arabic word for soldier) or as King's African Rifle. They were allocated some pieces of small plots of land for small-scale farming in Kibera. On several occasions, the African Commission as well as the African Committee of Experts on the Rights and Welfare of the Child have ruled against the Republic of Kenya, observing that Kenya has failed to protect the Nubian Community against statelessness for having laws that are against minimum standards provided under international human rights law.²²¹

4.3. The Republic of Uganda

Under the laws of Uganda, a child born to a naturalised Ugandan citizen does not automatically acquire Ugandan citizenship by birth. A child who becomes a citizen by birth is the one who is born to a parent who is a citizen by birth.²²² This child becomes at high risk of statelessness since

²¹⁸ Abdirahman A. Muhumad and Rose Jaji, "Somali Refugees, Informality and Self-Initiative at Local Integration in Ethiopia and Kenya" (2023) 11(1) *Journal of Migration and Human Security*, pp. 75-88.

²¹⁹ *Ibid.*

²²⁰ See Elvis Fokala, "Do not Forget the Nubians: Kenya's Compliance with the Decisions of African Regional Treaty Bodies on the Plight and Rights of Nubians" (2021) *Dejure Law Journal*, pp. 476-492.

²²¹ See *Nubian Community in Kenya v Kenya*, Communication No. 317/2006 and *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v the Republic of Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Communication No. 002/2009.

²²² See the Constitution of Uganda, 1995, art 10.

they cannot apply for naturalisation as the period within which a non-citizen is eligible for naturalisation is twenty years.²²³ Acquiring the nationality of their parents becomes tricky since some of the parents might have denounced their country of origin's nationality to acquire Ugandan nationality before dual nationality was allowed in 2005. This narration applies to children of Ugandan Asian returnees.

Preceding the above, in 1972 the then President of Uganda Idd Amin expelled about 76,000 Ugandan Asians.²²⁴ These Asians had been present in Uganda since the 1890s being brought by the British during colonialism.²²⁵ After their expulsion in 1972, they fled to the UK and established their lives there leaving their homes and businesses in Uganda.²²⁶ In 1997, President Yoweri Museveni welcomed the expelled Ugandan Asians to return to Uganda. About half of the expelled ones returned and they were recognised as naturalised citizens. Against this backdrop, their children have been at risk of statelessness due to the preceding reasons.

Another group that is subject to statelessness in the Republic of Uganda comprises children of long-term refugees, particularly South Sudanese, Congolese and Rwandese. Some have been in Uganda for more than fifty years including Rwandan Tutsi who fled to Uganda in various periods from 1959 to 1973.²²⁷ Congolese refugees have been in Uganda since 1964 fleeing the Lumumbist rebels' defeat.²²⁸ South Sudanese

²²³ Ibid., art 12(2)(c).

²²⁴ Thomas Brown, "Ugandan Asians: 50 Years Since the Expulsion from Uganda" 31 August 2022, available at <<https://lordslibrary.parliament.uk/ugandan-asians-50-years-since-their-expulsion-from-uganda/>> (accessed 14 September 2023).

²²⁵ Ibid.

²²⁶ Mansi Vithlani, "How Ugandan Asians are Keeping their History Alive: 50 Years After Expulsion" 4 August 2022 available at <<https://gal-dem.com/ugandan-asian-expulsion-leicester-anniversary/>> (accessed 29 August 2023).

²²⁷ See Tigranna Zakaryan, "Report on Citizenship Law: Uganda", European University Institute-Robert Schuman Centre for Advanced Studies, May 2019.

²²⁸ Ibid.

started to enter Uganda in 1972 after the first Sudanese civil war.²²⁹ To date, they remain un-naturalised in Uganda. Notably, Uganda has an international reputation for being a refugee-friendly territory.²³⁰ Uganda has been notorious for its non-encampment policy, which encourages refugees to integrate into the local community.²³¹ As of June 2023, the number of refugees and asylum seekers in Uganda was 1,561,634.²³² The children of these long-term refugees cannot apply for naturalisation or registration due to the 20 years of residence requirement. The lack of documentation to prove the country of origin for these refugees makes not only their children but also themselves unable to rely on the nationality of their country of origin; hence, they become at risk of statelessness.²³³

5. Shortfalls in the EAC's Response to Statelessness

Ordinarily, statelessness falls within the spheres of immigration and citizenship laws which in most cases fall within national jurisdiction and more often beyond regional integration laws. Nonetheless, within the scope of the purpose for which it was formed, a regional bloc plays a complementary and supplementary role in improving the political, social and economic conditions of the member states or partner states. In essence, regional blocs have been instrumental in facilitating the free movements of persons within the bloc and eventually not only promoting the legal identity of citizens of member states but also their

²²⁹ Emmanuel Bagenda and Lucy Hovil, "Sudanese Refugees in Northern Uganda: From One Conflict to the Next" (2003) 16 *Forced Migration Review*, pp. 14-16.

²³⁰ Alexander Betts, et al., "Refugee Economics in Uganda: What Difference Does the Self-Reliance Model Make?", *Refugee Studies Centre*, 2019, p. 1.

²³¹ *Ibid.*

²³² UNHCR, "Uganda Factsheet-June 2023", 15 August 2023, available at <<https://reliefweb.int/report/uganda/unhcr-uganda-factsheet-june-2023>> (accessed 13 September 2023).

²³³ Samuel G. Walker, "From Refugee to Citizen? Obstacles to the Naturalization of Refugees in Uganda", LL.M Dissertation, University of Cambridge, 2012, p. 1; see also Georgia Cole, "Refugees' Integration in Uganda will Require Renewed Lobbying" (2014) 48 *Forced Migration Review*, pp. 68-69.

citizenship rights.²³⁴ On this basis, regional blocs have been resorted to in fighting against statelessness.²³⁵ The EAC, despite its existing efforts towards promoting the free movement of persons and their accruing identity, has proved a fiasco as far as fighting statelessness is concerned.²³⁶ Needless to say, even the existing successful stories of fighting statelessness in the EAC, have been at the auspices of the partner states without sustenance from the EAC as a regional integration.²³⁷

The fighting of statelessness is not a one man show by a partner state alone; it needs intervention of many actors including regional blocs. According to the UNHCR, fighting statelessness is a combination of collective efforts from governments, NGOs, regional blocs, international organisations and the UNHCR in particular.²³⁸ The EAC insufficient response to statelessness is largely caused by the following possible factors:

5.1. Inadequate Policy Framework

The EAC lacks a dedicated policy document for fighting statelessness. The available provisions under the Community law have proven to be inadequate for want of specificity and abundance. Under the EAC Treaty, partner states commit themselves to adopt measures dedicated towards free movement of labour, persons and services and consequently ensure that the rights to establishment and residence are

²³⁴ Bruno Nascimbene, *Nationality Law and the Law of Regional Integration Organization: Towards New Residence Status*, (the Hague Academy of International Law, Brill 2022), p. 2.

²³⁵ See Brad K. Blitz and Caroline Sawyer, *Analysis: The Practical and Legal Realities of Statelessness in the European Union*, (Statelessness in the European Union: Displaced and Unwanted, 2011), p. 334.

²³⁶ See Emmah Wabuke and Ouma Patricia, *Regional Responses to Nationality, Citizenship and Child Statelessness: The Case of the East African Community*, (Children in Migration: Nomos Verlagsgesellschaft mbtt and Co KG. 2022), pp. 151-168.

²³⁷ Juliana Masabo, "Statelessness and Rightless? An Appraisal of Standards and Practices on Prevention of Statelessness and Protection of Stateless Persons in Africa" in *the Routledge Handbook of African Law*, (Routledge, 2021), pp. 511-527.

²³⁸ See UNHCR, "Establishing Statelessness Determination Procedures to Protect Stateless Persons" *Ending Statelessness within 10 Years*, Good Practice Paper, (Action 6, 2014), p. 1.

enjoyed by citizens within the community.²³⁹ Free movement is always far from access by stateless persons due to a lack of identity documents. Therefore, a provision on enhancing free movement is always positive for stateless persons. However, this commitment, while plausible, does not accord any protection to persons in the community who are already stateless since it applies to citizens. It can however be used for protecting citizens who are at risk of statelessness. Further, the EAC Treaty has a provision that, if properly utilised, it may be of use for protecting long-term refugees against statelessness. Under this provision, partner states to the EAC commit themselves to adopting common mechanisms for the management of refugees.²⁴⁰ This provision has however been rendered obsolete as partner states so far have distinct frameworks and policies on the management of refugees.

Integral to the EAC Treaty is the Protocol for the Establishment of the EAC Common Market (CMP) of 2010.²⁴¹ The CMP has several provisions that may be applicable in fighting against statelessness. Under the CMP, partner states are obliged to ensure the issuance of identification documents to nationals, including using a valid common standard travel document.²⁴² Again, as for the EAC Treaty, these provisions of the CMP are beneficial to persons who are already citizens of partner states and not stateless persons. A leeway for EAC partner states is available under the International Conference on the Great Lakes Region (ICGLR). All EAC partner states are members of the ICGLR. In 2017, the ICGLR adopted a Declaration and Regional Action Plan on the Eradication of Statelessness (2017-2019). Under these arrangements, members commit themselves to taking several measures towards the eradication of statelessness. These measures include reform of nationality laws, adoption of national action plans, ratification of statelessness

²³⁹ Treaty for the Establishment of the East African Community, 1999, art 104 (1 and 2).

²⁴⁰ *Ibid.*, art 124 (5) (h).

²⁴¹ Under art 151 of the EAC Treaty, protocols are integral to it.

²⁴² Protocol for Establishment of East African Community Common Market, 2010, arts 8 and 9.

conventions and nomination of government focal points on statelessness. By April 2018, the fourth commitment had been fully implemented since focal points had been nominated in all ICGLR member states and were trained by the UNHCR. Sadly, the operation of the ICGLR towards genuinely fighting statelessness has remained on paper rather than in actual practice.²⁴³

5.2. Volatile Political Will

The available provisions under the EAC legal framework, albeit derisory, are nonetheless sufficient for acting as an initial point for impactful combatting of statelessness in the region. Apparently, the founders and subsequent partner states of the EAC had not put statelessness as a priority area of cooperation. That means, the intention is to retain the domestic sovereignty mandate of partner states to deal with the phenomenon using national measures. There is therefore no political will for the partner states' governments to leverage the EAC legal framework in fighting against statelessness.²⁴⁴ The volatile political will of the EAC partner states towards a regional approach to combatting statelessness can also be reflected in the fact that, despite the adoption of the Declaration and Regional Action Plan on the Eradication of Statelessness under the ICGLR framework, no significant steps have been taken to implement the same.

As a result of the above two shortfalls, the EAC is faced with a number of challenges that worsen the statelessness problem in the region. These are the absence of national legal procedures on the identification of stateless persons and grant of status, lack of accurate data on statelessness,

²⁴³ See, Juliana Masabo, "Statelessness and Rightless? An Appraisal of Standards and Practices on Prevention of Statelessness and Protection of Stateless Persons in Africa" in *the Routledge Handbook of African Law*, (Routledge, 2021), pp. 511-527.

²⁴⁴ See Bronwen Manby, "Statelessness and Citizenship in the East African Community", (A Study for UNHCR, September 2018), pp. 76-78

absence of a dedicated domestic legal framework on statelessness and inadequate birth registration.²⁴⁵

6. Best Practices from ECOWAS

From the outset, it is significant to mention that the binding norms of the ECOWAS community laws are more or less similar to the EAC laws. The community laws of the ECOWAS apply only to citizens of its member states; community citizens are properly so-called and not to stateless persons. This can be seen from the provisions of the Protocol relating to the Free Movement of Persons, Residence and Establishment of 1979 and the Protocol relating to the Definition of Community Citizen of 1982. A community citizen in the ECOWAS is defined as a citizen of a member state.²⁴⁶ Hence, stateless persons cannot benefit from the protective provisions of the ECOWAS community laws, just like it is the case with the EAC community laws.

What features as the icebreaker in the ECOWAS is the strong political will of member states that has been manifested through the adoption and robust implementation of policy documents on preventing and fighting statelessness in the region.²⁴⁷ From 2014 to date, the ECOWAS has developed policy documents which, though interpreted as soft laws, have significantly contributed to the current positive developments in the prevention and combatting of statelessness. By 2022, according to the UNHCR, the ECOWAS was a leading region in effectively taking measures towards the eradication of statelessness.²⁴⁸ The first policy

²⁴⁵ Juliana Masabo, “Statelessness and Rightless? An Appraisal of Standards and Practices on Prevention of Statelessness and Protection of Stateless Persons in Africa” in *the Routledge Handbook of African Law*, (Routledge, 2021), pp. 511-527.

²⁴⁶ The Protocol relating to the Definition of Community Citizen, 1982, art 1.

²⁴⁷ See Amalie Raun Weinrich, “Regional Citizenship Regimes from Within: Unpacking Divergent Perceptions of the ECOWAS Citizenship Regime” (2023) 61(1) *Journal of Modern African Studies*, pp. 117-138.

²⁴⁸ See UNHCR, “Five Years Since Abidjan Declaration, West Africa Leads on Reduction of Statelessness in Africa”, 2 March 2022 available at <<https://www.unhcr.org/news-releases/five-years-abidjan-declaration-west-africa-leads-reduction-statelessness-africa>> (accessed 12 September 2023).

document is the Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness of 25 February 2015. It was adopted in Abidjan-Cote D' Ivoire during the first Ministerial Conference on Statelessness. The conference was co-organised by the ECOWAS and the UNHCR. It was endorsed by all ECOWAS Heads of States in May 2015 in Accra, Ghana, during the ECOWAS Summit. The document provides for 25 measures dedicated to ECOWAS member states on putting an end to statelessness in the region by 2024. Post and resulting from the conference, 62 recommendations on implementing the commitments made were adopted.

The preceding document was followed by the Banjul Plan of Action of the Economic Community of West African States on the Eradication of Statelessness (2017-2024). It was adopted pursuant to and in furtherance of the recommendations and commitments made in the Abidjan Declaration. Inter alia, the Banjul Plan of Action provides support measures that the UNHCR and the ECOWAS can avail to ECOWAS member states in line with Articles 22 and 25 of the Abidjan Declaration. More importantly, the Banjul Plan of Action provides for monitoring mechanisms for the implementation of the Abidjan Declaration.

The more recent document relevant to the prevention and combatting of statelessness in the ECOWAS is the Regional Model Law on the Determination of Statelessness, the Protection of Stateless Persons and The Facilitation of their Naturalisation adopted in May 2023. The ECOWAS adopted this model law in partnership with the UNHCR and the Economic Community of Central African States (ECCAS). The main objective underpinning the adoption of this document is to enable stateless persons in the ECOWAS to have a legal identity and hence be able to live in dignity. The document is considered a source of inspiration to ECOWAS member states to develop their domestic laws for either the protection of stateless persons or applicants for recognition of such

status.²⁴⁹ Fundamentally, this model law was adopted under Objective 3.1 of the ECOWAS Banjul Plan of Action, which provides for the determination and grant of status to stateless persons in the region. The totality of the policy documents has led to various achievements in the ECOWAS by 2023.²⁵⁰

12 out of 15 ECOWAS member states have signed, ratified and/or acceded to the 1954 and 1961 stateless conventions. Commitment to accede to the two statelessness conventions features in Articles 4 and 14 of the Abidjan Declaration. Further, nine out of 15 ECOWAS member states have adopted, developed and initiated implementation of national action plans against statelessness. This is under Article 24 of the Abidjan Declaration.

Moreover, towards the improvement of accurate data for stateless persons and pursuant to Articles 1 and 15 of the Abidjan Declaration, statelessness studies have been completed in Liberia, Côte d'Ivoire, Gambia, Benin, Ghana, Mali and Nigeria. And, pursuant to Article 5 of the Abidjan Declaration, there has been an official nomination of national focal points for issues relevant to statelessness in all ECOWAS member states.

It is also important to note that ECOWAS member states that had gender discriminatory laws such as Sierra Leone and Liberia have removed gender discrimination in their citizenship laws which prevented mothers from passing their nationalities to their children on an equal footing with men.

²⁴⁹ See the preamble to the Regional Model Law on the Determination of Statelessness, Protection of Stateless Persons and the Facilitation of their Naturalization, May 2023.

²⁵⁰ On this see also Solomon Oseghale Momoh, *Statelessness Determination Procedures and the Right to Nationality: Nigeria in Comparative Perspective*, (Routledge-Taylor and Francis, New York 2023), p. 22; see also UNHCR, “Five Years since Abidjan Declaration, West Africa Leads on Reduction of Statelessness in Africa” 2 March 2020, available at <<https://www.unhcr.org/news/-releases/five-years-abidjan-declaration-west-africa-leads-reduction-statelessness-africa>> (accessed 11 September 2023).

7. Conclusion

The central argument of this chapter is that unlike the ECOWAS member states, EAC partner states have yet to utilise the EAC community laws in fighting and combatting statelessness in the region. Although there have been spontaneous measures and decisions at the individual level by partner states, without a dedicated policy framework at the regional level, fighting and combatting statelessness will be discretionary at the choice of governments and not as a matter of regional policy. This is even cemented by the fact that EAC partner states do not have a dedicated domestic legal framework on statelessness. As stated earlier, the duty to prevent and fight statelessness has attained the status of customary international law. Henceforth, the lenient policy framework for fighting statelessness by the EAC partner states amounts to a breach of international law. To curb this conundrum:

As a starting point, the EAC should adopt a policy framework, whether it be a Protocol to the EAC Treaty or a declaration on fighting statelessness, to act as a guiding mechanism for fighting statelessness in the region. The adoption should be coupled with a strong monitoring mechanism to spearhead the implementation of the commitments by partner states. This will be a catalyst for enhancing the political will of partner states and may consequently be an inspiration for partner states to accede to the two UN statelessness conventions.

Further, the EAC should develop a standard reference framework for the review of citizenship laws of partner states. This may come along with a standard methodology and design for data collection on statelessness. This can also be included during national population censuses. It will address the lack of accurate data on statelessness in the region. An operational standard reference framework may also come with a model law on the determination and issuance of statelessness status. This will act as a guide for determination procedures by partner states.

The EAC should establish a regional committee that will be responsible for assessing and regularising stateless persons including populations at risk of statelessness who present in the EAC partner states. As a tool towards raising awareness of statelessness in the region, it is also useful for the EAC to set a special date to commemorate the fight against statelessness in the bloc.

Chapter Eight

Traversing the Internally Displaced Persons’ Phenomenon and Its Effects in Realising the EAC Common Market

*Lillian Mihayo Mongella**

1. Introduction

The Common Market is one of the main pillars of the EAC. This is the second milestone achieved in 2010 by signing the Protocol on the Establishment of the EAC Common Market. The Common Market is geared at improving the quality of life of the people of East Africa as well as accelerating the economic growth and development of the partner states by providing freedoms, including free movement of goods, services, persons, workers, capital, and providing rights, particularly, right of establishment and residence.

Partner states within the EAC are facing the problem of internally displaced persons (IDPs) due to a number of factors, mainly political, especially civil unrest. The issue of IDPs seriously affects the full

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achievement of the stages of integration, particularly the Common Market, which directly touches the lives of the citizens within the partner states. This is because IDPs are socially isolated due to living in camps that are usually in remote areas and cannot build any networks. This state restricts them from enjoying rights as other normal citizens, such as the right to work and build professional expertise, move freely, own property, or access financial services. As such, the objective of improving the economies of the citizens within the partner states in the community cannot be achieved without equality for all members. Therefore, this chapter addresses the restrictions faced by IDPs within the EAC that affect the full achievement of the integration objectives, especially those in the Common Market stage.

2. The Concept of Internally Displaced Persons

Before 1992, IDPs had not been assigned a clear definition of who they were. This is because the focus internationally was on refugees. IDPs were thus viewed as people who had fled their homes, not fitting in the definition of refugees.¹ The effort to accord IDPs a clear definition started to gain light in the early 1990s. Specifically, in 1992, whereby a working definition was provided in the Analytical Report of the UN Secretary General. The report defined IDPs as:

Persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or manmade disasters; and who are within the territory of their own country.²

¹ Catherine Phuong, *The International Protection of Internally Displaced Persons* (Cambridge University Press, 2004), p. 2.

² UN Commission on Human Rights, Analytical Report of the Secretary General on Internally Displaced Persons, UN Doc E/CN4/1992/23. Extracted from, Romola

The above definition was revised in 1998 through the UN Guiding Principles on IDPs. The revised definition stands to date and is being referred to in other instruments, reports and scholarly works. Under Principle 2, IDPs are defined as:

Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human made disasters, and who have not crossed an international recognised state border.³

According to the above definitions, for a person to fall within the scope of IDPs, they must be displaced within their country's national borders. This is unlike refugees, who acquire the status upon crossing international borders. The AU has also adopted the exact definition of IDPs.⁴

3. The State of IDPs in the EAC

The EAC is among the affected regions in the world with IDPs, with the most affected states being Burundi, the DRC, Somalia, South Sudan, Uganda and Kenya.⁵ However, the exact number of IDPs in the region is uncertain. Various sources report varying numbers of IDPs in the East and Horn of Africa region. For instance, the UNHCR reports that by the

Adeola, *The Internally Displaced Person in International Law* (Edward Elgar Publishing Limited, 2020), p. 2.

³ United Nations Guiding Principles on Internal Displacement, (E/CN.4/1998/53/Add.1).

⁴ Article 1 (k), African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted by the Special Summit of the Union, Kampala-Uganda, 23 October 2009. Entered into Force on 06 December 2012.

⁵ Zachary Strain, "South-South Migration within the East and Horn of Africa Region" in Glenn Rayp, Ilse Ruyssen and Katrin Marchand (eds), *Regional Integration and Migration Governance in the Global South* (Springer Nature Switzerland AG 2020).

end of 2022, the East and Horn of Africa and the Great Lakes region had 10.7 million IDPs.⁶ The EAC reports the presence of 17 million IDPs within the East and Horn of Africa region by April 2023.⁷ At the IGAD-EAC High-Level Ministerial Conference on Durable Solutions for Refugees, held in Kampala, Uganda, between June 13 and 16, 2023, the number of IDPs within the Intergovernmental Authority on Development (IGAD) and EAC region was reported to be 12 million.⁸ However, despite the varying numbers in these reports, the general picture is that the problem of IDPs in the region is alarming.

3.1. The Root Causes in Generating IDPs and the Predicaments Faced by IDPs

There are several root causes of the phenomenon of IDPs in the region. These are mainly armed conflicts and violence/civil unrest, natural disasters, climate change, harmful practices, and development projects.⁹ Armed conflicts, however, form more than 80% of the IDPs generating causes. Except for Tanzania, the other partner states in the Community have undergone an armed conflict or serious civil unrest at one point or another. Research conducted by the Stockholm International Peace Research Institute (SIPRI) reveals that out of the 49 States in sub-Saharan Africa, 18 have been involved in active armed conflict by 2021. The conflicts are grouped into high-intensity conflicts and low-intensity ones. In both groups falls a number of EAC partner states. The research report shows that the DRC, Somalia and South Sudan are among the states

⁶ UNHCR, “Global Report 2022”, available at <reporting.unhcr.org/operational/regions/east-and-horn-africa-greatlakes> (accessed 14 October 2023).

⁷ East African Community, “President Ruto to Officiate the Launch of the State of Migration in East and Horn of Africa Report”, available at <eac.int/press-release/148-immigration-and-labour/2789> (accessed 14 October 2023).

⁸ IGAD-EAC, “Durable Solutions for Refugees in the East and Horn of Africa”, available at <igad.int/wp-content/uploads/2023/06/Agend-Booklet-EAC-IGAD-Kla-2023> (accessed 14 October 2023).

⁹ Romola Adeola, *Emerging Issues in Internal Displacement in Africa* (Springer Nature Switzerland AG 2021), pp. 4-5.

involved in high-intensity armed conflict, while Burundi, Kenya and Uganda have been involved in low-intensity armed conflicts by the year 2021.¹⁰

Armed conflicts within these states are triggered by a number of factors, including ethnic and religious tensions rooted in a combination of other factors such as corruption, ineffective delivery of basic services to the citizens, competition over natural resources, inequalities and a sense of marginalisation among ethnic and religious groups. Other factors include the presence of armed groups, election-related violence and the weakness of states in protecting the citizens from violence, addressing the root causes and providing durable solutions.¹¹

Generation of IDPs and refugees are among the effects of armed conflicts. This is because armed conflicts, particularly internal armed conflicts, are coupled with high violations of human rights. Atrocities such as killings, rape, torture, and maiming are committed against civilians day by day. This causes civilians to flee their homes in search of shelter and safety. Among the top 10 states with high numbers of IDPs worldwide, by 2022, two of them were partner states in the EAC. These are the DRC, with an estimated number of 5,686 IDPs, and Somalia, with an estimated number of 3,864 IDPs.¹²

In the DRC, more than 80% of displacement is caused by armed conflict waging in the Eastern DRC in the provinces of Ituri, North Kivu, South Kivu and Tanganyika, whereby more than 120 militias and armed groups

¹⁰ Ian Davis, “Armed Conflict and Peace Processes in Sub-Saharan Africa” available at <sipri.org/yearbook/2022/07#:text=In%20East%20Africa%20%209%20of,in%20large-scale%20armed%20violence> (accessed 21 July 2024).

¹¹ Ibid.; see also, Annie Barbara Chikwanha, “The Anatomy of Conflicts in the East African Community (EAC): Linking Security with Development” available at <aselleiden.nl/pdf/lectureeanniechikwanha.pdf>.

¹² Einar H. Dyvik, “Countries with the highest number of IDPs due to conflict worldwide 2022” available at <statista.com/statistics/545975/number-of-newly-internally-displaced-persons-due-to-conflict-by-country/> (accessed 21 July 2024).

fight the government while perpetrating widespread violations and abuses against civilians.¹³ The situation in Somalia is also complicated, as the country has been undergoing repeated incidents of displacement since 1991. Currently, Somalia has more than 2,400 IDPs sites in the urban and peri-urban areas across the country. Apart from the conflict and insecurity that has lasted for decades due to the fragility of the State, displacement in Somalia is also caused by drought and floods.¹⁴

South Sudan has experienced a wave of IDPs since it gained independence from Sudan in 2011. Since then, the country has never been free from conflicts, violent attacks and sexual assaults, particularly against women and children. By July 2023, the country was estimated to have 2.3 million IDPs.¹⁵ A report by a special rapporteur on the human rights of internally displaced persons mission to South Sudan, Chaloka Beyani, May 2014, revealed causes of conflicts to include politicised ethnic violence, political instability, and absence of transparent and inclusive process towards national cohesion. Apart from conflicts, the report revealed other causes of displacement, such as evictions giving way to development projects, particularly in urban areas of Juba, Aweil, Wau and Rumbek, and natural hazards, particularly floods due to heavy rains. These have affected livelihoods, homes and infrastructure in states like Janglei, Warrap, Unity, and Upper Nile, though these states have also undergone conflicts.¹⁶

¹³ Reliefweb, “Democratic Republic of the Congo: Internally displaced persons and returnees, February 2024”, available at <Reliefweb.int/report/democratic-republic-congo/democratic-republic-congo-internally-displaced-persons-and-returnees-february-2024> (accessed 21 July 2024).

¹⁴ UNHCR “Horn of Africa Somalia Situation” available at <data.unhcr.org/en/situations/horn/location/292> (accessed 21 July 2024).

¹⁵ UNHCR, “South Sudan Emergencies”, available at <unrefugees.org/emergencies/south-sudan/> (accessed 23 July 2024).

¹⁶ OHCHR “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani, Mission to South Sudan-May 2014” available at <http://www.ohchr.org.>A-HRC-26-33-Add3_en> (accessed 23 July 2024).

In Kenya, IDPs have resulted from multiple factors over the years. These include long-standing inter-ethnic disputes over land, cattle rustling, competition over scarce resources, conflicts between pastoral and agricultural communities, conflicts between refugees and local population, particularly in the Turkana district, politically instigated ethnic clashes, especially during elections, droughts and floods.¹⁷ The 2007-2008 post-election violence is said to have had immense effects on the population compared to other events.¹⁸ The post-election violence is estimated to have generated about 250,000 IDPs scattered in 331 spontaneous IDP camp sites in Rift-Valley, Western, Nyanza and Nairobi provinces.¹⁹ Currently, most of Kenya's IDPs result from climate disasters. As of May 2024, there were about 194,305 IDPs in Kenya following heavy rains and flooding, which affected Nakuru, Nairobi, Kirinyaga, Home Bay, Machakos, and Tana River provinces.²⁰

Currently, most of Burundi's IDPs result from climate disasters such as violent winds, torrential rains, and floods. As of March 2023, Burundi was estimated to have about 75,300 IDPs across all its provinces. Out of this number, 66,805 resulted from climate disasters.²¹ In Rwanda, IDPs were generated during the 1994 genocide. Presently, it is unclear whether Rwanda can be classified as having IDPs or not. This is due to the fact that quite a large number of the displaced persons were re-settled by the

¹⁷ Fidh “Massive Internal Displacements in Kenya Due to Politically Instigated Ethnic Clashes: Absence of Political and Humanitarian Responses” available at <fidh.org/IMG/pdf/Kenya-end.pdf> (accessed 24 July 2024).

¹⁸ Forced Migration Review (FMR), “Internal Displacement in Kenya: the quest for durable solutions” available at <fmreview.org/kiama-koome/> (accessed 24 July 2024).

¹⁹ UNHCR, “Supplementary Appeal for IDPs in Kenya 2008” available at <unhcr.org/in/sites/en-in/files/legacy-pdf/479eed1f2.pdf> (accessed 24 July 2014).

²⁰ Reliefweb, “Kenya: Heavy Rains and Flooding Update-Flash Update” available at <reliefweb.int/report/Kenya/kenya-heavy-rains-and-flooding-update-flash-update-4-03-may-2024> (accessed 24 July 2024).

²¹ UNHCR, “East and Horn of Africa, and the Great Lakes Region: Regional Overview-Internally Displaced Persons, January-March 2023” available at <C:/User/user/Downloads/IDP%20regional%20overview%20Jan-March%202023.pdf> (accessed 24 July 2024).

year 1999. Some, however, were re-settled in unconducive environments, leading them to be termed IDPs according to the UN. Nevertheless, the situation has kept on changing for the better.²² There is no precise data on IDPs in the country at the moment.

In Uganda, IDPs have been generated over the past years due to various factors, such as armed conflicts, cattle rustling and natural disasters. Since independence, the country has undergone several armed conflicts, civil unrests and other violations. This includes the dictatorial regime of Idi Amin from 1971 to 1979 which was coupled with attacks and other human rights violations, the war in the Lowecro Triangle between 1981 and 1985, the insurgency by the Uganda People's Army (UPA) in the North-East (Soroti and Kumi districts) from 1987, fighting movements by the Holy Spirit Movement and later the LRA, which lasted for decades. The atrocities committed during these fighting caused people to flee their homes. During the intense fighting between the LRA and the government forces, the number of IDPs raised into millions.²³ However, the plight of IDPs in Uganda is currently not alarming as it used to be during the intense armed conflict in the Northern part. In fact, in 2012 the UNHCR marked Uganda a non-IDPs crisis area following a ceasefire and return to homes by most of the IDPs. In that respect, it ended its activities in Uganda whereby it used to assist nearly 2 million IDPs in 251 camps across 11 districts in Northern Uganda.²⁴ This, however, does not entail that Uganda is a totally IDPs free state. Out of the 251 camps, only 247 were closed.²⁵

²² Reliefweb, "Internal Displacement in Rwanda: new profile summary" available at <reliefweb.int/report/Rwanda/internal-displacement-rwanda-new-profile-summary.> (accessed 24 July 2024).

²³ The Republic of Uganda, The National Policy for Internally Displaced Persons, August 2004.

²⁴ UNHCR, "UNHCR closes chapter on Uganda's internally displaced people.", available at <unhcr.org/news/briefing-notes/unhcr-closes-chapter-uganda-internally-displaced-people> (accessed 25 July 2024).

²⁵ Ibid.

Cattle rustling has occurred in Karamoja, Katakwi and Pader districts causing a number of IDPs. Natural disasters, particularly landslides and floods at the slopes of Mount Elgon, Rwenzori mountains, the hills of Kigezi, Ankole, the Semliki Valley and along the basin of River Nile in the North of the country, have as well generated a number of IDPs.²⁶ These natural disasters continue to make the country prone into generating more IDPs in future as the incidents are unpredicted and not easily controlled.

IDPs are among the vulnerable groups of persons due to the dire situations they have to go through. In developing states with limited resources, as the EAC member states, apart from lack of freedom, IDPs are subjected to poor living conditions whereby they lack adequate and proper basic care such as food, clothing, clean water and sanitation, education and health care. Due to their unplanned migration, IDPs also lack finance and documents for travel and further education, particularly the youths. In conflict zones, IDPs face security issues as they are usually attacked and violated their human rights. They face physical attacks, sexual assaults, and abductions.²⁷

4. Legal, Policy and Institutional Framework on IDPs in the EAC

Currently, no legal, policy or institutional framework is in place for handling IDPs in the EAC. However, in its dealings, the EAC makes reference to international and regional (African Union) legal and policy instruments and guidelines. The problem of IDPs also appears to be

²⁶ The Uganda National Policy for Internally Displaced Persons, August 2004.

²⁷ UN-OHCHR, "About internally displaced persons", available at <[ohchr.org/en/special-procedures/sr-internally-displaced-persons/about-internally-displaced-persons](https://www.ohchr.org/en/special-procedures/sr-internally-displaced-persons/about-internally-displaced-persons)> (accessed 25 July 2024); see also, F. Olanrewaju, F. Omotoso and J. Alabi, "Datasets on the challenges of forced displacement and coping strategies among displaced women in selected internally displaced persons' (IDPs) camps in Nigeria", available at <[C:/Users/user/Downloads/Datasets_on_the_challenges_of_forced_displacement_.pdf](C:/Users/user/Downloads/Datasets_on_the_challenges_of_forced_displacement_.pdf)>.

managed at the national level, whereby some of the state parties have put in place policies and law enactments for handling IDPs. Such policies and enactments adhere to the standards set in the United Nations General Principles on Internal Displacement of 1998 and the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).

The common features of these two instruments are that they define the scope of IDPs, protect their human rights, which are the same as those of other people, charge states with the obligation to protect the rights of IDPs, invoke measures to prevent displacement, reintegrate IDPs into communities, and facilitate their free movement by providing them with necessary documentation as assistance.

It, however, should be noted that the UN Guiding Principles on Internal Displacement are not a binding instrument but rather a guide. The Guiding Principles are, however, highly regarded and followed by the UN member states in managing the IDP crisis. In contrast, the Kampala Convention is an instrument with legal force and has been drafted along the same lines as the Guiding Principles. So far, among the EAC partner states, four states have signed and ratified the Kampala Convention, two have only signed, and one has not signed or ratified. The ones that have signed and ratified are the DRC, which signed on 02 February 2010 and ratified on 03 February 2022; Uganda, which signed on 23 October 2009 and ratified on 29 January 2010; Rwanda, which signed 23 October 2009 and ratified on 27 December 2012; and South Sudan, which signed on 24 January 2013 and ratified on 26 September 2018. States that have signed but not ratified are Burundi, signed on 23 October 2009, and Tanzania, signed on 08 December 2010. Kenya has not signed or ratified.²⁸

²⁸ African Union, “Status List (EN)”, available at <au.int/sites/default/files/treaties/36846> (accessed 15 October 2023).

At the national level, Kenya and South Sudan have enacted laws for handling IDPs. Kenya, though not signed or ratified the Kampala Convention, enacted a law in 2012 titled “*Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012*”. Kenya also has a policy on IDPs called “*National Policy on the Prevention of Internal Displacement, Protection and Assistance to Internally Displaced Persons (IDPs) in Kenya*”. Both instruments provide for prevention, protection and assistance to IDPs and affected communities in line with the UN Guiding Principles for Internal Displacement and the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons.

South Sudan enacted a law in 2019 titled “*Protection and Assistance to Internally Displaced Persons Act, 2019*”. The law was based on the UN Guiding Principles on Internal Displacement and the Kampala Convention and provides for the same protections and safeguards under these instruments.²⁹

The Uganda’s policy on IDPs was concluded in August 2004. The policy is based on the UN Guiding Principles on Internal Displacement, constitutional guarantees for the protection of citizens, and other regional human rights policies. It recognises the rights of IDPs in the same way as those of other citizens but focuses on their special needs, such as returning, resettlement, and reintegration.³⁰

5. Effects of IDPs on the EAC Integration

As stated in the introduction, this chapter discusses the effects of the problem of IDPs on EAC integration in relation to the Common Market

²⁹ Extracted from, Rose Mwebi, “Towards a Legal Framework on Internal Displacement in South Sudan” in Romola Adeola (ed), *National Protection of Internally Displaced Persons in Africa: Beyond the Rhetoric* (Springer 2021).

³⁰ Friederike Santner, “Uganda’s Policy for Internally Displaced Persons. A Comparison with the Colombian Regulations in Internal Displacement”, available at <www.redalyc.org> (accessed 14 October 2023).

stage of integration. Article 1 of the EAC Treaty defines a Common Market as “the partner states’ markets integrated into a single market in which there is free movement of capital, labour, goods and services.” Common Market, therefore, entails “elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about the conditions as close as possible to those of a genuine internal market.”³¹ In other words, it is a merger of two or more territories to form one common territory with free movement of persons, goods, labour, services and capital, and the rights of establishment and residence.³²

In the EAC, the Common Market is the second regional integration milestone to be achieved.³³ The Protocol on the Establishment of the EAC Common Market (Common Market Protocol - CMP) entered into force in 2010. The Common Market is geared at accelerating economic growth and development of the partner states. As such, the CMP guarantees the movement of goods, persons, labour, services, capital, and the right of establishment and residence. These freedoms and rights are interrelated and interdependent. For instance, there cannot be free movement of goods if there is no free movement of persons or capital. There cannot be free movement of labour if there is no free movement of persons, services, or right of establishment and residence.

This chapter considers the free movement of persons paramount for realising the guarantees under the CMP in relation to IDPs. The free movement of persons is guaranteed under Article 7 of the CMP. The provision obliges partner states to commit to guaranteeing the free movement of persons who are citizens of the other partner states within their territories. In doing so, partner states are obliged to ensure non-

³¹ EAC, “Common Market”, available at <<https://www.eac.int>> (accessed 06 October 2023).

³² Ibid.

³³ Ibid.

discrimination against the citizens of other partner states based on their nationalities. The provision, therefore, requires partner states to ensure entry of other partner states' citizens into their territory without visa, free movement of the citizens of other partner states, and freedom of staying into the partner state's territory and exit.

As stated earlier, the essence of having a Common Market is to accelerate the economic growth and development of the citizens of the partner states, which in turn accelerates the economic growth and development of the partner states. The member States benefit from the trade and taxes payable in the trade. As much as the free movement of persons is guaranteed under the CMP, the same is not without restrictions. The freedom is not absolute. It is subject to restrictions imposed by the host partner state in accordance with its public policy, public security and public health.³⁴ For instance, though citizens of one partner state are allowed to enter other partner states without a visa, they must have other travel documents, such as passports.

IDPs face several limitations due to being confined to one place (the IDP camps). These include a lack of proper travel documents, which impedes their ability to cross their national borders in the enjoyment of the benefits the Common Market offers to the citizens of the partner states, and a lack of capital to enable them to move from one place to another and conduct business or create networks. Thus, this group of persons within the partner states is left behind, and the partner states are affected in one way or another.

Considering the significant number of IDPs within the EAC and the restrictions they have on active participation in economic activities, the EAC is deprived of the workforce that would have entered the Common Market and contributed to the economic growth and development of

³⁴ Ibid.

the partner states. For instance, IDPs are deprived of self-development opportunities, such as education or skilled work experience, which they could use to enjoy the guarantees under the free movement of labour, which would eventually benefit the partner states.

As discussed earlier, the United Nations Office of the High Commissioner on Human Rights reports that IDPs are at a higher risk of physical attacks, sexual assault and abductions, which put them at a higher rate of mortality than the general population.³⁵ As such, the workforce within the EAC is further affected. Events like these come with attackers invading IDP camps for looting and abductions, which also poses security issues concerning the Community as a whole. This has happened in partner states that are faced with rebel groups, for example, the LRA in Uganda, which on several occasions invaded IDP camps in Gulu, abducting people and burning down huts.³⁶ When a state faces security issues in parts of its territory, people cannot be free to move and conduct economic activities freely. The goals of integration are to fast-track economic growth and development in all parts within the boundaries of the partner states. As such, the goals of the Common Market cannot be fully achieved as long as citizens within the partner states cannot reach some parts of the respective states; they would wish to for security reasons in the realisation of the freedoms and rights guaranteed under the Common Market.

As a regional block, the EAC has a number of developmental issues to take care. The Community has not passed through all the stages of integration and looks forward to achieving that. To facilitate all integration activities, including running the various offices and institutions of the Community, member states make financial contributions. This

³⁵ OHCHR, “About Internally Displaced Persons”, available at <<https://www.ohchr.org>> (accessed 16 October 2023).

³⁶ ReliefWeb, “Uganda: LRA Rebels Attack Gulu IDP Camp”, available at <<https://reliefweb.int>> (accessed 16 October 2023).

obligation adds up to the other obligations member states have towards their national citizens. In the premises, the presence of IDPs adds to the financial burden of the member states to the EAC and the national citizens. Even if the problem of IDPs is handed by the EAC, it shall add the burden to the Community in terms of financial, time and other resources. The Community shall be forced to somehow divert its attention into dealing with IDPs instead of concentrating on the issues relevant to the development of the integration.

6. Conclusion

IDPs are an integral part of the citizenry in the EAC. Just as every other citizen's contribution is vital to the security, economic growth, and prosperity of the Community, IDPs' contribution is equally vital. In that respect, their integration into the Community is inevitable. To achieve this, the present chapter recommends the following approaches to be taken on board:

Common Approach to Root Causes of IDPs

The EAC should have a common approach to arresting all the root causes of generating IDPs, particularly armed conflicts and other civil unrests that force people to flee their homes. As discussed earlier, almost all EAC partner states have undergone an armed conflict or civil unrest at one point or another. This is, in fact, a major root cause of the generation of IDPs in the region. The EAC, therefore, needs to develop workable mechanisms to prevent the eruption of armed conflicts and other civil unrest. Researches show that most of the armed conflicts and other civil unrests are caused by ethnic and religious differences, which are also connected to fights for control of political power and control of natural resources.³⁷ Therefore, the EAC needs to develop measures,

³⁷ See, K Ngeta, K Njogu and M Wanjau, *Ethnic Diversity in in Eastern Africa: Opportunities and Challenges* (Twaweza Communications, 2010); see also, G Schlee and A Shongolo, *Islam & Ethnicity on Northern Kenya and Southern Ethiopia* (James Currey, 2012).

such as adopting legal instruments and policies that bring equality among varying ethnic and religious groups in different economic, political, and social facets. It also has to establish mechanisms for controlling natural resources for the benefit of all citizens within the EAC member states to prevent conflicts fueled by the fight for natural resources.

It is not that no effort has been made at all. Some mechanisms have already been implemented or are underway. Under Article 124 of the EAC Treaty, the EAC recognises the need for peace and security within the partner states and provides a number of approaches to be implemented for a secure and peaceful environment within the region. Under this provision, the EAC adopted the Protocol for Peace and Security. Among the implementations effected under the Protocol is the implementation of a Regional Strategy for Peace and Security and the establishment of a peacekeeping force, the EACRF.³⁸ However, this chapter holds that these efforts deal with crimes already committed and restore peace where it has been disrupted. They do not directly address the root causes of generating IDPs.

The EAC should also develop joint measures to alleviate the economic hardships its citizens face to prevent civil unrest caused by economic hardships. Such measures should be geared at creating employment, especially for the youth. This should include creating jobs or a conducive environment that enables self-employment and prosperity, for example, reducing taxes for citizens and harmonised school curriculums that prepare the youth for self-employment.

Establishment of IDPs Response Department

The EAC should establish an IDPs response department at its secretariat that should be responsible for coordinating matters related to IDPs at the

³⁸ EAC, “EAC reaffirms its commitment to restoration of peace in Eastern DRC”, available at <eac.int/press-releases/154-peace-security/3007-eac-reaffirms-its-commitment-to-restoration-of-peace-in-eastern-drc> (accessed 11 July 2024).

sub-regional level. This department also shall be foreseeing the prevention of IDP generation causes and programmes to re-integrate IDPs into the Community in collaboration with individual partner states. In essence, the management and protection of IDPs remain highly the responsibility of the national government. However, in recognition of how overwhelming the influx of IDPs can be to national governments, some agencies like UNHCR have intervened in assisting national governments to care for IDPs by providing shelter, food, clean water, health care and other required assistance.³⁹ The ICRC also provides similar assistance to national governments and works towards alleviating the root causes of generating IDPs.⁴⁰ It is, therefore, in the same spirit that the EAC should establish an IDP response department to assist the member states in corroboration with other international agencies like the UNHCR and ICRC.

Legal Instruments and Policies to Enable IDPs to Enter the Community

The EAC should develop its own instruments and policies for handling IDP crises within the Community. Through the legal instruments and policies, partner states should be charged with the responsibility to ensure IDPs are accorded the necessary documents and skills to enter the Community and enjoy the rights and freedoms as the rest of the citizens in the partner states. The EAC appears to concentrate on refugees, leaving out IDPs. Under Article 124 (4) and (5) (h) of the EAC Treaty, the Community is charged with the task of establishing common mechanisms for the management of refugees. The EAC is underway to finalise and adopt the EAC Regional Refugee Management Policy. The policy is geared towards ensuring regional approaches in line with

³⁹ UNHCR, “Internally Displaced Persons”, available at <[unhcr.org/about-unhcr/who-we-protect/internally-displaced-people](https://www.unhcr.org/about-unhcr/who-we-protect/internally-displaced-people)> (accessed 21 July 2024).

⁴⁰ Jakob Kellenberger, “The ICRC’s response to internal displacement: strengths, challenges and constraints”, available at <international-review.icrc.org/sites/default/files/irrc-875-kellenberger.pdf> (accessed 21 July 2024).

international standards, such as access to quality asylum procedures, protection and assistance, digital identity documents, family unity and durable solutions are implemented.⁴¹

It is only at some points in certain forums where IDPs are mentioned with a promise to develop mechanisms to deal with the problem.⁴² This is however not enough. In my view, IDPs can be well managed if there are binding legal and policy instruments in place charging the Community with an obligation to do so. Most of the EAC member states are also member states to the Great Lakes Region. The Great Lakes Region is committed to managing the IDP crisis in the region. In that respect, it has adopted a protocol on IDPs, *the Great Lakes Protocol on Internally Displaced Persons*, on 30 November 2006. This instrument provides for the management of IDPs and provides durable solutions to combat the problem of IDPs in the region. In the same spirit, the EAC should also adopt the instrument to govern and manage the IDP crisis in the region in collaboration with other international institutions and respective partner states, adding to the efforts already in place.

⁴¹ EAC, “Peace and Security”, available at <eac.int/press-releases/148-immigration-and-labour/2968-eac-to-partner-with-other-stakeholders-to-improve-refugee-welfare-in-east-africa> (accessed 21 July 2024).

⁴² EAC, “EAC reaffirms its commitment to restoration of peace in Eastern DRC”, available at <eac.int/press-releases/154-peace-security/3007-eac-reaffirms-its-commitment-to-restoration-of-peace-in-eastern-drc> (accessed 11 July 2024).



PART IV

HUMAN MOBILITY, INVESTMENT AND LABOUR MARKET IN THE EAC

Chapter Nine

Assessment of the Migration Legal Framework in Enhancing Human Mobility for Higher Education in the EAC

*Belinda Chepchumba Rop**

1. Introduction

Internationalisation and student mobility within the EAC are topical issues in higher education.¹ Human mobility has become a hallmark of higher education internalisation within the EAC.² There is a growing trend towards regionalisation as higher education adjusts to openness and globalisation within the region.³ East African member states responded

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¹ Tibelius Amutuhare, and Y. El Kirat El Allame, “Hybrid Mobility: The Future of Internalization and Student Mobility in East Africa”, (*ICESD9* July 2023); see also, Per-Anders Forstorp and Ulf Mellström, “Higher Education, Globalization and Eduscapes: Towards a Critical Anthropology of a Global Knowledge Society” (*Palgrave Studies in Global Higher Education*, July 2018).

² Emma Sabzalieva, Takudzwa Mutize, and Clarisa Yerovi, “Moving Minds: Opportunities and Challenges for Virtual Student Mobility in Post-pandemic World” (*United Nations Educational, Scientific and Cultural Organization, Paris*, July 2022).

³ Tibelius Amutuhare, “Regionalization and Higher Education Student Mobility in East Africa: Examination of Opportunities and Challenges from the Ugandan Context”, (2023) 14(4), *Journal of International Students*, pp. 45-58; see also, Rachel Brooks and

by forming networks and collaborations that bolstered business, higher education, student and staff mobility, and research due to the fact that regionalisation is ingrained in East Africa's economy, politics, culture, and social norms.⁴ Universities with the EAC continue to invest in increasing inbound student mobility and how to produce globally competent graduates.⁵ In recent decades, human mobility for higher education with the EAC has seen an increasing trend, and the growth of international programmes, expansion of branch campuses, joint partnerships, and increased global mobility of academics confirm this global approach to education.⁶

Needless to say, human mobility for higher education purposes within the EAC is a strategic concept and agenda which is widespread, as both public and private universities continue to invest in increasing inbound student mobility and how to produce globally competent graduates.⁷ According to Article 102 of the Treaty for the Establishment of the EAC, the partner states undertook concerted measures to foster co-operation in education and training within the Community. Further to the Treaty provisions, the 18th Ordinary Summit of EAC Heads of State that took place on 20 May 2017 declared the EAC as a Common Higher

Johanna Waters, *Student Mobilities, Migration and the Internationalization of Higher Education*, Houndmill, Basingstoke (U.K. Palgrave Macmillan, 2011).

⁴ Julien Arseneault, et al., "The Environmental Footprint of Academic and Student Mobility in a Large Research-Oriented University", (2019) 14(9), *Environmental Research Letter*, pp. 34-59.

⁵ Stephen Odebero, Ulf Engel, U., and Mathias Middell, "Factors Influencing Unequal Cross Border Higher Education Students' Mobility in East African Community", (2015) 4(1), *Research Journal of Education*, pp. 35-49.

⁶ Hans de Wit and Philip G Altbach, "Internationalization in Higher Education: Global Trends and Recommendations for its Future", (2021) 5(1), *Policy Reviews in Higher Education*, pp. 28- 46.

⁷ Ibrahim Oanda, and Fred Matiang'i, "The East African Higher Education Area: A Global or Regional Higher Education Space", (2018) 4 (3), *Forum for International Research in Education*, pp. 56-76.

Education Area to harmonise and enhance the quality of education in the region.⁸

On 20 May 2017, the Summit of the East African Heads of State declared the EAC a common higher education area, thereby bringing into force the EAC Common Higher Education Area (EACHEA).⁹ The establishment of the EACHEA can be traced to three historical contexts. The first is the colonial context that saw higher education in East Africa being established as a joint enterprise with the Federal university of East Africa. The federal university collapsed in 1970 as the political leadership opted for autonomous national universities.¹⁰ The Inter-University Council of East Africa (IUCEA), one of the institutions that survived the collapse of the federal university and the EAC was later revived and has been instrumental in creating the common education area.¹¹ The desire for the creation of the EACHEA by the political leadership of the region may be interpreted as an expression of the region to establish strong higher education institutions.¹² The aim of such a political ambition is to have higher education institutions better suited to address the developmental challenges of the region while at the same time, signalling a wish to open the higher education institutions of the

⁸ See the Joint Communiqué: 18th Ordinary Summit of Heads of State of The East African Community, available at <https://www.foreign.go.tz/eac/docs_view/joint-communique-18th-ordinary-summit-of-heads-of-state-of-the-east-african> (accessed 23 October 2023).

⁹ Stefan Trines, “Bologna-type Harmonization in Africa: An Overview of the Common Higher Education”, JOUR, 2018.

¹⁰ Ibrahim Oanda and Fred Matiang’i, “The East African Higher Education Area: A Global or Regional Higher Education Space”, (2018) 4 (3), Forum for International Research in Education, pp. 56-76.

¹¹ Tibelius Amutuhaire, “Improving Access and Equity in East African Higher Education through Internationalization”, (2023) 8(1), FIRE: Forum for International Research in Education, pp. 22–39.

¹² Inter-University Council for East Africa, IUCEA. (20 May 2017). Declaration by Heads of State of the East African Community Partner States on the transformation of the East African Community into a Common Higher Education Area, available at <<http://iucea.org/eahea1/declaration/>> (accessed 24 November 2023).

region to external players- students, researchers and private sector players, but doing so from a position of strength.¹³

In the EAC, cross border movement in search of higher education in neighbouring countries still remain a challenge despite the efforts of integration within EAC. Studies have shown that in EAC, cross border movement in search of HE in neighbouring economies has been to say the least, the most unequal with majority of the students. Against this backdrop, this paper aims to assess of the migration legal framework in enhancing human mobility for higher education purposes in the East Africa community.

2. Historical Background for Student Mobility in the EAC

In the past two decades, there have been substantial changes to the higher education systems in the East Africa Community.¹⁴ This can be traced back to the history of higher education at the three pioneer institutions in the area: Makerere University in Uganda, University of Nairobi in Kenya, and University of Dar es Salaam in Tanzania.¹⁵ These institutions were all founded in 1970 following the dissolution of the University of East Africa, which had been around since 1963.¹⁶ The cooperation and networking of these universities that included exchange of students and staff, has seen many of those assuming leadership positions in the three countries to have interacted as students in one of the universities. This is

¹³ Ngalomba, S., and Bacwayo, K., “Intra-regional mobility of students for university education. Push and pull factors of Tanzanian students in Kenyan Universities”, Conference of Rectors, Vice chancellors and presidents of African universities; Azhar University, Egypt, 2015.

¹⁴ David Court, “East African Higher Education from the Community Standpoint”, (1977) 6(1), *Higher Education*, 1977, pp. 45-66.

¹⁵ Inter-University Council for East Africa Harmonization of Higher Education in East Africa, July 2015.

¹⁶ Ibid.

one of the key drivers of the continuous collaboration between the East African nations.¹⁷

After the collapse of the former EAC in 1977, the three universities continued to cooperate in a number of ways, initially under the umbrella of the Inter-University Committee, which in 1980 was transformed into the current IUCEA.¹⁸ When the current EAC was re-established in 1999, the IUCEA - recognised as one of the surviving institutions of the former EAC - was given broader mandate of coordinating the development of higher education and research to promote sustainable socio-economic development and regional integration.¹⁹

The strategic interventions of the IUCEA specified in the roadmap was integrated into the 4th EAC Development Strategy (2011-2016) and they focus on the following areas: operationalising the IUCEA Act 2009 which spells out the objectives, functions, institutional set up and systems of governance and management of the IUCEA and implementing the full integration of IUCEA into the EAC institutional framework; enhancing university support systems by developing, promoting and supporting student and staff exchange programmes; enhancing curriculum development strategies and university leadership skills and competences; and mainstreaming the ICT into institutional core functions and general support operations; strengthening research support to universities and within the Community; strengthening higher education quality assurance processes in university institutions and eventually establishing an East African system of quality assurance; enhancing regional research management and coordination systems for

¹⁷ Stephen Odebero, Ulf Engel, and Mathias Middell, "Factors Influencing Unequal Cross Border Higher Education Students' Mobility in East African Community", (2015) 1(4), *Research Journal of Education, Academic Research Publishing Group*, pp. 35-49.

¹⁸ IUCEA, "Harmonization of higher Education in East Africa Status Update", 2015, available at <http://repository.eac.int/bitstream/handle/11671/2047/Harmonization%20of%20Higher%20Education%20in%20East%20Africa%20Status%20Update.pdf?sequence=1&isAllowed=y> (accessed 29 November 2023.)

¹⁹ Ibid.

universities and the Community; and, supporting higher education research in the Community so as to establish a regional education research repository for supporting harmonisation of education systems and education sector reforms.

The interventions also includes establishing an East African qualification framework to facilitate harmonisation of education and training systems, and student mobility across the region, and harmonisation of skills, competences and qualifications, so as to simplify mutual recognition of the latter; supporting the EAC regional integration process through various strategies; and, supporting establishment of systems for the university of the future by promoting responsiveness of university institutions in the region to both excellence and relevance to the society.²⁰ Harmonisation of higher education in East Africa was prompted by, among others, the need to establish a framework to facilitate comparability of higher education quality standards to allow mobility of students and to promote regional and international competitiveness, comparability, and compatibility of the curriculum and qualifications attained for them to be mutually recognisable among the EAC partner states and outside the Community, and hence promote labour mobility.²¹

It is worth noting that higher education plays a special and crucial role in fostering East Africa's cooperation and regional integration.²² Each country in the region has seen a significant rise in university enrolment, driven by demographic growth and the resulting expansion of secondary education.

²⁰ See the Inter-University Council of East Africa, *Benchmarks for Bachelor of Education Programmes*, 2017.

²¹ Ben Ruhinda, "Harmonisation of Higher Education Systems Towards an EAC Common Higher Education Area", available at < <https://www.knqa.go.ke/wp-content/uploads/2019/05/Harmonizing-education-in-East-Africa.pdf> > (accessed 24 November 2023).

²² Paulo Drummond, S. Kal Wajid, and Oral Williams, *The Quest for Regional Integration in the EAST African Community*, International Monetary Fund, 2018, pp. 120-124.

3. Legal Framework for Student Mobility in Higher Education in the EAC

The Treaty for the Establishment of EAC clearly stipulates the commitment of the partner states to develop policies and programmes aimed at deepening and widening cooperation among partner states and to harmonise their education and training systems to provide for, among others, concerted efforts in the development of human resources, and mobility of people, labour, and services.²³

In 2006, the EAC signed the EAC Education Protocol, which aimed to harmonise education policies and systems in the region. The protocol outlined various measures to be taken, such as the recognition of academic qualifications acquired in any EAC partner state, the promotion of vocational and technical education, and the establishment of a common higher education area. The protocol also provided for the establishment of a regional quality assurance and accreditation framework to ensure that education standards are maintained.²⁴

In that regard, the coming into force of the Protocol for the Establishment of the EAC Common Market in July 2010 required the IUCEA to develop systems that, among others, would enhance students' mobility and labour across the partner states, and hence transform the EAC region into a Common Higher Education Area. Thus, in 2013 and 2014, the IUCEA guided a regional consultative and participatory process that led to the development of the East African Qualifications Framework for Higher Education (EAQFHE), which was approved by the EAC Council of Ministers on 30 April 2015.

The IUCEA embarked on the development of the students' mobility policy to contribute to the implementation of the Common Market

²³ Article 102 read together with Article 5 of the EAC Treaty.

²⁴ East Africa Community, "EAC Partner States working to harmonise education systems and curricula in the region", available at <<https://www.eac.int/press-releases/138-education,-science-technology-news/1545-eac-partner-states-working-to-harmonise-education-systems-and-curricula-in-the-region>> (accessed 11 December 2023).

Protocol (CMP) which provides for mobility of Human Resource and goods across the Community. An IUCEA-led team of experts from the EAC partner states developed a draft Students Mobility Policy which was presented to the 2nd Meeting of the Scholarship, Students and Staff Mobility Committee held on 18 March 2015 in Dar es Salaam. The student mobility policy developed by the IUCEA provides a framework for the promotion of students' mobility among the partner states, as a way of facilitating regional integration as envisioned in the CMP.²⁵

The team held a couple of meetings and developed a draft Policy which was considered by the Scholarship, Students and Staff Mobility Committee on 27 September 2015 and approved by the Executive Committee on 6 October 2015 in Kigali, Rwanda. It is expected that this policy will provide a framework for the promotion of students' mobility among the partner states, as a way of facilitating regional integration as envisioned in the CMP and transforming EAC region into a Common Higher Education Area.²⁶

In 2015, the EAC developed a common curriculum framework for primary and secondary education in the region. The framework aimed to promote the harmonisation of education systems and the development of relevant skills for the region's job market. The framework also provided for the development of a common assessment system to ensure that education standards are maintained.²⁷

4. Harmonisation of Higher Education System in the EAC

The coming into force in July 2010 of the Protocol for the Establishment of the EAC Common Market prompted the need to harmonise higher education systems in the Community, among other, to enable the operationalisation of Article 11 of the Protocol which entails facilitation

²⁵ Inter-University Council for East Africa, "Academic Staff Mobility: Policy Framework", 2015, p. 20

²⁶ Ibid.

²⁷ East African Qualification Framework for Higher Education, 2015.

of easy mobility of learners and labour across the partner state borders. The harmonisation of higher education systems was aimed at transforming the EAC region into a common higher education area by 2017.²⁸

Harmonisation of higher education system in the EAC relates to the establishment of a framework for comparability of higher education systems in the Community partner states. Important elements for harmonisation of higher education in East Africa constitute the following: Regional higher education policy framework, Regional quality assurance system operationalised by principles and guidelines in quality assurance, and benchmarks for Regional Qualifications Framework.²⁹

In 2017, Heads of East African states declared the transformation of the EAC into a Common Higher Education Area, which would facilitate the recognition of academic certificates and the transfer of credits from higher education institutions across the region, at their summit on 20 May in Dar es Salaam, Tanzania³⁰. The harmonisation of the region's higher education aims to attain an increasingly networked and interrelated group of curriculums linked in such a way that the systems possess overlapping, interconnected, and comparable logistics that are uniform across the EAC region.³¹ It is expected to significantly enhance students' and academics' mobility across the partner states. Below is a framework of reference for harmonisation of higher education in East Africa.

²⁸ Inter-University Council for East Africa, "Harmonization of Higher Education in East Africa", Status Update July 2015, p. 7.

²⁹ Ibid.

³⁰ See the East African, "A Common Higher Education to Open EAC's Universities to all Students", available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/a-common-higher-education-to-open-eac-s-universities-to-all-students--1366176>> (accessed 23 November 2023).

³¹ Mussa K. Mohamed, Anjum Halai, and Simon Karuku, "Issues for Quality Enhancement and Harmonization of Education in East Africa", in Anjum Halai, and Geoff Tennant, (eds), *Mathematics Education in East Africa: Towards Harmonization and Enhancement of Education Quality*, Springer, pp. 1-7.

4.1. Framework of Reference for Harmonisation of Higher Education in East Africa

The frame of reference for harmonisation of higher education in East Africa developed by IUCEA in collaboration with the national commissions/councils for university/higher education constitutes the following:

4.1.1. Regional Quality Assurance Framework

The Regional quality assurance system is a common framework of reference for guiding higher education institutions and national commissions/councils for higher education in operationalising the regional quality assurance system, and in developing and practicing a common quality assurance culture in line with the regional aspirations for harmonisation of higher education systems, and international developments in quality assurance.³² The Regional Quality Assurance Framework consists of standards, guidelines and procedures, programme benchmarks, and principles and guidelines constituting a policy framework.³³

The Regional Quality Assurance System is based on four operational tools: (1) a policy framework, titled Principles and Guidelines for Quality Assurance in Higher Education in East Africa; (2) regional quality assurance instruments contained in the Handbook for Quality Assurance in Higher Education—the Road Map to Quality—published in four volumes covering internal quality assurance at programme level, external quality assurance at programme level, institutional quality assurance, and implementation of a quality assurance system; (3) benchmarks for academic programmes; (4) and the East African Higher Education Quality Assurance Network as the technical arm of the IUCEA, which promotes the development of quality culture in East Africa.

³² Inter-University Council for East Africa, “A Road Map to Quality: Handbook for Quality Assurance in Higher Education”, Volume 4: Implementation of Quality Assurance System, DAAD, 2010.

³³ Ibid.

4.1.2. East African Qualifications Framework for Higher Education (EAQFHE)

The coming into force of the EAC-CMP in July 2010 prompted the urgent need to develop tools and systems for the operationalisation of Article 11 of the Protocol to facilitate easy mobility of learners and labour.³⁴ This, among others, required the establishment of a framework to enable mutual recognition of academic and professional qualifications across the region.³⁵ Thus, in 2013 and 2014 IUCEA guided a regional consultative and participatory process that led to the development of the EAQFHE, which was approved by the EAC Council of Ministers on 30 April 2015.³⁶

The EAQFHE is a regional qualification framework proposed for the EAC partner states.³⁷ The EAQFHE is a generic instrument for the region onto which the partner states' national qualifications frameworks will be anchored for the purpose of harmonisation and synchronisation of education and training systems, and the qualifications attained in the community. It is a formalised structure guiding the higher education and training systems, and as a reference tool in facilitating mutual recognition of qualifications attained in and outside the EAC partner states. It constitutes a key element for harmonisation of higher education systems in its member states.³⁸ The framework allows for greater ability to develop, assess, and improve quality education, and provides a mechanism by which countries can compare and recognise each other's qualifications and integrate returning citizens and skilled immigrants into the labour force.³⁹

³⁴ Inter-University Council for East Africa: Harmonization of Higher Education in East Africa: Status Update July 2015, available at <<https://www.google.com/search?q=InterUniversity+Council+for+East+Africa%3A+Harmonization+of+Higher+Education+in+East+Africa%3A+Status+Update>> (accessed 29 November 2023).

³⁵ Ibid.

³⁶ Ibid.

³⁷ East African Qualifications Framework for Higher Education, available at <<https://www.iucea.org/?mdocs-file=6233>> (accessed 29 November 2023).

³⁸ Ibid.

³⁹ Ibid.

The main purpose of the framework is to facilitate mutual recognition of education and training systems and academic qualifications attained in the EAC partner states as well as outside the EAC region, hence promoting mobility of labour across borders in EAC and outside EAC. The framework provides mechanisms for harmonisation of education and training systems in EAC, thereby transforming the EAC into a common higher education area.

The framework is not a replacement for the national qualification framework or similar instruments of the partner states, nor is it a prescription for each partner state to make its national qualifications framework exactly the same as the EAQFHE. It is an instrument to guide the partner states' qualifications framework for alignment with the regional framework, so that the regional education and training systems and the qualifications attained are appropriately harmonised.

4.1.3. The IUCEA

The IUCEA is an inter-governmental institution of the EAC responsible for coordinating the development of higher education and research in the region.⁴⁰ The IUCEA coordinates and regulates all EAC universities operations while promoting internationally higher education standards and systems for sustainable regional development.⁴¹ The main roles of the IUCEA include advising the EAC partner states on higher education matters, facilitating maintenance of quality standards, facilitating harmonisation of the higher education sector, supporting HE research in the EAC, coordinating student and staff exchanges, and collaborating with national councils and commissions on HE.⁴²

Since 2000, the IUCEA has been carrying out reforms to respond to the EAC integration agenda. One of the key reforms included the need to

⁴⁰ Inter-University Council for East Africa: Harmonization of Higher Education in East Africa: Status Update July 2015.

⁴¹ Ibid.

⁴² Ibid.

establish an appropriate environment for harmonisation of higher education systems so as to promote the EAC regional integration agenda as envisioned in the CMP.⁴³ Among the important steps towards harmonisation of higher education in the region is the setting up of a regional quality assurance system for universities that was initiated in 2006. The initiative aimed at harmonising regional quality assurance by establishing a common East African quality assurance framework, establish a regional quality assurance office at the IUCEA Secretariat, set regional higher education benchmark quality standards based on internationally recognised standards, prepare a use-friendly quality assurance handbook based on existing national benchmark standards and systems, and streamline national and institutional quality assurance systems according to the local perspectives. It is also aimed at promoting international competitiveness of universities in East Africa.⁴⁴

The IUCEA is currently steering a number of initiatives on the development of centres of excellence in various fields which will serve as hubs for the development of highly skilled human resources for the region. Mobility of both academic staff and students, which is an important avenue for brain circulation; research and innovation are currently on top of the IUCEA's agenda to respond to various needs of our region. This is in cognisance of the fact that higher education plays a unique and pivotal role in promoting East Africa's co-operation and regional integration.⁴⁵

⁴³ Inter-University Council for East Africa, "Harmonization of Higher Education in East Africa", Status Update July 2015, available at <<https://www.google.com/search?q=InterUniversity+Council+for+East+Africa%3A+Harmonization+of+Higher+Education+in+East+Africa%3A+Status+Update>> (accessed 29 November 2023).

⁴⁴ Ibid.

⁴⁵ Inter-University Council for East Africa, Higher Education Stakeholders discuss the role of universities in the operationalization of the EAC Common Higher Education Area for Regional integration, Kampala, Uganda; 28 June 2017, available at <https://www.eac.int/index.php?option=com_content&view=article&id=805:vision-east-africa-forum&catid=146:press-releases&Itemid=194> (accessed 4 December 2023).

5. The State and Trends of Student Mobility in East Africa

According to recent data, there has been a growing trend of student mobility within the East Africa community.⁴⁶ Ideally, this is prompted by the political ambition to establish the EACHEA and the act of establishing the IUCEA as the coordinating institution for the establishment of EACHEA to ensure mobility and employability of graduates in the region as the main motivation.⁴⁷ The 2010 CMP for the EAC region stipulates the commitment of the partner states to harmonise their education and training systems to provide for, among others, concerted efforts in the development of human resources, and mobility of people, labour, and services. In that regard, the treaty required the IUCEA to develop systems that, among others, enhance students' mobility and labour across the partner states, and hence transform the EAC region into a Common Higher Education Area. The student mobility policy developed by the IUCEA provides a framework for the promotion of students' mobility among the partner states, as a way of facilitating regional integration as envisioned in the CMP.⁴⁸

The latest indicative data on the direction of mobility and the number of students from the EAC partner states studying in another country within the region is for 2021. According to the data, 13,513 (1.8%) were mobile within the region (Burundi 603, Kenya 9,072, Rwanda 1,852, Tanzania 1,059 and Uganda 727). Kenya had the largest number of students in the other four partner states, while Uganda was enrolling the highest number of foreign students (10,707) from other member

⁴⁶ Ibrahim Oanda, and Fred Matiang'i, "The East African Higher Education Area: A Global or Regional Higher Education Space", (2018) 4 (3) Forum for International Research in Education, pp. 56-76.

⁴⁷ Inter-University Council for East Africa, "Harmonization of Higher Education in East Africa", Status Update July 2015.

⁴⁸ See EAC, 2009; IUCEA, 2013.

states.⁴⁹ The above data clearly shows that there is unequal cross border student mobility for higher education within the East Africa member states.

6. Factors Contributing to Unequal Cross Border Higher Education Mobility in the EAC

As noted in the introduction part of this chapter cross border higher education mobility in the EAC is essential not only for knowledge and cultural exchange but also for regionalism. Despite the benefits that come with cross border higher education mobility, there are several factors that contributes to its inequality. Such factors are as expounded below:

6.1. Lack of Harmonisation of Tuition Fees in Higher Learning Institutions in the EAC

Plans to have all EAC universities charge students from other partner states the same tuition fee as locals remains a distant dream and students hoping to benefit from the initiative will have to wait longer due to lack of uniform policy on the amount of tuition fee.⁵⁰ Currently, foreign students are charged between 10 -30 per cent more than what local students pay for a course, depending on the university. This can go as far as requiring the students to pay their fees in dollars.⁵¹ Forthwith, universities in the region set their own fee structures as per their guidelines.

Due to this concern, three EAC member states signed a local agreement meant to harmonise tuition fees. Under the ‘coalition of the willing’, Kenya, Rwanda and Uganda signed an agreement that was meant to bind the three states into charging local tuition fees for students moving to

⁴⁹ *Id.* note 43.

⁵⁰ Maina Waruru, “East African Region to Harmonise Tuition Fees Next Year”, available at, <<https://thepienews.com/news/eac-to-harmonise-tuition-fees-next-year/>> (accessed 23 November 2023).

⁵¹ *Ibid.*

study in either of the three countries.⁵² However, despite the signing of this agreement, there is no guarantee that indeed, the fees charged will be harmonised to enhance equitable student movement in the region. Moreover, the fact that Tanzania and Burundi were not included in the local agreement means that EAC states are yet to agree on harmonised fees.⁵³ This led to the signing of another agreement dubbed the 'Northern Corridor integration Projects' by Kenya, Uganda, Rwanda, Burundi and South Sudan.⁵⁴

In a recent proposal, countries in the EAC acknowledged that differences in tuition fees paid in HE institutions had inhibited the free movement of students in the region and mooted a plan to harmonise tuition fees that will enable continuing students enrolled in HE institutions in the region to freely move to any university in any member country without having to be subjected to higher tuition fees there.⁵⁵

However, even with this proposal, universities in member countries are hesitant to approve or adopt the idea because of limited funding from their governments.⁵⁶ Public universities rely solely on tuition fees charged and government capitation for sustenance of their programmes while private universities rely mainly on tuition fees.⁵⁷ Therefore, reduced fees in harmonisation may inhibit their operations. In addition, as argued elsewhere in this paper, taxation also eats on to the university's income from tuition fees and unless the taxation law is amended in some countries

⁵² Ligami, C., Regional Universities to Harmonise Fees, available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/regional-universities-to-harmonise-fees-1373272>> (accessed 8 January 2024).

⁵³ Ibid.

⁵⁴ See circular Ref MoE.HQS/3/9/11 dated 4.6.2014

⁵⁵ The New Times, *No End in Sight on Harmonization of Tuition Fees in EAC Universities*, 2013.

⁵⁶ Stephen O. Odebero, *Education Inequalities and Opportunities in East Africa Region*, Society of International Development (SID), Nairobi, 2011.

⁵⁷ Ibid.

like Kenya to reduce corporate tax for higher education institutions, reduced fees in harmonisation will injure Kenyan universities to a halt.⁵⁸

The duration of stay in a university will also undermine the harmonisation effort. Even if tuition fees were to be the same, this does not necessarily imply that the cost of university education will necessarily be the same in member states owing to the difference in the duration one has to stay in university in different member states. Member countries with 4 years basic university education such as Kenya, Rwanda and Burundi will pay more in the long run compared to those with 3 years basic university education practiced in Uganda and Tanzania. In the end, tuition fees for countries with a 3-year basic university education will continue to attract more students than in countries where the 4-year period is adopted. The harmonisation effort, though a welcome idea, will most likely not solve the problem of unequal students' mobility in search of higher education in the region.⁵⁹

To resolve this challenge, head of states from the EAC member states agreed to harmonise tuition fees structure in both public and private universities. at a conference held in July 2017 in Zanzibar, Tanzania. Until to date, harmonisation of fees has not been harmonised in EAC and the biggest challenge to harmonising the fees still remains the variation in the quality of learning, curricula and length of courses in the region's universities. Needless to say, standardised fee for EAC citizen students studying with EAC universities is very vital in ensuring that the imbalance nature of student mobility with the EAC is cured.

6.2. Disparity in the Cost of Higher Education in the EAC

Disparity and high cost of higher learning among the member states have affected the mobility of students in search for higher learning within the

⁵⁸ Stephen Odebero, Ulf Engel, and Mathias Middell, "Factors Influencing Unequal Cross Border Higher Education Students' Mobility in East African Community", 1(4), *Research Journal of Education, Academic Research Publishing Group*, 2015, pp. 35-49.

⁵⁹ Billy Mutai, "The Exodus of Kenyan Students to Uganda", *The Kenyan Watchdog*, 2010.

region.⁶⁰ Currently, universities in the region set their own fee structures as per their guidelines. However, East African universities have disparities in fees for students studying different courses.

In EAC, cross border movement in search of HE in neighbouring economies has been to say the least, the most unequal due to the disparity in the cost of higher education among the member states. Recently, student's mobility to Uganda in search of higher education has drastically risen with more than 20,000 Kenyan and over 10,000 Tanzanian students enrolling in Ugandan universities and other educational institutions outside. The sole reason is that the cost of higher education in Kenya and Tanzania is relatively high compared to Uganda.⁶¹ Tanzania has also recorded a significant number of Kenyan students in its universities. However, the number of foreign students seeking admission in Kenya has been quite low compared to the numbers seeking admission outside the country. Available information indicate that Uganda seem to attract more foreign students from all the EAC states.⁶² If this is left to obtain, it will result into a huge imbalance in benefits arising from educational exchange in favour of receiving countries.

In Tanzania, for example students from East Africa countries pay their fees in USD, making the cost of studies to be very high.⁶³ The dominance of Kenyan students in Uganda's tertiary institutions has largely been attributable to the high cost of tertiary education in Kenya. Most literature and the interviewed students and senior administrators in HE institutions indicated that the relatively lower cost of higher education in Uganda was the main attracting factor for most Kenyan and Tanzanian students.⁶⁴

⁶⁰ Nshemereirwe, V. C., "Socioeconomic Status and Access to Higher Education in Uganda", 7(1), *International Journal of Educational Leadership*, 2016, pp.11-23.

⁶¹ Billy Mutai, "Exodus of Kenyan students to Uganda", The Kenyan Watchdog, 2020.

⁶² Stephen Odebero, Ulf Engel and Mathias Middell, "Factors Influencing Unequal Cross Border Higher Education Students' Mobility in East African Community", 1(4), *Research Journal of Education, Academic Research Publishing Group*, 2015, pp. 35-49.

⁶³ See the Postgraduate Fee Structure at University of Dar es Salaam website, available at <<http://www.udsm.ac.tz>>.

⁶⁴ Supra note 59.

For instance, a bachelor of laws degree at the University of Nairobi costs USD 1,925 a year compared with USD 890 at the University of Dar es Salaam and USD 950 at Makerere University. A law student paying full-cost fees at Nairobi would require USD 7,700 to complete the four-year course, compared with USD 2,670 at Dar es Salaam and USD 2,850 at Makerere respectively, where the degree takes a minimum of three years.

There are also fee disparities for students interested in studying the combined medicine degree in the three top universities in East Africa. Nairobi charges USD 5,230 a year compared to USD 1,065 at Muhimbili University of Health and Allied Sciences—the recently upgraded University of Dar es Salaam’s faculty of medicine—and USD 1,000 at Makerere. The course takes a minimum of five years. In essence, the disparity in the cost of higher learning education with the East Africa member states has largely affected human mobility for purposes of higher education within the region.

6.3. Different Curriculum and Asymmetries in Education Systems of the EAC Member States

The education systems adopted in EAC is one of the most unequal in the history of integrating nations in the world. Member states in the EAC despite starting off with a fairly homogenous system of education adopted from their colonial masters. Most degree courses are similar across the region but the course content, qualifications considered and even the time for the completing course is different in almost all the universities.⁶⁵

At present, the education systems in the region experience wide disparities as follows: It can be discerned that Rwanda and Burundi are on a 6-3-3-4 system of education encompassing 6 years of primary

⁶⁵ The East African, “A Common Higher Education to Open EAC’s Universities to All Students”, available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/a-common-higher-education-to-open-eac-s-universities-to-all-students--1366176>> (accessed 23 November 2023).

education, 3 years of lower secondary and 3 years of upper secondary. Their university education requires a minimum of 4 years, totaling to 16 years of education. Tanzania and Uganda are on a 7-4-2-3 system of education requiring 7 years of primary, 4 years of secondary and another 2 years at advanced level, with university education taking 3 years at the very minimum.⁶⁶ On the contrary, Kenya has a unique system of education in EAC transitioning to Competence Based Curriculum (CBC) which emphasises competency over content, aiming to nurture well-rounded individual capable of thriving in a rapidly changing world.⁶⁷ Kenya Rwanda and Burundi, because of the lack of A level segment in their education system, have pegged their minimum university duration at 4 years contrary to Uganda and Tanzania where university education takes only 3 years.⁶⁸

It is correct to argue that countries whose integration effort is still at a low level and experiencing insurmountable challenges like the EAC cannot propagate such huge asymmetries in their education systems and hope to be successful.⁶⁹ The five countries in the region are practicing 3 different education systems and this could portend doom to the integration efforts as it inhibits labour mobility in the region.⁷⁰ No meaningful integration effort can be achieved without an education system that allows for free movement of labour and human capital in general. Overall, these asymmetries have disadvantaged Kenya as a destination of students' mobility in search of HE. Students in Uganda and Tanzania, upon sitting their Advanced level examinations, expect to complete their basic university education in 3 years. Studying in Kenya, Rwanda or Burundi, would mean they are subjected to a 4-year

⁶⁶ Stephen Odebero, Ulf Engel, and Mathias Middell, "Factors Influencing Unequal Cross Border Higher Education Students' Mobility in East African Community", 1(4), *Research Journal of Education, Academic Research Publishing Group*, 2015, pp. 35-49.

⁶⁷ Stephen Odebero, Ulf Engel and Mathias Middell, "Factors Influencing Unequal Cross Border Higher Education Students' Mobility in East African Community", 1(4), *Research Journal of Education, Academic Research Publishing Group*, 2015, pp. 35-49.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ *Id*, note 62

curriculum and this would lead to unnecessary increased duration and costs of their education.⁷¹

Therefore, it is apparent that the different curriculum and asymmetries in education system in EAC member states poses a challenge on human mobility for purposes of higher learning.

6.4. The Use of Different Languages of Instruction in Higher Education within the EAC

Different language of instruction in the East Africa Community has posed a major challenge hinder human mobility for higher education within the region.⁷² Needless to say, integration in Africa has been divided on the line of the colonial languages that had been enforced on the people.⁷³ On the aspect of human mobility for higher education within the East Africa Community, it can be argued that the lack of a common language of instruction has negatively affected student mobility.

English is the most common language of instruction, but other member states such as Rwanda have been using French which has posed a challenge to students joining higher learning institutions that used English as medium of instruction.⁷⁴ For example, since independence, Rwandan education system used French and Kinyarwanda as their language of instruction. But since joining the EAC, the government policy on language of instruction changed to fit in the regional integration, language of instruction changed to English. Many university students feel that they will be better placed in the job market if they understand English comprehensively but contend that the development of the language is low in Rwanda. According to there are over 1128 students who cross the

⁷¹ Ibid.

⁷² Ibrahim Oanda Ogachi, “Internationalization vs Regionalization of Higher Education in East Africa and the Challenges of Quality Assurance and Knowledge Production”, 22(1), *Higher Education Policy*, pp. 331–347.

⁷³ Jaime de Melo, and Yvonne Tsikata “Regional Integration in Africa: Challenges and Prospects”, Discussion Paper No. 10598. Centre for Economic Policy Research 77 Bastwick Street, London EC1V 3PZ, 2015.

⁷⁴ Ibid.

border in search of HE outside Rwanda and report that most of those who moved to Uganda wanted to improve their reading culture and comprehensively understand English since this was still a huge challenge among the local institutions.⁷⁵

Language is a very powerful tool in deepening regional integration and ensuring human mobility of higher learning in the EAC. There is a need to adopt one language of instruction which will be used within the EAC.

6.5. Social and Cultural Challenges

Social and cultural challenges have from time to time been seen as a stumbling block for human mobility for purposes of higher education within the East Africa Community. The social relations the students experience in the community, the emotions, the difficulties they encounter, the perspective and attitudes of the society towards them affects the quality of life of the students.⁷⁶

Furthermore, the mobility of student within the East Africa community is linked to diverse social-economic and political realities. Factors as such as peace, security, economic growth and infrastructure influence student mobility across African institutions. The socio-cultural difficulties international students face are problems or concerns that arise from fundamental foreign language deficiency, academic development, cultural differences, social interaction, finance of education, tradition, religion, and security.⁷⁷

Students also face cultural differences when studying in another country which can lead to feelings of isolation. Furthermore, students may feel discriminated based on their nationality, race or other factors which can impact their overall experience and success in their studies. Certainly,

⁷⁵ The New Times, *No End in Sight on Harmonization of Tuition Fees in EAC Universities*, 2013.

⁷⁶ Robin Shields, "Globalization and International Student Mobility: A Network Analysis", (2013) 57(4), *Comparative Education Review*, pp. 609-636.

⁷⁷ Ibid.

language deficiency, policies, social ideologies, stereotyping, prejudice and personal value judgments can also complicate students' social interactions affecting mobility for higher education within the EAC.

7. Border Closure and Effect on Student Mobility in Post-Pandemic World

Since the COVID-19 pandemic, student mobility for higher education within EAC have faced tremendous pressure and challenges.⁷⁸ The Covid-19 pandemic and associated lockdowns and travel restriction which were imposed across the borders left many international students stranded in their host country.⁷⁹ This challenge clearly portrayed that traditional mode of provision of international education are not sustainable especially in the situation that involve health or political restrictions.⁸⁰ Academicians and various stakeholders are concerned about the future of students' mobility in higher education within the EAC in the face of post-pandemic and travel restrictions. Below is a discussion on way to achieve student mobility in post-pandemic world.

7.1. Technology as a Virtual for Student Mobility for Higher Learning in the EAC

The COVID-19 pandemic introduced several changes that constituted the responses to the challenges posed by this pandemic.⁸¹ The most prominent response was the change from the traditional modes of

⁷⁸ Leah Mason, "International Student Mobility Flows and COVID-19 Realities", Institute of International Education, 2021, available at

<<https://www.iie.org/443/en/Research-and-Insights/Publications/IntIS-student-Mobility-Flows-and-C19-Realities>> (accessed 23 November 2023).

⁷⁹ David Cairns and Thais França, "Managing Student Mobility during the COVID-19 Pandemic: An Immobility Turn in Internationalized Learning?" (2022) 12(4), *Societies*, pp-1-13; see also, Giorgio Marinoni, Hilligje van't Land and Trine Jensen, "The Impact of Covid-19 on Higher Education Around the World", IAU Global Survey Report, 2020.

⁸⁰ Basak Bilecen, "Commentary: COVID-19 Pandemic and Higher Education: International Mobility and Students' Social Protection", (2020) 58(4) *International Migration*, pp. 263-266.

⁸¹ Emma Sabzalieva, Takudzwa Mutize and Clarisa Yerovi *Moving Minds: Opportunities and Challenges for Virtual Student Mobility in Post-pandemic World*, United Nations Educational, Scientific and Cultural Organization, Paris, 2022.

teaching to web-based ones. Considering such changes, the nature of student mobility during the post-pandemic period is not clear. With the limited technological development, it is not clear whether universities in the East Africa Community will continue to exploit the COVID-19 responses for student mobility.⁸²

Nevertheless, it should be acknowledged that technological development is so challenging, especially in the resource-developing nations of East Africa. However, practical digital cooperation is instrumental for a better future and for achieving the Sustainable Development Goals and human mobility for education in the EAC.⁸³ It is only through global connectivity that we can have a continued supply of critical services and enable digital literacy and social inclusion.⁸⁴ Therefore, technological advancement remains primary in the search for inclusive mechanisms in ISM. Nations and institutions must cooperate to avail affordable and stable internet connectivity together with compatible devices.

It is without debate that four technological components are essential for virtual mobility. Such components include: a learning management system, a video- conferencing platform, online free teaching tools, and student communication platforms.

8. Conclusion

The assessment of the migration legal framework reveals that while significant strides have been made to enhance human mobility for higher education within the EAC, substantial challenges remain. The establishment of the East African Community Common Higher

⁸² Emnet Tadesse Woldegiorgis and Martin Doeverspeck, "Current Trends Challenges and Prospect of Student Mobility in the East African Higher Education Landscape" (2015) 4(2) *International Journal of Higher Education*, 2015, pp. 34-56.

⁸³ Markus RoosBreines, Parvati Raghuram and Ashley Gunter, "Infrastructures of Immobility: Enabling International Distance Education Students in Africa to Move", 14(4) *Mobilities*, pp. 484-499.

⁸⁴ Hans de Wit and Philip Altbach, P, "Internationalization in Higher Education: Global Trends and Recommendations for its Future" (2021) 5(1) *Policy Reviews in Higher Education*, pp. 28-46.

Education Area (EACHEA) and the development of pertinent policies have laid a foundation for improved student mobility. However, issues such as disparities in tuition fees, varying education systems, and linguistic differences continue to impede cross-border movement.

The current legal frameworks and protocols, including the EAC Education Protocol and the CMP, highlight a collective commitment to harmonise education systems and promote mobility. Nevertheless, the inconsistencies in tuition structures across member states prevent equitable access to higher education. Initiatives such as the agreement among Kenya, Uganda, and Rwanda to charge local tuition rates represent progress but necessitate broader participation from all EAC states to be effective.

Furthermore, the varied duration of degree programmes and the differing curricula among member states create additional barriers to student mobility. The ongoing shift to a more digital landscape, particularly accelerated by the COVID-19 pandemic, presents both a challenge and an opportunity. While digital platforms can enhance accessibility, the need for adequate technological infrastructure and the elimination of social and cultural barriers remains paramount.

In light of these complexities, it is clear that a multifaceted approach is essential to realise the vision of a truly integrated higher education system within the EAC. This includes not only policy harmonisation but also the fostering of a common language of instruction and cultural understanding. Only through collaborative efforts can the EAC overcome the existing obstacles and enhance human mobility for higher education, ultimately contributing to regional integration and socio-economic development.

Chapter Ten

Cooperatives in Inclusive Integration: Where Should the EAC Invest and Learn From?

Mathias S. Nkuhi^{*} and Esther N. Towo^{**}

1. Introduction

Regional integration represents a form of cooperation where two or more nations come together to achieve among others, social, economic, political, and cultural goals. This form of cooperation is usually expressed in writing through an agreement or a series of them and which describes the areas of cooperation.¹ Regional integration is not a new phenomenon. It has a longstanding existence with diverse forms of integrations. In Africa, regional integration dates back to the colonial period.² Over the years, and especially after independence, many countries in Africa embraced regional integration, where most of them

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¹ Carleton, "Extension: What is Regional Integration?", available at <<https://carleton.ca/ces/eulearning/introduction/what-is-the-eu/extension-what-is-regional-integration/>> (accessed 24 October 2023).

² Tesfaye Dinka, and Walter Kennes, "Africa's Regional Integration Arrangements" H&C 1.74 (2007), p. 7; this is particularly in 1910 when the South Africa African Customs Union was formed.

were members of more than one regional integration.³ Most notable are SADC in the southern part, ECOWAS in the western part, and the EAC in the eastern part of the continent. As earlier noted, motives behind these integrations are multiple but all cornered to social, economic, political, and cultural prosperity. There are also multiple actors in the integration process. The actors encompass people, their governments, and private enterprises. This chapter discusses the place of cooperative societies in regional integration. It makes a critical analysis on the EAC integration process focusing on its goal of involving the private sector. The chapter's concern is on slow progress in the EAC integration process. This slow progress is attributed to the minimal or no efforts on utilising the private sector, especially the cooperative enterprise. Dominating the discussion is a decade-long failure to capitalise on the cooperative model for inclusive integration with a dim future still in the picture.

2. Inclusive Integration and Cooperative Pluralism

2.1. The Concept of Inclusive Integration

Inclusive integration varies from one context to another. Literature provides contextual definitions to suit different circumstances. To understand the concept, however, one needs to look at the two terms it embodies, namely integration and inclusiveness. Integration is a term that presupposes uniting of entities or incorporating entities into a larger functioning unit. The Merriam Webster Dictionary defines integration as forming, coordinating, or blending an entity into a functioning or unified whole.⁴ Integration is linked with distribution of risk, sharing of benefits, combination of strengths, joint creation of products, processes and services, increasing bargaining power, strengthening entrepreneurship, creation of a sense of commonness, expansion of knowledge and

³ Martina Metzger, "Regional Cooperation and Integration in Sub-Saharan Africa" (United Nations, 2008), available at <UNCTAD/OSG/DP/2008/4> (accessed 27 November 2023).

⁴ Merriam Webster, "integrate", available at <<https://www.merriam-webster.com/dictionary/integrate>> (accessed 24 October 2023).

experience sharing forum, facilitation of easy access and exchange of technology.⁵ Guarco argues that integration enhances democratisation along the value chain.⁶ The argument by Guarco connotes accessibility to services and participation by diverse groups irrespective of age, sex, culture, locality, ethnicity and religion, among others. The term inclusiveness comes from the term inclusion which is currently a common term that has been mainstreamed in several disciplines and sectors. Inclusiveness is the quality of including many different types of people and treating them all fairly and equally.⁷ At a regional level, the concept of inclusive integration is understood as one requiring a framework for equal rights, responsibilities, and opportunities for all, as well as policies to foster intercultural interaction, understanding and participation on the ground.⁸ There is a positive relationship between economic integration and economic growth. A study by Kamau established the link between economic integration and growth in the EAC, SADC and COMESA.⁹ On the other hand, regional integration is closely linked with democracy. However, the positive impacts are dependent on the strength of the integration and institutions.¹⁰

⁵ Cooperativa de las Americas, “Economic Integration and Cooperation among Cooperatives: Successful Cases of Practical Applications of the 6th Cooperative Principle in the America Region” (Cooperativa de las Americas, 2021) at p. 12; see also Henry Kyambalesa, and Mathurin C. Houngnikpo, *Economic Integration and Development in Africa* (Routledge, 2016), pp. 17-29.

⁶ Ariel Guarco, “Cooperative Principles in Action: Addressing the Challenges of Today’s Global Agenda” (INTERCOOP LTDA, 2020), chapter 5.

⁷ Cambridge Dictionary, “inclusiveness” available at <<https://dictionary.cambridge.org/dictionary/english/inclusiveness>> (accessed 24 October 2023).

⁸ Council of Europe, available at <<https://www.coe.int/en/web/interculturalcities/policy-lab>> (accessed 22 October 2023).

⁹ Njoroge Lucas Kamau, "The Impact of Regional Integration on Economic Growth: Empirical Evidence from COMESA, EAC and SADC Trade Blocs" *AJSMS* 1.2 (2010), p. 150.

¹⁰ See Abdoulie Fye and A. Muluh Senghor, "Regional Integration and Democracy in Africa." *ASRJET* 12.1 (2015):, p.100; Marco Tabellini and Giacomo Magistretti, “Economic Integration and the Transmission of Democracy”, Working Paper 30055 (National Bureau of Economic Research, 2022); Jeffrey J. Anderson

2.2. Pluralism as Cooperatives' Steering Gear

Cooperatives were traditionally¹¹ defined as member-based organisations with a focus on members' benefit. Contemporarily, the enterprises are defined as member-based organisations but with a larger role to play beyond their membership. According to the UN, cooperatives are pertinent to addressing poverty and hunger, food security, climate change, pandemics, and peacebuilding.¹² Cooperatives are mentioned twice in the UN Agenda 2030 as significant private enterprises that can contribute to the realisation of the UN Sustainable Development Goals (SDGs).¹³ The International Labour Organisation (ILO) ties the enterprises with the realisation of 12 SDGs, namely: ending poverty; empowering girls and women and achieving gender equality; providing quality education and lifelong learning; ensuring healthy lives; ensuring food security and good nutrition; achieving universal access to water and sanitation; securing sustainable energy; creating jobs, sustainable livelihoods and equitable growth; managing natural resource assets sustainably; ensuring good governance and effective institutions; ensuring stable and peaceful societies; and creating a global enabling environment and catalyse long-term finance.¹⁴ However, literature suggests that cooperatives can contribute to the realisation of all the 17 SDGs.¹⁵ Unlike other enterprises, cooperatives are unique with a distinct

(ed), *Regional Integration and Democracy: Expanding on the European Experience*. (Rowman & Littlefield, 1999).

¹¹ This was before 1995 when concern for community was introduced as a core guiding principle for the entire cooperative movement in the world.

¹² United Nations, United Nations General Assembly Resolution (A/C.3/78/L.11) on Cooperatives in Social Development (2023); see also Mathias S. Nkuhi, Esther N. Towo and Gervas M. Machimu, "Cooperatives, Concern for Community and Climate Change Actions" Conference Paper at 7th Annual Conference - CUK (2023) unpublished.

¹³ United Nations, "Agenda 2030 for Sustainable Development", (United Nations, 2015).

¹⁴ Fedrick O. Wanyama, "Cooperatives and the Sustainable Development Goals: A contribution to the Post-2015 Development Debate." (ILO, 2016), p. 6., available at <https://www.ilo.org/empent/Publications/WCMS_240640/lang-en/index.htm> (accessed 16 July 2023).

¹⁵ See Juan Lafont, Jose Ramon Saura, and Domingo Ribeiro-Soriano, "The Role of Cooperatives in Sustainable Development Goals: A Discussion about the Current Resource Curse" (2023) 83 *Resources Policy*, p. 103670; the authors argue that cooperative interventions can be in all the 17 SDGs.

identity as defined in the International Cooperative Alliance (ICA) Statement on Cooperative Identity, 1995.¹⁶ It is a set of principles and values embedded in the statement that confers uniqueness to these enterprises.

Cooperative enterprise operations are guided by the values of self-help, self-responsibility, democracy, equality, equity,¹⁷ and solidarity and principles of voluntary and open membership, democratic member control, member economic participation, autonomy and independence, education training and information, cooperation among cooperatives and concern for the community.¹⁸ Cooperatives have a dual nature, as business enterprises on the one hand and as member-based associations organised for collective action on the other. They differ from investor-owned firms in the way they operate.¹⁹ In Africa, Asia and Europe, they well excel in the microfinance sector as Saving and Credit Cooperative Societies (SACCOS). They are also dominant in agri-business and housing sectors in Africa and Americas. Uniquely, they lead the way in, *inter alia*, energy (wind, solar) and dairy sectors in Europe.

A cooperative is an inclusive business model with member-based ownership and generates income for members, while an investor-owned firm is focused on profit maximisation and can raise capital via private investors and markets. D'Amato et al. posit that cooperatives have the advantage of realising economies of scale, reducing transaction costs,

¹⁶ International Cooperative Alliance, The Statement on Cooperative Identity (ICA, 1995), available at <<https://www.ica.coop/en/cooperatives/cooperativeidentity>> (accessed 24 October 2023).

¹⁷ The societies do also comply with traditional values of honesty, openness, social responsibility and caring for others.

¹⁸ ICA Cooperation, "Cooperatives" available at: <<https://www.ica.coop/en/cooperatives/cooperative-identity>> (accessed 24 October 2023).

¹⁹ For more details, see Cooperatives Europe, "Building Strong Development Cooperation: Partnership Opportunities between Cooperatives and the EU". (Cooperatives Europe, 2015), p.14, available at <https://coopseurope.coop/sites/default/files/STUDY_WEB.Pdf> (accessed 2 November 2023). It elaborates on the difference between cooperatives, trade unions and investor-owned firms.

forming new markets and creating access in favour of its members.²⁰ Cooperative enterprises thus represent a form of integration and potential for wider integration generally through their nature and operational principles and values and with the cooperation among cooperatives principle. According to the ICA, there are about 3 million co-operative societies throughout the world with almost 1.3 billion members. Statistics are not accurate in East Africa, and some are hard to obtain.²¹ For Kenya, Rwanda, Uganda, and Tanzania alone, there are about 90,000 cooperatives with estimated 50,000,000 members as shown in Table 1.

Table 1: Status of Cooperatives in Tanzania (Mainland), Uganda, Kenya and Rwanda

Type of cooperatives	Tanzania (Mainland)	Uganda	Kenya	Rwanda
AMCOS	4,252	10,741	4232	5 050
Horticulture	-	-	96	-
Beekeeping	40	-	96	-
Fishing	130	326	123	-
Housing	14	109	447	227
Industry	40	-	12	-
Irrigation	64	-	-	-
Joint Enterprises	27	-	-	-
Mining	152	71	-	141
SACCOS	2,034	12,690	12,291	444
Unions	49	158	104	152
Transport	-	471	235	-
Health Services	-	17	-	-

²⁰ Antonio D'Amato, Giuseppe Festa, Amandeep Dhir, and Matteo Rossi, "Cooperatives' Performance Relative to Investor-owned Firms: A Non-distorted Approach for the Wine Sector" (2022) 124.13 BFJ, p. 35, available at <<https://doi.org/10.1108/BFJ-03-2021-0275>> (accessed 16 May 2024).

²¹ The author encountered challenges in obtaining data from Democratic Republic of Congo, South Sudan, Burundi and Somalia.

Type of cooperatives	Tanzania (Mainland)	Uganda	Kenya	Rwanda
Diary	-	376	689	-
Energy	-	28	-	-
Area Cooperative Enterprises	-	159	-	-
Multipurpose	-	1,228	2854	-
Sand Harvesting	-	-	52	-
Timber	-	-	9	-
Parish Development Model	-	10,663	-	-
<i>Emyooga</i> (Skill-Based)	-	6,862	-	-
Others	498	88	6358	89
Water and Environment	-	15	-	-
Trading	-	-	-	1687
Transformation (Processing of Raw Products into Finished)	-	-	-	189
Handicraft	-	-	-	1195
Service	-	-	-	1830
Federations	1	1	1	15
Total	7,301	44,003	27599	11,019
Membership Status (Estimated Total Members)	8,400,000	15,000,000	14,000,000	5,012,354

The data is mainly based on the authors' compilation from surveys between 2022 and June 2024. Even though statistics are non-comprehensive and randomly clustered, they present the potential of cooperatives to the EAC people-centred integration.

Pluralism is a concept describing a situation in which people of different social classes, religions, and races are together in a society and continue to have their different traditions and interests.²² Pluralism applies to various aspects and institutions. At the institutional level, there is a concept of pluralistic organisation which offers a structure enabling actors with diffuse power and divergent perspectives to cooperate on substantive issues.²³ Pluralistic organisations perform various characteristics and functions at the organisational and local levels.²⁴ The functions include facilitation of plurality and collaboration among actors as well as enhancement of collaboration.²⁵

Pluralism equally applies to members-based organisations, cooperative enterprises included. The enterprises are pluralistic in nature as they accommodate different people of different social classes, religions, race, political backgrounds, and beliefs. The pluralistic nature of these enterprises provides structure enabling different members with diffuse power and divergent perspectives to cooperate on various socio-economic and cultural issues.²⁶ Cooperatives are pluralist organisations

²² Britannica, "Pluralism", available at <<https://www.britannica.com/dictionary/pluralism>> (accessed 24 October 2023).

²³ Luc Pierre Bres and Emmanuel Raufflet, "Pluralistic Organizations in Management: One Phenomenon and Multiple Theoretical Developments" (2013) *Academy of Management Proceedings* p. 12514.

²⁴ Stephane Jaumier, Thibault Daudigeos and Vassili Joannidès de Lautour, "Co-operatives, Compromises, and Critiques: What do French Co-operators Tell Us About Individual Responses to Pluralism?" *Justification, evaluation and critique in the study of organizations* (2017) 52 EPL, p. 73.

²⁵ Ibid., by providing structures, mediating conflicts, and changing the conditions between members.

²⁶ Stephane Jaumier, Thibault Daudigeos and Vassili Joannidès de Lautour, "Co-operatives, Compromises, and Critiques: What do French Co-operators Tell Us About Individual Responses to Pluralism?" *Justification, evaluation and critique in the study of organizations* (2017) 52 EPL.

since they are enterprises formed by people who have a common need notwithstanding their differences.²⁷ Cooperatives as collective organisations are entrenched with joint actions, bearing shared interests that are encompassed in any community with diverse features. Cooperative pluralism is moulded and guaranteed by the cooperative values and principles. Cooperative principles, for instance, are enshrined and complemented with the characteristics and functions of pluralistic organisations. Religious neutrality was²⁸ and is still applicable to the operations of cooperative enterprises. Altman describes religious and political neutrality as crucial to the cooperatives' existence.²⁹ Membership in cooperative enterprises is without artificial restriction or any social, political, racial, or religious discrimination.³⁰ In 1995, the scope of open and voluntary membership was expanded to include gender neutrality.³¹ The principle of voluntary membership and member participation offers the best avenue for diverse membership and fair access to the enterprise resources.

The principle of democratic control manifests equality, fairness and justice, which are crucial for pluralism and subsequently inclusive integration. The principle number five on education, training and information describes a cooperative enterprise as a pluralistic enterprise

²⁷ Luc Pierre Bres and Emmanuel Raufflet, "Pluralistic Organizations in Management: One Phenomenon and Multiple Theoretical Developments" (2013) Academy of Management Proceedings. The authors describe pluralistic societies as societies that unites people with common needs and that they have a constitution, they are not bureaucratic, they are democratic, they are well organised to cater for the broader social and economic needs at the institutional and community level.

²⁸ It was part of the initial cooperative principles promulgated by the ICA in 1937, but it was dissolved into principle number one on open and voluntary membership in 1966 during the ICA Vienna Convention on Cooperative Principles.

²⁹ Altman Morris, "*History and Theory of Cooperatives*" (Helmut Anheier, Stefan Toepler, eds., Springer, 2009), available at <History and Theory of Cooperatives by Morris Altman: SSRN> (accessed 28 November 2023).

³⁰ Paul Lambert, "The Decision of the Vienna Congress of the International Co-operative Alliance on Co-operative Principles" (1966) 37.3 *Annals of Public and Cooperative Economics*: 179, p.180.

³¹ ICA Cooperation, "Cooperatives", available at <<https://www.ica.coop/en/cooperatives/cooperativeidentity>> (accessed 24 October 2023).

which provides knowledge, experience, and competencies without discrimination and to a wide range of members/groups. This is crucial for the growth of an enterprise. On the other hand, the principle of cooperation among cooperatives dwells on collaboration between actors by providing relevant structures that are key to vertical and horizontal integration and progression. The Statement on Cooperative Identity published by the ICA in 1995 alone shows that cooperation is not just a business vision; it also puts forward a view of the economy based on respect for people and a commitment to living and working together. Cooperation is thus the concrete expression of the idea of a pluralist economy.³² Cooperative pluralism is crucial to the process of integration as shown in Figure 1.

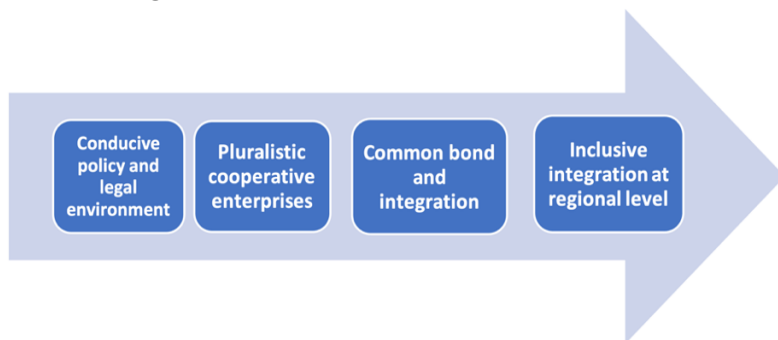


Figure 1: Cooperative Pluralism and Inclusive Integration

3. Private Sector and Cooperatives in the EAC Integration

3.1. Private Sector in the EAC Integration

The private sector plays a crucial role in regional economic integration. This is for among other reasons that it promotes values and principles which focus on people's needs and their communities in the spirit of their

³² Jerome Blanc and Denis Colongo, "Cooperatives' Contribution to Plural Economy" (2011) HALSHS, p. 23.

voluntary participation, self-help, and self-reliance.³³ Three major reasons are cited for the collapse of the EAC in 1977. Critical to the present discussion is the lack of strong participation of the private sector.³⁴ It is one of the many lessons that the EAC Partner States learnt, and which remains significant today and for the future. The question that may strike an ordinary man is whether the EAC has anything on the role of the private sector in its Treaty (addressing the lack of their involvement and subsequent collapse in 1977).

A close look at the Treaty is thus imminent. The entire Chapter 25 of the Treaty is on the 'Private Sector and Civil Society'. Articles 127 and 128 embodies, respectively, provisions on 'Creation of an Enabling Environment for Private Sector and Civil Society' and 'Strengthening the Private Sector'. The titles suggest the Partner States' intent to avoid what happened in 1977. From lack of the sector involvement, the thought is to ensure its strengthening for smooth operations and subsequently effective contributions. Partner States have agreed to provide for an enabling environment for the private sector and the civil society to take the full advantage of the EAC.³⁵ To that end, the Partner States' undertaking is one dedicated to the formulation of a strategy for the development of the private sector. Alongside such formulation, the Partner States have agreed to promote a continuous dialogue with the private sector and the civil society and provide opportunities for entrepreneurs at the National and EAC levels.³⁶

The promotion of the dialogue is with a view of helping to create an improved business environment in all economic sectors. The provision

³³ Bénédicte Fonteneau, Nancy Neamtam, Fredrick Wanyama, Leandro Pereira Morais, and Mathieu De Poorter, *Social and Solidarity Economy: Building a Common Understanding* (2nd ed, ITC-ILO, 2011).

³⁴ The Treaty for the Establishment of the East African Community, 1999, [hereinafter The EAC Treaty, (1999)] the Preamble.

³⁵ The EAC Treaty (1999), Art. 127(1); see also Mathias S. Nkuhi, "The East African Community Co-operative Societies Bill, 2014 and its Implications on the Partner States Cooperative Legislation" (2016) *The Tanzania Lawyer* 1 (1), p. 1.

³⁶ The EAC Treaty (1999), art. 127 (1) (a) and (b).

of opportunities for entrepreneurs is for the purpose of ensuring their active participation in improving policies and activities of the EAC institutions that affect them. The EAC intent is to increase the private sector enterprises' confidence in policy reforms and raise their productivity, lowering costs for entrepreneurship. The Treaty provides for measures, agreed to by Partner States, for realisation of the goal to have an enabling environment for the private sector and the civil society to take the full advantage of the EAC.³⁷ Foremost among the measures is the improvement of the business environment through the promotion of conducive investment codes, the protection of property rights and other rights and the proper regulation of the private sector. Second is the stimulation of market development through two important measures, i.e., infrastructural linkages and the removal of barriers and constraints to market development and production. The third one is the regular provision of up-to-date commercial intelligence. The idea is to speed up market response through cooperation among the chambers of commerce and industry and other similar organisations of the Partner States.

The cross-border investment is also on the list of the contemplated measures. The States agreement is to facilitate such investment through support of the exchange of experience and the pooling of resources. Two other measures are pivotal to the realisation of the goal to have an enabling environment for the private sector and the civil society to take the full advantage of the EAC. These are none but the strengthening of the role of their national business organisations or associations in the formulation of their economic policies; and collaboration with their national chambers of commerce and industry to establish lending institutions. On the latter, the intent is to ensure there are lending institutions that primarily cater for the private sector, especially the small-

³⁷ Ibid., art. 127(2).

scale entrepreneurs who find it difficult to obtain credit from commercial banks and financing institutions.

There is an obligation that is placed to the EAC Secretary General to provide the forum for consultations between the private sector, civil society organisations, other interest groups and appropriate institutions of the Community.³⁸ Similarly, the Partner States have agreed to strengthen the private sector. The Treaty makes it mandatory for Partner States to adopt programmes that would strengthen and promote the role of the private sector.³⁹ The reason behind such mandatory obligation is the belief that the sector is an effective force for the development of the States' respective economies. The strengthening of the sector is through the adoption of programmes which would make the sector an effective force for their economic development.

In strengthening the sector, Partner States have committed themselves to encouraging the efficient use of the scarce resources in promoting the private sector organisations. Such use is dedicated to all types of economic activities, including agriculture, manufacturer, farmers, traders, and service providers. Besides, the Partner States have a commitment in the encouragement and sponsorship of the practical and resourceful methods of income generation in the sector; and the commitment to establish a quality information system which will allow collection, harmonised processing and timely dissemination of data and information. In addition, Partner States may take such other additional steps as the Council may determine. Cooperative societies form part and parcel of the private sector. They play a very vital role in the economic development of the Partner States. Thus, the provisions and the undertakings as highlighted from the Treaty of Establishment of the EAC, 1999, *inter alia*, apply *mutatis mutandis* to these societies.

³⁸ Ibid., art. 127 (4).

³⁹ Ibid., art. 128(1).

3.2. The Cooperative Enterprise under the EAC Legal and Policy Framework

Before the idea and ultimately the development of the EAC Cooperative Societies Bill, in 2014, the EAC had no record of an attempt to regionally regulate cooperative societies. The regulation of societies was one handled by the municipal laws. To date, the EAC comprises eight (8) Partner States. Each State has its cooperative development policy and legal framework governing, *inter-alia*, formation, management, and dissolution of cooperative societies. Table 2 shows the Partner States Cooperative Development Policies and Legislation.

Table 2: Partner States Cooperative Development Policies and Legislation

Country	Cooperative Policy	Cooperative Law
Rwanda	Cooperative Policy, 2018	N° 024/2021 of 27/04/2021 Law Governing Cooperatives in Rwanda
Tanzania	Cooperative Policy, 2002 (Tanzania Mainland)	Cooperative Societies Act No. 6 of 2013 (Mainland Tanzania)
	Cooperative Development Policy – 2014 (Zanzibar)	The Cooperative Societies Act, No 15 of 2018 (Zanzibar)
Kenya	National Cooperative Policy of Kenya, 2020	Co-operative Societies Act, 2020 (Chapter 490)

Country	Cooperative Policy	Cooperative Law
Uganda	National Cooperative Policy, 2011	Cooperative Societies Act 1991 Chapter 112 Amended 20 March 2020
Democratic Republic of Congo	-	The OHADA Uniform Act on the Law of Cooperative Societies, 2010 Law No. 002/2002 and No. 003/2002 of 2 February 2002 for saving and credit cooperatives; Law No. 007/2002 of 11 July 2002 for mining cooperatives; and Law No. 11/002 of 4 December 2011 for agricultural cooperatives
Southern Sudan	Cooperative Policy, 2007	Cooperative Societies Act, 2011 (Laws of South Sudan)
Burundi	Cooperative Policy, 2017	Cooperative Law No. 1/12 of June 28, 2017
Somalia	-	Cooperative Development Law No. 40,1980

The development of the EAC Cooperative Societies Bill in 2014 was an important milestone in the process of capitalising on the cooperative enterprise. It was developed with a view of implementing the provisions of Article 128 of the Treaty. Cooperative societies were identified as modal organisations to encourage the development of the private

sector.⁴⁰ They were looked at as people centred organisations that could exploit opportunities in the regional integration process. Target was the Community Common Market. It was believed that the societies could freely move goods and services from one partner state to the other and service the large regional market population of about 140 million at the time.⁴¹

Apart from the exploitation of the resources, the Bill is justified by the need to adopt best practices in co-operative legislation in the EAC region. In this, the Bill was thought as a necessary tool for the development of the uniform co-operative legislation throughout the EAC. It was thought that the latter would be achieved by taking the best practices in the laws of the Partner States and harmonising them at the EAC level. Lastly, the Bill was developed with a justification on its ultimate provision of incentives to co-operative businesses. Co-operatives have been touted as the model organisation for business development across all sectors. The development of the Bill involved several processes, which for the sake of this discussion, are worth explaining. Notably, the Bill has its genesis from what was known as “the Analytical Study of the Co-operative Societies Bills of Eastern Africa”. In 2010, the East African Farmers Federation (EAFF) commissioned the study. The nitty-gritty of the study was the analysis of the Co-operative Societies Acts of Ethiopia, Kenya, and Uganda.

The study was expected, *inter-alia*, to come up with the reasons why the Ethiopian Co-operative Societies Act was regarded as the best co-operative legislation among the studied legislation. The study was also expected to come up with the model Co-operative Societies Act from

⁴⁰ Mainza Mugoya, “East African Community Co-operative Societies Bill 2014: Presentation to Tanzania’s National Stakeholders Workshop” Background Paper (East African Farmers Federation, 2014), p. 1.

⁴¹ *Ibid.*, for now the EAC Partner States population has increased with the expansion of membership. The Community is currently estimated to have a market of about 350 million.

which feasible recommendations would be made to the study countries. On its findings, the study indicated that the Ethiopian co-operative legislation was the best model because it cherishes the member driven co-operative movement. The study made specific recommendations to the EAFF to promote a regional Co-operative Policy to be embraced by the Heads of State of the EAC Partner States and the AU.

The recommendation motivated the EAFF to advance its further effort towards the EAC law on societies. In 2011, the EAFF commissioned a committee of experts to draft a Bill. The committee of experts indeed drafted the Bill. After a draft Bill was prepared, the EAFF worked hand to hand with the member organisations, including the National cooperative movements in adding input to it. Following various workshops and received therefrom, the EAFF presented the Draft Bill for the first time to the EALA in 2012. The Draft Bill, namely the EAC Co-operative Societies Bill, was received and discussed by the EALA Committee on Agriculture, Tourism and Natural Resources. Because of the procedural requirements, the Bill was tabled in the EALA as a private members Bill. Later, national stakeholders' workshops were conducted for awareness creation and further input additions. There were think-tank workshops to further the discussion on the Bill. The latter included the national umbrella organisations, co-operative universities of Kenya and Tanzania and government ministries.

It was for the first time in January 2014 that the Bill was read by the EALA in Kampala, Uganda. A year later, i.e., in January 2015, the EALA passed the Bill. And as earlier noted, the Bill is awaiting the signatures of the Head of States for it to become an Act of the Community. However, the wait is too long given the fact that a decade has lapsed since the same was passed by the EALA. The authors, just like other ordinary EAC citizens, wonder why the same is yet to be signed and when will it be signed. Positively, we think this is an area worth exploring.

4. Cooperatives and Inclusive Integration: Principles and Best Practices

4.1. Cooperatives and Inclusivity

Cooperatives offer the best opportunity for inclusive integration everywhere in the world. This is for among other reasons, their inclusive nature. The cooperative model is regarded as most effective for inclusive integration for multiple reasons. Foremost to all is because of their principles and values which guarantees equal access to opportunities and resources for people who might otherwise be excluded or marginalised, such as those having physical or intellectual disabilities or belonging to other minority groups.⁴² The other equally important reason for reference to cooperatives in inclusive integration is the nature of the enterprises' structure. The enterprises are auto designed to integrate. Since the Vienna Convention (1966), it has been enacted that cooperatives must collaborate by all means with other cooperatives at the local, national, and international levels, to better serve the interests of their members and communities.⁴³ The collaborations are of paramount importance to allow cooperatives to better serve the interests of their members and their communities.⁴⁴

It is argued that inter-cooperation, integration and partnerships are determining factors to unlocking the transformative potential of cooperatives. Cooperative Integration stimulates and carries out the integration between cooperatives, in a way that allows complementation and joint work through local, national, regional and international structures, based on the existence of common economic and social interests oriented to their development.⁴⁵ They are crucial to realisation

⁴² The principles of democracy, cooperation among cooperatives and concern for community are relevant and applicable in this context.

⁴³ Paul Lambert, "The Decision of the Vienna Congress of the International Co-operative Alliance on Co-operative Principles." (1966) 37.3 *Annals of Public and Cooperative Economics*, p. 179.

⁴⁴ Cooperativa de las Americas (2021), *supra*, p. 12.

⁴⁵ *Ibid*, p. 13; the author quotes with approval Regalado, González and Echevarría, (2017), p. 86.

of an act of solidarity. The intensity of the inter-cooperation relationship can range from low levels of mutual commitment to levels of strong intensity, in which partners maintain close and demanding ties. Cooperatives are flexible to merge, absorb each other, and make such agreements or arrangements including ones on economic collaborations. These inter cooperation relationships can be horizontal or vertical. In fact, in legislation such as Germany's, integration is not an option but is part of the specificity of a cooperative.⁴⁶ Important to the list of reasons why cooperatives are crucial for inclusive regional integration is the critical mass that they are embedded with. Critical mass guarantees diversity, entrepreneurial ideas. The authors present a triangle depicting the possible vertical integration for cooperatives at the EAC level in Figure 2.

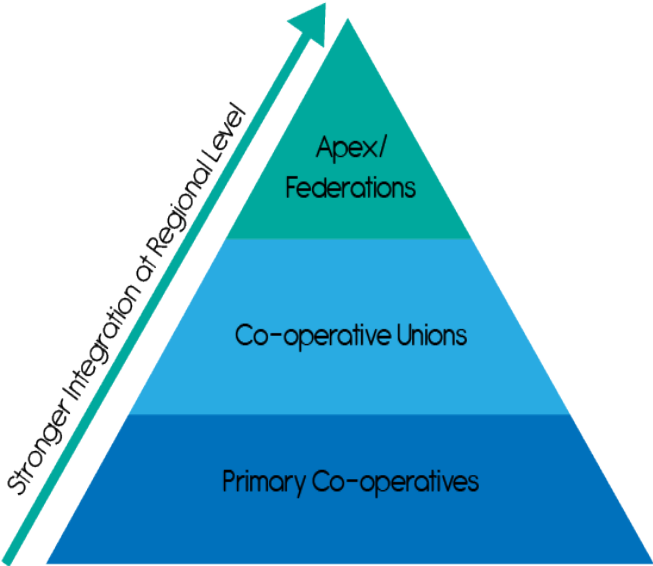


Figure 2: Cooperative Integration Triangle at the EAC

⁴⁶ Ibid, p. 14.

The critical mass that the cooperative enterprises have is pluralistic in nature⁴⁷ with diversity and inclusivity. The UN recognises the role of cooperatives in ensuring inclusive economic and social development of local communities and all people.⁴⁸ The UN looks at the societies as enterprises that accommodate people of all kinds including women, youth, older persons, persons with disabilities, and indigenous peoples whose inclusion strengthens economic and social development and contributes to the eradication of poverty and hunger.⁴⁹

Last and not least to the question why cooperatives fit in the inclusive integration model is their people centred characterisation. The enterprises are formed out of the people's desires to address their common needs. They are owned by people and function within the grassroots/ local communities. Most integrations, EAC inclusive, vision people at the centre. The cooperative model provides opportunities for people centred integration. This is particularly true where cooperatives operations are guided by their principles and values and members desires. Anything contrary to the cooperative identity would limit the potential of cooperatives in the integration process.

4.2. Inclusive Integration Through Cooperatives

The cooperative model has successfully been implemented, in integrating different types of cooperatives as well as not cooperative enterprises. There are examples from the Americas, Europe, and Africa where the model has fostered vibrant cooperative movements. At the national level there are examples from Argentina, Colombia, Costa Rica, Uruguay, Ukraine, Spain, and Egypt. The authors discuss these examples to showcase the possibilities of inclusive integration through cooperatives in

⁴⁷ Pluralism is guaranteed by the cooperative model particularly the principles and values.

⁴⁸ The UN has a series of Resolutions on Cooperatives in social development since the early 1990's. A recent one is the 2023 UN General Assembly Resolution A/C.3/78/L.11.

⁴⁹ United Nations, United Nations General Assembly Resolution (A/RES/76/135) on Cooperatives in Social Development (2021).

the EAC. There are also examples from the regional bodies. Interest has been the lessons from the EU, OAS and OHADA.

For the national level successful integrations, our start is with Argentina analysing the Argentinian Federation of Consumer Cooperatives (FACC, an abbreviation in Spanish) established in 2016.⁵⁰ The Federation has a purchase centre which was established for generating a common purchasing system for consumer cooperatives and mutuals⁵¹ or with a consumption section within its statutes. The idea was to allow them to access better commercial conditions⁵² and promote the integration of work and production cooperatives as suppliers, linked or not linked with the Federation.

The Centre has integrated 33 associated user entities (30 cooperatives and 3 mutuals), and about 30 production or labor cooperatives as suppliers offering more than 650 products plus 120 other suppliers. The Centre is integrated by an old workers cooperative founded in the city of Bahía Blanca in 1920. The worker cooperative is ranked 7th in the national ranking of supermarkets, present in 66 localities in 4 provinces and has 134 branches and 1,900,000 associates. The Centre operates through a virtual platform.⁵³ The Federation itself is a form of integration. Established in 1932 it consists of 93 cooperatives and 16 mutuals. It

⁵⁰ Cooperativa de las Americas (2021), p. 16.

⁵¹ Chiyoge and Shenaz, 2023 postulate that there is a slight difference between cooperatives and mutuals, as they are all democratic institutions in the social solidarity economy; see, Sifa B. Chiyoge and Caroline Shenaz Hossein, “Cooperatives and Mutuals” in Yi Ilcheong (ed), “*Encyclopaedia of the Social and Solidarity Economy: A Collective Work of the United Nations Inter-Agency Task Force on Social and Solidarity Economy*” (Elger Edward Publishing, 2023), p. 130. It is observed that cooperatives are guided by the statement of the cooperative identity encompassed with seven principles with services provided to members and beyond, while in mutuals the services are provided to members and family dependents. See also Jacques Defourny and Patrick Develtere, “The Social Economy: the Worldwide Making of a Third Sector” in Jacques Defourny, Patrick Develtere and Bénédicte Fonteneau *L'économie sociale au Nord et au Sud. Paris/Brussels* (De Boeck Université, 2009), p. 3.

⁵² Ibid.; fundamentally, price and assortment, but also management agility.

⁵³ Ibid.; with exclusive access for the associated users of the Centre; that to be a user (as a buyer) the cooperative or mutual has to be an associate of the FACC.

serves 15 provinces in 185 locations reaching 244 supermarkets that supply 3.5 million people.

Another example of successful cooperative integration shared is one from Colombia. Elsewhere we have appreciated the role of cooperatives in peacebuilding in Colombia post the 2016 peace pact.⁵⁴ In the present discussion Colombia is cited appreciating the role of cooperatives in the process of integration. Two cooperative institutions, a cooperative bank and a network have successfully and inclusively integrated cooperative and non-cooperative enterprises through products and services promoting sustainable economic and social development. As of 2020, the Coopcentral Bank's integration model articulated 593 solidarity entities, of these organisations 430 are cooperatives, 113 employee funds, 3 mutual associations and 47 are another type of legal entity.⁵⁵ As of the same year, the integration model of the Coopcentral Network linked 122 organisations in the solidarity sector, including cooperatives (101), employee funds (18), mutual associations (2) and other entities (1), representing more than 550 offices nationwide, with more than 466,000 active users and a potential of 2.9 million associates. Together, these entities impact 18 thousand users with their services in the country. There is a difference observed in the operations of Coopcentral Bank and Coopcentral Network. These have generated the interconnection capacity across borders.⁵⁶

Next in our list of examples of successful national integration through cooperatives is the inter-cooperation system in Uruguay (SICOOP). Literature describes the SICOOP as an organisational process that the Uruguayan cooperative movement promotes based on the principle of cooperation between cooperatives, and a policy framework on building synergies and inter-cooperation. SICOOP currently integrates 23 organisations representing more than 203,000 people, linked to

⁵⁴ Esther N. Towo, Mathias S. Nkuhi and Gervas M. Machimu, "Unleashing the Potential of Cooperatives in Peacebuilding" *Conference Paper: 7th Annual Conference CUK (2023) unpublished*.

⁵⁵ Cooperativa de las Americas (2021), *supra* at p. 20.

⁵⁶ *Ibid.*, p. 21.

consumer, savings, and loan cooperatives, agricultural, labor, housing, rural development societies, along with other organisations of the social and solidarity economy that are related to social inclusion programmes from public policy.

The pattern so far shows the dominance of Latin America cooperatives in successful integration. Costa Rica joins the list with the Coocique “Sistema de Banca para el Desarrollo” integration example. The Coocique was the first cooperative in San Carlos (Northern Zone of the country).⁵⁷ By 2020, the cooperative has had 22 branches nationwide, 96 service platforms and 401 collaborators. The Cooperative directs its services to a wide audience including public and private employees; agricultural sector, livestock, industry, tourism, services, and trade; private enterprises, microenterprises, and other cooperatives; community or development associations.

We now move to Europe with an example from Ukraine. Like the Colombian case where we referred to the role of cooperatives in peacebuilding, we did refer to the Ukrainian movement's role on the same.⁵⁸ Though not cited as an example in this case, the referred cooperative is also a manifestation of successful integration through cooperative enterprise.⁵⁹ Back to the Ukrainian case, the All-Ukrainian Central Union of Consumer Societies (Ukrkoopspilka)⁶⁰ is an important example of a successful integration system through cooperatives. The Ukrkoopspilka is a consumer co-operation united by 25 associations. Among others, it provides services for all rural

⁵⁷ Ibid.; this cooperative was founded on 11 April 1965.

⁵⁸ Esther N. Towo, Mathias S. Nkuhi and Gervas M. Machimu, “Unleashing the Potential of Cooperatives in Peacebuilding” Conference Paper: 7th Annual Conference CUK (2023), p. 19. CoopUkraine has been working tirelessly to provide products and services to members and customers, offer shelter to those displaced and bake bread to feed local communities. In kind and financial donations have been provided to the displaced and the military.

⁵⁹ The case of CoopUkraine which runs restaurants and hotels and operates co-operative markets.

⁶⁰ CCOP, “About Us”, available at <<http://www.coop.ua/en/about-us/>> (accessed 22 November 2023).

residents, especially where there are no trade facilities. The Union consists of about 15000 trade enterprises, 3000 restaurant facilities, 7 hotels, 3000 manufacturing enterprises and shops, 24 cooperative institutions of higher education and more than 300 markets throughout Ukraine. In addition, it has integrated the Media holding, COOP Media, which publishes the newspaper of the Central Union of Consumer Societies of Ukraine with a total weekly circulation of 155 thousand copies. Furthermore, the cooperation also entails the insurance market of Ukraine, the Private Joint-Stock Company.⁶¹

As earlier stated, the last two examples are taken from Spain and Egypt. In Spain, we have taken the Mondragón Cooperative Corporation, shortly referred to as the MCC. The MCC is a worker-owned enterprise in the world, highly integrating a network of cooperative businesses which competes successfully with conventional corporate rivals both locally and worldwide.⁶² It comprises more than 200 worker-owned enterprises and affiliated organisations.⁶³ It has partnerships and holds shares with standard corporations. Mondragon has negotiations with existing operations and partner corporations in dozens of over 17 countries, including Brazil, United States, Mexico, and several EU nations.

The MCC has customised its principles and values to suit inclusive integration. The Egyptian Coop Housing Central Union (CHCU) concludes our discussion on the successful integration through cooperatives at the domestic levels. The Union integrates Egyptian cooperators through housing services.⁶⁴ It provides affordable housing

⁶¹ Ibid.

⁶² It is the world 39th largest worker cooperative and its name originates from the small town in the Basque Country of Spain where it was founded. Today, the MCC's reach extends across Spain, Europe, and the globe.

⁶³ It has 225 enterprises, as per recent statistics.

⁶⁴ For more details about the cooperative housing union, see Salma Khamis, "Tracing Cooperative Housing in Egypt: Case-study-based Socio-spatial Assessment of Changing Cooperative Housing Practices in Greater Cairo Region" (Technische Universität Berlin, 2022), p. 91.

to the members of approximately 3,000 housing cooperative societies. These include Egyptian families looking for a home to shelter and achieve their aspirations for a decent life. The Egyptian housing cooperative union activity is extended beyond the borders linking the housing cooperative sectors in its Arab surroundings.

By now we have established the importance of cooperatives in integration generally and regional integration, in particular. We have also offered examples of successful national integration through cooperatives. Little however, we have cited a few cases of cross border integration through cooperatives. Next to our discussion are cases of integration through cooperatives with a regional perspective. We are not looking at domestic or national integrations which extend beyond borders but those which can be established within a particular region. Our discussion is focused on the EU, Latin America, and Africa with a focus on the Organisation for the Harmonisation of Business Law in Africa (OHADA).

In the European Union, cooperatives are crucial enterprises to the EU economy.⁶⁵ There are about 250,000 cooperatives in the region, owned by 163 million citizens⁶⁶ and employing 5.4 million people. They have substantial market share in industries.⁶⁷ Following the 1994 resolution on the contribution of cooperatives to regional development the EU developed and ultimately adopted the Statute for a European Cooperative Society (SCE).⁶⁸ The Statute ultimate goal is to facilitate

⁶⁵ European Commission, “Cooperatives”, available at <Cooperatives (europa.eu)> (accessed 23 October 2023).

⁶⁶ Equivalent to one third of the EU population.

⁶⁷ For Agriculture its 83% in the Netherlands, 79% in Finland, 55% in Italy and 50% in France. For Forestry its 60% in Sweden and 31% in Finland. In the banking sector cooperatives market share accounts for 50% in France, 37% in Cyprus, 35% in Finland, 31% in Austria and 21% in Germany. Retail business share by cooperatives is 36% in Finland and 20% in Sweden while that in pharmaceutical and health care is 21% in Spain and 18% in Belgium.

⁶⁸ Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).

cooperatives' cross-border and transnational activities. It provides for harmonisation of cooperatives operations and management in the region. SCE may be established under the Statute and required to unite residents from more than one EU member state.⁶⁹ The SCE allows its members to carry out common activities within the EU while preserving their independence.⁷⁰

The law confines membership to SCE to customers, employees, or suppliers or those involved in its activities. It also describes different ways in which SCE can be formed.⁷¹ There is a requirement that the SCE formed has to be registered in the EU country where it has its head office.⁷² Management and operations of the cooperatives is as per the by-laws or internal statutes of the respective cooperatives and laws in the member states. For instance, it is stipulated that the internal statutes of the SCE must set out its management structure according to one of two possibilities: two-tier structure (management body and supervisory body) or one-tier structure (administrative body).⁷³

As part of the EU efforts to ensure smooth integration through cooperatives, a working group on cooperatives was formed in 2013. The group is a means to assess the specific needs of cooperative enterprises on diverse issues including the appropriate EU regulatory framework, the identification of barriers at the national level and the internationalisation

⁶⁹ European Commission, “European Cooperative Society” available at <European Cooperative Society (SCE) (europa.eu)> (accessed 23 October 2023).

⁷⁰ Referring to Art. 1(4) with its principal object to satisfy its members' needs and not the return on capital investment, members benefit proportionally according to the profits obtained from the business done and not to their capital contribution.

⁷¹ Ibid., art. 2; these include formation by five or more natural persons resident in at least two Member States, companies and firms governed by the law of at least two different Member States a merger between cooperatives formed under the law of a Member State, by the conversion of an existing cooperative which has, for at least two years, been established or a subsidiary in another EU country.

⁷² Ibid., art. 6.

⁷³ European Commission, “European Cooperative Society” available at <European Cooperative Society (SCE) (europa.eu)> (accessed 23 October 2023).

of cooperatives.⁷⁴ The EU regional framework has prompted the establishment of transnational SCEs with the face of integration in various sectors including finance and agriculture. Examples in the agricultural sector include dairy cooperatives such as Arla Foods and FrieslandCampina.⁷⁵ The first example, Arla Foods with its headquarters located in Denmark, is a merger of MD Foods from Denmark and Arla from Sweden. After subsequent mergers with Hansa Milch and Milch-Union Hocheifel (both from Germany), Milk Link (UK) and Walhorn (Belgium) Arla Foods has members from Denmark, Sweden, Germany, Belgium, the UK, Luxembourg, and the Netherlands. The second example is FrieslandCampina, headquartered in The Netherlands and with members in three countries: Netherlands, Germany, and Belgium.

Furthermore, because of the regional framework for cooperative integration, the work of Cooperatives Europe (Coop Europe) is promoted. Coop Europe promotes the cooperative business model at the European level.⁷⁶ It advocates granting the plurality of business forms in Europe, fostering communication among and about cooperative enterprises and enhance the development of the cooperative ecosystem through projects and partnerships with 84 member organisations from 33 European countries across all business sectors.⁷⁷ Its members represent 141 million individual member cooperators owning 176,000 co-operative enterprises and providing jobs to 4.7 million European citizens.

The progress made in Latin America and OHADA is also worth sharing. Not matching the levels of the EU, the two have progressed so far to

⁷⁴ See European Union, “European Cooperative Society”, available at <<https://eur-lex.europa.eu/EN/legal-content/summary/european-cooperative-society.html>> (accessed 2 November 2023).

⁷⁵ For more details, see Jos Bijman, Perttu Pyykkonen and Petri Lauri Antero Ollila, “Transnationalization of Agricultural Cooperatives in Europe” (2014) DQ, p.168.

⁷⁶ For more information, see Cooperatives Europe, “the Organisation”, available at <<https://coopseurope.coop/the-organisation/>> (accessed 2 November 2023).

⁷⁷ Cooperatives Europe, “Home”, available at <Home - Cooperatives Europe (coopseurope.coop)> (accessed 23 October 2023).

creating uniform framework laws which are critical to successful integration through cooperatives. In Latin America, the Organisation of Cooperatives of America (OCA) initiated the thought for framework law for Latin America Cooperatives in 1987. The idea was to contribute to the progress of cooperative legislation in such countries. The law was approved in 2008.⁷⁸ The objective of the framework is to provide cooperatives and the cooperative sector in general with a legal framework for their organisation, operation, and regulation⁷⁹.

It is part of the initiatives to reviving, modernising, and consolidating cooperative laws of the Latin American nations. The consolidation is one of the fundamental initial stages and critical to regional integration through cooperatives. The framework outlines different ways in which the cooperatives can operate which among others include, governance, registration, financial management, partnership, and dissolution. The law also describes cooperatives in the context of the 1995 statement of the cooperative identity and indicates its crucial characteristics.⁸⁰

In the African region, similar developments exist. OHADA has a uniform Act on cooperatives.⁸¹ Composed of seventeen member states⁸² OHADA was formed by the Treaty on the Harmonisation of Business Law in Africa.⁸³ OHADA is an important tool for the development of business law, and the creation of an integrated legal space conducive for a viable and lively economic space. The Uniform Act of

⁷⁸ The Advisory Council gave its formal approval at the meeting held in San José, Costa Rica in July 2008.

⁷⁹ See Cooperativa de las Americas, "Framework Law for Latin American Cooperatives" (1st ed, Cooperativa de las Americas, 2009), p. 3.

⁸⁰ Ibid., p. 3. The framework outlines seven characteristics that the cooperatives must have.

⁸¹ It was adopted on 15 December 2010 at Lome Togo by The Council of Ministers of the Organization

⁸² Member states of OHADA include Benin, Burkina Faso, Cameroon, Central Africa Republic, Comoros, Congo, Côte d'Ivoire, Congo, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Democratic Republic of Congo, Senegal, Chad, and Togo.

⁸³ Signed in Port Louis on 17 October 1993, and revised in Quebec on 17 October 2008.

cooperatives is one of the business laws that enhances the uniformity of the operation of cooperatives across states and the collaboration of different forms across member states. It allows creation of cooperative networks of means or goals between organisations not covered within the same territory, or between organisations not registered in the same state party.⁸⁴

5. Dreams and Realities for the People Centred EAC

The EAC dream of a people centred integration is critical in the present discussion. The EAC Treaty stipulates that regional integration and development in the Community shall be people centred and participatory people centred institutions.⁸⁵ The requirement is crucial for it guarantees self realisation, social justice, and effective participation in economic activities. In the EAC, the idea of people-centeredness embeds people-centric development programmes as well as a concern about popular involvement.⁸⁶ As earlier noted, the EAC Treaty acknowledges the lack of people centeredness as one of the reasons for the collapse of the defunct EAC.

Lack of strong participation of the private sector, which constitutes a sufficient portion of the socio-economic drives in the community haunted, haunts and continues to haunt the integration process. In this paper we have only confined ourselves to the involvement of cooperatives in the EAC integration process. As observed from examples offered above, cooperatives, as part of the private sector, are crucial to inclusive integration everywhere in the world. The experience in the EAC is however not upright. Looking at the history of the EAC,

⁸⁴ OHADA Uniform Act on Cooperatives, art. 161.

⁸⁵ EAC Treaty (1999), art. 7.

⁸⁶ Louise M Mdachi, "Regional Integration and People-Centeredness; An Assessment of the Mechanisms for Popular Involvement in the Decision-Making of the East African Community" (CUNY City College, 2014), available at: <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1298&context=cc_etds_theses> (accessed 26 November 2023).

cooperatives have been there since the 1900's.⁸⁷ However, at the time, colonial interests prevailed. There was EAC colonial mastered integration, henceforth, not people centred. Multiple cooperatives centred on marketing of traditional cash crops and few on members' credit were formed and existed between 1930's and 1960's. It was also the timing where EAC initial Partner States gained their independence. Above all, it was in the 1960's that the idea of having one East African state dominated. There were vibrant cooperative Unions in all the partner states. For example, Tanzania had the Victoria Federation of Cooperative Union (VFCU) Limited. It was the largest cooperative in Africa in the 1960's.⁸⁸ The country itself had the largest movement in Africa and third largest in the world in terms of market share.⁸⁹

As for Uganda, the performance of cooperatives in the immediate post-colonial period was impressive, with the government offering them a monopoly status in agricultural marketing.⁹⁰ The vibrancy is what described the Kenyan cooperative movement of the time. There was a possibility of utilising cooperatives of the initial Partner States to further the agenda but the same was not the case. Capitalising on the movements would have been a great beginning to a stronger, inclusive and people centred EAC. Sadly however, it is the lack of strong participation of the private sector that is referred to in history books. History tells us that the collapse of the EAC in 1977 was greatly a result of the lack of such participation. The EAC, as earlier stated, understanding of this is high.

It was expected therefore that lessons would be best learnt and attempts to revive the EAC would take aboard the strong involvement of the

⁸⁷ See Esther N. Towo, Mathias S. Nkuhi and Gervas M. Machimu, "Unleashing the Potential of Cooperatives in Peacebuilding" Conference Paper: 7th Annual Conference CUK (2023), p. 4.

⁸⁸ Sam Maghimbi, "Cooperatives in Tanzania Mainland: Revival and Growth", Working Paper No. 14, ILO, 2010, p. 2.

⁸⁹ Ibid.

⁹⁰ Lawrence M Kyazze, "Cooperatives: The Sleeping Economic and Social Giants in Uganda", Working Paper, No. 15, ILO, 2010, available at <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---coop/documents/publication/wcms_672871.pdf> (accessed 25 November 2023).

private sector, cooperatives inclusive. Unfortunately, the problem of lack of strong participation recurred during the reviving of the EAC between 1984 and 1999. The Tripartite Commission and Heads of States dominance is underlined. Even after the formation of the EAC in 1999 private sector and social solidarity enterprises involvement remains negligible.

It was in 2011, 12 years after the formation of the EAC when thoughts about the private sector participation in the integration process emerged. Significant, at present, is the initial work of the East African Farmers Federation and subsequent ones by other actors. The thoughts and efforts are yet to materialise. The EAC Cooperative Societies Bill, 2014 which was a critical step to integrating cooperatives in the EAC⁹¹, is yet to become an Act of the EAC and strangely its whereabouts is unknown. No clear information about the progress is shared since the passing of the Bill in 2014. The authors and stakeholders in the cooperative sector are wondering on the same. Is the EAC going back to the lack of political will? Is it the unwillingness to involve the private sector? Are there vested business interests? Is it the lack of cohesion among the cooperators in the EAC? Are cooperative regulators concerned and willing to integrate? These are some of the questions which are yet to be explored even though there are some who assume that there is no political will on the capitalising of the societies in the integration process. To them, the silence is part of the defects in the will to ignore the pluralistic model that offers inclusivity.

The authors' discussion was crucial to respond to the question on the areas where the EAC should capitalise on. The authors strongly believe that unless the private sector, cooperatives in particular, are strongly participating in the integration of the EAC, rest of efforts would be in vain. What should therefore the EAC do to ensure cooperatives are in

⁹¹ It was a great move towards bringing Partner States Cooperative Societies Legislation at per. The same was also a move towards cross border/ transnational cooperative integration.

the map of the integration process? Should the Community go back to its cooperative societies' legislation Bill? Should it be pushed forward? Is it not time out? Were the levels of inclusion satisfactory? Will it, if passed and operational, have trickle down effects?

The questions raise serious debates and answers may vary. Significant however to the way forward is the truth that there is a need for umbrella cooperative legislation and institutions at the Community level. We have seen how the EU Council Regulation (ECR) No 1435/2003, on the SCE, has facilitated the formation and cross border as well as transnational operations of cooperatives in the EU region. The Regulation has, in addition, contributed to the smooth functioning of Coop-Europe especially in its role to integrating cooperatives in Europe.⁹²

Legislative measures are critical and preliminary to successful integration through cooperatives. And for that purpose, if the umbrella legislation option is unlikely to take place any time soon, the EAC must capitalise on harmonisation of cooperative and related business legislation of Partner States. Partner States cooperative legislation varies, to a greater extent, making it difficult for cooperative cross border and transnational operations. They vary in among other areas, membership, registration, and dispute settlement requirements.⁹³ The proposal that these laws have to be amended to allow the operationalisation of cooperative principle number 6 (cooperation among cooperatives) in the EAC should not be taken for granted.

Multiple more lessons may be extracted from the Latin America cooperative framework as well as the African OHADA uniform Act on cooperatives. There are multiple other areas that the EAC can capitalise

⁹² 84 member organisations from 33 European countries, 141 million individual member cooperators owning 176,000 co-operative enterprises and providing jobs to 4.7 million European citizens.

⁹³ Fredrick O. Wanyama, Patrick Develtere, and Ignace Pollet, "Reinventing the Wheel? African Cooperatives in a Liberalized Economic Environment", *Annals of Public and Cooperative Economics* 80.3 (2009), p. 361

on. These include investing in the cooperative enterprises through education on opportunities at the regional level, pilot studies on their willingness to integrate, and creation of integrated platforms for product, services and experience sharing. On education and willingness to integrate, to start with, the EAC can capitalise on existing national federations/apexes and later expand to primaries. On the platforms, the EAC may consider the work of APEC in Asia Pacific. APEC is a leading forum in facilitating trade and investment, economic, and regional cooperation in the Asia Pacific.⁹⁴ In the end, the EAC, just like other regional integrations, is expected to provide a conducive environment for the implementation of the SDGs, through achieving SDG No. 17, which insists on partnership to meet the goals. The EAC is also expected to facilitate the meeting of Africa Vision 2063 especially Aspiration 1 on Prosperous Africa based on inclusive growth and sustainable development and Aspiration 2 on integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance. To be able to do so, the EAC must capitalise on cooperatives.

⁹⁴ Office of the United States Trade Representative, "Asia-Pacific Economic Cooperation", available at <Asia-Pacific Economic Cooperation (APEC) | United States Trade Representative (ustr.gov)> (accessed 23 November 2023).

Chapter Eleven

Unlocking Opportunities: Assessing the Practical Implementation of the EAC Common Market Protocol in Relation to the Right of Establishment

*Provia Akinyi Odhiambo**

1. Introduction

The EAC has become the most vibrant and dynamic region in the African continent with growth rates topping continental averages.¹ Growth within the EAC is supported by a youthful population which drives the domestic demand, growth in the industry and service sectors across the region and governments' urge to boost infrastructure development through transport initiatives by way of regional partnerships and value-added exports.² Agriculture has

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¹ Ali Keya Anami, "Contribution of Regional Integration to Economic Development of Member States, Case Study: East African Community (EAC)" (2023) 8(2) World Journal of Advanced Research and Reviews, p. 45.

² Benjamin Musiita, et al., "Productivity Factors and the Growth of the Manufacturing Sector among the East African Community Members States: Testing the Adequacy of

remained a core pillar of the EAC economies and it has continued to play a major role in encouraging the growth in the productive sectors such as industrial and manufacturing. However, the agricultural sector has been affected by declining commodity prices, dependence on rain-fed agriculture and climate change with most farmers failing to get sufficient government support to embrace modern farming technology.³ This has most recently resulted in production shifting slightly towards manufacturing, which now accounts for about 14.6% of total exports on average across the East Africa region with Kenya taking the lead with manufactured goods accounting for 37% of its total exports.⁴

The slight shift to manufacturing has brought about an increase in rural-urban migration across the EAC as people move in search of favourable employment opportunities and a socio-economic environment to set up businesses and to reside.⁵ This movement also raises the demand for land and housing. All these factors point to the importance of the Right and of Establishments to EAC citizens.

This chapter looks at the concept of Direct Applicability of the Common Market Protocol (CMP) provisions in the context of the Right of Establishment. The chapter is divided into six sections and commences with an overview of the CMP, looks at its purpose and scope and thereafter broadly examines the Right of Establishment as a critical pillar within the framework of the CMP while delving into its tenets. The chapter proceeds to look at the progress made by the EAC partner states in the implementation of the Right of Establishment in the 25 years of EAC's existence and under this sub-

the Endogenous Growth Hypothesis" (2023) 25(4) American Journal of Economics, p. 312.

³ Teresa Thorp, "Challenges of Incorporating the Economic Acquis Communautaire of the East African Community in a New Common Market" (2010) SSRN Electronic Journal.

⁴ Naftaly Mose, "The Link between Human Capital Formation and Economic Growth in East Africa"(Feb 2023) Asian Journal of Economics, Business and Accounting.

⁵ Ibid.

topic it reviews the specific efforts and initiatives undertaken by EAC partner states in satisfying the pre-conditions for the realisation of the Right of Establishment. The chapter concludes by looking at the challenges faced by EAC partner states that hinder the direct applicability of CMP on the Right of Establishment such as regulatory and institutional hurdles and lastly sets forth recommendations that could be considered in addressing the challenges identified such as legislative reforms and collaborative strategies.

2. Overview of the CMP

The CMP is a priority area of policy and institutional concern for the partner states of the EAC.⁶ In its scope, the CMP guarantees four (4) fundamental freedoms which include the freedom of movement of goods, people and labour, services and capital together with the right of residence and establishment of oneself or business venture anywhere within the boundaries of the EAC.⁷

The freedoms and rights under the CMP are purposely in place to steer the achievement of the objectives of the EAC Treaty and CMP with regard to widening and deepening cooperation among the EAC partner states through the establishment of a single market and promotion of competition by eliminating all forms of discriminatory practices within the regional markets.⁸ In addition to the CMP, there are in place the East African Common Market (Right of Establishment) Regulations which complement the CMP in the realisation of the Right of Establishment.⁹

The CMP is not only critical within the EAC context but is a component of the broader regional integration initiatives as it is also

⁶ Walter Odhiambo, “East African Integration: Dynamics of Equity in Trade, Education, Media and Labour”, Society of International Development, Nairobi, 2011, pp. 76-79.

⁷ The East Africa Community Common Market Protocol, art.4.

⁸ Preamble, Treaty Establishing the East African Community, 1999 and Preamble, East Africa Community Common Market Protocol.

⁹ East Africa Community Common Market Protocol, art 13(12).

the focus of the AU efforts to harmonise and coordinate the activities of the RECs.¹⁰ This initiative by the AU has resulted to the 2020 Draft Revised Protocol on Relations between the AU and the RECs whose focus is to address the coordination and collaboration among RECs such as the EAC and the umbrella regional body within the outfit of the AU.¹¹ It therefore means that EAC partner states have a critical role to play in harmonised their legal and institutional frameworks on trade particularly the CMP on the Right of Establishment so that they can speak in one voice as a REC within the AU. This way, they will be contributing to AU's economic integration efforts by resolving issues of unclear principles of coordination which are obstacles to AU's objective of achieving a continent-wide economic community.¹²

3. The Right to Freedom of Establishment

The Right of Establishment plays a critical role in achieving an integrated market within the EAC and is provided for in the EAC Treaty and implemented under the framework of the CMP. It focuses on permitting nationals of each of EAC member states being Kenya, Uganda, United Republic of Tanzania, Rwanda, Burundi, South Sudan, Democratic Republic of Congo and now Somalia to set up their companies, businesses and exploit investment opportunities in other EAC member states and also the freedom to take up self-employment and also to reside without any form of discrimination on the basis of place of origin.¹³

¹⁰ Richard Frimpong Oppong, "The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web" (2010) 18(1) *African Journal of International and Comparative Law*, p. 92.

¹¹ Lesley Masters, "Sustaining the African Common Position on Climate Change: International Organisations, Africa and COP17" (2011) 18(2) *South African Journal of International Affairs*, p. 285.

¹² Mustapha Haruna, "African Union and Regional Economic Communities: Problems, Benefits and Prospects of Collaborations for Integration" (2022) 25(2) *Vestnik Volgogradskogo gosudarstvennogo universiteta. Seriya*, p. 4.

¹³ Christopher Zambakari, "South Sudan and the East African Community: Common Market, Citizenship, and Political Federation" (2017) *SSRN Electronic Journal*.

The EAC Treaty mandates its partner states to eliminate all forms of restrictions to the establishment of nationals of other EAC partner states in their territories and to provide similar conditions to nationals of other EAC member states seeking to establish themselves in the territories of other EAC partner states making the Right of Establishment critical to the achievement of the vision of the EAC Treaty.¹⁴ The EAC-CMP sets the pre-conditions to be satisfied by partner states for the realisation of the Right of Establishment. These pre-conditions include:

- a) removal of restrictions on companies, agencies, branches and subsidiaries;
- b) ensuring access to land, buildings and property for the setting up of business and economic enterprises; and
- c) granting to citizens of partner states the right to engage in any non-wage-earning activities of a commercial, industrial, agricultural, professional or artisanal nature (in this context, non-wage-earning activities means activities undertaken by self-employed persons) and create and manage economic enterprises.

Elimination of restrictions to the realisation of the Right of Establishment lies in the harmonisation of overly restrictive domestic laws to permit ease of doing business through companies, agencies, branches and subsidiaries; permit ease of access to land; grant citizens of partner states the right to engage in non-wage-earning activities of a commercial, industrial, agricultural, professional or artisanal nature (in this context, non-wage earning activities means activities undertaken by self-employed persons) and create and manage

¹⁴ East African Community Secretariat, East African Community (1999) EAC Treaty.

economic enterprises a step that would be dependent on the goodwill of the EAC partner states.¹⁵

The Right of Establishment is not a foreign concept as it has played a critical role in the integration process of various economic blocs such as the Organisation for Economic Co-operation and Development (OECD), with the European Union providing a benchmark on how best member states can ensure that citizens of a regional trade bloc enjoy this fundamental freedom. The subtopics below examine the manner in which the Right of Establishment is enforced in other jurisdictions.

3.1. The Right of Establishment within the Framework of the European Union

The Right of Establishment has been in existence within the EU's legal framework for decades. It is premised not only on the Treaty for the Functioning of the European Union but also the Charter of Fundamental Rights of the EU (the EU Charter) which enshrines the key political, social and economic rights of EU citizens and residents in EU law thus setting precedent on the fundamental freedoms of citizens of member states including the Freedom and Right of Establishment.¹⁶ The EU Charter obligates the EU member states to act and legislate consistently with the Charter and enables the EU's courts to strike down EU legislation which contravenes the Charter.¹⁷ The Charter applies to EU member states when they are

¹⁵ Bongani Reginald Qwabe, et al., "Local Economic Development as an Alternative Development Strategy in Southern African Cities" (2020) in *Reflections on African Cities in Transition, Selected Continental Experiences*, pp.147-168, available at <https://www.researchgate.net/publication/344404505_Local_Economic_Development_as_an_Alternative_Development_Strategy_in_Southern_African_Cities> (accessed 20 June 2025).

¹⁶ Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, "The EU Charter of Fundamental Rights" (2014), available at <<https://doi.org/10.5771/9783845259055>> (accessed 9 May 2024).

¹⁷ Katharina Anna Serrano, "Economic Partnership Agreements: Machiavellian Instruments of EU Trade Policy or Samaritan Development Tools?", *International Journal of Private Law*, Mar 2009.

implementing EU law but does not extend the competences of the EU beyond the competences given to it in the treaties. The EU's formulae of guaranteeing the Right of Establishment to its citizens therefore lies in the position of the EU laws in the hierarchy of laws.

Under the EU statutory regimes, the EU laws enjoy superiority over domestic laws of the EU member states under the principle of supranationality.¹⁸ Supranationality of laws in the context of regional blocs means that laws relating to a regional bloc take precedent over domestic laws of member states of a regional bloc giving such laws direct applicability or direct effect in the jurisdictions of member states. Within the context of the EU, direct applicability is an important characteristic of the EU legislation as it is the basis for the unified functioning of the institutions of the EU, the division of competences between the EU and the member states and the disclosure of the principles on which the EU legal system is built.¹⁹

Due to the principle of direct effect, the EU is regarded as a *sui generis* international organisation which imposes costly requirements on member states but rejects inter-state countermeasures making it quite a unique international organisation whose laws have a direct effect on member states.²⁰ The principle of direct effect was explained by the CJEU in the *Van Gend en Loos v Nederlandse Administratie der Belastingen and Flaminio Costa v E.N.E.L.*²¹ The learned judges described direct effect to mean that laws of a regional bloc are not dependent on national legal order. They further explained that it means that EU laws

¹⁸ See Tomasz P. Milej, 'What Is Wrong about Supranational Laws? The Sources of East African Community Law in Light of the EU's Experience' *ZaōRV* 75 (2015), pp. 579-617.

¹⁹ Andrii Hnitiu, Anastasiia Moskalenko Vadym, and Demchenko, (2023), "Supranationality as an important characteristic of European Union law", *Economics. Finances. Law*, available at <<https://doi.org/10.37634/efp.2023.6.1>>.

²⁰ William Phelan, "What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime", (2012) *International Studies Review*, 14, pp. 367-385, available at <<https://doi.org/10.1111/J.1468-2486.2012.01136.X>>.

²¹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 and Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.

are not required to be domesticated by the nationals of EU to have an impact on the EU member states. The judicial pronouncements in these two landmark cases reorganised international law relationships between EU member states, thus shaping the EU distinctive legal order.²² The Right to Freedom of Establishment is provided for in Article 49 of the TFEU, which states that: “Restrictions on the freedom of establishment of nationals of a member state in the territory of another member state shall be prohibited.”²³

The principles underlying the Right of Establishment within the EU were further defined by the CJEU in a number of its decisions. In *R. v Secretary of State for Transport Ex p. Factortame Ltd*, the right of establishment was defined as the actual pursuit of an economic activity through a fixed establishment in another member state for an indefinite period.²⁴ The CJEU in *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* was more explicit and defined the Right of Establishment in the following terms: “Right of Establishment is allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin.”²⁵

Like the EU where the prohibition under Article 49 ensures that the freedom of establishment is accessible to all the EU citizens, the Right of Establishment under the EAC-CMP focuses on facilitating cross border investment and growth of regional trade within the EAC. Under the EAC-CMP, *cross border investment* is defined as any

²² William Phelan (2015), “The Troika: The Interlocking Roles of Commission v. Luxembourg and Belgium, Van Gend En Loos and Costa v. ENEL in the Creation of the European Legal Order”, European Private Law eJournal, available at <<https://doi.org/10.1111/eulj.12085>>.

²³ Treaty on the Functioning of the European Union (2010) OJ C 83/47, art 49 (ex art 43 EC).

²⁴ *R v Secretary of State for Transport, ex p Factortame Ltd* (No 2) [1991] 1 AC 603.

²⁵ *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (C-55/94) [1995] ECR I-4165.

investment by a national of a partner state.²⁶ *Investment* on the other hand is defined to as any asset owned or controlled by an investor of a partner state in another partner state in accordance with national laws and investment policies of the partner state where the investment is situate.²⁷ This means that domestic legislation of partner states play a critical role in facilitating cross border investment and the realisation of the objectives of the EAC-CMP in respect to the Right of Establishment.

With respect to the scope of the Right of Establishment from the EU perspective, the CJEU in the case of *Sodemare SA and Others v Regione Lombardia* stated that the Right of Establishment is not limited to natural persons and that it stretches to companies which are well established in their states of origin this being aligned with the provisions of Article 54 of the TFEU.²⁸ Based on its scope, the Right of Establishment therefore firstly enables legal persons to set-up agencies, branches and subsidiaries within the jurisdictions of partner states under the national laws of such states and permits individuals who are self-employed to look for other opportunities without any statutory restrictions or discrimination.²⁹

3.2. The Right of Establishment within the Context of the African Continental Free Trade Area

In the context of the African Continental Free Trade Area (AfCFTA) the Right of Establishment was singled out as key in the establishment of the African Economic Community (AEC).³⁰ AfCFTA was signed in Kigali in March 2018 and entered into force in May 2019, when 22 signatories ratified the agreement. As of March 2020, 29 countries had

²⁶ Common Market Protocol, art 29(4).

²⁷ Karen Davis, *Understanding European Union Law* (2nd ed, Cavendish Publishing Limited, London, 2007), p. 147.

²⁸ Case C-70/95, *Sodemare SA and Others v Regione Lombardia* [1997] ECR I-3395.

²⁹ Enrico Vaccaro, “Transfer of Seat and Freedom of Establishment in European Company Law” (2005) *E.B.L.Rev.* 16 1348, p. 1350.

³⁰ Agreement Establishing the African Continental Free Trade Area [2018], art 3.

deposited their ratification instruments with the AU Commission including Kenya, Ethiopia, Rwanda, Tanzania and Uganda who are members of the EAC. The establishment of the AEC would lead to the creation of a vast continental market for goods and services, with free movement of business persons and investments for the African population consisting of all the 54 African countries with a combined population of over one billion people and an aggregate GDP of over USD 3.6 trillion.³¹ In the context of AfCFTA therefore, the Right of Establishment will facilitate intra-African trade and investment between EAC member states as a regional bloc and the other REC.³² Therefore, the achievement of the objectives of AfCFTA is contingent upon the successful fulfilment of the pre-conditions for the enjoyment of the Right of Establishment as outlined in the EAC-CMP which include among other things the resolution of the various outstanding matters and the harmonisation of the regulatory frameworks of the EAC member states on the Right of Establishment.³³

3.3. The Right of Establishment within the Context of the Organisation for Economic Co-operation and Development

Within the OECD framework, the enjoyment of the right of establishment is pegged on the principle of National Treatment for foreign controlled enterprises already established within the OECD member states and the Code of Liberalisation of Capital Movements which covers entities seeking to establish themselves within the OECD states.³⁴ National Treatment Principle focuses on according

³¹ Faustini Nteziyayo, “High Expectations as the African Continental Free Trade Area (AfCFTA) Agreement Enters into Force” SSRN Electronic Journal, May 2019.

³² Victor H. Mlambo, Sphephelo Zubane, Xolani Thusi, and Daniel N Mlambo, “Title of the Article” Latin American Journal of Trade Policy, May 2022.

³³ Manfred Kouty, “Implementing the African Continental Free Trade Area (AfCFTA): The Effects of Trade Procedures on Trade Flows” Research in Applied Economics, Mar 2021.

³⁴ OECD, “National Treatment Instrument”, available at

equal treatment to enterprises of nationals of member states already established within the territories of other OECD member states while the Code of Liberalisation of Capital Movements focuses on granting non-national enterprises that are seeking to set up within the OECD member states the most favorable and non-discriminatory environment to establish themselves. Through the principle of National Treatment and the Code of Liberalisation of Capital Movements, OECD ensures that there is non-discrimination and responsible conduct by OECD member states which in turn allows for cross border investments to thrive.

Like the OECD, EAC integration process is founded on the principle of National Treatment provided under Article 13 of the EAC Treaty and it was envisaged that the application of the principle of National Treatment would facilitate in the realisation of the objectives of the EAC- CMP including enabling the fulfilment of the pre-conditions to the enjoyment of the Right of Establishment.³⁵ While the OECD member states strictly adhere to the principle of National Treatment, the EAC partner states are lagging behind in as far as granting National Treatment to non-nationals from the EAC partner states and a considerable amount of effort in as far as compliance with the principle of National Treatment in guaranteeing the Right of Establishment is concerned.

3.4. Examining EAC's Progress in the Implementation of the Right of Establishment in the 25 Years of Existence

From an EAC perspective, trade has been recognised as key to regional growth and partner states have come up with numerous initiatives and institutions to drive trade across the EAC with the Right of Establishment remaining a critical pillar in this process.

<https://www.oecd.org/investment/nationaltreatmentinstrument.htm> (accessed 25 August 2023).

³⁵ Art. 13, Treaty Establishing the East African Community (1999).

Partner states have continuously rolled out various business support initiatives within the EAC to establish vibrant trade environment within the region as discussed in the subsequent subheadings.

3.4.1. Establishment of the East African Business Council

Over the years, the EAC partner states have realised that the private sector is a key driver of trade within the EAC and it became apparent that the role of the private sector as an economic driver is contingent upon the support and commitment of member states through the specific economic and policy environments at play in each of the EAC states.³⁶

This resulted to the urgent need for policies that placed the private sector at the center stage in the integration process. These included the formulation of rules and regulations that facilitated interactions between state agencies and the private sector players, focusing on ensuring a safe investment climate that would encourage economic development.³⁷

One of such initiatives included the establishment of the East African Business Council (EABC) in 1997 as the apex advocacy body of private sector associations and corporates from the EAC.³⁸ EABC is composed of business associations which foster private sector interests in all EAC organs by representing the views of parties in the private sector and driving the private sector trade agenda.³⁹ EABC enjoys an observer status within the EAC organs and ensures that its

³⁶ Elizabeth Murugi Nderitu, “A Win for the Private Sector: Harmonizing Standards in the East African Community Partner States” (Feb 2017), available at <https://www.tfafacility.org/sites/default/files/2022-01/15-2017_-_east_africa_standards_wto.pdf>.

³⁷ Francis Ejones, et al., “Regional Integration and Economic Growth: New Empirical Evidence from the East African Community”, *The International Trade Journal*, Feb 2021.

³⁸ East African Business Council (EABC), “Objectives and Role of EABC in Promotion of Trade”, available at <<https://eabc-online.com/>> (accessed 15 September 2023).

³⁹ Ibid.

input in any trade related matters is considered in the decision-making process.⁴⁰

EABC's main objective is to advocate for conducive business environment, promote sustainable private sector driven growth, chart out solutions to ease the cost of doing business, drive growth on intra-regional trade and investments and advance reforms for a diversified, competitive, export-led, integrated and sustainable economy all of which are pillars of the Right of Establishment.⁴¹

In addition, EABC also organises regular meetings of Chief Executive Officers of various key players within the private sector from all the EAC partner states with the EAC Secretary General through the EAC Consultative Dialogue Framework (CDF) to discuss various matters touching on ease of trade across EAC and assist in the formulation of policies that would eliminate barriers to regional trade. The CDF was established as an inclusive and consultative participation of the Private Sector in compliance with the provisions of Articles 127, 128 and 129 of the EAC Treaty which mandate partner states to have in place policies and structures that would recognise the private sector and strengthen their operations within the region while ensuring that they are involved in the integration agenda.⁴²

In addition to the dialogue framework under the CDF, the EABC's observer status at the EAC has created a platform for private sector players to air their views on matters related to trade within the region and to keep abreast with the developments on trade policy formulation, strategy proposals and areas of interest that focus on

⁴⁰ EABC was constituted in line with the provisions of the EAC Treaty which calls for private sector participation in the realization of the EAC goals and objectives.

⁴¹ Tomasz Milej, "East African Community – Inspiring Constitutional Change by Promoting Constitutionalism?", *International Organizations Law Review*, 2023.

⁴² Articles 127-129 EAC Treaty.

strengthening the private sector and creating a conducive business environment. Through the CDF, the private sector has pushed for the adoption of effective mechanisms to eliminate Non-Tariff Barriers to trade within the region. It has continued to monitor the progress in this area through the EABC framework in addition to the many other trade-related agendas that EABC has championed.⁴³ With frameworks like EABC and CDF, one can conclude that there is progress in the elimination of barriers to the enjoyment of the Right of Establishment.

3.4.2. Introduction of Regional Digital Integration

At the core of the EAC integration agenda is the creation of an integrated digital market by eliminating manual processes in service provision through an increased cross-border broadband connectivity, data flows and digital trade in the region as a tool to boost trade and economic activities.⁴⁴ With the help of the World Bank Group and other key development players, the EAC partner states came up with the Eastern Africa Regional Digital Integration Project whose focus is the development of the regional connectivity market to fill the gap resulting from large infrastructure deficits that still exist at the national levels of the EAC states.⁴⁵

The Eastern Africa Regional Digital Integration Project has focused on having in place regional legal and policy tools that can facilitate online cross-border transactions for goods and services as well as reducing regulatory barriers to investment and improving the security

⁴³ East African Business Council, “Ease of Doing Business in the East African Community” (2023) German Development Cooperation.

⁴⁴ African Development Bank Group, “East Africa - Regional Integration Strategy Paper 2023–2027”, available at <<https://www.afdb.org/en/documents/east-africa-regional-integration-strategy-paper-2023-2027>> (accessed 2 October 2023).

⁴⁵ Timothy John Charles Kelly, “Concept Project Information Document (PID) - Eastern Africa Regional Digital Integration Project SOP-II - P180931 (English)”, Washington, D.C.: World Bank Group, available at <<http://documents.worldbank.org/curated/en/099050423081036143/P18093108125ee090869a0089828ff2b8d>> (accessed 21 September 2023).

of personal data, online transactions and critical infrastructure.⁴⁶ Adoption of harmonised strategies, legal, and regulatory frameworks has also contributed to the creation of a larger digital market capable of generating economies of scale and network effects which are critical to fuelling investment in digital infrastructure and services.

3.4.3. EAC E-Commerce Strategy

The EAC e-commerce strategy was a directive of the EAC Sectoral Council of Trade, Investment, Finance and Industry on 31 May 2019 with the aim of strengthening cross-sectoral and public private collaboration in developing regional approaches to cross-border e-commerce.

The EAC e-commerce strategy was rolled out in two phases. The first phase was the assessment phase which commenced in 2020 and aimed at identifying challenges, gaps, assess progress of e-commerce activities and capture stakeholder perspectives on various aspects of the e-commerce ecosystem. The second phase was the strategy formulation phase which covered the development of a regional e-commerce strategy to provide a framework of implementation with specific actions targeting identified gaps and challenges and how best to fill those gaps. In both phases, stakeholder consultation exercise was conducted with a view of ensuring relevance and effectiveness in the final framework.

The EAC e-commerce strategy has seen significant improvement in internal policies of EAC partner states by complimenting various strategic national and regional initiatives for economic and human resource development targeting development of a regional digital economy. For instance, since its inception, it has influenced the development of various regional trade enhancement policies such as the Burundi Digital Economy Assessment (2020), Kenya's Digital

⁴⁶ Ibid

Economy Blueprint (2019), Uganda's National 4IR Strategy (2020), the Smart Rwanda Master Plan (2015-2020), Rwanda e-Commerce Policy (2020) and the Tanzania's Third Five Year National Development Plan 2021/22 – 2025/26 all of which are aimed at developing a robust digital economy and leverage digital technology to promote e-commerce in the region all of which work towards creating an enabling environment for the enjoyment of the Right of Establishment and achieve sustainable socio-economic growth and transformation.⁴⁷

There has been great progress among the partner states since the inception of EAC e-commerce which points to a commitment towards digital integration with Kenya and Rwanda leading the region, Tanzania, Burundi and Uganda making relative progress while South Sudan slightly lagging behind but noted to have started laying critical infrastructure in major urban centres in recent years.

In a bid to catch up with other EAC partner states, South Sudan has prepared a draft Trade Policy Framework (TPF) that sets out among others trade policy measures and strategies to drive the economy for the period 2020-30 this being a departure from the restrictive trade policy that was inherited from the pre-independence Sudan.⁴⁸ The TPF's focus is to promote economic stability, diversification and sustainable development while learning from the success stories of its EAC counterparts and their strategic interests.⁴⁹

3.4.4. Simplification of Formalities for Business Registration

One pre-condition to the enjoyment of the Right of Establishment is the mandate of partner states to create an environment that enables

⁴⁷ Tanzania, "Third Five-Year National Development Plan, 2021/22 - 2025/26", available at <<https://www.tro.go.tz/wp-content/uploads/2021/06/FYDP-III-English.pdf>>.

⁴⁸ Łukasz Jureńczyk, "Economic Cooperation of the People's Republic of China with the Independent South Sudan", *Humanities and Social Sciences Quarterly* (Mar 2021).

⁴⁹ Ibid.

nationals of other partner states to easily set up their companies, agencies, branches and subsidiaries in other partner states where they are not nationals. This not only requires policies that would accommodate such nationals but it also involves having in place systems that can easily facilitate the actual process of setting up which includes the registration process and the recognition of documents presented for such purposes by the nationals of other member states.

In line with this requirement, the EAC partner states have digitalised the processes of registration of business entities and eliminated the tedious requirement for physical forms in the application process that had existed for a considerable period. For instance, in 2017, Kenya moved all company related transactions including incorporation process to an online platform known as the Business Registration Service (BRS) while Tanzania introduced its Business Registrations and Licensing Agency (BRELA) in 1999 to facilitate orderly conduct of business and provision of business registration, licensing and regulatory services both of which created an attractive business environment.⁵⁰ Uganda on the other hand launched its Uganda Registration Services Bureau (URSB) in line with the Government of Uganda's development agenda on technology as an enabler of efficient service delivery and to shorten the registration process so as to improve the doing business environment.⁵¹ Rwanda also has in place an online business registration platform under the Rwanda Development Board.⁵²

The regulatory and institutional reforms introduced through BRS in Kenya, BRELA in Tanzania, URSB in Uganda and the Rwandan

⁵⁰ Business Registrations and Licensing Agency, Strategic Plan 2016/2017 – 2020/2021 (2016).

⁵¹ Uganda Registration Services Bureau, available at <<https://ursb.go.ug/>>.

⁵² Rwanda Development Board, "Business Registration", available at <<https://org.rdb.rw/business-registration/>>.

online business platform have significantly contributed to the ease of doing business within the EAC as they not only reduce on costs related to the processes but are also time efficient thus working towards the realisation of the Right of Establishment.

Elimination of barriers to setting up of companies and businesses through the digital platforms can be considered as a major commitment towards regulatory reforms by the EAC partner states to ease doing business within their respective countries. Out of all the EAC partner states, Rwanda was ranked the most efficient in regulatory reforms for setting up businesses with a global ranking of 8 and dubbed the Singapore of Africa by the Economist for putting investment climate reforms at the top of its economic policy agenda.⁵³ Rwanda was followed by Burundi at 28, Tanzania at 113, Kenya at 126 and Uganda at 144.⁵⁴

Other EAC countries have over the years continued to focus on eliminating processes that made it cumbersome to set up businesses and register companies within their jurisdictions. Burundi for instance eliminated age-old procedures that snarled commerce in paperwork, queues and wasted time such as the requirements to have company documents notarised, registration of a new company with the commercial court, the department of taxation and to publish information on it in a journal therefore making it possible to register a business in less than an hour.⁵⁵ Burundi also created a one-stop shop bringing together representatives from several agencies involved in the start-up process and this made the process much quicker.

⁵³ The Economist, “Africa’s New Singapore?” (25 February 2012), available at <<http://www.economist.com>>.

⁵⁴ World Bank, “World Development Indicators database”, available at <<http://data.worldbank.org/>>.

⁵⁵ TradeMark Africa, “Impact Story Compendium”, Volume 1, available at <<https://www.trademarkafrica.com/wp-content/uploads/2014/09/TMEA-Compendium-Final.pdf>>.

Tanzania also eliminated bureaucratic process that delayed the issuance of licences to new entities such as the requirement for inspections by health, town and land officers.⁵⁶

3.4.5. Reforms on Access to Land, Buildings and Property for the Establishment of Business and Residence

The Right of Establishment involves nationals of partner states moving into other partner states to set up their business and reside. This would require access to land, building and property. It is noteworthy that throughout the history of the EAC integration process, land has remained an emotive issue and was excluded from the EAC areas of corporation. This is tied to the historical experiences of partner states and the traditional ties to land. While this may be the case, there have been great strides and collaboration among the EAC partner states in ensuring access to land by nationals of partner states.

Reforms on policies touching on land were initiated by the AU in its 13th Ordinary Session of Heads of State and Government in July 2009. During this session, the AU called upon all RECs to convene periodic regional platforms to facilitate experience sharing, lesson learning and dissemination of best practices in land policy formulation, implementation and monitoring based on member states experiences and to address issues of land policies within their respective common agricultural policy framework.⁵⁷ This led to the establishment of the African Land Policy Centre (ALPC) to provide the required coordination and mutual learning by AU member states including EAC partner states.

⁵⁶ International Finance Corporation (IFC), “Doing Business in East Africa”, available at <<https://www.ifc.org/en/where-we-work/africa>>.

⁵⁷ East African Community (EAC), “Land Policy”, available at <<https://www.eac.int/environment/terrestrial-ecosystems/land-policy>>.

With the guidance and support of the ALPC, the EAC partner states-initiated capacity building on the implementation of the AU Declaration on Land and in 2022, they came up with the draft assessment report on the status of land policy development, needs and challenges in the EAC partner states.⁵⁸ The EAC partner states have also set up a Regional Steering Committee to support the initiatives geared towards land reform agenda.

Further, in relation to access to land, the EAC states have a uniform law on holding of land by non-nationals under which ownership of freehold land is reserved for nationals while non-nationals are limited to leaseholds tenure. For instance, the Constitution of Kenya allows a leasehold tenure not exceeding 99 years for non-nationals.⁵⁹ This is similar to the provisions of the Tanzania Land Act which sets the procedures for access to land by non-citizens to include identifying the land and registration with the Tanzania Investment Centre, a body corporate vested with a duty to designate land.⁶⁰

Rwanda also has provisions similar to Uganda, Kenya and Tanzania in its legislative framework on land holding.⁶¹ The Rwanda Governing Law on Land allows non-Rwandese to hold land for purposes of investments either under a 99 years lease or 49 years concession.⁶² The law also gives the president discretion to grant freehold interest in land to foreigners through a presidential order in exceptional circumstances of strategic national interest.⁶³

⁵⁸ East African Community, Report of the Meeting of the Sub-Committee on Approximation of National Laws in the East African Community Context: Session of the Task Force: AC/TFAL/05/2011, Bujumbura-Burundi.

⁵⁹ Kenyan Constitution, art 65(1).

⁶⁰ Tanzania Land Act (Cap 113 R.E 2019), s 20(1).

⁶¹ UNCTAD, "Investment Policy Review, Rwanda" (2006), available at <https://unctad.org/system/files/official-document/iteipr200611ch2_en.pdf>.

⁶² Law N° 27/2021 of 10/06/2021, art 16.

⁶³ Law No. 27/2021 of 10/06/2021, art 6.

The EAC partner states have also put in place measures to eliminate administrative bureaucracy related to registration of land. Rwanda decentralised the Office of the Registrar and Land Titles and created more branches throughout the country to address the backlog that resulted from its centralised system in Kigali. In addition, Rwanda introduced strict time limits for registration.⁶⁴

In April 2021, Kenya launched a National Land Information Management System a digital platform for all land transactions dubbed *Ardhisasa* which aimed at among others eliminating manual processed, making information on land accessible, fast tracking land transactions, simplifying land processes, ensuring uniformity and curbing fraud.⁶⁵ Uganda on the other hand has maintained its Land Information System a project that was supported by the World Bank's Competitiveness and Enterprise Development and this has since inception continued to streamline land processes and transactions in Uganda.⁶⁶

The commitment to land sector reforms by the EAC partner states has significantly streamlined land access and enhanced the overall business climate, ushering in an era of increased ease and efficiency for entrepreneurs and investors alike who are seeking to set up within the EAC. The unwavering commitment to land reforms has brought about integrity in land transactions and instilled confidence in investors and this has greatly contributed to the enjoyment of the Right of Establishment in as far as access to land is concerned.

⁶⁴ World Bank, *Doing Business in the East African Community* 2010.

⁶⁵ Citizen Digital, "President Kenyatta unveils ArdhiSasa to end manual land transactions in Nairobi", available at <<https://www.citizen.digital/news/president-kenyatta-unveils-ardhisasa-to-end-manual-land-transactions-in-nairobi-10715299>> (accessed 24 September 2023).

⁶⁶ Land Administration Reforms Cut the Red Tape, available at <<https://www.worldbank.org/en/news/feature/2018/04/20/land-administration-reforms-cut-the-red-tape>> (accessed 24 September 2023).

3.4.6. Reforms on the Right to Self-Employment

Over the years, the EAC partner states have reformed laws on movement of persons within the region and simplified the immigration processes at their various borders. This has seen the number of migrant workers in the EAC increase from 1.14 million in 2008 to 2.69 million in 2019.⁶⁷ Such steps include the issuing of community passports and identification cards, introduction of the right to travel visa free to other partner states and waiver of fees on residence permits a step that is significant as partner states have voluntarily elected to forego income arising from fees for visas and permits. Partner states are also progressively harmonising their national laws with administrative procedures and practices to eliminate any barriers to the enjoyment of the right of establishment.

The EAC-CMP defines a “self-employed person” as a person engaged in an economic activity not under any contract of employment or supervision and who earns a living through this activity.⁶⁸ Under the EAC-CMP, nationals of partner states engaging in self-employment in other partner states and their families are entitled to join the social security schemes of host countries.⁶⁹ The provisions of the EAC-CMP thus mandate EAC partner states to harmonise their national policies and laws on social security to enable self-employed migrant workers who are citizens of other partner states to access social security services. As a result of this, the EAC partner states are in the process of reviewing the draft Council Directive on Coordination of Social Security Benefits aimed at aligning national social security laws to extend access to social protection and portability of benefits for workers across the region

⁶⁷ Ouchou, L.A., L. Kandilige, and P. Kazmierkiewicz, *Labour Mobility and Regional Integration in East and Horn of Africa* (International Organization for Migration (IOM), Geneva, 2023).

⁶⁸ Common Market Protocol, art 1.

⁶⁹ East African Community Common Market Protocol, art 10.

which if approved will ensure that self-employed persons in other EAC partner states enjoy social security protection.⁷⁰

Even with the process of reviewing the draft Council Directive on Coordination of Social Security Benefits underway, EAC partner states are working towards creating a conducive environment for migrant workers in their territories. For instance, Rwanda came up with the EjoHeza in 2018 a voluntary investment scheme specifically targeting nationals and migrants engaged in the informal sector as well as the self-employed migrant workers as a measure to broaden social security protection to all categories of migrant workers and ensure universal access to pension and social security inclusion.⁷¹

4. Challenges in the Realisation of the Right of Establishment

Despite the commendable efforts of the EAC partner states in the journey to the realisation of the Right of Establishment and commitment by partner states to their specific obligations under the EAC Treaty and the CMP, the Right of Establishment has not yet been meaningfully realised within the EAC as there still exist various challenges that continue to systematically undermine the progress towards its full realisation. Such challenges are majorly attributed to the restrictive regulatory frameworks and laws of partner states that are not aligned with the provisions of the CMP.

State agencies play a critical role in the realisation of the right of establishment and therefore the non-compliance with the existing corporate governance structures and ethical commitments by some government officials and public agencies has resulted to corruption, imaginary bottlenecks and inadequate feedback from government

⁷⁰ East African Community, “Annual Report 2019-2020”, available at <https://www.eala.org/uploads/Final_Annual_Report_FY2019-2020_230405_074655.pdf>.

⁷¹ Law No. 29/2017.

agencies on key aspects of the Right of Establishment. This highly contribute to inefficiency in service delivery thus hampering the realisation of the right of establishment within the region noting that state agencies play a significant role in this process.

Given that the domestic laws of partner states are not harmonised coupled with the flexibility brought about by the principle of variable geometry, there are isolated national reforms which only focus on short-term gains without a bigger picture for the region.⁷² This aspect has hindered progress towards the full implementation of the CMP and the realisation of the right of establishment.

Procedural requirements in the domestic laws of EAC partner states which also differ from state to state for non-citizens on access to land, setting up of businesses, right to residence and freedom to undertake self-employment activities have remained major bottlenecks to the realisation of the right of establishment within the EAC leading to an upsurge in illegal undocumented migrants within the EAC.⁷³

5. Conclusion

A major challenge identified in the full realisation of the right of establishment across the EAC is the fact that legislation touching on the various aspects of the Right of Establishment is not harmonised. Additionally, any effort to harmonise domestic laws with the provisions of the EAC Treaty and the EAC-CMP has been a mere political concept with no particular devotion to the importance of solid legal frameworks and in most cases, the principle of variable

⁷² Kikwete, J., “Dar is in EAC to Stay despite isolation strategy by Coalition of the Willing”, *The East African*, 11 November 2013, Issue 993, p. 14.

⁷³ Friedrich Ebert Stiftung, “The East African Community Market Protocol for Movement of Labour: Achievement and Challenges of Implementation of the Protocol” (Nairobi, 2012).

geometry is deliberately used to defeat the CMP on the Right of Establishment.⁷⁴

Harmonisation of national laws of partner states would involve identifying the specific national laws that are an obstacle to the full realisation of the Right of Establishment and amending such laws in conformity with the EAC Treaty and the CMP.⁷⁵ Step by step harmonisation process would obviously require time and a serious commitment of member states bearing in mind that the existing legal framework for EAC partner states on integration matters is largely ambiguous.

A progressive and long-lasting solution would be best achieved if the CMP on the Right of Establishment is made to have direct applicability in each of the EAC partner states. Direct applicability in the context of regional economic blocs means that laws relating to a regional bloc take precedence over domestic laws of member states of that regional bloc without the requirement for domestication of such laws by members of a regional economic bloc.⁷⁶

While the EAC Treaty provides that the Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of the EAC Treaty thereby giving Community laws supranationality over domestic laws, the EAC Treaty deprives the supranational laws the direct applicability.⁷⁷

⁷⁴ Fred Oluoch, “Lest We Forget: What Killed the First EAC Marriage”, *The EastAfrican*, 2-8 November 2013, Issue 992, p. 11.

⁷⁵ Milej, 2023, (n. 41).

⁷⁶ Joanna Smigiel, *Free Movement of Workers in the European Union: Obstacles to EU Labour Mobility and Possibilities to Overcome them* (Master Thesis Central European University, 2010).

⁷⁷ East African Community Treaty, art 8(4), art 8(5).

What the EAC Treaty does is to obligate partner states to give life to EAC laws through subsequent laws.⁷⁸ This means that the enjoyment of the Right of Establishment remains at the mercy of the partner states who are required to legislate on the Right of Establishment in compliance with the EAC Treaty provisions.⁷⁹ There are also no sanctions in place for non-compliance, a factor which further contributes to the lack of commitment by EAC partner states in the fulfilment of their obligations under the CMP.

This is a departure from the EU's position where the EU laws enjoy superiority over domestic laws of the EU member states and are directly applicable.⁸⁰ With the concept of direct applicability, application of EU laws is not at the mercy of the EU member states and no domestication by the EU member states is required so as to give such laws direct effect.⁸¹ Direct applicability also makes it possible for parties whose rights are violated to seek redress before any national court of EU member states.⁸²

With the EAC integration objectives and scope being wide and varied touching on several key social, political and economic areas of each partner state, a key recommendation and solution to reforms is for the EAC partner states to consider coming up with an omnibus statute that would give the CMP on the Right of Establishments direct applicability within the EAC partner states.

The rationale for this recommendation is that the harmonisation process would require identifying specific laws of each partner state

⁷⁸ Kikwete, J., "Dar is in EAC to Stay despite isolation strategy by Coalition of the Willing", *The EastAfrican*, 11 November 2013, Issue 993, p. 14.

⁷⁹ Haywood, K., "The Ministry of East African Community Common Market Protocol: Legal & Regulatory Effects" (Kampala, 2010).

⁸⁰ Milej, 2023, (n. 41).

⁸¹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I.

⁸² John Bosco Kanyangoga, *Integrating Migration with Development in EAC: Policy Challenges and Recommendations* (Kampala: s.n., 2010).

that touch on the parameters of the Right of Establishment and amending the same to ensure conformity. The omnibus statute being a comprehensive legislative document would address, within a single law, the challenge of varied pieces of legislation across the EAC and speed up the cumbersome process of harmonising the varied laws and reduce the regulatory overlap which has hampered the implementation of the provisions of the EAC-CMP on the Right of Establishment within the EAC.⁸³

Although the omnibus statute would give direct applicability to the EAC-CMP on the Right of Establishment and make it possible for the EAC citizens to benefit from this freedom, the process of coming up with the omnibus statute would require careful consideration of the needs of each EAC partner states, the stage at which they are at in as far as economic development is concerned and their level of commitment to the implementation of the EAC-CMP provisions on the Right of Establishment against the general needs of the EAC with the aim of striking a balance between the competing demands of the EAC and those of individual partner states. This is against the backdrop of respect for sovereign rights and the principle of variable geometry which are fundamental principles under the EAC Treaty as they set the impetus for the EAC integration agenda.

⁸³ J. Tochukwu Omenma, et al., “African Union Counterterrorism Frameworks and Implementation Trends among Member States of the East African Community”, *India Quarterly: A Journal of International Affairs*, (2020).

PART V



BARRIERS TO TRADE AND INTER-STATE DISPUTES IN THE EAC

Chapter Twelve

Towards a Silver Jubilee of a Borderless Bloc: Examining the EAC State of Affairs on Non- Tariff Barriers to Trade

*Kulwa Gamba**

1. Introduction

The EAC is an intergovernmental regional body with an agenda of attaining economic, social, and political integration. It comprises eight countries with a total population of approximately 300 million people by September 2023.¹ The EAC offers a market for the countries of the Eastern African region to exchange goods, services, and capital and scale up regional development.

The EAC Customs Union came into force in 2005, pledging member states to establish common external tariffs and paving the way for the

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¹ The EAC constitutes eight countries including the DRC, Tanzania, Kenya, Burundi, Rwanda, Somalia, South Sudan and Uganda.

removal of all intra-regional tariffs by 2010. Aimed further to achieve a free circulation of goods, people, services and capital among partner states, the community identified non-tariff barriers (NTBs) related to administrative and bureaucratic inefficiencies; standards and technical requirements to be among the major impediments to trade within the region; others being poor infrastructures and communication networks.²

As part of the efforts to facilitate the elimination of NTBs that businesses experience in intra-EAC trade, the EAC partner States agreed to remove all the existing non-tariff barriers on the importation into their territory for goods originating from the other partner states and thereafter to refrain from imposing any further non-tariff barriers.³ This was followed by recommendations that actions to facilitate monitoring and removal of such trade hindrances need to be identified.

In 2004, the EABC initiated the Business Climate Index Survey (BCI) for East Africa.⁴ The BCI survey aimed to identify the nature and scope of NTBs experienced in the day-to-day business within the EAC. The 2004 BCI survey found out that NTBs do exist within the EAC countries, and recommended the establishment of an effective mechanism for monitoring and facilitating the elimination of the current and future NTBs within the region, as provided for under Article 13 of the East African Customs Union Protocol which provides for the elimination of NTBs to promote intra-EAC trade.⁵

² The EAC Development Strategy (2001-2005).

³ Treaty for the Establishment of the East African Community 1999, art 75 (5) provides that “except as may be provided for or permitted under this Treaty, the partner states agree to remove all the existing non-tariff barriers on the importation into their territory of goods originating from the other partner states and thereafter to refrain from imposing any further non-tariff barriers”.

⁴ The 2004 BCI was undertaken by Daima Associates Ltd of Dar Es Salaam, Tanzania. The 2004 BCI covered 500 companies and 150 government executives.

⁵ Protocol on the Establishment of the East African Custom Union 2005, art 13 (1) specifies that “unless provided for or permitted by the Protocol, each of the East African partner states will remove, with immediate effect, all the existing non-tariff barriers to the importation into their respective territories of goods originating in the

It was further agreed that under Article 13 of the EAC Custom Union Protocol,⁶ the EAC Secretariat will work in collaboration with national monitoring committee in partner states to resolve NTBs persisting in the region. The monitoring mechanisms give traders the opportunity to report NTBs to get them eliminated. This is provided for under the EAC Custom Union Protocol section 6 (2).⁷

2. Nature, Origin and Causes of NTBs in the EAC

NTBs are trade restrictions, such as quotas, technical standards, licensing procedures, embargoes, or sanctions, unjustified and or improper application of Sanitary and Phytosanitary (SPS) Measures, and other Technical Barriers to Trade (TBT) that countries use to further their political and economic goals. The World Trade Organisation (WTO) identifies various NTBs to trade, including import licensing, pre-shipment inspections, rules of origin, custom delays, and other mechanisms that prevent or restrict trade.⁸ The Eastern and Southern Africa Region, the COMESA-EAC-SADC NTB online reporting mechanism defines (NTBs to mean restrictions resulting from prohibitions, conditions, or specific market requirements that make importation or exportation of products difficult or costly.⁹

In the EAC, NTBs vary in type, intent, scope, and its use is quite widespread. They arise from different measures governments and authorities take in the form of government laws, regulations, policies,

other partner states and, thereafter, not to impose any new non-tariff barriers". To achieve this goal, Article 13 goes further under paragraph 2 to provide that "the partner states shall formulate a mechanism for identifying and monitoring the removal of non-tariff barriers".

⁶ Ibid.

⁷ Ibid., s 6 (2).

⁸ Robert W. Staiger Stanford, Wisconsin and NBER, Non-Tariff Measures and the WTO, 2011.

⁹ COMESA-EAC-SADC, "Non-Tariff Barriers, Reporting, Monitoring and Eliminating Mechanism", available at <<https://www.tradebarriers.org/>> (accessed 10 October 2023).

conditions, restrictions or specific requirements, and prohibitions that protect domestic industries from foreign competition.¹⁰

The mechanism classifies NTBs into eight categories: government participation in trade and restrictive practices tolerated by governments, customs and administrative entry procedures, technical barriers to trade, sanitary and phytosanitary measures, specific limitations, charges on imports, other procedural problems, transport, clearing and forwarding.¹¹ Further, NTBs can be classified as actionable or non-actionable. Actionable NTBs are NTBs that can be removed without having to change legislation or a regulation, for example, misapplication of custom procedures or an arbitrary classification of goods under incorrect harmonised system codes. Non-Actionable NTBs are NTBs that cannot be removed without changing legislation or a regulation, for example, if a government introduces a law banning the importation of a staple food crop to protect domestic producers or a new legal requirement for labelling of goods.¹²

In the EAC, the persistence of non-tariff barriers (NTBs) has been the subject of much of the recent discourse on the integration process. The trend of NTBs in the community paints a mixed picture of the impact of the EAC on intra-regional trade. Although the establishment of the EAC aimed for an important expansion in intra-regional trade in absolute

¹⁰ COMESA-EAC-SADC, “Non-Tariff Barriers, Reporting, Monitoring and Eliminating Mechanism”, available at <<https://www.tradebarriers.org/>> (accessed 10 October 2023).

¹¹ EEAC, available at <<https://www.eac.int/trade/internal-trade/elimination-of-non-tariff-barriers>> (accessed 15 October 2023). The COMESA-EAC-SADC NTB is a tripartite online reporting mechanism which was operationalized in 2007 enable stakeholders to report and monitor the resolution of barriers encountered as they conduct their business in COMESA, EAC and SADC regions. It enhances transparency and easy follow-up of reported and identified NTBs. This web-based NTBs reporting, monitoring and eliminating mechanism is accessible to economic operators, government functionaries, academic researchers and other interested parties.

¹² Trade Mark Africa, “How Non-tariff Barriers Affect Trade in the EAC” (29 August 2022), available at < <https://www.trademarkafrica.com/how-non-tariff-barriers-affect-trade-in-the-eac/#:~:text=According%20to%20the%20COMESA-EAC,products%20difficult%20and%2Ffor%20costl>>.

terms, overall intra-EAC trade is facing serious impediments with the continuing persistence of NTBs undermining the benefits to be gained from the regional integration process.

The application of NTBs is rooted in a variety of causes, both justified and unjustified. Unjustified and or improper application of NTBs includes the use of NTBs to discriminate imports from other partner states. Among the measures are delayed approval of import permits, import quotas, import licenses, discriminatory taxes or excessive document requirements applied on imports, complex or discriminatory rules of origin, improper use of health, safety regulations or quality standards to discriminate against imported products. Nevertheless, NTBs can be justified for fundamental reasons such as to safeguard health, safety, and security of human beings, animals and plants, and against environmental pollution, to protect home industries and consumers, to safeguard national security as well as to safeguard the country against revenue loss but sometimes the NTBs have been imposed beyond these purposes.¹³

All partner states in the community recognise that realising the vision of the EAC to create an integrated market requires the reduction and removal of NTBs. It is from that position partner states within the EAC have made devoted efforts to address NTBs with the support of the EAC Secretariat.

3. Mechanisms for Eliminating Non-Tariff Barriers in the EAC

Several measures have been undertaken to eliminate NTB within the partner states to increase economic efficiency and create political and cultural relationships among the partner states. Among the initiatives undertaken are hereinafter explained.

¹³ Monica A. Hangi, "The Non-Tariff Barriers in Trading Within the East African Community", Economic and Social Research Foundation (ESRF), 2010.

3.1. Elimination of Non-Tariff Barriers Act 2017

Partner states in the region have undertaken specific measures, including the enactment of the EAC Elimination of Non-Tariff Barriers Act (2017) to provide a legal framework for monitoring and addressing NTBs in the region.¹⁴

The Non-Tariff Barriers Act provides three mechanisms for resolving reported NTBs. The first mechanism relies on mutual agreements among concerned partner states to eliminate a reported NTB. The second mechanism involves implementing the EAC time-bound programme for the elimination of identified or reported NTBs which is also embedded into the COMESA-EAC-SADC Tripartite web-based NTBs Monitoring System. The third mechanism utilises regulations, directives, decisions or recommendations made by the Council of Ministers of the EAC.

3.2. National Monitoring Committees

National Monitoring Committees (NMCs) also known as national focal points were launched in 2007 as a mutual agreement between the partner states.¹⁵ Mutual agreement is the priority in resolving reported NTBs. Partner states are encouraged to hold a discussion and agree on a strategy to eliminate the reported NTBs.¹⁶ They are advised to identify NTBs that can be easily resolved through amicable talks and bilateral meetings.

Generally, when NTBs arise in the EAC, they can be reported through NMCs offices or through a specific designated website for reporting NTBs. The NMCs have the responsibility of identifying, monitoring and facilitating the elimination of NTBs including establishing web and short

¹⁴ The East African Community Elimination of Non-Tariff barriers Act 2017. An Act of the Community to provide for the elimination of non-tariff barriers in the Community and to provide for other related matters.

¹⁵ Non-Tariff Barriers Act 2017, s 10.

¹⁶ EALA, 2015.

messages (SMS) platforms where businessmen can report NTBs.¹⁷ NMCs have membership from private and public sectors. They are usually chaired by a representative from the ministry responsible for trade or EAC affairs, and the vice chair is usually from a private sector business organisation. This ensures that the private sector has a channel to table the NTBs it encounters while conducting business across the region.

Any company operating in the EAC can register and report NTBs that it faces in day-to-day operations. NMCs receive NTB complaints in real-time and are mandated to resolve NTBs within given deadlines. The communication and exchange of documents is facilitated through the online tool. The tool has an automatic translation feature for many languages. An offline SMS text messaging feature is also available and integrated with the online platform, especially for business men whose internet connectivity is scarce.

NMCs that receive a report or a complaint on a NTB from the partner state are obliged to investigate the report or complaint, and prepare a plan for the elimination of such NTB, in accordance with the EAC Time Bound Programme for Elimination of Identified Non-Tariff Barriers.¹⁸ NMCs meet regularly to discuss reported cases and actions taken, and report the information gathered to their line ministries or the agency responsible for taking further action. NMCs also participate in regional fora where they are able to share experiences of NTBs and of the elimination process.

The main challenge with this mechanism is that partner states may not agree on the best strategy to eliminate NTBs. Although mutual agreement seems to be the fastest way to resolve NTBs, discussions may

¹⁷ Marry Odongo, "Elimination of non-tariff barriers to trade in East Africa", Trade Mark East Africa, WTO (2017), available at: <<https://www.oecd.org/aidfortrade/casestories/casestories-2017/CS-72-TMEA-Elimination-of-non-tariff-barriers-to-trade-in-East-Africa.pdf>>.

¹⁸ Non-Tariff Barriers Act 2017, s 12(4).

sometimes take a long time to conclude, thereby worsening their persistence and impact on trade. Reports also indicate that NMCs are weak in some countries due to a lack of skills and capacity to evaluate the impact of NTBs and determine an appropriate solution.¹⁹

3.3. Time-Bound Programme for the Elimination of NTBs

The Council of Ministers approved the Time-Bound Programme for Eliminating NTBs in September 2009. The aim was to achieve free circulation of goods, people, services, and capital among partners in the EAC. The mechanism was expected to swiftly identify NTBs in the region and their subsequent removal.

A partner state can initiate the elimination of an NTB through the Time-Bound Programme by presenting a written notification to the country responsible for the NTB. The NMC of the responsible country is expected to investigate the reported NTB to identify its impact, establish the required time to resolve the NTB and the challenges that might be experienced in the process of eliminating the reported barrier.

The time-bound works in the order of the partner state issuing a notification, a copy of which shall be submitted to the EAC Secretary General.²⁰ Upon a partner state receiving the notification shall, within a timeline of ten days of receiving the notification, provide a written response to the requesting partner state on the issues specified in the notification.²¹ Where the responding partner state is not able to respond to a notification within ten days, the partner state shall inform the requesting partner state of the reasons for the delay in responding and shall submit its response within twenty-five days of receipt of the notification.²² Where the partner state issues a response to a notification

¹⁹ MTIC (Ministry of Trade, Industry and Cooperatives) (2016), “Overview of the MTIC’s National Response Strategy for Elimination of Non-Tariff Barriers (NRSE-NTBs)”, Kampala MTIC.

²⁰ Non-Tariff Barriers Act 2017, s 11 (5).

²¹ Non-Tariff Barriers Act 2017, s 11 (6).

²² Non-Tariff Barriers Act 2017, s 11 (7).

then they shall submit a copy of the response to the Secretary General.²³ Where a partner state fails to resolve a matter relating to a NTB, the Secretary General shall, within fifteen days of receipt of the response, convene a meeting of the concerned partner states, to resolve a matter relating to the non-tariff barrier.²⁴

In 2023, the EAC Elimination of NTBs Mobile Application was also developed to ease the reporting, monitoring, and elimination of NTBs in the Community. The EAC Elimination of Non-Tariff Barriers (NTBs) Mobile Application was finalised and piloted during the NMCs meetings in March 2023. The EAC NTBs App allows the users to report the complaints in one of the three (3) EAC official languages, i.e., English, Swahili and French. The application was officially launched at the official opening ceremony of the 23rd EAC MSMEs Trade Fair held on 8 December 2023 in Bujumbura, Burundi.²⁵

Furthermore, the Eastern and Southern Africa Region, the Common Market for Eastern and Southern Africa (COMESA), the EAC and the SADC have developed a tripartite online and freely accessible NTBs reporting, monitoring and eliminating mechanism that enables stakeholders to report and monitor the resolution of barriers encountered during the conduct of their business within the three regions.²⁶ The AU recently developed a similar mechanism at the continental level for identifying and removing NTBs to trade in Africa, which has been operational since 13 January 2020.²⁷

²³ Non-Tariff Barriers Act 2017, s 11 (8).

²⁴ Non-Tariff Barriers Act 2017, s 11 (9).

²⁵ East African Community, “EAC embarks on use of Mobile App to eliminate NTBs”, available at <<https://www.eac.int/press-releases/157-trade/3013-eac-embarks-on-use-of-mobile-app-to-eliminate-ntbs>> (accessed 13 February 2024).

²⁶ COMESA-EAC-SADC, “Non-Tariff Barriers, Reporting, Monitoring and Eliminating Mechanism”, available at <<https://www.tradebarriers.org/>> (accessed 10 October 2023).

²⁷ The African Continental Free Trade Area (AfCFTA), Non-Tariff Barriers, Reporting, Monitoring and Eliminating Mechanism, the online platform built by UNCTAD and the African Union in 2019.

3.4. Directives, Decisions or Recommendations Made by the Council of Ministers of the EAC

If the reported NTBs cannot be resolved through mutual agreement or the Time-Bound Programme, they have to be escalated to the Council of Ministers. The Council may make a directive or a decision concerning the best way to resolve a reported NTB. Alternatively, it can escalate the reported NTB to the EAC Committee on Trade Remedies for guidance. A major challenge with this mechanism is that directives such as a recommendation by the Council to the Summit to impose a sanction on non-complying parties may not be implemented as a result of political goodwill.²⁸ Therefore, a legally binding mechanism that provides for sanctions that can be imposed by the Council should be adopted to ensure compliance. If a person aggrieved by a directive, decision or recommendation of the Council or a decision of the EAC Committee on Trade Remedies, may refer such matter to the EACJ.²⁹

The EAC has come a long way, and efforts of elimination of NTBs are widely acknowledged by business enterprises in the region and indeed, the EAC stands as one of the most cohesive regional economic communities in Africa. However, the trend of NTBs acts as impediments towards the realisation of smooth intra trade and stands as a manifestation of absence of free trade environment in EAC region, notwithstanding the Custom Union Protocol and CMP signed by the partner states.

Hence, as the 25th anniversary of the EAC is marked, NTBs still significantly restrict the importation and exportation of goods and services more than customs duties and other charges. This poses additional direct or indirect costs to trade constraining competitiveness of traders in the region. It also negatively affects trade flows, and reduces the benefits to be gained from the regional integration process. It is to be

²⁸ Craig Mathieson, *The Political Economy of Regional Integration in Africa: The East African Community* (The European Centre for Development Policy Management 2016).

²⁹ Non-Tariff Barriers Act 2017, s 12(4).

acknowledged that the EAC could have progressed further in terms of intra trade if there would be fewer or no NTBs.³⁰

3.5. Reasons for the Persistence of NTBs in the EAC

This part examines reasons and the magnitude of NTBs affecting trade in the EAC. It explores the different types of NTBs reported in the EAC in recent years and evaluates various mechanisms for their removal. From 2004 up to June 2023, the EAC had reported 257 NTBs and resolved 244, translating to a resolution rate of 91.4%. The outstanding NTBs were eight (8) and were at different levels of resolution, while four (4) new NTBs were emerging, in 2023 ten (10) NTBs were resolved. This was reported at the end of the 42nd Meeting of the Sectoral Council of Ministers on Trade, Industry, Finance and Investment (SCTIFI) that was held at the EAC Headquarters in Arusha, Tanzania on 1 June 2023.

Most of the outstanding NTBs concern was discriminatory charges, fees and levies by partner states, non-preferential treatment of goods originating from partner states, non-recognition of calibration certificates from partner states and requirement for upfront payment of guaranteed cheques for storage of oil and penalties after expiry of grace period as illustrated hereinafter.³¹

On 4 May 2016, it was reported that Rwanda did not accord preferential treatment for rice originating from Tanzania as per the requirement of the EAC Rules of origin.³² This matter took 299 days to be resolved on 6 May 2017. When the NTB was imposed, rice exports from Tanzania

³⁰ Pauline Koola, “PWC Tanzania, ‘EAC tax harmonization remains a challenge’”, available at <<https://www.pwc.co.tz/press-room/eac-tax-harmonization-remains-a-challenge.html>> (accessed 11 October 2023).

³¹ Trade Mark Africa, “How Non-tariff Barriers Affect Trade in the EAC” (29 August 2022), available at <<https://www.trademarkafrica.com/how-non-tariff-barriers-affect-trade-in-the-eac/>> (accessed 11 October 2023).

³² NTB Complaint No. NTB-000-707.

reduced drastically and in 2017 the exports were only 35,000 kg. After resolution of the NTB, the rice exports from Tanzania to Rwanda in 2018 increased to 3.2 million kg and has been increasing. In 2020 it peaked to 59 million kg at a value over USD 35 million.

Again, on 28 August 2019, it was reported that Rwanda Revenue Authority had denied preferential treatment on silk coat products from Tanzania.³³ This matter took 322 days to be resolved on 1 September 2020. It is worth noting that trade reduced by over USD 1 million between 2019 and 2022, and this can be explained partly because of the introduction of the NTB. Another complaint is by Kenya against Uganda over unfair trade practises.³⁴ Kenya is complaining that Uganda is denying its market access to Kenya under preferential treatment by charging a full CET of 35 % on juices originating from Kenya.³⁵

3.5.1. Discriminatory Charges, Fees and Levies by Partner States

On 12 October 2015, it was reported by Kenya that the Republic of Uganda had discriminatively imposed a 10% duty on Kenyan manufactured laundry bar soaps.³⁶ It took 262 days to resolve this matter on 30 June 2016.

Before the NTB, Kenya exported over 1.6 million kg of soap to Uganda, worth about USD 941,000; but when the NTB was introduced, trade reduced to just about 86,000 kg, worth just over USD 100,000. This shows a 90% drop in trade, which costs businesses over USD 800,000 in lost revenues. After the resolution of the NTB in 2016, the quantity increased gradually to 147,955 kg in 2017 and 2.3 million kg in 2021. This shows that the resolution of the NTB has increased the exports of bar

³³ Under NTB Complaint No. NTB-000-910.

³⁴ Kenya Cabinet Secretary for Cooperatives and MSMEs Simon Chelugui at a meeting of trade ministers held in Arusha in June 2023.

³⁵ NTB complaint No. NTB-001-112

³⁶ NTB Complaint No. NTB-000-681.

soaps from Kenya to Uganda by 2.2 million kg in 2021 (2,333,141 – 86,556), which translates to USD 1.5 million.³⁷

In 2018, Rwanda complained that milk exported to Tanzania attracted numerous charges collected by different institutions such as the Tanzania Bureau of Standards, Tanzania Foods and Drugs Authority and the Tanzania Dairy Board. According to Rwanda, to import a kilogramme of milk into Tanzania, the government charged Tanzania Shilling 2,000 (USD 0.86) from Tanzania Shilling 150 (USD 0.064) a year before. This was a 1,233% increase published under the Animal Diseases and Animal Products Movement Control Regulations on August 31, 2018 (Government Notice No 478) and which entered into force on October 1, 2018. Rwanda compared the commensurate to a total ban since imported milk cannot compete with the local milk.³⁸

Later Tanzania conceded the issue of numerous charges by revising the Tanzania Dairy Board Charges from Tanzania shillings 2,000 to 1,000 through Government Notice number 478 of July 2022. The remaining are part of the ongoing process of harmonisation of fees, levies, and charges. Despite being resolved the dispute took almost five years to resolve on 20 February 2023.

In 2021, the Kenya Excise Duty Act was amended to introduce 25% excise duty on all imported eggs. The duty was meant to protect local producers of eggs. The tax adversely affected the egg business, including causing insufficient local supply since Kenya relies on cheap eggs from Uganda. Due to the increasing duty, traders were reluctant to import the product, causing outcries in the country. The Eggs Traders Association of Kenya moved to court challenging the implementation of the

³⁷ Trade Mark Africa, “How Non-tariff Barriers Affect Trade in the EAC” (29 August 2022), available at <<https://www.trademarkafrica.com/how-non-tariff-barriers-affect-trade-in-the-eac/>> (accessed 10 October 2023).

³⁸ NTB compliant No. NTB-000-836.

measures. The court issued an interim order restraining the government from collecting or imposing taxes on table eggs imported from Uganda.

Kenya also reported that Tanzania was subjecting its exports of animals and animal products to discriminatory treatment despite their commitment in the bilateral meeting to amend the Act to resolve the discriminatory charges by June 2022. Tanzania reported that Kenya was charging a 25% excise duty on hatching eggs exported by some Tanzanian companies.³⁹

Kenya is also complaining that Uganda charges 18% Value Added Tax on exercise books from Kenya while Uganda manufacturers of the exercise books are VAT-exempt as per the provisions in the Uganda VAT Act. The discriminative VAT violates Article III of GATT 1994, Article 75(6) of the Treaty establishing the EAC, and Article 15 of the EAC Customs Union Protocol as it subjects Kenyan manufactured products to VAT charges not charged on the same domestic products in Uganda.⁴⁰

3.5.2. Delayed Approval of Import Permits

There have been delays in issuing or approving import permits. One such example is the case of Happy Sausage Ltd, a meat processing company based in Arusha Tanzania. The company produced various types of sausages (fresh, smoked, cooked, fermented), bacon, ham, fresh, beef, lamb, pork and chicken. It wanted to export its products to Kenya. The company was advised to apply to the government of Kenya for an import permit of meat. It complied with all requirements. Despite this compliance, the authorities in Kenya did not send staff to Tanzania to inspect the slaughter and meat processing facility in Arusha which would have allowed the company to export meat and meat products to Kenya.⁴¹ After the company filed a

³⁹ NTB complaint No. NTB-001-110.

⁴⁰ NTB complaint No. NTB-000-997.

⁴¹ COMESA-EAC-SADC, "Resolved Complaints", available at <https://www.tradebarriers.org/resolved_complaints/page:1/search:tanzania/sort:date_of_incident/direction:desc> (accessed 10 October 2023).

complaint did the Kenyan authority look at the risk assessment questionnaire submitted by Happy Sausage Ltd. and approve their import permit.⁴²

Another export crisis arose in June 2023 at the Namanga border, where more than 200 maize-laden trucks were stranded over permits from Kenya authorities. Trucks loaded with maize from Tanzania were barred from crossing into Kenya after the Tanzanian authorities stopped issuing maize exportation permits. Cross-border importers termed the change in policy by Tanzania as a re-emergence of NTBs. Though the trucks were later allowed to cross the border after the talks between the two countries, the delays had impacts on traders and consumer welfare.⁴³

Furthermore in 2023, Uganda complained against import ban and denial of market access by Kenya through non-issuance of import permits for powdered milk from Uganda. On 6 March 2023, the government of Kenya, through the Kenya Dairy Board, stopped or and sometimes delayed the issuing of import permits for powdered milk as a means of cushioning the surplus production and low producer prices in Kenya. Uganda complained the measures were in breach of the EAC Customs Union Protocol and the Common Market Protocol (CMP).⁴⁴

Another resolved NTB are the 13 roadblocks between Nimule and Juba in South Sudan with Ugandan traders. Ugandan traders had raised several complaints about the numerous roadblocks along the Nimule Road and within Juba. Traders have frequently described these impediments as extortion points that make conducting business even more difficult. South Sudan reported that they had already complied with the SCTIFI

⁴² NTB complaints No. NTB-001-068.

⁴³ The EastAfrican, “Cross-border Traders Protect New Barriers to Trade in Food in EAC” (10 June 2023), available at <<https://www.theeastafican.co.ke/tea/business/food-fights-erupts-again-in-eac-4265170>> (accessed 13 October 2023).

⁴⁴ African Development Bank Group, “Non-Tariff Barriers: Reporting, Monitoring and Eliminating Mechanism”, available at <https://www.tradebarriers.org/resolved_complaints> (accessed 10 October 2023).

directive to remove all roadblocks, adding that there were only two roadblocks from Nimule to Juba left.⁴⁵

3.5.3. Improper Sanitary and Phytosanitary (SPS) Measures

In June 2022, in South Sudan, 72 Ugandan trucks loaded with maize flour were stuck at the Elegu-Nimule border crossing for a month, after South Sudan claimed that preliminary tests showed the flour had high aflatoxin levels. While aflatoxin, caused by high moisture and poor drying methods, is a health risk, including the potential to cause cancer, both sides could not agree on whose results they should rely on. Uganda said it tested the flour and approved the export, while South Sudan said random tests showed too high levels. Uganda decided to formally protest the delays until the matter was resolved and the trucks were allowed to cross.⁴⁶

Similar events occurred between Kenya, Uganda, and Tanzania regarding maize. Maize is a staple crop in many sub-Saharan countries, particularly in East and Southern Africa. In the past five years, there have been food safety concerns in the maize value chain, specifically due to aflatoxin. Under the EAC common market safe rules, standards for aflatoxins in maize have been set. The EAC's standard is 10 parts per billion.⁴⁷ Uganda and Tanzania are the region's net exporters of maize, and Kenya and Rwanda are the net importers. Uganda used to be the largest exporter of maize to Kenya, but the aflatoxin contamination concerns and subsequent import bans by Kenya have resulted in loss of export markets for Ugandan maize exporters. For example, in 2018, 600 metric tonnes of Ugandan maize, worth about 180 billion Ugandan shillings (over USD 80 million), were returned by Kenya claiming the maize had traces of aflatoxin among other standards issues leading to

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ EAC Aflatoxin Prevention and Control Strategy, Action Plan and Result Framework 2018 – 2023.

significant decrease of over 90% of maize exports from Uganda to Kenya.

Again, in March 2020, Kenya enforced a blanket ban on all imports of maize, particularly from Uganda and Tanzania due to aflatoxin contamination exceeding the legislated level of 10ppb. According to the Agriculture and Food Authority (AFA) in Kenya, Ugandan maize was found to contain mycotoxins, particularly aflatoxins and fumonisins, exceeding 10ppb and 2000ppb respectively. In addition to maize import bans from Uganda and Tanzania, the Kenya Bureau of Standards (KEBS) also banned and directed market recall of 17 maize flour brands in the same year, citing high aflatoxin levels that could negatively impact human health. The next year, in May 2021, Kenya's AFA confiscated and destroyed more than 150 tonnes of Tanzanian maize with an approximated value of Tanzanian Shilling 75 million (USD 32,000) due to non-compliance to aflatoxin maximum limits.

Again, in August 2021 KEBS issued a ban on several maize meal and composite flours from being sold to the public in Kenya due to non-compliance with the requirements of the Standards Act Cap 496, Laws of Kenya. Surprisingly, in 2021, in less than a week, the Kenyan government appeared to backtrack and announced that it had asked its EAC trading partners to pass sanitary and phytosanitary standards on farm produce before it reached Kenya. Such unilateral decisions were condemned by counterparts as to be political motivated rather than legitimate.⁴⁸ Hence, SPS measures, including food safety measures and their implementation, remain a major impediment to food trade in the EAC. Further, the fragmented nature of food safety regulations poses challenges in implementing food safety measures, more so for traders who face difficulties trying to comply with these measures. The absence

⁴⁸ Luke Anami, "Kenya Clears Air on Toxic Maize 'Ban' After EAC Partners Condemn Action" (15 March 2021), available at <<https://www.theeastafrican.co.ke/tea/business/kenya-clears-air-on-toxic-maize-ban-3323052>> (accessed 12 October 2023).

of harmonised food safety measures, in most instances, gives rise to the presence of NTBs.

3.5.4. Lack of Trust among Partner States

Lack of trust among partners is also a factor for NTBs in many occasions, including the May 19, 2020 saga, where Kenya reported that it had returned 180 foreigners who had tested positive for Covid-19 to Tanzania. This sparked accusations of faulty testing being conducted by Kenya as sabotage to Tanzania as a tourist destination country.⁴⁹ Again, lack of trust in each other's competency was in play when 19 Tanzanian truckers who had tested positive for Covid-19 were denied entry into Kenya on May 20, 2020. This attracted a response from Tanzania, which reported that the same drivers who tested positive in Kenya had re-tested negative in Tanzania.⁵⁰ This caused long queues as the Tanzanian government ordered that the truckers had to change over their cargo at the border so that owners of the goods had to collect them from the border point, denying all truckers from Kenya entry into Tanzania and also suspending travel of Tanzanian truckers into and through Kenya.

Recently, a trade dispute has also been bubbling between Uganda and Tanzania. Uganda does not recognise the calibration certificate issued by the Weight and Measures Agent (WMA) for oil tanks from Tanzania. As a result, Tanzanian traders are forced to undergo recalibration by the Uganda Bureau of Standards for USD 230. This increases the cost of doing business.

There are also disputes between Tanzania and the rest of the EAC partner states over work permits. Tanzania demands a business visa fee of USD 250 for EAC business persons entering Tanzania charged as a certificate of temporary assignment at all borders, contrary to the EAC-

⁴⁹ Catherine Nambi, and Amina Chombo, "Fear of Covid-19 slows trucking in East Africa" (21 May 2020), available at <<https://www.voanews.com/Covid-19-pandemic/fear-Covid-19-slows-trucking-east-africa>> accessed 1 October 2023.

⁵⁰ Ibid.

CMP of free movement of people across the region.⁵¹ The fee is charged on persons visiting Tanzania on temporary assignments such as economic activities and professional services. Tanzania has been urged to scrap the fee for East African citizens as per Regulation 5 of the EAC-CMP, which establishes limits of free movement of persons in the EAC only on grounds of public policy, public security or public health.⁵²

3.5.5. Slow Implementation of Agreed Taxation Rules

East African economies are losing millions of dollars as stiff trading policies, including slow implementation of agreed taxation rules, yet again force a drop in intra-regional commerce. A report on regional commerce shows that policymakers have not been putting their words into action, agreeing on significant policies but delaying implementation. In turn, this has seen EAC states frequently flout the CMP and undermine the regional integration agenda through imposition of NTBs to trade and repeated requests for preferential tax treatment and exemptions. The Intra-EAC Trade Brief Analysis report by the EABC shows that the value of trade among the EAC partner states fell by more than 33% (USD 1.8 billion) to USD 3.6 billion in 2022, from USD 5.4 billion in 2021.⁵³ According to the EABC report, restrictive trade practices including NTBs are among the major causes of the downfall, while other factors includes failure to fully implement the revised CET, high cost of doing business, over-reliance on foreign currencies and rain-fed

⁵¹ Protocol on the Establishment of the East African Community Common Market (CMP) was signed and entered into force in 2010. It was projected that by December 2015 will be fully implemented.

⁵² The Protocol on the Establishment of the East African Community Common Market (CMP) was signed and entered into force in 2010.

⁵³ James Anyanzwa and Luke Anami, “Intra-EAC Trade Down by \$1.8 bn on Barriers, Taxation” (29 July 2023), available at <<https://www.theeastafrican.co.ke/tea/business/intra-eac-trade-down-by-1-8bn-on-barriers-taxation-4319896>> (accessed 7 October 2023). The report shows the intra-EAC trade was mainly impacted by trade in cereals, which fell to \$285.5 million from \$607.2 million and trade in mineral fuels, which fell to \$175.1 million from \$618.2 million in the period. Trade in sorghum and rice declined, but intra-export trade in maize increased by 63% to \$187.1 million from \$114.6 million.

agriculture are other major obstacles to trade. Others are the spillover effects of global shocks that have exacerbated food insecurity by disrupting the supply of key commodities such as fuel, fertiliser and wheat.

Non-recognition of calibration certificates from partner states. In 2017, the Kenyan government expressed condemnation towards the Tanzanian government's decision to burn smuggled chicks and auction animals belonging to Kenyan pastoralists without prior communication.⁵⁴ Conversely, in 2021, Tanzanian trans-border truck drivers were prevented from entering Kenya, citing concerns that a significant percentage of them had been affected by COVID-19, despite possessing clean COVID-19 test certificates from Tanzania.⁵⁵

3.5.6. Failure to Implement the Revised Common External Tariff

On the other side, countries seek preferential tax treatment or tax favours to protect their local industries. The EAC partner states commenced implementation of the new EAC CET 2022 Version effectively from the 1st of July 2022. The four-band tariff structure introduced the 4th band, which attracts a 35% import duty, which is the maximum tariff. The 4th band mainly caters for final products which are sufficiently produced in the region or have high potential to be sufficiently produced or are likely to generate maximum tax revenue for the region. The other three bands are 0% for raw materials or essential products, 10% for intermediate products and 25% for final products which are not sufficiently available in the region. In addition, the EAC CET 2022 Version maintained a sensitive list of a few products that are attracting higher tariff rates above maximum tariff rate of 35% which are ranging from 40% to 100%.

⁵⁴ Calvince Omondi Barack, and Gerishon Barack Munga, "Covid-19 and Border Restriction Policies: The Dilemma of Trans-border Truck Drivers in East Africa" (2021) 1(1) Journal of Governance and Accountability Studies, pp. 55-67.

⁵⁵ Ibid.

However, one of the main challenges regarding the implementation of the EAC CET 2022 Version is the failure of the EAC partner states to uniformly implement the new EAC CET as was the case for the previous EAC CET. The EAC partner states have continued to persistently apply for stays of applications and Country-specific duty remission, creating an unlevel playing field for the producers, manufacturers and traders across the region. The action has in addition been frustrating intra EAC trade as well as regional value addition which were among the objectives of developing the EAC CET 2022. For instance, Tanzania has demanded a delay in implementing the regional CET rate of 50%. The country continues to apply a duty rate of 35% for one year on vitenge fabric while Uganda has to similarly delay zero-rating and apply a duty rate of 10% for one year on mobile phones. Conversely, Kenya will stay the application of the EAC CET zero rate and apply a duty rate of 25% for one year on mobile phones. Uganda has also sought to assign “ginger” as a sensitive item for one year; and to stay application of the EAC CET rate of 35% and apply a duty rate of 60% for one year.⁵⁶ The above-mentioned challenges compromise progress towards achieving intended objectives of the new EAC CET 2022 Version. The above circumstance illustrates the challenges faced by intra-trade in the EAC. They highlight instances of NTBs where government decisions and restrictions disrupt trade activities, leading to financial losses and hindering economic growth in the EAC. These instances cement the existence of NTBs that create tension and hinder trade relations among member states within the EAC. Such actions not only disrupt the smooth flow of goods and services but also strain diplomatic relations and hamper regional cooperation.

⁵⁶ East African Business Council, “EABC Survey Report on Implementation of EAC Common External Tariff (CET) Version 2022” (2 October 2023), available at <<https://eabc-online.com/download/eabc-survey-report-on-implementation-of-eac-common-external-tariff-cet-version-2022/?wpdmdl=10129&refresh=6525734bc16051696953163>> (accessed 10 October 2023).

While a number of NTBs may be seeking to meet regulatory objective such as food safety or product safety some of NTBs are explicitly protectionist. There may be a consensus that existing NTBs should be abolished but this does not mean that there is agreement on how to meet legitimate regulatory objectives in a less trade restrictive manner. The publication of NTBs in the EAC along with the existence of a different high-profile forum within the EAC for discussing NTBs - represents a major step forward.

However, EAC partner states and the Secretariat face the challenge of moving from identifying and discussing NTBs to implementing regulatory reforms and reducing trade restrictive measures. Currently there is no mechanism for ensuring that partner states follow a process of either justifying the NTB or agreeing to remove it once a NTB is identified and publicised. The absence of a clearly defined monitoring mechanism with time limits for action means each partner state is responsible for voluntarily removing or reforming listed NTBs without being subject to possible sanctions for non-compliance. Currently removing NTB within the EAC has, to date, failed to end the NTBs as previously projected. This may be different with more formal, legally binding mechanisms with sanctions.

4. Conclusion

This chapter examined the state of affairs of the EAC's NTBs as the community itself has celebrated its silver jubilee since its revival in 1999. The chapter has established that several NTBs continue to hinder intra-EAC trade. For that purpose, the present chapter offers the following recommendations:

Partner states need to ensure that NTB's legal and regulatory framework governing the integration process is properly enshrined in the national laws, and clearly understood and complied with by all regulatory and administrative agencies. This is important to ensure that relevant agencies do not introduce laws, regulations, practices and

procedures that may contradict aspirations of the EAC Treaty and its protocols including the Custom Union Protocol and CMP.

The proposed new regulatory measures should be required to be notified to the other Partners and the EAC Secretariat in advance to allow time (a minimum of 90 days) for consultation and review. The EAC and partner states should commit to ensuring all existing policies, regulations, administrative procedures, and any related fees relating to the importation and export of goods are prior readily available through a publicised website and notified to the counterpart. Provision should also be made for all proposed changes to technical regulations to be posted on the website with a facility for interested parties to submit comments. When partner states notify new regulatory requirements or procedures to the EAC Secretariat and each other, they should also notify the WTO. For simplification, the reporting requirements should be identical. The experience of the WTO SPS and TBT Committees represents a relevant model for notification, reporting and discussion.⁵⁷

EAC partner states and the Secretariat should ensure that the dispute settlement system is in place and ready to address NTBs. I recommend that the EAC considers adopting the SADC approach of linking the management of NTBs with a formal monitoring and compliance mechanism that allows for fast-tracking decision making and is linked to the formal dispute settlement mechanism with a legally binding outcome. SADC has established a transparent system for monitoring and ensuring compliance with the SADC Trade Protocol which includes procedures for addressing reported barriers to trade including NTBs. The SADC Trade Monitoring and Compliance Mechanism (TMCM) requires all members to notify all

⁵⁷ Oker Güler, “WTO Agreements on Non-Tariff Barriers and Implications for the OIC Member States: Customs Valuation, Pre-shipment Inspection, Rules of Origin and Import Licensing” (2002) 23(1) *Journal of Economic Cooperation*, p. 61.

trade laws and regulations and will function as a system for notification, consultations and negotiation among Member States as well as for implementing judgments and sanctions determined by the dispute settlement system. The experience of the EU in establishing a legally binding mechanism with sanctions for non-compliance also provide a relevant model in this case.⁵⁸

Lastly, to mitigate these challenges, I propose to ensure uniform application of the EAC CET 2022 Version among the EAC partner states to opt for a regional duty remission scheme instead of the country's specific duty remission to promote market access, abolish stay of applications which are creating unlevel playing field and frustrating regional value addition and intra EAC trade and finally involve the private sector in the process of inclusion of additional products into 4th Tariff Band which attract 35% import duty.⁵⁹ It is also important to note that EAC members belong to the WTO. As such they have already committed to organising their multilateral trade relations in a transparent and non-discriminatory manner with the least trade restrictive regulations, within a legally binding and enforceable system keeping on implementing NTBs is a violation of both the EAC treaty and its protocol as well as the WTO obligations. This is inconsistent with each of the partner states committing to implement their commitments under GATT 1994 Articles V, VIII and X.⁶⁰

⁵⁸ European Parliament resolution of 17 February 2022 on tackling non-tariff and non-tax barriers in the single market (2021/2043(INI)).

⁵⁹ East African Business Council, "EABC Survey Report on Implementation of EAC Common External Tariff (CET) Version 2022" (2 October 2023), available at <<https://eabc-online.com/download/eabc-survey-report-on-implementation-of-eac-common-external-tariff-cet-version-2022/?wpdmdl=10129&refresh=6525734bc16051696953163>> (accessed 10 October 2023).

⁶⁰ General Agreement on Tariff and Trade 1994 is one of the multilateral agreements annexed to the WTO Agreement. It is an international treaty binding upon all WTO Members.

Chapter Thirteen

The Implications of Inter-State Disputes on the Freedom of Movement in the EAC

*Mwaka Mupe**

1. Introduction

The creation of regional economic communities is driven by factors such as politics and economics. More often than not, regional economic communities are created to achieve economic growth and reinforce the political power of developing countries in relation to developed countries.¹ The EAC, one of the eight regional communities in Africa, was designed with the objective of deepening cooperation among its members in matters such as cultural, political, social, and economic affairs. In line with the aforementioned objective, the Common Market came into being in 2010, bringing five freedoms, known as the free movement of persons, labour, goods, services and capital.² Be that as it may, implementing the Common Market Protocol (CMP) in relation to the five freedoms has not been without challenges. One of the challenges

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¹ Sena Eken, “Breakup of the East African Community” (1979), 37, available at <<https://www.elibrary.imf.org/downloadpdf/journals/022/0016/004/article-A010-en.xml>> (accessed 4 August 2023).

² “Common Market”, available at <<https://www.eac.int/common-market>> (accessed 4 August 2023).

is recurring inter-state disputes that disrupt the free flow of persons, labour, goods, services and capital.

2. The Historical Overview of Inter-State Disputes in the EAC

The advent of a unified East African region stemmed from the colonial administration of Great Britain in the mid-1890s. Subsequent to a visit by Sir Harry Johnson, who was serving as the Special Commissioner to Uganda, he recommended the placement of Uganda, Kenya, Zanzibar and British Somaliland under a single administration.³ It was not until 1919 that cooperation attempts were made by the British administered regions, namely Kenya, Uganda, and joined by Tanganyika in 1927 to form a customs union that saw the strengthening of economic links among the three countries. In 1948, the establishment of the East African High Commission introduced a unified tax system to the already established customs union.⁴ Even then, there were disputes among the three countries over the fair and equitable distribution of benefits, which intensified after independence, with each country preferring national development to regional development.⁵

The disparities in the distribution of benefits and ensuing disputes therefrom led to the signing of the Kampala Agreement 1964. Its subsistence was meant to introduce a quota system on intra-East African trade by limiting trade imbalances experienced in deficit countries and introducing a licensing system to promote new major industries in countries with the least number of industries. Notwithstanding the far-reaching efforts of the Kampala Agreement, the three countries failed to

³ Bheki R. Mngomezulu, “Why did Regional Integration Fail in East Africa in the 1970s? A historical explanation”, 2, available at <<https://phambo.wiser.org.za/files/seminars/Mngomezulu2013.pdf>> (accessed 4 August 2023).

⁴ Stefan Reith and Moritz Boltz, “The East African Community: Regional Integration between Aspiration and Reality” (2011) KAS International Reports, p. 92.

⁵ Sena Eken, “Breakup of the East African Community” (1979), 37, available at <<https://www.elibrary.imf.org/downloadpdf/journals/022/0016/004/article-A010-en.xml>> (accessed 4 August 2023).

adhere to the Agreement's provisions, resulting in Tanzania and Uganda imposing quantitative restrictions on intra-East African trade.

A historic occasion was witnessed in the East African region on 6 June 1967, when the presidents of Kenya, Uganda and Tanzania signed the Treaty of the East African Cooperation. The three countries agreed to be guided by the three objectives of the Treaty: to establish a common external tariff, abolish trade restrictions, and control imports from third countries especially when similar imported goods were produced within the Community. However, from the onset, the EAC appeared to be built on a shaky foundation; the fact that the initial idea of a unified East African region emanated from the colonial masters drew suspicion from different quarters within the EAC.

The initial formative years of the EAC were encouraging as the partner states appeared to be eager to implement it; nonetheless, in the early 1970s, cracks in the member states' relations became evident. After 1971, the presidents of the three countries, who constituted the highest authority of the EAC, did not meet. This was because President Julius Nyerere refused to meet President Idi Amin of Uganda who had just overthrown the Ugandan civilian-led government of President Milton Obote.⁶ What seemed to be a national affair escalated to the regional level because the overthrow of Obote by Amin did not augur well with the Presidents of Tanzania and Kenya. President Nyerere, while having personal relationship with Obote, offered political asylum to Obote and was against convening EAC meetings with Amin. When the Organisation of African Unity (OAU) recognised Amin as the President

⁶ Monitor, "How the 1971 Overthrow of President Obote was Hatched", *Monitor*, 9 January 2021, available at <<https://www.monitor.co.ug/uganda/magazines/people-power/how-the-1971-overthrow-of-president-obote-was-hatched-1641098>> (accessed 17 September 2023).

of Uganda, Nyerere together with President Kenneth Kaunda of Zambia boycotted subsequent O.A.U. meetings.⁷

Inter-state disputes in the former EAC also took the form of aggravation of territorial sovereignty, characterised by Uganda, under the leadership of Amin, picking battles with its neighbours. In 1972, when 1,000 armed supporters of Obote, with Nyerere's support, invaded Uganda from Tanzania and occupied the towns of Kyotera, Kakuto and Kalisizo, an irked Amin retaliated by bombing Tanzanian towns near the Tanzania-Uganda border.⁸ It took the intervention of Somali President Siad Barre for Nyerere and Amin to sign a five-point ceasefire Mogadishu Agreement, in which both Parties agreed to withdraw their troops to 10 kilometres from their shared borders and pledged to stop supporting aggressive forces against the other's regime. On 4 February 1976, Amin issued a statement claiming that all areas of western Kenya belonged to Uganda before the colonial demarcation, and that he had with him a signed Agreement by Herbert Asquith, the British Colonial Secretary of State, that transferred parts of Uganda to Kenya in 1926.⁹ Although he repudiated any allegations of going to war with Kenya, President Kenyatta of Kenya swore that he would ruthlessly deal with any attempts to invade Kenya.¹⁰

⁷ Sena Eken, "Breakup of the East African Community" (1979), p. 11, available at <<https://www.elibrary.imf.org/downloadpdf/journals/022/0016/004/article-A010-en.xml>> (accessed 4 August 2023).

⁸ Keesing's Record of World Events, "Armed Invasion of Uganda by Followers of Ex-President Obote", 1972, Vol. 18, available at <<https://web.stanford.edu/group/tomzgroup/pmwiki/uploads/1381-1972-11-KS-a-RRW.pdf>> (accessed 17 September 2023).

⁹ Fredrick Ngugi, "The Day Idi Amin wanted to Annex Kenya", *The East African*, 10 September 2011, available at <<https://www.theeastafrican.co.ke/tea/news/east-africa/the-day-idi-amin-wanted-to-annex-western-kenya--1304946>> (accessed 18 September 2023).

¹⁰ Livin Opiyo, "When Idi Amin Put Jomo Kenyatta in the Mood for Battle", *The Citizen*, 1 November 2020, available at <<https://www.thecitizen.co.tz/tanzania/news/international/when-idi-amin-put-jomo-kenyatta-in-the-mood-for-battle-2708276>> (accessed 17 September 2023).

Uganda and Kenya's tension was greatly aggravated by two factors: the Entebbe raid by Israel and Kenya's economic blockade on Ugandan goods. The Entebbe raid, which took place between 3 and 4 July 1976, involved an Israeli commando squad rescuing Israeli hostages from a French airline that had been hijacked in Greece and forced to land in Uganda by the Popular Front for the Liberation of Palestine and the Red Army Faction (a West Germany radical leftist group).¹¹ President Amin claimed that following the Entebbe raid, Kenya blockaded 200 oil tankers and vehicles transporting goods to Uganda.¹² Kenya counterclaimed that Uganda had conducted indiscriminate mass murder of Kenyans in Uganda. The standoff between the two countries ended by a joint communiqué, in which both countries agreed to allow free traffic flow and cease animosity between them.¹³

Kenya and Tanzania's economic tussle virtually pronounced the subsistence of the EAC impossible. The conflict intensified when Kenya claimed a larger share of the proceeds of the East African Airways (EAA) because of shouldering EAA's outstanding debts amounting to over USD 15 million.¹⁴ As a result, mudslinging ensued, leading to the grounding of the EAA in Kenya. Tanzania retaliated, in 1977, by forbidding Kenyan heavy transport from using its highways, bringing Kenya's inter-border business to a grinding halt. Following the closure of the Kenya-Tanzania border, the Kenya National Transport Cooperative Society (KENATCO), which had invested in refrigerator trucks to transport meat, pork and butter through Tanzania to Zambia, closed

¹¹ Judah Ari Gross, "Entebbe in Person: A New Oral History Challenges Official Account of 1976 Rescue", *The Times of Israel*, 23 August 2021, available at <<https://www.timesofisrael.com/entebbe-in-person-a-new-oral-history-challenges-official-account-of-1976-rescue/>> (accessed 20 September 2023).

¹² Ibid.

¹³ "Kenya and Uganda in Accord on Ending Hostility and Threats", *New York Times*, 7 August 1976, available at <<https://www.nytimes.com/1976/08/07/archives/kenya-and-uganda-in-accord-on-ending-hostility-and-threats.html>> (accessed 20 September 2023).

¹⁴ Walter A. E. Skurnik, "Whither East Africa?", *Current History* (1977) Vol. 73 No. 432 205, p. 206.

business.¹⁵ Consequently, in June 1977, all Kenyan nationals working under the EAC in Tanzania were recalled for reasons that the EAC's Finance Council had failed to settle on a venue for discussions of the following year's budget.¹⁶ It became apparent that the irreconcilable differences between the Member States had pushed the EAC to rock bottom and that any attempt to salvage it had proven futile, leading to its collapse in July 1977.

3. Legal Framework Regulating Freedom of Movement

3.1. Underlying Principles of the Freedoms

The Common Market, being the second step of integration in the EAC, follows the Customs Union that became fully operational in 2010. The Protocol on the Establishment of the EAC Common Market was forecasted to be implemented by 2015 after entering into force in 2010.¹⁷ Even though the deadline was not met, progressive steps have been taken to merge the economies of the partner states into a single market. Legally bound by Article 76 of the Treaty for the Establishment of the EAC,¹⁸ partner states shall progressively establish the Common Market within which there shall be the freedom of movement of persons, labour, goods, services and capital.

The implementation of the CMP has always been guided by three sets of principles: fundamental principles of the Community under Article 6 of the Treaty, operational principles under Article 7 of the Treaty, and principles of the Common Market under Article 3 of the CMP. Under Article 6 of the Treaty, the fundamental principles require partner states to exercise peaceful co-existence and settlement of disputes, equitable distribution of benefits and cooperation for mutual benefits. The East

¹⁵ John Kamau "How Kenatco was driven into Receivership – and Parked for 20 Years", *Nation*, 25 June 2016, available at <<https://nation.africa/kenya/blogs-opinion/opinion/how-kenatco-was-driven-into-receivership-and-parked-for-twenty-years--1211814>> (accessed 16 September 2023).

¹⁶ Mngomezulu, 2013 (n.3).

¹⁷ Protocol on the Establishment of the East African Community Common Market [2010].

¹⁸ Treaty for the Establishment of the East African Community [2000].

African Court of Justice, in *Samuel Mukira Mohochi vs Attorney General of the Republic of Uganda*, held that fundamental principles are rules that must be respected by the partner states so as to attain the objectives of the EAC.¹⁹ The EACJ put emphasis on Article 146 (1) of the Treaty, which states that a partner state may be suspended from taking part in the activities of the EAC for failure to comply with the fundamental principles.

Article 7 of the Treaty advances operational principles that obligate the partner states to take heed of people-centered and market-driven cooperation, establishment of an export-oriented economy that will enable the free movement of goods, services, labour, persons and capital, and equitable distribution of benefits. In addition to the principles set out in the Treaty, Article 3 (2) of the CMP dictates that partner states should not discriminate against nationals of other partner states on grounds of nationality. Moreover, treatment accorded to the nationals of other partner states should not be less favourable than that accorded to third parties. The partner states should also ensure transparency and share information on the implementation of the Protocol.

3.2. Freedoms under the CMP

3.2.1. Free Movement of Goods

The tenet of free movement of goods is meant to achieve the free flow of goods by eliminating quantitative restrictions and other inhibitive measures among the partner states of the EAC. It is premised on Article 6 of the CMP and further governed by Customs laws of the EAC as specified in Article 39 of the Protocol on the Establishment of the EAC Customs Union.²⁰ Aggrieved by the differential treatment of goods introduced by Section 2 (a) and (b) of Uganda's Excise Duty (Amendment) Act No. 11 of 2017, which applied different excise duties to goods originating from Uganda, the British American Tobacco

¹⁹ *Samuel Mukira Mohochi v Attorney General of the Republic of Uganda* (2011) Reference No. 5.

²⁰ Protocol on the Establishment of the East African Community Customs Union [2005].

(Uganda) Limited sought a declaration from the EACJ on the basis that the said Act contravened provisions of the Treaty, Customs Union Protocol and CMP. The EACJ, in *British American Tobacco (U) Ltd vs Attorney General of Uganda*, averred that the Ugandan authorities erred in applying Ugandan tax laws to the exclusion of Uganda's obligations under the EAC law. Thus, the EACJ held that in addition to the Treaty and Customs Union Protocol, the Government of Uganda had flouted Articles 6 (1) of the CMP. The EACJ further held that Uganda's implementation of the impugned Act was unlawful, discriminatory, and contradicted the objectives of the Treaty.

In 2001, the Protocol on the Standardisation, Quality Assurance, Metrology and Testing (SQMT Protocol) entered into force to effect Article 81 of the Treaty.²¹ Under Article 3 of the SQMT Protocol, partner states are to develop and apply a common policy on standardisation, quality assurance, metrology and testing of goods produced and traded within the EAC. Subsequently, the EAC Standardisation, Quality Assurance, Metrology and Testing Act was passed on 10 September 2006, whose key objective, among others, is to facilitate regional and international trade.²²

3.2.2. Free Movement of Persons

Among the regional blocs in Africa, the EAC and the Economic Community of West African States are the most advanced in easing restrictions on cross-border movement of persons.²³ According to Article 7 of the CMP, the partner states commit to permitting free movement of persons who are nationals of the other partner states

²¹ Protocol on the Standardization, Quality Assurance, Metrology and Testing [2001].

²² East African Community Standardization, Quality Assurance, Metrology and Testing Act 2006.

²³ Alan Hirsch, "Free Movement of People across Africa: Regions are Showing how it can Work", *The Conversation*, 19 January 2023, available at <<https://theconversation.com/free-movement-of-people-across-africa-regions-are-showing-how-it-can-work-197199>> (accessed 24 September 2023).

within their territories. The partner states are expected to not discriminate against nationals of other partner states based on their nationality. Thus, these nationals are entitled to enter without a visa, move freely, and exit without restrictions. South Sudan was condemned, in 2016, for charging EAC nationals visa fees to gain entry into South Sudan.²⁴ In *Samuel Mukira Mobochi vs Attorney General of Uganda*, the applicant contended that the Government of Uganda had violated his rights by discriminating against him and further flouted the provisions of the Treaty when the Government detained him at the Entebbe International Airport and denied him entry into Uganda.²⁵ The EACJ found that the treatment Mohochi had been subjected to was discriminatory; therefore, Uganda had failed to uphold the provisions of Articles 6 (d) and 7(2) of the EAC Treaty and 7 (2) of the CMP.

Subject to national laws, the partner states shall protect the nationals of other partner states within their territories. Only on grounds of public policy, public security or public health can a partner state deny nationals of other member states the freedom of movement of persons. Even so, the respective partner state must inform the other partner states accordingly. The EACJ, in the Mohochi's Case, reiterated that Article 7 (6) of the CMP obligates the partner states to notify other member states of the limitations they have imposed on the freedom of movement.²⁶ Article 7 of the CMP is implemented with the aid of the EAC Common Market (Free Movement of Persons) Regulations, which serve to ensure uniformity in the implementation of the Article and facilitate transparency, accountability and fairness in the process.

²⁴ Chinedu Okafor, "East Africa Makes Progress in Removing Trade Barriers but Faces New Challenges", *Business Insider Africa*, 11 June 2023, available at <<https://africa.businessinsider.com/local/markets/east-africa-makes-progress-in-removing-trade-barriers-but-faces-new-challenges/7d8ht0k>> (accessed 24 September 2023).

²⁵ *Samuel Mukira Mobochi v Attorney General of the Republic of Uganda* (2011) Reference No. 5.

²⁶ Ibid.

3.2.3. Free Movement of Labour

Article 10 of the CMP lays down the free movement of workers. Partner states agree to guarantee freedom of movement to workers who are nationals of other member states. In implementing this Article, the partner states should exercise non-discrimination against such workers with respect to employment and remuneration. Under this freedom, workers shall be entitled to seek and accept employment, move freely and stay in other partner states for employment, enjoy freedom of association and collective bargaining, and enjoy rights and benefits of social security. Like the free movement of persons, the free movement of workers can only be limited on grounds of public policy, public security and public health.²⁷

3.2.4. Free Movement of Services

A point worth noting is that free movement of employment does not cover service suppliers as these are not regarded as workers. Free movement of service suppliers is embedded in Part F of the CMP. Article 16 provides that free movement of services shall include supply of services from the territory of one partner state to the territory of other partner states and eventually to service consumers. The principle of national treatment is paramount in regulating free movement of services in the EAC; each partner state is prohibited from treating services from other partner states less favourably than services from the receiving partner state.²⁸ Similarly, under the principle of most favoured nation treatment, each partner state should not treat services from other partner states less favourably than services from third countries.²⁹

3.2.5. Free Movement of Capital

More than the other Common Market freedoms, free movement of capital shows a close relationship with the Monetary Union. In Article 86

²⁷ Protocol on the Establishment of the East African Community Common Market, Article 10 (11).

²⁸ Ibid, Article 17.

²⁹ Protocol on the Establishment of the East African Community Common Market, Article 18.

of the Treaty, state parties are required to permit free movement of capital, harmonise and finally integrate their financial systems. Article 24 of the CMP provides the legal basis for the free movement of capital. It imposes on partner states the obligation to eliminate restrictions on the movement of capital owned by residents in the EAC and to eliminate discrimination based on nationality, place of residence or place of investment. A partner state wishing to impose restrictions on the free movement of capital can do so only on grounds relating to prudential supervision, public policy considerations, money laundering, and financial sanctions agreed to by the partner states.³⁰

4. Inter-State Disputes within the EAC

4.1. Territorial Border Disputes

Sharing boundaries, each EAC partner state has experienced a border dispute with their neighbours. Most of these disputes are attributed to indistinct borders that were inherited from colonialists. During the scramble for Africa, colonial masters portioned African land with limited knowledge of the geography, history and ethnic composition of Africa, hence, colonial demarcations split people belonging to the same ethnic groups.³¹ The EAC has experienced its share of border disputes at the Uganda-DRC, Kenya-Uganda, Tanzania-Uganda, Uganda-Rwanda, and Kenya-South Sudan borders. Over the recent past, disputes have increased in borderlands with mineral resources. A case in point is the Uganda-DRC dispute over Lake Albert basin that has intensified with the oil discoveries. In September 2008, *Heritage Oil*, a Canadian oil company, made public the discovery of oil reserves around Lake Albert. Besides the oil reserves, both Uganda and the DRC have coveted Lake

³⁰ Protocol on the Establishment of the East African Community Common Market, Article 25.

³¹ Tasew Gashaw, “Colonial Borders in Africa: Improper Design and Its Impact on Africa Borderland Communities” (17 November 2017), available at <<https://www.wilsoncenter.org/blog-post/colonial-borders-in-africa-improper-design-and-its-impact-on-african-borderland-communities>> (accessed 5 October 2023).

Albert basin because of its mineral resources, such as gold.³² The conflict between Uganda and the DRC has resulted in thousands of people fleeing their homes, abductions and killings while those still inhabiting the area live in fear. Although Uganda and the DRC officials have held bilateral talks to end the stalemate, the area keeps experiencing killings and kidnappings. On 21 May 2016, four Ugandan marine police officers were shot dead by the DRC soldiers as they patrolled the lake.³³

Kenya has a long-standing dispute with Uganda over Mingo Island in Lake Victoria, with each country claiming to own the island. The dispute over Mingo island is founded upon competing claims over resources: Nile Perch fish and oil prospects. While Kenya dominates less of Lake Victoria than Uganda, it harvests more Nile Perch than Uganda.³⁴ The first Ugandan settlers to join Kenyans on Mingo island arrived in 2004 and were later joined by the Ugandan customs officers in 2006, who started to assess levies on fish catch.³⁵ Uganda deployed its Marines to Mingo between 2008 and 2009, and they forced Kenyan fishermen to pay licensing fees and use Ugandan processors for fish caught in Ugandan territorial waters. Kenya responded by sending twelve police officers, thus compelling Uganda to deploy sixty Marines the following day.

³² Stephane Balong, “Uganda-DRC: Tensions mount over Lake Albert Resources” (*Afrik.news*, 12 June 2009), available at <<https://www.afrik-news.com/article15802.html#:~:text=Tensions%20are%20mounting%20between%20Uganda%20and%20the%20Democratic,authorities%20called%20on%20their%20neighbours%20to%20remain%20calm.>> (accessed 5 October 2023).

³³ The Monitor, “Why Lake Albert and River Nile Resources have Sparked Conflicts” (*The Monitor*, 19 January 2018), available at <<https://www.monitor.co.ug/uganda/special-reports/why-lake-albert-and-river-nile-resources-have-sparked-conflicts-1736642>> (accessed 5 October 2023).

³⁴ Christopher R. Rossi, “What Mingo, the World’s Tiniest Disputed Island, Tells Us about International Law” (6 December 2017), available at <<https://theconversation.com/what-mingo-the-worlds-tiniest-disputed-island-tells-us-about-international-law-88536>> (accessed 28 September 2023).

³⁵ Christopher R. Rossi, “The Mingo Island between Uganda and Kenya” *Brooklyn Journal of International Law*, Vol. 42: 2 659, p. 666.

4.2. Political Disputes

Like the previous EAC, the current EAC has had political differences among the presidents of the partner states. After the signing of the *Lusaka Agreement* in August 1999, a dispute emerged that pitted President Museveni against President Kagame, leading to a battle between the Uganda People's Defence Forces and the Rwandan Patriotic Army that led to the death of over 600 civilians and troops. The two Presidents had different stances on the war objectives and strategies in the DRC. Uganda's strategy was to empower Congolese people to fight President Kabila, but Rwanda was more than eager to overthrow Kabila, who was arming Rwanda's foes.³⁶ Uganda and Rwanda's political differences heightened with Rwanda's closure of the Gatuna border post in February 2019, with each country accusing the other of disrespecting state sovereignty.³⁷ Rwanda accused Uganda of hosting hostile groups to Kagame's regime, while Uganda accused Rwanda of conducting espionage on Ugandan territory. After a three-year closure, Rwanda eventually opened the border in January 2022.³⁸

4.3. Trade Disputes

Since the inception of the EAC, the realisation of the objectives of the Treaty and CMP has been threatened by continuous trade disputes among the partner states, some of which originate from political differences between the partner states. Rwanda's closing of the Gatuna border was an offshoot of the failure to resolve political differences between Uganda and Rwanda, thereby halting cross-border trade and

³⁶ International Crisis Group, "Uganda and Rwanda: Friends or Enemies", *Crisis Group*, 4 May 2000, available at <<https://www.crisisgroup.org/africa/horn-africa/uganda/uganda-and-rwanda-friends-or-enemies>> (accessed 10 October 2023).

³⁷ Johnson Kanamugire, Jonathan Kamoga and Moses Havyarimana, "East Africa: Tanzania Gains From Uganda-Rwanda Tiff and Kigali-Bujumbura Rapprochement" (*The East African*, 28 November 2021), available at <<https://allafrica.com/stories/202111280003.html>> (accessed 8 October 2023).

³⁸ Deutsche Welle, "Rwanda Reopens Land border with Uganda", *DW*, 31 January 2022, available at <<https://www.dw.com/en/rwanda-reopens-land-border-with-uganda/a-60611300>> (accessed 28 September 2023).

travel. Kenya and Uganda have been embroiled in a trade war that started in December 2019 when Kenya banned the importation of milk from Uganda.³⁹ In July 2020, Kenya went against an earlier agreement with Uganda of increasing Uganda's sugar exports when it banned sugar from Uganda. Consequent to Kenya's ban on eggs originating from Uganda in January 2021, Uganda announced its decision to ban some Kenyan raw and processed agricultural products as a retaliatory measure.

In a separate trade war between Kenya and Tanzania, analysts conclude that the dispute is not based on tariffs and the origin of goods but evolves around two factors: each country's responsibility to protect domestic manufacturers and competition for economic growth, power and status, with each country wanting to lead in trade and exports in the EAC.⁴⁰ In 2022, Kenya complained of Tanzania's doubling of maize export permits by 93 per cent, from KES 27,000 per truck to KES 52,000, which in turn led to a snarl-up at the border as truck owners rushed to update their permits in line with the new requirements.⁴¹ Following a maize shortage in Kenya at that time, it was feared that Tanzania's new permit requirements would severely hit Kenyan millers who were relying on Tanzania's maize to overcome the maize shortage in Kenya. Previously, in 2020, Tanzania imposed a 25 per cent import duty on Kenyan confectionery on claims that such goods were produced using zero-rated

³⁹ Monitor, "Kenya-Uganda Trade War is Harming Free Trade in East African Community", *The Monitor*, 7 March 2022, available at <<https://www.monitor.co.ug/uganda/oped/letters/kenya-uganda-trade-war-is-harming-free-trade-in-east-african-community-3738990#:~:text=Kenya%20and%20Uganda%20have%20for%20long%20engaged%20in,agreement%20to%20increase%20Uganda%E2%80%99s%20sugar%20exports%20to%20Kenya>> (accessed 8 October 2023).

⁴⁰ Trendtype, "Kenya's Trade War with Tanzania Shows no Sign of Abating" (*Trendtype*, 10 October 2018), available at <<https://trendtype.com/news/kenya-trade-war-tanzania/>> (accessed 5 October 2023).

⁴¹ Gerald Andae, "Tanzania Hits Traders with Nearly Double Export Fees", *Business Daily*, June 26 2022, available at <<https://www.businessdailyafrica.com/bd/news/east-africa/tanzania/tanzania-hits-traders-with-nearly-double-export-fees-3860554>> (accessed 1 October 2023).

industrial sugar.⁴² The two countries' trade war spilt over to the tourism sector; while arguing that Tanzania had stopped Kenya's tour operators from accessing Serengeti National Park, Kenya banned Tanzania's tour vans from visiting Maasai Mara National Reserve.

5. Effects of Inter-state Disputes on the Freedom of Movement

5.1. Loss of Government Revenue

Trade liberalisation and regional trade integration are among the key support pillars of the subsistence of the CMP; they lay a solid foundation for the Treaty, Customs Union Protocol and CMP. Even as the free movement of goods, services and capital are the most debated freedoms of the EAC, the free movement of persons and the free movement of labour are equally essential freedoms in the accomplishment of the integration agenda of the EAC. The recurrent dissensions among EAC partner states have far-reaching effects on the well-being of persons and the economic prosperity of the partner states.

The drafters of the Treaty had foreseen instances where some, if not all partner states, would be entangled in squabbles. Noting the grievous harm inter-state disputes would impact the integration process, Article 6 of the Treaty contains the peaceful settlement of disputes as a fundamental principle. One major repercussion of inter-state disputes is the loss of revenue by EAC partner states. In 2019, Uganda recorded a loss of USD 174.8 million in export revenue as exports dropped from USD 714.9 million to USD 540.1 million, in contrast to Kenya's exports rising by USD 225.9 million.⁴³ Before September 2020, records indicated that Uganda had imported goods valued at USD 566.4 million from Kenya, while Kenya imported goods worth USD 342.7 million from Uganda. Compared to the first nine months of 2018, before Kenya

⁴² The Citizen, "Tanzania and Kenya still Locked in Trade Dispute", *The Citizen*, 27 June 2022, available at <<https://www.thecitizen.co.tz/tanzania/news/business/tanzania-and-kenya-still-locked-in-trade-dispute-3861148>> (accessed 1 October 2023).

⁴³ Muhereza Kyamutetera, "Dear Kenyans, Ugandans Want to Do Business and not Trade Wars" (15 December 2020), available at <<https://www.linkedin.com/pulse/dear-kenyans-ugandans-want-do-business-trade-wars-kyamutetera/>> (accessed 8 October 2023).

restricted the importation of Ugandan products, Uganda's revenue dropped from USD 613 million to USD 342.7 million, causing losses of USD 270.3 million.

It is noted that political wrangles between Rwanda and its neighbours contributed to the spiralling down of informal cross-border trade. Figures by the country's central bank indicate an 8.1 per cent drop in exports and a 10 per cent drop in imports in the first half of 2019.⁴⁴ Informal cross-border trade plays a vital role in Rwanda's economy as informal exports form 10 per cent of Rwanda's exports and informal imports account for 0.5 per cent of the total imports. Due to Rwanda's earlier standoff with Burundi, Bujumbura stopped its local traders from selling groceries to Rwanda.

5.2. Loss of Business by Private Persons

By dint of Articles 127 and 128 of the Treaty, the EAC partner states commit themselves to creating an enabling environment for the private sector to take full advantage of the EAC. However, with the repeated inter-state disputes, the enabling environment for the private sector is far from being reached. Many times, traders in landlocked countries such as Rwanda and Uganda bear the brunt of unnecessary trade barriers even as the EAC partner states had unanimously agreed to eliminate non-tariff barriers by December 2012. In a letter addressed to their Kenya counterpart, Uganda's Minister in charge of EAC affairs channelled complaints from Ugandan motor vehicle traders that Kenya Revenue Authority officials were demanding a cash bond for motor vehicles with an engine capacity of 2000cc and above, passing through Kenya to Uganda.⁴⁵ The Kenya Revenue Authority refuted the claims amidst

⁴⁴ Monitor, "Feuds Hurt Rwanda's Cross-border Trade", *The Monitor*, 2 January 2021, available at <<https://www.monitor.co.ug/uganda/business/finance/feuds-hurt-rwanda-s-cross-border-trade-1844868#:~:text=Feuds%20between%20Rwanda%20and%20its%20neighbours%20have%20led,2019%20compared%20to%20the%20same%20period%20last%20year>> (accessed 11 October 2023).

⁴⁵ The EastAfrican, "Unending Trade Disputes, Barriers Slow Down EAC Integration Process", *The East African*, 12 August 2013, available at

complaints that the cash bond equivalent to the value of the imported vehicles, was putting a financial strain on Ugandan motor vehicle traders as it had to be paid in advance.

According to the Uganda Manufacturers Association, as at the end of 2020, after Kenya's ban on milk from Uganda, farm-gate prices had dropped by 90 per cent.⁴⁶ The impact of the 16 per cent Value Added Tax by Kenya on Ugandan milk pushed Pearl Dairy Farm, the owner of the Lato milk brand that is popular in Kenya for being cheap, to operate at a 15 per cent capacity.⁴⁷ Due to the reduced capacity of milk processing, Ugandan dairy farmers were forced to seek an alternative source of income in beef farming and apiculture.

5.3. Deterioration of Living Standards

More often than not, inter-state disputes have a ripple effect that undermines the objectives of the EAC and CMP, hinders partner states from economic growth and prosperity, and caps the enjoyment of the freedoms enshrined in the CMP by people within the EAC. Inter-state disputes contradict the essence of Article 5 (3) (b) of the Treaty that partner states shall cooperate to raise the standards of living and improve the quality of life of its people. When businesses are banned from exporting their products within the region, not only do governments lose revenue, but also businesses and people lose profits and employment.

<<https://www.theeastafrican.co.ke/tea/business/unending-trade-disputes-barriers-slow-down-eac-integration-process--1318580>> (accessed 19 September 2023).

⁴⁶ Christine Byaruhanga and Henry Onoria, "A Vicious Cycle of Uganda-Kenya Trade Wars – Implications for Free Trade and Trade Integration in the East African Community" (2022) ALP Law Series Article 1/2022, p. 2.

⁴⁷ Trendtype, "Uganda-Kenya Milk Dispute Shows Limits of Regional Trade Integration", *Trendtype*, 4 March 2021, available at <<https://trendtype.com/news/uganda-kenya-milk-dispute-shows-limits-of-regional-trade-integration/#:~:text=Kenya%20and%20Uganda%20have%2C%20in%20February%202021%2C%20now,Kenyan%20fruit%20juices%20and%20verification%20fees%20on%20pharmaceuticals.>> (accessed 1 October 2023).

While Kenya banned dairy products from Uganda, leading producers were forced to lay off some of their workers.⁴⁸ Pearl Dairy Farms Limited, a leading milk exporter to Kenya, had to sack over 1,500 employees because production capacity had dropped to less than 25 per cent.⁴⁹ Dairy farmers in Uganda were forced to shift to other types of farming. This was in contravention of Article 44 (2) (f) of the CMP, which requires partner states to adopt common principles to promote investment and employment opportunities in the Community. Since inter-state disputes disrupt cross-border trade in goods and services, they create a scarcity of products, leading to high product costs and limiting consumers' choices. With the restrictions on eggs from Uganda, Kenyans have been distressed by the soaring egg prices.⁵⁰

6. The Dispute Settlement Mechanisms Under the EAC

6.1. The EACJ

The drafters of the Treaty were alive to the reality that inter-state disputes would be inevitable and that partner states would, on several occasions, hold divergent positions regarding the application and interpretation of the Treaty. Even so, such disputes should not threaten the existence of the EAC. According to Article 6 (c) of the Treaty, one of the fundamental principles guiding partner states to achieve objectives under Article 5 is the peaceful settlement of disputes. In *Kalali Steven vs the Attorney General of the Republic of Rwanda*, a

⁴⁸ DHL, "Kenya-Uganda: What's at Stake in the Recent Trade Row" (26 May 2021), available at <https://lot.dhl.com/kenya-and-uganda-whats-at-stake-in-the-recent-trade-row/#:~:text=Kenya%20and%20Uganda%3A%20What%E2%80%99s%20at%20stake%20in%20the,imported%20goods.%20...%203%20Longstanding%20trade%20partners%20>> (accessed 2 October 2023).

⁴⁹ Kenya Insights, "Lato Milk Plant Shut Following Kenya-Uganda Trade Wars" (23 March 2021), available at <https://kenyainsights.com/lato-milk-plant-shut-following-kenya-uganda-trade-wars/> (accessed 28 September 2023).

⁵⁰ Jacktone Lawi, "Egg Prices Double in Six Months as Farmers Decry Costly Feeds", *The Star*, 12 January 2023, available at <https://www.the-star.co.ke/business/kenya/2023-01-12-egg-prices-double-in-six-months-as-farmers-decry-costly-feeds/> (accessed 24 September 2023).

case that arose after Rwanda closed its border with Uganda, the Court declared that Rwanda, in addition to other contraventions, had flouted the principle of peaceful settlement of disputes under Article 6 (c).⁵¹ Alongside the Treaty, Article 54 (1) of the CMP buttresses the requirement that disputes emanating from the interpretation and application of the Protocol must be settled in accordance with the provisions of the Treaty.

The EACJ is mandated, subject to Article 23 of the Treaty, with the responsibility of ensuring adherence to the law in relation to the interpretation and application of the Treaty. It plays a crucial role in protecting the freedoms of the CMP from violations by partner states. Therefore, in the afore-stated Kalali's Case, the EACJ held that, by closing its border, Rwanda had breached Article 7 (7) of the CMP that requires the partner states to open border posts.

The infringement of freedoms recognised by the CMP attracts remedies. Under Article 52 (2) of the CMP, the partner states commit to ensuring that persons whose freedoms have been infringed are entitled to redress. In *Hon. Dr. Margaret Zziwa vs. the Secretary of the East African Community*, the appellate division of the EACJ held that Articles 23 (1) and 27 (1) not only allow the EACJ to make declaratory orders but also to grant appropriate remedies, which can be remedies of compensation (damages).⁵² Based on Margaret Zziwa's Case, the Court, in *Grands Lacs Supplier S.A.R.L. & Others vs. Attorney General of Burundi*, awarded USD 20,000 to the Applicants as general damages for the loss they had suffered when the Government of Burundi unlawfully seized their goods.⁵³

⁵¹ *Kalali Steven v the Attorney General of Rwanda* {2019} Reference No. 2, 13.

⁵² *Hon. Dr. Margaret Zziwa v the Secretary of the East African Community EACJ Appeal* [2017] No. 2.

⁵³ *Grands Lacs Supplier S.A.R.L. & Others v Attorney General of Burundi* [2016] Reference No. 16 (78).

6.2. Bilateral Talks

In the event of a dispute wherein a state party is aggrieved by another state party's breach of the Treaty and Community laws, the concerned Party, under Article 28 of the Treaty, may refer for determination by EACJ the legality of the directive, decision or action. Be that as it may, partner states are always reluctant to drag one another to the EACJ whenever a dispute arises, unlike natural and legal persons. Partner states always prefer to engage in bilateral talks as a means of solving their disputes. This is in line with Articles 6 (c) and 123 (4) of the Treaty that call for state parties to peacefully settle their disputes. In 2021, a Ugandan official from the Ministry of Trade intimated to the press that if bilateral talks failed to end trade disputes between Uganda and other partner states, Uganda would seek redress from the EACJ.⁵⁴ After bilateral talks and the signing of a Memorandum of Understanding in Angola, Rwanda and Uganda agreed to end a long-standing dispute in which both countries were accusing each other of spying and political assassinations.⁵⁵

The success of bilateral talks, however, is dependent on the political will of the state parties to honour agreements arising from such talks. There are some instances where the state parties renege on their promise to end disputes among themselves, thereby causing a

⁵⁴ Dorothy Nakaawesi, "Private Sector Wants EAC Govt to End Tax Disputes", *The Monitor*, 25 February 2021, available at: <<https://www.monitor.co.ug/uganda/business/finance/private-sector-wants-eac-govts-to-end-tax-disputes--3303426#:~:text=Businesses%20across%20the%20region%20and%20the%20private%20sector,domestic%20tax%20disputes%20that%20continue%20to%20affect%20tra>> (accessed 6 October 2023).

⁵⁵ Eugene Uwima, "Uganda, Rwanda Hold Peace Talks to Defuse Tensions", *VOA*, 17 September 2019, available at <https://www.voanews.com/a/africa_rwanda-uganda-hold-peace-talks-defuse-tensions/6175960.html#:~:text=Rwanda%20and%20Uganda%20have%20agreed%20to%20resolve%20issues,on%20their%20differences%20in%20order%20to%20defuse%20tensions> (accessed 28 September 2023).

repetitive cycle of disputes. The East African Business Council, an advocacy body of private sector associations and corporates from the 8 EAC partner states noted that despite Kenya and Uganda agreeing to end their trade tussle, much of their agreement remains on paper.⁵⁶ Therefore, the East African Business Council forwarded the issue, among others, before the Council of Ministers for consideration. Article 129 (3) of the Treaty recognises the role of the private sector in regional cooperation and development. It tasks the Council of Ministers to establish modalities that would enable businesses, organisations or associations to effectively contribute to the progress of the EAC. Based on this provision, the East African Business Council is an instrumental voice in championing the interest of businesses in the EAC. It actively monitors regional trade integration in the EAC. Due to the absence of an effective trade dispute settlement mechanism, the East African Business Council urged the EAC to operationalise the Committee on Trade Remedies.⁵⁷

6.3. Committee on Trade Remedies

Most trade disputes among the EAC partner states evolve around rules of origin and tax, but are fashioned in a manner to protect national industries. In their diplomatic nature, bilateral talks relied on by the partner states to end disputes are ineffective means to ensuring that the partner states settle disputes and proffer remedies where violations have occurred. For this purpose, Article 24 (1) of the Customs Union Protocol establishes the EAC Committee on Trade Remedies. The jurisdiction of the Committee covers matters pertaining to rules of origin, anti-dumping measures, subsidies and

⁵⁶ Supra n. 54.

⁵⁷ Njenga Hakeenah, “EABC Wades into Kenya, Kenya Non-Tariff Barrier Trade Tiff”, *The Exchange*, 16 December 2021, available at <<https://theexchange.africa/industry-and-trade/eabc-kenya-uganda-trade-standoff-ntbs/>> (accessed 6 October 2023).

countervailing measures, safeguard measures, and any other matter referred to it by the Council of Ministers. Among the major functions of the Committee is to administer and manage the dispute settlement mechanism, and subject to the EAC Customs Union (Dispute Settlement Mechanisms) Regulations, the decisions of the Committee in dispute settlement shall be final.⁵⁸

To date, the Committee has not come into existence because of delays caused by the partner states' reluctance to amend Article 24 (2)(a) of the Customs Union Protocol, which deletes the word “nine” from the Article. In 2019, the EALA, while noting that the delay has jeopardised the integration process, urged the partner states to speedily amend the aforesaid provision and operationalise the Committee by 2020.⁵⁹

7. Conclusion

The Common Market is undoubtedly an indispensable building block to strengthening commercial, social, cultural, political, and other relations among the EAC partner states. Through the freedoms embedded in the CMP, people in the Community enjoy the fruits of economic and social development. However, the present EAC, just like its predecessor, is riddled with inter-state disputes that have jeopardised the implementation of the CMP and full enjoyment of the freedom of movement of persons, labour, goods, services and capital. These inter-state disputes restrict the free flow of freedoms, thus, from time to time, occasioning the loss of

⁵⁸ Protocol on the Establishment of the of the East African Community Customs Union, Article 24 (4) (j) and (5).

⁵⁹ The East African Community, “EALA Urges Partner States to Duly Institute Trade Remedies Committee” (2 October 2019), available at <<https://www.eac.int/press-releases/1576-eala-urges-partner-states-to-duly-institute-trade-remedies-committee#:~:text=East%20African%20Legislative%20Assembly%2C%20Arusha%2C%20October%201st%202019%3A,disputes%20and%20impacting%20on%20intra%20EAC%20trade%2C%20>> (accessed 10 October 2023).

revenue, collapse of businesses, unemployment, and generally leading to a high cost of living.

Even as the EACJ is the apex dispute settlement organ of the Community, the partner states are always reluctant to seek the assistance of the EACJ to solve inter-state disputes, unlike natural and legal persons. Bilateral talks, preferred by the partner states, have proven to be an ineffective means of dispute settlement as they lack the binding force to compel disputing partner states to adhere to resolutions arrived at. It is, therefore, paramount that the partner states observe the principle of peaceful settlement of disputes and respect the objectives of the Treaty encapsulated in the CMP to avoid disrupting the freedom of movement. The private sector, led by the East African Business Council, and natural persons should not hesitate to sue the partner states before the EACJ in case of violating the freedoms arising from inter-state disputes. The partner states should also affect the amendments to the Customs Union Protocol to operationalise the Committee on Trade Remedies that would efficiently solve trade disputes.



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