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THE EAST AFRICAN COMMUNITY: INTERGOVERNMENTALISM, COLONIAL LEGACIES AND THE ABSENCE OF PEOPLE CENTREDNESS

Antidius Kaitu*

Abstract

This paper examines the intergovernmental structure of the East African Community (EAC) and critically analyses the historical motives behind its establishment. It reveals that the composition of the EAC's organs largely reflects the executives of the Partner States rather than adopting a supranational approach, resulting in limited participation from the general citizenry, including private sectors, business communities, and civil societies. The paper highlights the unique integration approach of the EAC, which is not followed by constitutional regulation, by reviewing relevant constitutional provisions from some of the Partner States. While acknowledging the merits of this approach, the author draws on lessons and challenges from the European Union (EU) experience. Additionally, the paper addresses the relationship between communitarian (international) law and domestic law within the EAC context. The study concludes by analysing the EAC's legal framework, categorizing its structures, and examining their applicability within domestic jurisdictions.

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Key Words: - *East African Community, intergovernmentalism, people centredness, communitarian law, domestic law, constitutional regulation and public international law*

1. INTRODUCTION

Regional integration is essentially a political process; in the sense that what drives integration is mainly rooted in nation-state power over economic and political interests. [1] In Africa, it is derived from the old but still strong idea of African unity or Pan-Africanism. The importance of regional integration cannot be overemphasized. The ongoing globalization has defined the world by trading blocs (North America, European Union, Southeast Asia and China) and it has made the African regional integration not only urgent but also imperative.[2] The advantages of regional integration cut across social, economic, cultural and political benefits.

Being re-established in 1999 by the same Partner States who were members of the 1967 defunct East African Cooperation, the East African Community (EAC) has been described by some as the most successful and more advanced in terms of its projected political and economic integration goals in Africa.[3] In 2016, it

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1 Prof. Abdalla Bujra Presentation to TRID Meeting of Regional Economic Communities 31st October, 2003.p.1 http://bujra.com/documents/Political%20Aspects%20of%20Regional%20IntegrationOctober%2030-2003.pdf (Accessed on 10th April 2017).

2 Manone, R. M. "The importance of regional economic integration in Africa." 2008, *Published MBA Thesis* at p.14.

3 These remarks were even shared by the former US- Secretary of States Hilary Clinton during the US-Africa AGOA Forum held in Washington DC on 3rd August 2010 when said that Sub-Saharan Africa has 14 Regional Trade or Cooperation Agreements, many are overlapping and not all as successful as the East African Community. Also, Prof. Abdallah Bujra (note 1). p. 5).

emerged as the best integrating Community in the Continent.[4] The Partner States envisage to establish among themselves a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation.[5] This paper traces the EAC's history to understand the root cause of its current challenges and examines its structure through its various organs, alongside its legal framework, to highlight the absence of people-centeredness. To achieve this, the paper analyses the constitutional provisions of select member states, demonstrating that not only does the EAC integration lack popular participation, but it also lacks constitutional authorization.

2. THE MAKING OF EAST AFRICAN COMMUNITY

The EAC traces its origin from the 1884/1885 Berlin Conference that crafted German East Africa under Germany colonial rule and British East Africa controlled by Britain.[6] The formal economic and social East African integration were augmented by the construction of the Kenya-Uganda Railway in 1897 to 1901. These historical ties are eloquently recognised under the 1999 EAC Treaty and the Partner States are reminded of their shared historical bond that needs to be strongly protected under the new

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4 The African Integration Index Report, 2016 jointly carried out by African Union Commission, African Development Bank and the United Nations Commission for Africa. (http://www.uneca.org/sites/default/files/PublicationFiles/arii-report2016_en_web.pdf).

5 Article 5(2) of the Treaty for the Establishment of the East African Community, 1999.

6 Gastorn, K. "The legal analysis of the common market of the East African Community as market freedoms in the open market economy", 2011, *Law in Africa (Journal of the African Law Association-Germany)*, *14*(2), (143-154.) p.4.

EAC arrangement.[7] Historically, the initial idea of EAC integration was pioneered by colonial powers who were more focused on extending their 'empire building' ideology that had originated in Europe.[8] Consequently, the East African Empire that would be treated as one unit was an outcome of a colonial enterprise.[9]

It is to be recalled that under the colonial arrangements as early as 1923 to 1927, Kenya, Uganda and Tanganyika (now Tanzania) had established the well-functioning Common Market.[10] Tanganyika was under British rule as a mandate territory after the defeat of Germany in WWI. The Common Market was cemented by establishment of the East African High Commission (EAHC) (1948-1961) offering a Customs Union, a common external tariff, currency, postage, and it dealt with common services in transport, communications, education and research.[11] It was later replaced by the East African Service Organisation (EACSO) (1961-1967). By 1963, the leaders of Kenya, Tanganyika and Uganda had already anticipated on a declaration of a federation by the governments of East Africa. However, that dream never materialized due to political differences between the three

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7 Paragraphs 1, 2 and 3 of the Preamble to EAC Treaty appreciates these historical links and calls upon Partner States to keep in mind the necessity of having the regional cooperation.

8 Lugard, Fredrick John Dealtry, "The Rise of Our East African Empire. Early Efforts in Nyasaland and Uganda", London: William Blackwood 1893 in Sippel. H., "Regional Integration in East Africa: A legal Historical Overview" 2011. In Gaston. K. Sippel.H. &Wanitzek.U (Eds). Processes of legal integration in the East African Community. DUP. Dar es Salaam at p.27. The same Author notes that there is no indication of regional integration in pre-colonial East Africa.

9 Ibid.

10 Sippel. H., Regional Integration in East Africa (note 8 above) at.p.27.

11 Ibid.

leaders.[12] In 1967, the Member States replaced the EACSO by establishing the East African Cooperation aimed at strengthening ties between Member States through a Common Market, a customs tariff and a range of public services.[13] Until its demise in 1977, the East African Cooperation was internationally regarded as a most promising and a world model of economic and regional integration.[14]

Essentially, the East African Cooperation functioned effectively during the colonial period. However, after independence, each Partner State shifted its focus to its own nation-building interests and the welfare of its citizens, often at the expense of the regional community. The EAC's success during colonialism, which saw its evolution into a properly functioning Common Market and Monetary Union, can be attributed to its alignment with the interests of its colonial founders.[15] This paper establishes that the current East African Community continues to suffer from its colonial legacy. Its architecture reflects a colonial design, suggesting that the challenges faced today are rooted in a historical context that prioritizes the interests of the executives over genuine interests of the people.

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12 Ibid. p.32.

13 Ibid. p 34. The Member States ratified the Treaty for the East African Cooperation, 1967.

14 AKINTAN, S.A., The Law of International Institutions in Africa, Leyden: A.W. Sijthoff, 1977, pp.125-126: in Sippel. H., (note 8 above) p. 36 & Mwapachu. J. V., "Ten Years of the East African Community-Achievement, Challenges and Prospects" 2011. p. 46.

15 Among the British Interests in East Africa include protecting the Nile waters which ensured the profitable occupation of Egypt and the Suez Canal that was very significant to its Indian colony. Also, raw material, migrant and cheap labour that made some places exclusively labour suppliers that greatly attributed to uneven development. Also, as already alluded elsewhere in this paper building a strong East African Empire.

It has been contended that Kenya being a historically advantaged settler economy was more favoured by the British.[16] As a result, she became the industrial hub of region at the expense of Tanzania and Uganda who were consumers of her products. Critics view Nairobi to have been the centre used by capitalist to continue colonial exploitation in the region. Thus, it may not be surprising that the primary reasons often cited for the collapse of the Cooperation in 1977 such as political instability in Uganda, a lack of people-centeredness, unequal sharing of costs and benefits, and insufficient political will were likely secondary factors that reflected the apathy existing among the Member States. Arguably, since its inception, the Cooperation was rooted in colonial structures designed to serve colonial interests, making it difficult for to thrive outside that colonial framework. Some scholars argue that it was premature for the Partner States to pursue regional and economic integration at that time.[17] Indeed, it might have been too early for these newly independent states to establish a form of regional integration that genuinely served their interests while still relying on a colonial foundation.

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16 The existing historical trade imbalance arose complaints from Tanzania and Uganda who were unhappy with the economic development of Kenya at their detriment. It is this unequitable sharing of the benefits of the community that has been acknowledged under paragraph 4 of the Preamble to the Treaty as one of the main reasons for the collapse of the Community. Also discussed in Binda, E.M., "The Legal Framework of the East Africa" in Ugirashebuja, E., et al(eds.) EAC Law, Brill Nijhoff, 2017. p.111.

17 Sippel, (note 8 above) at p.37.

3. THE NATURE OF THE EAC

The EAC is an Intergovernmental Organisation under public international law.[18] It is the sovereign Partner States that are represented.[19] Apparently, EAC Partner States have not fully formed independent supranational bodies. Hence, the relationship between Partner States and the Community is governed by conventional Treaty Law, in particular the Vienna Convention on the law of Treaties, 1969.[20] However, some scholars have contended that by virtue of article 8(4) of the Treaty, EAC is a supranational organisation that presides Community Organs, Institutions and laws over national ones on matters pertaining to the implementation of the Treaty.[21] Others, have argued that EAC is an intergovernmental, supranational and closed organisation.[22] This paper establishes that the EAC is fundamentally an intergovernmental organization. This conclusion is reached through a critical examination of the composition of its organs and its founding legal framework. It is important to note that the EAC exists as an abstract entity, with

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18 http://www.eac.int/about/overview. It is thus a subject of international law as defined by the Advisory Opinion of the ICJ in the matter of Reparation for Injuries suffered in the Services, ICJ Rep. 1949, where it was held that the UN's founders had 'clothed it' with legal personality making it the subject of international law. http://manusama.com/2016/10/03/classics-reparation-for-injuries-bernadotte.

19 Under Paragraph 10 of the Preamble to the EAC Treaty, Partner States envision to strengthen their cooperation in achieving their objectives by observing the principles of international law governing relationships between sovereign states.

20 The same point is raised by Kamanga., K.C., "Fast Tracking East African Integration and Treaty Law: Pacta Sunt Servanda Betrayed?" 2010 Vol.3, No.3 *Journal of African and International Law*, p. 705.

21 Luhangisa. E.J., "*Scope Nature of EAC Law"* in Ugirashebuja, E.,et al (eds.), EAC Law, Brill Nijhoff, 2017, p.154.

22 Amerasinghe, C. F. Principles of Institutional Law of International Organisations, and edn Cambrige University Press, 1996 pp.9-13 in Kaahwa, W.T.K., "The Institutional Framework of the EAC" in Ugirashebuja, E, et al (eds), EAC Law, Brill Nijhoff, 2017, p. 43.

its existence inferred through its organs and institutions. This section reveals that the EAC's organs are not truly independent; rather, they are significantly influenced and controlled by the executives of the Partner States due to their structure and operational dynamics.

3.1 The Organic set up of the Community

The EAC adopts an inter-state cooperation system.[23] The organs of the EAC are arguably highly representative of the governments of the Partner States. Unlike the European Union, for example, the EAC lacks strong supranational institutions. It has been argued that the appointment of Community officers occurs primarily through the executives of the Partner States, either by seconding their officers to the organs or exercising exclusive control over the appointment process. Consequently, this has led the Community to function as an extension of the executives of the Partner States. Critically, the EAC is often criticized for operating like a department within the Partner States' executive branches.[24]

Partner States seem to substantially retain much their sovereign powers. Even the limited sovereignty that may be said to have been ceded on a few issues remains discretionary, allowing Partner States to reclaim it as they deem fit. A critical examination of the EAC's organs reveals inherent weaknesses; they lack the power to make independent decisions that are not endorsed by or agreeable to the executives of the Partner States. In the current setup, the organs struggle to take any decisions that do not align

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23 Kaahwa, W.T.K., "The Institutional Framework of the EAC" in Ugirashebuja, E.,et al (eds), EAC Law, Brill Nijhoff, 2017, p. 43.

24 Ibid.

with the preferences of at least one of the Partner States, even if supported by the majority. This argument is further emphasized by the consensus requirement that predominates decision-making within the EAC.[25] The composition, powers and functions of the organs of the Community is briefly examined in the following discussion below.

3.1.1 The Summit

The Summit is a central Community organ which gives the general directions and impetus of the Community. It has been criticized for being a "non-representative political club" where neither civil society, private sector nor trade unions are represented.[26] It consists of Partner States' Heads of State.[27] This is an organ that exercises all the central powers and functions of the Community. The general success or failure of the Community largely lies on the decisions of the Summit. Nevertheless, Summit decisions must be reached by consensus.[28] This requirement elongates the intergovernmental nature of the community. Under this mechanism, Heads of State have an opportunity to infuse national preferences and interests which may sometimes paralyse wider community's winder needs. Despite resulting challenges, the consensus decision making requirement may serve to preserve confidence among the Partner States by creating an atmosphere of not feeling bulldozed in the integration process.

Importantly, the provisions related to the Acts of the Community illustrate the intergovernmental nature of the EAC.[29] The process

25 Article 12(3) and 14(4) of the treaty.
26 Ibid.
27 Article 10(1) of the Treaty.
28 Article 12(3) Ibid.
29 Article 62, 63 and 64 Ibid.

for passing these Acts requires unanimous assent from all Heads of State. If even one Head of State withholds assent, the Bill lapses.[30] Consequently, the passage of the Acts is largely not dependent on the supranational organs of the Community, particularly the East African Legislative Assembly (EALA), but rather on the individual Partner States.

Apart from the express functions of the Summit listed under Article 11 of the Treaty, it is also mandated with other vital powers and functions under several provisions of the treaty. For instance, the power to establish organs of the Community,[31] the powers to determine the procedures for the meetings and the powers to suspend or expel any member from the Community.[32] The Summit is as well endowed with huge powers when compared to other organs, the extent to which the practicability of the doctrine of separation of powers in the EAC is casted in great doubt. It is questionable whether other organs have the liberty to exercise their functions independently. This is due to the fact that it is the Summit which appoints and determines the terms and conditions of other organs' leaders like the Secretary General, their deputies and members of the judiciary.[33] As a result of its composition, the consensus requirement in decision making as it is the case in passing other community laws may be main reason for indecisiveness on community affairs.[34] The next part

30 Article 63(4) Ibid.

31 Article 9(1)(h) Ibid.

32 Articles 12(5), 146 and 147 ibid.

33 The Summit appoints the Secretary General and their Deputies, and it approves their terms and conditions. Article 67(1) & (5) Ibid. Under Article 68(2) and Article 68(5), the Summit retains the powers to appoint EACJ judges and remove them from office.

34 Article 12(3) of the Treaty.

reveals how the Summit is closely intertwined with the Council because it is the Council's recommendations which largely form the basis of the Summit's decisions.

3.1.2 The Council

The Council consists of Ministers responsible for East African Community affairs and Attorney Generals of each Partner States.[35] Although, the Council is the policy organ of the Community, it is not represented by interest groups other than the cabinet ministers from the national governments of the members of the Summit.[36] The Council is the very crucial organ in the functioning of the Community. It not only initiates fundamental issues for consideration by the Summit but also makes policy decisions to ensure the efficient and harmonious functioning and development of the Community.[37]

The Council plays a central role on the EAC legislative process as well. It is the one that initiates and submits Bills to the Assembly.[38] Therefore, it is at this organ where solutions to most problems attracting policy and legal address is sought. Unfortunately, citizens, business community, civil society, professions, transport and other stakeholders who need to own and be part of the Community are not represented in this key organ. The total exclusion of these vital stakeholders does not reflect the anticipated people centred representation under the Treaty.[39] This is especially with respect to the Community that

35 Article 13 of the Treaty.
36 Article 13 of the Treaty.
37 Article 14 (3) of the Treaty.
38 Article 14(3)(b) of the Treaty.
39 Article 7(1)(a) of the Treaty.

was re-established to address the lack of strong private and civil society participation in cooperation activities which was among the reasons for the collapse of the former EAC in 1967.[40]

Like the decisions of the Summit, those of the Council are made by consensus, requiring agreement on crucial matters such as treaty amendments, sanctions, and expansion of cooperation areas. [41] Most Summit decisions rely on the Council's recommendations, yet the Council's excessive powers including appointing key officials, determining their salaries, and establishing offices undermine the independence of other organs within the Community. This concentration of power raises concerns about the missing people-centeredness in the EAC's governance structure.

3.1.3 The Co-ordination Committee and the Sectoral Committees

The Co-ordination Committee is composed of the Permanent Secretaries of the cabinet ministers responsible with EAC affairs from the national governments.[42] Its functions include submitting reports and recommendations to the Council, implementing decisions of the Council as well as receiving and considering reports of Sectoral Committees.[43] On the other hand, the establishment, composition and functions of the Sectoral Committees can be effected upon recommendations of the Co-ordination Committee.[44] Like the Summit and the Council, other

40 Paragraph 4 of the Preamble to the Treaty.
41 Article 45(1) and Article 48(4) of the Treaty.
42 Article 17 of the Treaty.
43 Article 18 of the Treaty.
44 Article 20 of the Treaty.

key stakeholders especially the citizens, private sector and civil society are unrepresented in these Committees. In fact, these two national executive organs are initiators of all community affairs to be worked upon in tandem with the Council and the Summit.

3.1.4 The East African Court of Justice

The East African Court of Justice (EACJ) is made up of judges who are appointed by the Summit from among persons recommended by the Partner States.[45] Actually, the judges are appointed by Partner States' governments because the Summit simply picks names from amongst those submitted by Partner States' governments. There are no set of standard qualifications to be met by the appointees. Apparently, since Partner States have different qualifications for one to be appointed a judge, there may be a danger of having underqualified and incompetent judges at the EACJ. This issue is exacerbated by the lack of independent vetting for appointees, preventing assessments of their competence, integrity, and independence. Additionally, following the case of *Prof. Peter Anyang' Nyong'o*, the treaty was amended to permit the removal of judges for misconduct committed in the Partner States,[46]creating an environment ripe for potential abuse. Furthermore, the Summit, another organ, is responsible for determining the salaries and terms of service for these judges.[47]

The EACJ ostensibly reflects the influence of the Partner States' executive's upper hand. The current appointment procedure

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45 Article 24 of the Treaty.

46 Article 26(b) of the Treaty. *Prof. Peter Anyang' Nyong'o & 10 Others V The Attorney General of the Republic of Kenya & 2 Others* Reference N0.1 of 2006.

47 Article 25(5) of the Treaty.

limits opportunities for qualified and competent lawyers, favouring government preferences that may prioritize loyalty to appointing authorities over broader community interests. If unaddressed, the EACJ risks becoming a 'Partner States government organ' rather than a 'Community organ.'

3.1.5 The East African Legislative Assembly

The East African Legislative Assembly (EALA) ought to be the peoples' representative organ. Unfortunately, like other organs discussed above, its composition and the modality of getting its members, seem to suggest a weak Partner State's government-controlled Assembly. This is because, the EALA fails to be popular representative due to the fact that all its members are not directly elected by citizens.[48] Also, its composition is very uneven.[49] Not only the mode of getting EALA members is problematic but also the requirement of having the equal nine members from each Partner State, regardless of country's geographical size and population, suggests the unrepresentative and undemocratic Assembly. For instance, a sound representation is not truly reflected when a country like Burundi with a population of less than 15 million is apportioned the same nine representatives like that of the Democratic Republic of the Congo with more than 100 million people.

Under the defunct East African Legislative Assembly each Partner State was required to appoint 9 out 27 members as government representatives to the Community.[50] In order to cure

48 Article 48 and 50 of the Treaty.

49 Ibid.

50 Article 56(2) of the East African Cooperation Treaty, 1967. Like the Current arrangement the Assembly was also composed of the ex-official members.

the disconnection between the Assembly and the citizens, the new arrangement gives room to the National Parliaments to elect not among from its members, nine members to the Community. However, the EALA election procedure is still wanting. Article 50 of the treaty does not state the modality of conducting the elections. The lacuna has been left to the National Assemblies that have enacted controversial election rules upon which a good number of applications have been filed at the EACJ challenging the impugned elections.[51]

The EACJ has ruled in several cases that the National Assemblies had failed to comply with Article 50 of the Treaty. [52] This Article mandates representation that reflects diverse opinions, gender, special interest groups, and political parties. However, the discourse has largely been dominated by the interests of political parties. As a result, membership in the Assembly is primarily determined by the majority party in national Parliaments. Consequently, it is the ruling parties in the Partner States that extend their executive influence into the EALA.

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51 Most of the elections have been found violating article 50 the Treaty in the following cases, *Anthony Callist Komu v. The Attorney General of the United Republic of Tanzania* Reference No. 7 of 2012, *Prof. Peter Anyang'yongo' and Others V. Attorney General of Kenya, the Clerk of the East African Community and the Secretary General of East African Community*, Reference No. 1of 2006. More details are widely discussed in Kaitu A. (2015), *Popular Participation in Regional Parliaments: A Critical Overview of the East African Legislative Assembly;* A Dissertation Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Law of the University of Dar es Salaam.

52 Ibid. pp 57-63. For example, in the case of *Prof. Peter Anyang' Nyongo* where no actual voting was done, the court ruled that the National Assembly of Kenya did not undertake or carry out an election within the meaning of article 50 of the treaty. Also, in the case of *Anthony Callist Komu v. AG*, the Court declared Standing Order No. 12 and Rule 5(5) of the Tanzania EALA election rules which created only one category of representation by subsuming gender, special interest groups and shades opinion in political parties to be a clear violation of article 50 of the treaty.

For example, in Tanzania, campaigns are usually conducted in a single day where candidates hardly use 10 minutes for self-introduction, campaigning and answering maximum of three questions from the national Assembly members. Generally, the process is highly politicized and arguably, majority of the members are elected not on merit but largely on 'political connections.'[53] One would wonder how such short and unpopular process would yield committed and competent leaders to address community challenges. It is not surprising that even the very legitimacy of the EALA is being highly questioned.[54] The EALA is not truly the representative of the people.[55] As a result, its members are likely to suffer the failure of raising above the parochial national government's interests for the sake of broader Community's gains.

3.1.6 The Secretariat

The Secretariat is the executive organ of the Community. The appointment of the principal officers of the secretariat is predominantly a reflection of the intergovernmental nature of representation. Individual Partner States' interests seem to feature in the composition of the Secretariat staff. For instance, the Secretary General and Deputies are appointed by the Summit upon nomination by the relevant Head of State and recommendation of the Council respectively.[56] Moreover, the principle of rotation on appointment of the Secretary General for a fixed five year term with no possibility of extension regardless

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53 Ibid.

54 Oluoch, L. W. "Legitimacy of the East African Community," (2009), *Journal of African Law*, *53*(02) p.211.

55 Ibid.

56 Article 67(1) and Article 68(2) respectively.

of one's performance and effectiveness is another indication of intergovernmentalism.[57] The same is case with Deputy Secretaries who are also appointed on rotational basis.[58] Despite performing the executive functions, the top officials of the Secretariat are not appointed on contract and the posts are not open to the general competent citizens in the community to compete. Apparently, the two top posts are only reserved for the preferences of the Partner States governments to extend their influence in the Secretariat. The integration in relation to two posts is more intergovernmental than supranational.

Despite many functions of the secretariat as stipulated under Article 71 of the Treaty, it is weak and subordinate to other organs. It submits its reports to the Council and it is required to implement the decisions of the Summit and Council.[59] Some scholars have even hyperbolised the roles of the Secretariat to being a mere powerless meetings organiser and minutes taker.[60] Though unrealistic, other scholars have been positive by noting that it is only the secretariat which is mandated with steering the integration process by implementing decisions of all other organs.[61] Because of its day to day functions, the secretariat has been equated to the fulcrum upon which the wheels of integration rotate.[62]

By comparison, despite the fact that, the Secretariat is required to play the same roles as the European Commission, it lacks the

57 Article 67(1) and (4) of the Treaty.
58 Article 68(2) Ibid.
59 Article 71(1)(a) and Article 71 (1) (l) of the Treaty.
60 Kaahwa, W.T.K., "The Institutional Framework of the EAC" in Ugirashebuja, (above) p. 62.
61 Ibid.
62 Ibid.

executive authority. It is this dearth which Mwapachu, the former Secretary General of the Community, points out to be the main challenge faced by the secretariat. [63] He argues that the Secretariat lacks a "tangible authority whereby every act of the Community is subjected to the sovereign interests and concerns of the Partner States."[64] Arguably, the Secretariat is only a facilitator of the Partners States executives' resolutions. It is this absence of an executive body with tangible authority to drive the Community, which among other things, is seemingly a definitive feature of the 'intergovernmentalism' nature of the Community.

As indicated above, the organs are either composed or directly influenced by the presidents, cabinet ministers, permanent secretaries and senior civil servants of the national member governments. Interests outside the ruling government are hardly represented in that composition, obscuring the borderline between national governments and the Community. The composition, therefore, fails to provide checks and balances.[65] Lack of strong participation of civil society and private sector, which is acknowledged by the Treaty as one of the main reasons for the collapse of the former EAC is revived in the new EAC set up of community organs.[66] The composition of the EAC organs does not embrace the principle of people centeredness which is the EAC's acknowledged operational principle.[67] Essentially, it is

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63 Mwapachu, J. V. "Challenging the frontiers of African integration: the dynamics of policies, politics and transformation in the East African Community," 2012. at pp. 41-42.

64 Ibid.

65 Oluoch, L. W. "Legitimacy of the East African Community," (2009), *Journal of African Law*, *53*(02) p. 203.

66 Paragraph 4 of the Preamble to the Treaty.

67 Article 7(1) (a) of the Treaty.

the governments of the Partner States that are represented at the Community level as opposed to the peoples of the Community. If the community is to thrive, certainly, it needs to be owned and driven by the people through their representatives as well as their private institutions and organisations.

3.2 The EAC integration Approach

At first glance, it seems that the Partner States opted for an integration approach that does not require constitutional authorization to join the Community. The constitutions of the Partner States do not expressly confer sovereign rights or any law-making powers on the EAC organs.[68] This approach has an implication of suggesting that EAC law is not above the national constitutions. From the constitutional law perspective of all the Partner States, it is only the people who are above the constitution.[69] The Partner States' implied approval of this approach is evidenced even in the recent constitutional review processes that have ensued after ratifying the Common Market

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68 Milej, T. P. "What Is Wrong About Supranational Laws? The Sources of East African Community Law in Light of the EU's Experience," 2015 *Zeitschrift für ausländisches öfentliches Recht und Völkerrecht, ZAORV= Heidelberg Journal of International Law, HJIL*, *75*(3), p. 593. Article 63(3)(e) of the Constitution of the United Republic of Tanzania, 1977 and article 123 of the Constitution of the Republic of Uganda, 1995 respectively. Article 21 of the Constitution of Kenya and *Beatrice Wanjiku and Stanley Kariuki v. Attorney General and Commissioner of Prisons*. Para 20-24 in Milej, T.P. (above) p.595. Kenya through its 2010 constitution under articles 2(5), 2(6) and 21(4) International law is part of Kenya law. Article 2(2) of the Constitution of Kenya, Article 64(5) of the URT Constitution, Article 2(2) of the Constitution of Uganda and the Preamble of the Constitution of the Republic of Rwanda.

69 For example, Article 8 of the Constitution of the United Republic of Tanzania, 1977, Article 1 of the Constitution of Uganda, 1995, Article 2 of Constitution of Rwanda 2003, Article 1 of the Constitution of Kenya, 2010 and Article 7 of Constitution of Burundi, 2005 and Article 3 of the Transitional Constitution of South Sudan, 2011.

Protocol.[70] For example, a draft of the new Kenyan constitution of 2010, had well-defined provisions on the EAC but the same were not embraced in the final version.[71] Similarly, the United Republic of Tanzania constitutional draft of 2015 is silent on the status of EAC law. Both the Constitutional Review Commission and the Constituent Assembly found no need of including coherent provisions neither on the EAC law nor on the general status of international law in Tanzania.[72]

The integration approach taken by the EAC Partner States retains the Partner States' sovereignty. This approach is suitable and probably it is the most deserved in the current EAC circumstances for avoiding clashes like what are currently facing the EU that have been amplified by Brexit.[73] For example, even before Brexit, the UK had vividly asserted its sovereignty in

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70 Even Partner States that have recently amended their constitutions like Rwanda in 2015 and Burundi in 2018 saw no need of having coherent constitutional provisions on EAC law.

71 Oppong, R. F. "Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa" *Fordham Int'l LJ*, *30*, 296, 2006, at p. 210

72 Masabo, J., & Wanitzek, U. "Constitutional Reform in Tanzania: Developing Process and Preliminary Results." (2015). *VRÜ Verfassung und Recht in Übersee*, *48*(3), p. 354.

73 Brexit is the abbreviation of "British Exist" referring to the UK's decision in 23rd June 2016, referendum to leave the EU. Defined at http://www.investopedia.com/terms/b/brexit.asp (Accessed on 30th April 2017 at 17: 38). Where the Capital Economics has identified that more five countries may conduct a referendum to leave EU. The Countries were Germany, France, Italy, the Netherlands and Sweden. Flood. R, revealed which Countries to be next to leave the EU? Sunday Express, 2016 http://www.express.co.uk/news/world/716421/EU-referendum-Brexit-leave-vote-country-Merkel-superstate-Italy (Accessed on 30th April, 2017 at 17:40) This would technically mean the total collapse of the EU considering most of them not only being the founding members but also the highly supporter of the Union.

several instances.[74] The UK is on record complaining about the European Court of Justice (ECJ) being "an unguarded back door through which national sovereignty is being catered away."[75] This approach leaves no room for undemocratic Community organs to produce Community legislations that supersede national constitutions. Consequently, the national sovereignty to legislate is not tempered with. Partner States still retain the jurisdiction to determine the areas they are willing to integrate, at their chosen pace.[76]

Unlike the EAC integration approach, in the European Union (EU), Member States cede aspects of their sovereignty to the Union by virtue of their national constitutions. Even new members intending to join the EU must first adopt the Euro-Atlantic *"monism"* structures. For instance, all the former socialist block members when joining the EU in 2004 had to amend their constitutions to accommodate the supremacy and direct applicability of EU law. For example, the constitutional amendments in regard to the Republic of Romania under Article 148(2) acknowledged the principle that the provisions of the EU Treaties as well as other mandatory Community regulations take precedence over the opposing provisions of national laws. It also

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74 For example, in when United Kingdom and Republic of Ireland refused to sign the Schengen Agreement exercising their right of opting out. As well, when the members of the Conservative Party rejected the Euro, John Major incited that the British government used the Maastricht negotiations to reassert the authority of national governments, that it was for nations to build Europe and not for Europe to attempt to supersede nations. In Major John, *Raise Your Eyes, there is a land beyond, The Economist, 25th* September-1 October 1993, p.27.

75 European Court of Justice: Biased Referee? The Economist, 19 May 1997.

76 EAC subscribes to the Principle of Variable Geometry under Article 7(1)(e) of the Treaty which allows progression in co-operation among groups within the Community for wider integration schemes in various fields at different speeds.

accepted the transfer of certain prerogatives of sovereignty to the European Union institutions.[77] There has been no such requirement in the EAC, at least for the new members that have been admitted so far.

Rosas and Armati note that "unlike public international law, Union law is, by its own force, part of the national legal orders of the Member States."[78] They maintain that one of the features of the EU which distinguishes it from classical international organisations is the ability to legislate in the true sense of the word. The EU bodies have the power to adopt Acts which are often directly applicable in the legal orders of the Member States, because of the nature of the Acts rather than the character of the national legal order as monist or dualist.[79] Upon adoption, such Acts may create rights and obligations for the individuals.[80] The EU legal framework is much further than public international; it clearly provides for strong integration and supranational institutions.[81] This is not the case in the EAC counterpart which is largely public international law regulated as evidenced in the next section.

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77 Besselink, L. F., Bovend'Eert, P., Broeksteeg, H., de Lange, R., & Voermans, W. "*Constitutional law of the EU-member states," 2014* Kluwer.p 51. The amendments were via Law No. 492 of 23 October 2003. p. 1369, page 1435 for Slovak Republic. Also, the Republic of Slovenia through Constitutional Amendment of First Chapter by adding Article 3a and article 47 and 68 (official Gazette RS, No. 24/03) 7th March 2003. Also, Article 8,90 and 91 of the Constitution of Poland, Article 23 of the Constitution of Germany and Article 88-1,88-4, 88-6 of the Constitution of France, 1958.

78 Rosas, A., & Armati, L. "*EU constitutional law: an introduction*.". Bloomsbury Publishing, 2012, p. 66.

79 Ibid. 61.

80 Ibid.

81 Ibid. 2. The EU, especially as it emerges from the treaties of Maastricht (1992), Amsterdam (1997), Niece (2001) and Lisbon (2007).

4. NATIONAL CONSTITUTIONS AND EAC LAW

All the constitutions of the EAC Partner States lack express and articulate provisions on the status and the hierarchy of the EAC Law in their national legal systems. This part attempts to answer questions surrounding the status of EAC law (international law) in the domestic jurisdictions. Notwithstanding the international law general requirement of not abrogating international law by invoking municipal law provisions,[82] it appears that the applicability of unendorsed respective EAC law either by ratification or domestication depending on the legal system in place is unwelcome. The domestication requirement is of great concern in countries like Tanzania, Uganda and Kenya that lean towards dualism; hence mandating transformation of international law into national legislation for the former to have force in those jurisdictions.[83] This is heightened by the fact that unlike municipal law, enforcement of international law merely depends on '*pacta sunt sarvanda*."[84] As it is revealed shortly, not all categories of EAC law are directly applicable in the domestic jurisdictions. Not only is consensual assent by all Partner States is necessary for some categories of EAC law but also domestication for other categories.

In order to appreciate the relationship between EAC law on one hand and municipal law on the other, three fundamental questions are examined;[85] namely: - (i) whether EAC law is part

82 Article 27 of the Vienna Convention on the Law of Treaties, 1969.

83 Obitre-Gama, J. "The Application of International Law into National Law," In *Policy and Practice. Paper delivered at the WHO International Conference on Global Tobacco Control Law,* 2000, p.8.

84 Article 26 ibid.

85 The attempt to answer these questions is also discussed in Masabo, J., & Wanitzek, U. (2015) (above) p. 352. And Kamanga K. "International Law and Constitution

of the national laws? (ii) what is the place of the EAC law in the hierarchy of national laws? And lastly, (iii) how should courts handle conflicts of interpretation between EAC law and national law?

The relationship between EAC law and domestic laws of the Partner States is not a settled matter. It is so because, unlike the EU law that established a new legal order among its members that was distinct from the classical international law, EAC Law is still struggling to establish one.[86] This paper argues that the EAC legal framework is that of the traditional public international law governing intergovernmental organisations where international law does not automatically become part of the municipal law. Therefore, it follows that in order to appreciate the legal relationship between EAC Law and municipal law, recourse needs to be sought from each Partner States Constitutions' pronouncement and recognition of EAC (international) law. It is through examining each Partner States' legal order that the status of EAC law may be known. Accordingly, this part attempts to answer the three questions raised by closely analysing the provisions of the Partner State's constitutions that provide for the application of international law in the domestic legal framework.

4.1 Rwanda

The Rwandan Constitution does not explicitly mention EAC law. Nevertheless, unlike other Constitutions of the Partner States, it encompasses coherent provisions that address issues of

making in Tanzania: Where is the Weakest Link, Zanzibar Yearbook of Law-Volume 6-2016. p. 104.

86 *Van Gend en Loos* (Case 26/62) *and COSTA v ENEL* (Case 6/64) & P. Craig, et. Al., EC Law: Texts, Cases and Materials, Oxford University Press, 1996, p 152-153.

international law generally. International treaties and Agreements are provided for under the entire chapter X of the constitution.[87] It is the President of Rwanda who negotiates and ratifies international treaties and agreements upon which the parliament is to be notified.[88] Constitutionally, Rwanda cannot be ceded or joined to another country without the consent of the people by a referendum.[89] More importantly, is the provision that answers the second question on the hierarchy of international law in the Rwandan legal system. Before the 2015 constitutional amendments, international law was placed over and above domestic law (organic laws and ordinary laws) upon publication in the official gazette.[90] However, following the amendments in 2015, international law ranks third in the hierarchy; it is preceded by the constitution and organic laws.[91] The unique feature in Rwandan constitution is the precision in listing the hierarchy of laws. The Constitution categorically emphases that a law cannot contradict another law that is higher in the hierarchy.[92] Above all, the Constitution of Rwanda in an attempt to answer the third question raised above, gives room where there is a conflict between the intended international treaty to be ratified and the constitution or organic law, to first amend the latter in order to resolve the inconsistency.[93]

87 Article 167 -170 of the Constitution of Rwanda as amended in 2015.
88 Article 168 Ibid.
89 Ibid.
90 Article 190 of the Constitution of Rwanda, 2003.
91 Article 96 of the Constitution of Rwanda as amended in 2015.
92 Ibid.
93 Article 170 Ibid.

4.2 Burundi

Though merely preambular, the constitution of Burundi is so far the only one in the region which has recently affirmed its commitment to the EAC.[94] Like Rwanda, the Constitution of Burundi encompasses comprehensive provisions stating the status of international law in Burundi.[95] It is the president who has high direction of international negotiations by signing and ratifying all the international treaties and agreements.[96] Because of its monist culture, Burundi constitution requires domestication only in very exceptional issues like treaties of peace, commerce, treaties relative to the international organisations, treaties that engage the finances of the States and those that modify the provisions of the legislative nature as well as those relative to the status of persons.[97] Burundi's joining international organisations like EAC is also expressly permitted under its constitution.[98] Significantly is article 279 under which treaties are given effect only after ratification when conditions for entry into force specified by them are met for multilateral treaties and upon publication by other State in case of a bilateral treaty. Unlike constitutions of other EAC Partner States, the Constitution of Burundi does not have the express provision guaranteeing its supremacy. However, when the constitutional court declares that a certain international engagement (treaty) contains clauses which contravene the constitution, then the authorization for

94 This follows the 2018 Constitutional amendment where the preamble partly added the following "Affirming the commitment of Burundi to the Treaty establishing the East African Community (EAC)…"

95 Title XIV i.e. Articles 276 – 283 of the Constitution of Burundi, 2018.

96 Article 276 Ibid.

97 Article 277 ibid.

98 Article 278 Ibid.

ratification will only occur after the amendment or revision of the Constitution to cure the controversy.[99] This may have an implication that international law is supreme having the effect of compelling the amendment of conflicting municipal law provisions before ratification. However, in Burundi, the constitution reserves discretion to the President of the Republic to submit to a referendum a bill of amendment.[100]

Arguably, both the constitutions of Rwanda and Burundi have coherent and detailed provisions regarding the status of international law under explicit and precise chapters probably due to the monism influence. This practice is in line with most of the civil law continental Europe constitutions including their former colonial master (Belgium) as well as some African States that embody civil/Roman law system features. For example, the constitution of the Republic of South Africa, 1996 expressly states that international law is part of the laws in the Republic of South Africa and the Republic is so bound.[101] Further, it clearly states that the Republic is bound by those international agreements that were binding on the Republic before the new constitution took effect.[102] Notably, is article 233 which prefers international law position when courts are interpreting laws. It urges courts to prefer any reasonable interpretation of the legislation that is consistent with international law to any

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99 Article 283 ibid. The Constitutional Court makes a declaration upon being referred to by the President of the Republic, the President of the National Assembly, the President of the Senate and a quarter of the members of the National Assembly or of the State.

100 Article 285 of the Constitution.

101 The whole Chapter 14 specifically, Article 231(2) and (3) of the Constitution of South Africa, 1996.

102 Article 231(5) ibid.

alternative interpretation that is inconsistent with international law.[103] The same coherent and is unavailable in other Partner States' constitutions as discussed below.

4.3 Kenya

The Republic of Kenya has traditionally been a dualist State. However, following the promulgation of the 2010 constitution, it incorporated some provisions that explicitly stipulate that international law is part of the laws of Kenya. In this regard, reference is specifically made to article 2(5) and 2(6) which provide that the general rules of international law form part of the laws of Kenya and that any treaty or convention ratified by Kenya forms part of the laws of Kenya respectively. Unlike the constitutional drafting practice in monist states discussed above where the status of international law is explicitly stated in a specific chapter of the constitution, the status of international law in Kenya is stipulated under a subheading which accentuates the constitution's supremacy.[104] No wonder that the preceding provisions comprehensively declare the supremacy of the Kenyan constitution whose validity or legality cannot be challenged before any organ whatsoever.[105] The constitution categorically

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103 Also, The Constitution of the Kingdom of Netherlands, 2002 under article 90, the government commits to promote the development of international legal order and under article 94 it clearly stipulates that "statutory regulations in force within the kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions." The same is the position under article 15 (4) the constitution of the Russian Federation, rev. 2008 which states that "…if an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied."

104 The status is stated under Chapter one that provides for the Sovereignty of the People and Supremacy of the constitution. It is under the last two sub-articles of the latter that the status of international law is provided.

105 Article 2(1) and 2(3) of the Kenyan Constitution, 2010.

points out that any law inconsistent with it, is void to the extent of the inconsistency. Also, any act or omission contravening the constitution is to be declared void.[106]

Being a a common law jurisdiction the Republic of Kenya adheres to the doctrine of precedents. Consequently, despite the "progressive" provisions introduced in 2010, the High Court of Kenya continues to uphold its traditional approach, viewing international law primarily as an interpretative aid for statutory law rather than as binding.[107] In responding to Articles 2(5) and 2(6), the Court emphasized that these provisions "must be understood in the context of the historical application of international law in Kenya, where the courts have been reluctant to rely on international instruments, even those ratified by Kenya, to enrich and enhance the enjoyment of human rights." [108] The Court maintained that the role of Articles 2(5) and 2(6) was to declare international law as part of Kenyan law, but subordinate to the Constitution. [109]

Remarkably, if the court is to respect the doctrine of precedents when interpreting the relationship between EAC law and national law, then it will need to have in mind the famous *Okunda* precedent where it was held that national law is over and above

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106 Article 2(4) of the Kenyan Constitution, 2010.

107 *Beatrice Wanjiku and Stanly Kariuki v. Attorney General and Commissioner of Prisons* (2012) eKLR Paragraphs 20-24 (http://www.kenyalaw.org/Downloads_FreeCases/88056.pdf).

108 Ibid. Paragraph 21.

109 The argument of Kenya's dualist character may further be strengthened by the fact that in 2012 the country had to pass the treaty making and ratification Act (Act No. 45 of 2012) whose purpose is to give effect to the provisions of 2(6) and to provide for procedures for making and ratifying treaties.

the community law.[110] Probably, this precedent may hold more water due to the absence of express constitutional provisions mentioning EAC law specifically. Therefore, the constitution at least tries to answer two of the three questions raised in the sense that, though, international law in part of the law in Kenya, it is not supreme.[111] However, as to what would prevail in case of conflict between a statutory law and international law remains blurred.

The Supreme Court of Kenya seems to be wavering, shunning and unready to resolve this uncertainty. When asked to answer the question whether Kenya is a monist or dualist in the case of *Karen Njeri Kandie*, unexpectedly, the court responded that it did not find it necessary in the circumstances to delve into the issue.[112] It emphasised that the monist-dualist debate did not require the court's attention in that appeal.[113] The court reserved this debate for the future when called upon to do so in appropriate circumstances.[114] Paradoxically, this was the case, when the Supreme Court was expected to confirm or refute the Court of Appeal's decision on the issue. In the preceding judgement, the Court of Appeal had unequivocally stated that

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110 *Okunda and Another v. Republic, EALR (1970) 453*. This decision was made in regard to the defunct East African Cooperation Treaty, 1967 where the Kenya High Court was of the view that where Community law conflicts national constitution then the Community law is void to the extent of that inconsistency.

111 This has also been affirmed by the High Court in the case of Revital Health (EPZ) Limited v Public Procurement Oversight Authority & 6 others [2015] eKLR, where the court partly stated that where international agreements ratified by Kenya exist, they become "part of the law of Kenya by virtue of Article 2(6) of the Constitution, and subject to the constitution under article 2(4) thereof." para 32 of the judgement.

112 *Karen Njeri Kandie v Alassane Ba & another* [2017] eKLR. Para 37.

113 Ibid. para 38.

114 Ibid.

"there can be no doubt therefore that by the constitutional fiat, Kenya converted itself from a dualist country to a monist one with the effect that a treaty or convention once ratified is adopted or automatically incorporated into our laws without the necessity of a domesticating statute."[115]

4.4 Tanzania

In order to appreciate the status of international law in Tanzania, it suffices first to consider her constitution historical evolution as there is still the ongoing 'hopeless' new constitution writing process the success of which can have the impact in addressing the dilemma.[116] Four phases are discussed under this part. First is under the independence constitution, 1961 when the Queen was the Head of State under the West-Minister model of government.[117] During this system, there was no constitutional

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115 *Karen Njeri Kandie v Alssane Ba & another* [2015] eKLR. P. 8.

116 The process commenced after a televised statement by President Kikwete on December 31st, 2010, that was followed by the Constitutional Review Act, 2011. The process is hopeless because after the referendum postponement in April 2015 to pave away to the general elections in October 2015 there has not been any resumption efforts. Seemingly, the process has been impliedly abandoned. Despite having in place, the proposed Draft Constitution though contentious, over 8 years now since the process started there is no hope of advancing to the next stage. The Prime minister's remarks when responding to the questions from members of Parliament nailed the futility. He pointed out that the fifth phase government was concentrating on provision of social services and building the industrial economy. That resumption to writing the new constitution would come after the government had satisfied itself that the economy had stabilized and the provision of social services was in order. Valentine Oforo, " Majaliwa reiterates new constitution 'not a priority", The Citizen Newspaper, 9th November, 2017 (http://www.thecitizen.co.tz/News/Majaliwa-reiterates-new-constitution--not-a-priority-/1840340).

117 This Constitution was in force between 9th December 1961 until December 1962 when Tanganyika became a Republic. Article 14 of this constitution provided that the executive authority of Tanganyika was vested in her majesty.

requirement for legislative ratification of treaties.[118] All the treaties were concluded by the Queen upon receiving advice of the Prime Minister.[119] Then, followed Republican Constitution in 1962 when Tanganyika officially became a Republic under the executive presidency and the Queen ceased to be Head of State.[120] Under this system, the president was given exclusive powers to deal with all matters relating to treaties, and such powers could be delegated. [121] The parliament did not have any role to play in either ratification or domestication process until the ninth constitutional amendment in 1992 when for the first time a new provision, article 63(3) was inserted giving the parliament powers to ratify treaties that by their nature require ratification.[122] Apart from the above provision, there is no any other provision under the Tanzanian constitution that specifically addresses issues of international law leave alone EAC law in particular.

Since its incorporation in 1992, this provision has been extensively referenced by scholars and courts in Tanzania, including the Court of Appeal, to define Tanzania as a dualist state.[123] Being so, therefore, treaties that have only been signed and ratified but not domesticated do not form an integral part of the laws in Tanzania. However, courts in Tanzania when

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118 Mapunda B.T. "Treaty Making and Incorporation in Tanzania" Eastern Africa Law Review Vol. 2003, 28-30.

119 Ibid.

120 Article 3(1), (2) and (3) of the Republican Constitution, 1962.

121 Mapunda B.T. (above) 2003 p.160.

122 Vide section 12 of the Ninth Constitutional Amendment Act no. 20 of 1992 (*Sheria ya Mabadiliko ya Tisa katika Katiba ya Nchi No.20 of 1992).*

123 KAMANGA, K, "International Human Rights Law as Reflected in Tanzania's Treaty & Court Practice" in BINCHY, W. et al, Human Rights, Constitutionalism and the Judiciary: Tanzania and Irish Perspective, Clarus Publishers, 2006, 53-70.

addressing issues related to human rights have been drawing inspiration from the international human rights instruments even where the same have not been domesticated.[124] For example, in the case of *Valambia,* after the Court of Appeal noted that the constitutional protection falls short of what is provided by the International Covenant on Civil and Political Rights,1966, it held that since Tanzania is a party to the Covenant, its derogation law is to be interpreted and applied strictly.[125]

Similarly, in the case of *Bernado v. Holaria Pastory,*[126] the Court after referring to several international instruments stated that the principles enshrined therein were standards below which any civilized nation would be ashamed to fall. The recent standing binding precedent so far stated by the Court of Appeal is to the effect that where there is ambiguity or uncertainty in a domestic law, reference may be made to international law as interpretative devices to bring it in harmony with the latter. Citing its previous decision of *DPP v. Daudi Pete*, in the case of *Mtikila* the Court of Appeal ruled that reference to international instruments is in order when interpreting the Bill of Rights of the Constitution, and that it had already ordained reference to international Human Rights instruments in its previous decisions.[127]

Keenly reading article 63(3) of the constitution, however, one will readily conclude that the same is vague, and it does not precisely respond to the three questions raised under this section. Further,

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124 For example, in the Case of *Republic v. Mbushuu Dominic Mnyaroje & Kalai Sangula* [1994]2LRC 335, *Khamis Manywele v. The Republic,* High Court of Tanzania at Dodoma, Crimininal Appeal No. 39 of 1990.

125 *Transport Equipment Lt.d and Reginald John v. Devram P. Valambia* [1993] T.L.R.91.

126 *Bernado Ephraim v. Holaria Pastory and Gervas Kaizilege(1990) LRT 757.*

127 In the Cases of *DPP v. Daudi Pete* [1993] T.L. R 22 p.34 and *The Attorney General v. Rev. Christopher Mtikila*, Civil Appeal No.45 of 2009. P. 13-14.

apart from the Court of Appeal supporting reference to international instruments where need be, the Court has stuttered from unequivocally declaring international law to form an integral part of the laws of Tanzania, save for referencing as an interpretative aid. Even for domesticated treaties, the Court has fallen short of stating their hierarchy in the Tanzania legal system. This reluctance has left a question as to which one should prevail when there is a conflict between international law and municipal law quite unanswered.

However, some scholars have even gone as far as questioning if article 63(3) (d) is properly drafted to warrant treaty domestication. It has been alluded that when article 63(3)(c) is taken into account, then it is clear that article 63(3)(d) does not deal with treaty domestication in the strict sense.[128] It instead deals with the powers of the National Assembly to enact laws in respect of 'plans' (not treaties) which the United Republic wishes to implement.[129] If this argument is true, the view subscribed to by this author, then it would be of no wonder for one to make a case that the constitution of Tanzania has a wider lacuna not only on the status of international law but also on the general domestication of treaties. Supposedly, courts and other scholars may need to have this in mind when addressing this issue to avoid any chances of misdirection. As it has already been pointed elsewhere, even the new proposed constitution neither addresses the status of EAC law nor international law in Tanzania. One

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128 Kamanga K. "International Law and Constitution making in Tanzania: Where is the Weakest Link, Zanzibar Yearbook of Law- Volume 6-2016. pp. 119 – 120.

129 Ibid. He notes the disjoint in the logical flow between Articles 63(3)(d) and (e). He notes an existing ambiguity and that the sequence is in a reverse order, where the provision regarding domestication, precedes that, which vests in the parliament, the powers to deliberate upon and ratify all treaties.

author notes that even the equivalent of Article 63(3)(d) and (e) in the 1977 constitution have vanished all together in the proposed draft.[130]

4.5 Uganda

Uganda's willingness to join regional organisations and its commitment to respect international law is constitutionally provided for under the general objectives and directive principles of state policy. Her foreign policy objectives include respecting international law and treaty obligations.[131] The provisions are highly progressive especially towards the country's commitment and readiness to join regional blocks and international organisations. Despite other elaborative provisions committing the country to actively participate in international and regional organisations as well as promoting regional and pan-African cooperation and integration, the constitution does not coherently answer the three questions posed.

Gama observes that the constitution the Republic of Uganda, 1995, the Judicature Statute of 1996 and the Ratification of Treaties Act, 1998 are silent on the status of international law within Ugandan law.[132] Hence, she opines for examining the practice of the British common wealth to deduce the status.[133] The constitution superficially gives powers to the president or any authorized person to make treaties without pronouncing neither the status nor hierarchy of those treaties in the national

130 Kamanga K. "International Law and Constitution making in Tanzania" (above) at p.122.
131 Article XXVIII of the Constitution of Uganda, 1995.
132 Obitre-Gama, J. "The Application of International Law into National Law," 2000, p. 9.
133 Ibid.

legal system.[134] The ratification process in Uganda is governed by Ratification of Treaties Act, 1998 which also does not coherently answer the three questions raised. Supposedly, Uganda being a common law jurisdiction and a dualist state, international law which has not been domesticated may only be resorted to as an interpretative aid.

4.6 South Sudan

The constitution of the Republic of South Sudan, like those of the majority EAC Partner States, does not aptly answer the three questions raised under this part. However, it is very clear in proclaiming the foreign policy of the country which, among other things, promotes international and regional organizations by respecting international law and treaty obligations. The constitution blesses the country's efforts in achieving the African Economic Integration, regional integration plans as well as African Unity.[135] The first question as to whether international law is part of the laws of the Republic of South Sudan would be inferred from the provisions of article 57(d) of the treaty.

International treaties, conventions and agreements qualify to become part of the laws of South Sudan after their ratification by the National Legislative Assembly. Article 5 of the constitution which lists the sources of legislation, supposedly in the order of their hierarchy, does not expressly mention international law. However, the interpretation of article 5(b) would infer that where international law has been properly ratified and domesticated, it would qualify placement under written laws; second in the

134 Article 123 Ibid.

135 Article 43(a)(b) and (e) of the Transitional Constitution of the Republic of South Sudan, 2011.

hierarchy, only superseded by the constitution. Also, international law could as well fall under the fifth source in the hierarchy which recognizes any other relevant source.[136] The constitution is silent on which category of law should prevail in case of conflict, but Article 3 unambiguously affirms South Sudanese constitutional supremacy.

5. EAC LEGAL SET UP

EAC Law emanates from what may generally be categorized as both hard and soft law. EAC hard law mainly encompasses the Treaty, Protocols and the Acts of the Community. On the other hand, the soft law is mainly comprised of annexes to treaty. Community soft laws also include regulations, directives, decisions and opinions of the Council[137] as well as orders, decisions and directives of the Summit.[138] However, the two categories identified do not operate the same; whereas some become operational immediately after their enactment and publication, others have to wait for scrutiny to go through the signature, ratification and domestication procedures depending on the nature of the legal system in place. In either case, these laws being the product of the unrepresentative organs discussed in Part 3.1 above, may be lambasted for being an outcome of unpopular will in some instances. The EAC legal set up is briefly examined below.

136 Article 5(e) of the Transitional Constitution of the Republic of South Sudan, 2011.
137 Article 14(3)(d) of the Treaty.
138 Article 14(3) (k) of the Treaty. Also, other organs like the EALA and EACJ have in place their rules of procedure which are part of the general soft laws.

5.1 The Treaty

Since Partner States' constitutions do not expressly mention EAC Law, the EAC Treaty becomes operational in the domestic jurisdictions upon fulfilling public international law requirements of recognizing international law. Depending on the nature of the legal system in place, a Partner State must ratify, domesticate and deposit ratification instruments with the EAC Secretary General.[139]All the three founding EAC Partner States because of their dualistic culture at the time, domesticated the treaty via parliamentary Acts, embracing the requirements of article 8(2) of the treaty.[140] Since then, the provisions of the treaty became part of the domestic laws. The same was adopted by the subsequent acceding Partner States.[141] Against the above backdrop, the EAC treaty has been criticized for lacking people's consent.[142] Even the very idea of forming the Community did not emanate from the people, be it through a referendum or their representatives. On its inception, it was a Partner States executive's establishment that did not even consult the national legislatures.[143]

5.2 Protocols

The Partner States have been empowered to conclude Protocols on any areas of cooperation as they may deem necessary.[144] A number of Protocols have so far been passed by the community. Protocols, like the treaty are not directly operational until they

139 Article 152 of the Treaty.

140 The East African Community Act, 2002 (Uganda), The Treaty for the Establishment of the East African Community Act, 2001 (Tanzania), The Treaty Establishing the East African Community Act, 2000 (Kenya).

141 Law No. 29 / 2007 of 27/06/2007 (Rwanda) and Burundi being a moist, the EAC treaty became part and parcel of the laws of Burundi on ratification.

142 Oluoch, L.W, 2009, (above), p.198.

143 Ibid.

144 Article 151(1) of the Treaty.

secure a signature and obtain ratification from all Partner States.[145] It is logical that Protocols being integral parts of the treaty, their operational mechanism should mirror the latter. Therefore, it follows that unless, a respective Protocol has been ratified or domesticated by all Partner States, even if approved by the Summit, it remains inoperative. This is a reason why although the EAC has passed a good number of Protocols, some are not yet in force. For instance, the East African Community Protocol on Natural Resources and Environment that was adopted 2006, is not yet operational until now 2024, because the United Republic of Tanzania is yet to ratify the same.[146]

5.3 Annexes

Other organs of the Community are empowered to make some soft laws. For example, the Council may make regulations, issue directives, take decisions, make recommendations and give opinions.[147] The Council also is required to make staff and financial rules and regulations of the Community.[148] The East African Legislative Assembly is given powers to make rules of procedures like the East African Court of Justice which is mandated to make Court rules to regulate the conduct of its

145 Article 151(3) of the Treaty.

146 The United Republic of Tanzania expressed its hesitance to ratify the Protocol in its letter of 4th September, 2014 to the Secretary General arguing that the Protocol contradicts the Protocol on Establishment of the EAC Common Market. In particular, access to land and premises which should be governed by national policies and laws. Also, the Protocol was faulted for dealing with issues of marketing and trading in minerals as well as tourism matters. Adam Ihucha, The East African; *Why Tanzania said No to the EAC Protocol on Environment*; Saturday, 27th September, 2014. (http://www.theeastafrican.co.ke/news/Why-Tanzania-said-No-to-EAC-protocol-on-the-environment-/2558-2467232-viis58z/index.html) Accessed on 26th April, 2018.

147 Article 14(3)(d) of the treaty and Article 140(6) of the Treaty.

148 Article 14(3)(g) and Article 135(2) of the Treaty.

business.[149] The Summit also can make rules, orders, directives and decisions to be implemented by the Council.[150]

It is the soft laws, identified above, that form the annexes of the treaty, and become its integral part thereto, as recognized by Article 151(4) of the treaty. For example, Annexes I to V to the Common Market Protocol are the regulations made by the Council to implement some provisions of the Protocol in ensuring there is uniformity among the Partner States in the implementation of those provisions.[151] Despite Annexes being integral parts of the treaty like Protocols, they do not need to go through the signature and ratification process for them to have legal force in the Partner States' jurisdictions. They become operational and acquire automatic legal force immediately after publication in the Gazette.[152] The same is case for the rules and orders made by the Summit that come into force on the date of publication.[153] The matter is further complicated by the fact that the Council, under article 140(6) of the treaty, is given powers to make regulations, issue directives, take decisions, make recommendations and give opinions where the respective Protocol has not been adopted. The lingering issue is whether Partner States should resort to this mechanism to cure the drawbacks brought about by non- ratification of some protocols by Partner States. Further, while the hierarchy of adopted

149 Article 42, Article 49(2)(g) and Article 60 of the Treaty.

150 Article 11(8) and 14(3)(k) of the Treaty.

151 Annex I is the Common Market (Free Movement of persons regulations), Annex II is the Common Market (Free movement of workers) regulations, Annex III is the Common Market (Right of Establishment) regulations, Annex IV is the Common Market (Right of Residence) regulations and Annex V is the Common Market Schedule of Commitment on the Progressive Liberalization of services.

152 Article 14(5) of the Treaty.

153 Article 11(8) of the Treaty.

Protocols after ratification will depend on the nature of the legal system in place in the respective Partner State, the Regulations of the Council are binding, and they take precedence in the Partner States legal order.[154]

5.4 Acts

Acts of the EALA like Annexes do not need to go through the ratification and domestication procedures for them to have legal force in the Partner States. They acquire immediate, direct and automatic effect in Partner States legal order after they have been assented to by all Heads of State and published. The Treaty for the Establishment of the East African Community Act of Kenya expressly provides that any Act of the Community has the force in the laws of Kenya from the date of publication of that Act in the official Gazette of the Community.[155] The same position is restated under section 8(1) of the Treaty for Establishment of the East African Community Act, 2001 for Tanzania. Moreover, the domesticating Act of Uganda is more elaborative, detailing extra procedures that need to be taken in giving force of law to the Act of the Community in Uganda. The respective Act needs to be tabled before the parliament first.[156] The rationale is to give opportunity to Attorney General to cure any conflict with the written national laws within 24 months of the commencement of the Act.[157] This is a good practice for accommodating immediate amendments and adaptations that need to be brought in conformity with EAC law. Surprisingly, despite EALA's weaknesses discussed under part 3.1.5 above, its Acts have

154 Article 16 of the Treaty.
155 Section 8(1) of the Treaty for the establishment of the East African Community Act, 2000.
156 Section 9(3) of the East Africa Community Act, 2002.
157 Article 10(1) of the East African Community Act, 2002.

immediate and direct applicability within Partner States' jurisdictions.

6. CONCLUSION AND RECOMMENDATIONS

This paper has traced the history of the EAC by inquiring into the objectives of its pioneers who are the former colonial powers. In so doing, this paper has made the call to Partner States and other stakeholders to continue searching and working towards realising firm reasons that shall make the EAC integration project an imperative establishment in the current circumstances. The Partner States' abandonment of the EAC in 1977 and living with its absence for over 20 years aggravates the debate on whether there exist compelling reasons for having the EAC by independent states. Some scholars have contended that had there been a compelling fear factor in the EAC, the Partner States would have found it difficult to disband the EAC in 1977.[158]

While discussing the organs of the community, the intergovernmental structure of the Community has been surveyed, pointing out how the executives of the Partner States have extended their arms in the decision and law-making process of the Community, at the expense of popular participation. Through EAC Partner States' constitutions scrutiny, it has been established how a strong supranational institution is still missing, subjecting the Community under a traditional public international law regulation where its binding nature depends on the national

[158] Kamanga, K.C, "General Principles of European Union Law, and East African Community Law Compared" A paper presented at the 5th Anniversary of the Tanzania-German Centre for Eastern African Legal Studies (TGCL), and The50th Anniversary of the German French Elysee Treaty", held at the Seascape Hotel, Dar es Salaam, October 25-26, 2013. 17.

legal order in place. Whereas some of the community laws become operational directly upon adoption, others need to go through ratification and domestication procedures.

It is recommended that it is essential to foster ongoing debate and deeper exploration of the reasons for establishing a strong East African Community (EAC), making this initiative a pivotal project for the region's future. This discourse should not only engage governments but also reach ordinary citizens within the community, ensuring widespread awareness of the significance of a robust EAC. Key questions that should drive this continuous dialogue include whether the Partner States truly need the EAC and whose interests the community is to serve. There is a pressi ng need to evaluate its modalities while prioritizing the broader interests of East African citizens. The Partner States should consistently identify and promote new reasons for unity; otherwise, they risk becoming entrapped in outdated colonial ambitions that may no longer be relevant in today's globalized world.

In the European Union context, for example, it has been clearly pointed out that the Union was a necessity; essentially aiming at curtailing German militarism and maintain peace in Europe.[159] It

[159] The Common interest to preserve peace in Europe after WWII especially between German and France is vividly seen in Schuman declaration in 1950 which partly provided as follows "Franco-German production of coal and steel be placed under common High Authority. open to the participation of the other countries in Europe. The pooling of coal and steel production… will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims. The solidarity in production thus. Established will make it plain that war between France and Germany becomes not merely unthinkable, but materially impossible." In D. Chalmers, et el., (2006) European Union Law: Texts and Materials, Cambridge University Press. pp. 13-14

is in that context that integration in Europe was "approached with passion and probably viewed as a matter of life and death, an absolute necessity for which no sacrifice was too high."[160] Can the same case by argued for EAC? Some studies have shown the decrease of conflicts in the EAC as a direct result of intra-Community trade.[161] On average, the reduction was about 10% for the period between 2009 and 2016.[162] The conflicts are expected to range between 3% and 5% after a full establishment of the Common Market.[163] Maintaining peace in the region could, for instance, be the motivation in this regard. It is, therefore, important for the EAC to continue pondering and clearly defining the main reasons compelling its existence.

The EAC organs must adopt a citizen-centric approach to effectively address the immediate and pressing needs of the people in the region. A people-centered EAC is crucial for shaping the formation of EAC legal institutions and for the interpretation of EAC legal instruments in ways that prioritize the interests of ordinary citizens. It is essential to consider legitimate historical contexts that influence current EAC circumstances. These considerations should inform the purpose, objectives, and structure of EAC institutions and legal frameworks. For instance, significant milestones regarding the free movement of persons, goods, capital, and the right to establishment should incorporate historical perspectives to ensure that the new EAC avoids the

160 Kamanga, K. C. Fast-Tracking East African Integration & Treaty Law: Pacta sunt servanda Betrayed? *Journal of African & International Law*, *3*(3), 697-717, 2010, p. 701.
161 T. Mayer & M. Thoenig, *Regional Trade Agreements and the Pacification of Eastern Africa*, Working Paper, Intl. Growth Ctr. (Apr.2016).
162 Ibid. pp. 17-18.
163 Ibid. p.21.

pitfalls faced by its predecessor. To facilitate the effective enforcement of EAC law, it is also recommended that states cede certain sovereign powers to EAC organs and institutions through constitutional amendments. This step is necessary if the Partner States wish to successfully establish the envisaged Monetary Union and Political Federation.