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An Enquiry into the Achievements and Challenges of East African Regional Integration

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Abstract

The EAC Treaty, signed on November 30, 1999, is a second go at regional economic integration, a previous initiative having collapsed in 1977, only a decade after its inception. Admittedly, the European Union (EU) is an inappropriate analogy for the EAC. However, today's supranational EU once too, had to confront the very legal, political and institutional challenges which accost the EAC today. The EAC is not without it's 'success stories', including outliving the 1967-1977 EAC. But debilitating challenges may not be overlooked. The Court of Justice is yet to deliver 'integrationist judgments'. Not only does the EAC Treaty suffer drafting gaps. The relationship between EAC Law, and national legal systems of Partner States, is mired in avoidable ambiguity. Despite an expressly stated pledge, the creation of a 'people-centred' EAC, remains elusive. Finally, and pertinently, the 'donor dependency syndrome' is so acute as to threaten 'sustainability and ownership'.

Introduction

The preoccupation of this paper is the East African Community (EAC), as created, on November 30, 1999, by the Treaty for the Establishment of the East African Community, in short, the EAC Treaty. However, the grand goal lies in the identification of the 'success stories' as well as the hurdles standing in the way of the integration process, that is, in creating a Customs Union, a Common Market, a Monetary Union, and ultimately, Political Federation. In

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the admission of the crafters of the EAC Treaty, the erstwhile EAC came crashing (in 1977), on account of the following "main reasons": a) political will deficiency; b) skewed benefit sharing; and c) "lack of adequate policies to address this situation". If that is so, how far has the present EAC distanced itself from this governance deficit? In other words, this a second time that East African States embark on a shared economic integration initiative in the post independence era. Otherwise, economic integration has its roots in British colonial times, most notably with the construction of the "Uganda Railway" in 1896 – 1901, which over time was elevated to a Customs Union, a common currency and a raft of service organisations such as the (postal, railways, harbours, civil aviation, income tax and a court of appeal (Umbricht, 1988:7-12).

Put briefly, and running ahead of the narration, the key achievements and challenges of East African economic integration can be clustered in the following manner. Among the EAC's most fundamental and visible 'success stories', is the sheer fact of survival, and the consolidation, and growth of its organs and institutions (Sezibera, 2014). Parallel with this, is the enlargement in membership.[1] Furthermore, Partner States have, by and large, gone a long way in creating the appropriate legal environment for the national implementation of their respective treaty obligations.

A caveat is in order. Seeking to ascertain the achievements and gaps of a cross cutting phenomenon such as a Regional Economic Community (REC) could easily fill the pages of a book. Given this limitation, the present paper addresses only a modest number of issues – adequacy of the EAC Treaty, and of the organs it creates, and relevant jurisprudence. As a consequence, while some attention is given to economic, historical and political dimensions of the EAC, the study does so in a manner and depth unfamiliar to these sister branches of knowledge. For example, while the 'cost and benefit analysis' with its focus on the Vinerian approach to ascertaining trade diversion and trade creation while common in the realm of economics (Wangwe, 1995, Lyakurwa, 1999, ERB, 2002, Neal, 2007) are barely known to lawyers.

Western Europe's Experience with Regional Economic Integration

It has to be acknowledged that to get where it is today, the EU has successfully negotiated its way past a Customs Union, a Common Market, and a Monetary Union. Further relevance of the EU experience is the fact that the EAC Treaty is in fact modelled on the EU Treaty framework (ERB, 1999;

80 – 81; 139 – 140), a fact acknowledges by several EAC observers (Baregu, 2005). In summary, the following may be taken as the aspects of most relevance, and they are six:

Firstly, Europe took a *gradual* approach in terms of membership expansion, but secondly, also in the scope of the integration itself (Kamanga, 2010:698-701). *Thirdly*, has been the unique role of the European Court of Justice, in particular through what have come to be known as '*integrationist judgements'*. Cases such as *Van Gend en Loos, Costa, Handelsgessellschaft, Dassonville,* and *Cassis de Dijon,* stand out for their contribution in articulating the scope of the free, non discriminatory movement of goods, a corner stone of any REC (Craig, 1996:153, Chalmers, 2006:14).

Fourthly, EU experience also shows how the existence of an identifiable, shared fear is capable of facilitating bonding in charting out a new common destiny. In this particular case it was apprehensions over Germany's proven predisposition towards aggression and expansion (Chalmers, 2006:9).

Fifthly, was the presence of 'eurocrats', a passionate, dedicated ruling elite, especially in the early years of the EEC, passionate about 'federalism'. In East Africa an analogy would be (and to paraphrase Thomas Kwasi Tieku), what could be termed '*East Africrats*', the 'drivers', 'champions' of EAC integration. (Tieku, 2011:193-212). Finally, and *sixthly*, is the role of individuals, civil society and even political groupings. The Union of European Federalists (UEF) is nearly 50 years old, and the European Federalists Party, a Pan-European political organisation is distinct for its agitation for a Federal Europe.[2]

How does the EAC fair in respect to the above six issues? Like the EU, the EAC has adopted a *gradualist* approach both in terms of membership expansion, but also in adopting a fresh treaty at each major step in the integration process. Burundi and Rwanda, the first ever new entrants joined the EAC eight years after the organisation's inception, thus bringing the membership to 5 from its original 3 (Kenya, Tanzania, and Uganda). But Protocols, that is, fresh treaties have been adopted at each major turn. First came the Protocol on the Customs Union in 2005, followed by one on the Common Market in 2010, and finally, on the Monetary Union in 2013. As for 'integrationist judgments' it may be too early given the nascent stage of the existence of the East African Court of Justice. The Court has been in existence for barely a decade and fully operational for a period shorter than that,

whereas the European Court of Justice has celebrated its 60th anniversary already. But there are other more fundamental aspects but these are discussed in greater detail in part (iv) of this paper.

The EU is also notable for one major driving factor – the desire to place controls over German access to two key resources – coal and steel, at the heart of that nation's propensity to wage aggressive wars. However, the regional integration process in the EAC betrays no such shared fear of any particular aggressor State. The British colonial government prescribed regional economic integration in the last century as part of its strategy to check imperial German expansionism in the region but also access to the riches of the Kenyan and Uganda hinterland (Umbricht, 1988:7-11).

Indeed, rather than coalesce in confronting a common aggressor, EAC Partner States have at different times been at war with one another, Tanzania and Uganda in 1978/1979 (Avirgan et al, 1983) followed by Rwanda and Uganda, on the territory of the DRC (Clarke, 2003). The conflict in the DRC, which is itself not an EAC Partner State, sadly, has sucked in 3 contagious EAC Partner States with awesome economic, social and political consequences.[3] Another critical factor behind the success of the EU, and not highly visible in the case of the EAC, appears to be a dedicated corps of technocrats across Europe, the 'eurocrats'. While each Partner State has indeed designated a centralised Government agency (at the level of a Cabinet Ministry), matters of regional economic integration and the EAC to be specific, barely surface or make it to the top of the political agenda during general elections or in Parliamentary debates.[4]Parallel to this is the fact that the person designated to lead the respective Ministry is often not a career officer but appointed at the leisure of the State President from among sitting Members of Parliament. The fluidity of this situation can be seen in the number of persons who have once served as Minister for EAC. In Tanzania, within the last decade or so alone, the position has been occupied by a succession of three persons – Hon. Dr. Diordus Kamala; Hon. Dr. Harrison Mwakyembe; and the incumbent Minister, Hon. Samuel Sitta. In the next Cabinet lineup expected with the forthcoming elections in October 2015, probably a new office occupant will be appointed.

A sixth factor which stands out in the EU experience is the sustained and ever growing engagement of civil society with regional integration. Just as there seems to be a deficit of '*East Africrats*', one rarely encounters civil society bodies on the scale found in western Europe, dedicated to promoting

regional integration in East Africa. This is particularly worrying given the modest achievements in securing a 'people-centred' EAC and the peripheral role of civil society and the youth. As we point out in a subsequent section of this paper, while a number of initiatives such as the launch of an EAC Civil Society Organisation have been rolled out, it is premature to ascertain the impact of such initiatives.

The Treaty for the Establishment of the East African Community, 1999

A recurrent gap in existing literature on achievements and challenges of the regional economic integration EAC has been either a modest (Wangwe: 1995, ERB: 1999), or archaic (Lyakurwa: 2002) attention given this matter. Let us direct attention to this constitutive instrument even if in respect of only a limited, but fundamental dimensions, and bearing in mind the edicts of the Vienna Convention on the Law of Treaties, 1969. Among these must be the admission by the EAC Treaty of the determinants of the collapse of an earlier and similar attempt at regional economic integration in 1977. Three factors are expressly spelled: lack of sufficient political will on the part of high leadership; absence of popular participation in the decision making; and a chronic, skewed apportionment of the 'Community cake'. Which in turn raises the question of how well inoculated is the present EAC. But let us turn to other aspects of the EAC Treaty.

Membership & Objectives

The provision on membership reiterates widely accepted modern day political and legal values, namely, "good governance, democracy, rule of law,... human rights and social justice".[5] The key provision in the EAC Treaty governing the nature and scope of legal obligations of Partner States makes repeated reference to the sanctity of objectives of the Community, but pertinently, sets out the main goals (and means for their achievement). And these are, a "Customs Union, a Common Market, subsequently a Monetary Union, and ultimately, a Political Federation".[6] Implicit in this formulation is the concept of gradualism, which has been a cornerstone of the EU experience.

This *gradualism* is, by the way, given further emphasis by several other provisions of the Treaty, and practice. It is also worth stressing that the significance of 'objectives' can be gleaned from two distinct situations. Often, courts of law do seek guidance by recalling the 'objectives' for which an organisation was created, as indeed was the case in *Van Gend en Loos*. But also the Vienna Convention on the Law of Treaties, 1969, is unequivocal: "A

Treaty shall be interpreted in good faith... and in light of its **object** and **purpose**" (*emphasis mine*)

Principles of EAC

Another matter given ample, if not exaggerated attention is the governing 'principles of the [EAC]' and understandably so (Ruhangisa, 2011). An entire two distinct provisions are dedicated to this question. In elucidating its governing principles in such elaborate fashion, the EAC Treaty sets itself out when compared with the constitutive instrument of the EU, which allowed principles of EU Law to be developed subsequently and gradually, by the European Court of Justice (ECJ).

The impression one gets from reading the two respective provisions of the EAC Treaty is that, whereas the first cluster of principles, identified as "fundamental principles", are of general applicability, and therefore hierarchically more superior, in the second cluster are "principles that shall govern the ***practical achievement*** of the objectives of the Community" (*emphasis added*) Having so distinguished the two categories of principles, the crafters then proceeded to reproduce *verbatim*, the very principles found in the first group (that is, 'fundamental principles'), in the second group (which comprises 'operational principles'), and thus creating avoidable duplicity and attendant difficulties. This is particularly the case in respect of the following principles: good governance, democracy, rule of law, social justice, and human rights.

The EAC Treaty is also striking in that despite making explicit reference to, and enumerating principles of EAC, when one combs the Treaty closely the number of principles exceeds those expressly listed in Articles 6, and 7, respectively. This includes reference to "principles of international law governing relationships between sovereign States", and to the duty "to abstain from any measures likely to jeopardise the achievement of the objectives or the implementation of the provisions of the Community". The overarching duty to create the environment necessary to "give effect to [the] Treaty, probably forms part of this 'addendum' of principles, as is the implicit recognition of the customary international law principle of *pacta sunt servanda*.

In language reminiscent of the EU Law principles of 'direct effect' and 'supremacy' (and characteristic of a supra-national REC like the EU), the EAC Treaty is unequivocal in defining the inter-sectionality between EAC

Law, on the one hand, and national legal systems of Partner States, on the other. The pertinent part reads as follows: "[EAC] organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of [the EAC Treaty]" Secondly, is the provision which sets out the international legal status of Regulations, Directives, Decisions and Recommendations of the EAC Council, the "policy organ". Its edicts, the Treaty stresses, are "binding on the Partner States… and on those to whom they may …be addressed"

This discussion on the inter-sect between EAC Law, and legal systems of Partner States would be incomplete if it ignores the following provisions in the EAC Treaty. Not only is the EAC Treaty (and all subsequent Protocols) the subject of mandatory ratification, but so too, is Presidential assent an absolute legal requirement for EAC legislation to acquire the force of law, a situation suggesting a nuanced but significant departure from the 'direct effect' principle. The significance of this observation lies in the fact that this type of legislative process throws EAC law into the phenomenal red tape and ornate procedures prevalent in Partner State legislative assemblies (and therefore far removed from the 'direct effect' some of the provisions of the EAC Treaty seem to embrace). Indeed, one of the chronic challenges confronting the EAC, is the debilitating delays in undertaking the national measures, including legislative, necessary to give effect to EAC Treaty law.
To conclude, there is no escaping that principles of EAC (and, the maxim *pacta sunt servanda*, in particular), have been destined to assume a significant legal role, as is evident from case law of the EACJ. In quiet a few and growing number of cases, litigants have founded their claims on the basis of infringement of their respective rights as protected by the "fundamental, and operational principles of the Community". Illustrations can be found in the *Hon. Sitenda Sebalu* v *Secretary General of the EAC et als*, *Mary Ariviza* & *Okotch Mondoh* v *Attorney General of the Republic of Kenya et al*, *Plaxeda Rugumba* v *Secretary General of the EAC et al*, *Mbugua Mureithi wa Nyambura* v *Attorney General of the Republic of Uganda and the Attorney General of the Republic of Kenya,* and *Mbidde Foundation Ltd and Rt Hon Margaret Zziwa* v *Secretary General of the EAC et al* (East Africa Law Society Practice Manual Series).

Challenges Confronting Economic Integration in East Africa

The EAC Development Strategy

The EAC Development Strategy, the pre-eminent policy text of the EAC, offers unique insights into the general issue of 'challenges'. Most notable of which are: fragility of democracy in the sub-region; absence of a crystal clear, shared 'vision'; weak alignment between policies, plans, laws and regulations of the EAC, on one hand, and those of Partner States, on the other; popular participation deficit; limited institutional capacity; low industrialisation; "low implementation rate of [EAC] decisions"; and "inadequate capacity for coordination, implementation and monitoring and evaluation mechanisms" . It is worth stressing that some of these factors have been confirmed by independent, external assessors. In 2008, for instance, the European Union had commissioned a team of consultants to examine the EAC system in respect of internal control, internal audit, and procurement. To be fair, the erstwhile archaic EAC budget system has given way to the more modern Medium Term Expenditure Framework (MTEF).

Zanzibar and the EAC

Another key challenge and which may be termed of a 'constitutional nature' relates to the position, and role of Zanzibar within the EAC legal architecture (Ruhangisa, 2011, Mahadhi, 2014). There is hardly any dispute that what is now the United Republic of Tanzania (URT) is the result of a 'union' between two sovereign entities: Tanganyika (present day, Mainland Tanzania), on the one hand, and the Isles of Zanzibar and Pemba, as personified by the Government of the Revolutionary Council, on the other. Despite the ruling of the Court of Appeal of the United Republic in *Machano Khamis Ali et als,* debate persists as to whether Zanzibar is a 'State' in the eyes of International Law, and by extension, entitled to individual membership (or some other kind of representation, along with the URT) in Intergovernmental Organisations (IGOs) such as the EAC. And this debate is an enduring one, going back to several decades (Mkubwa Mohamed, 1996). Curiously, Zanzibar does not feature in any substantive way in none of the early scholarly works, and which took a comprehensive reach of regional economic integration in the EAC (Wangwe: 1995 and Lyakurwa: 2002). Even more intriguing is the ERB (1999: 138 - 140) study which while acknowledging the peculiar situation of Zanzibar within the EAC, eschews the fundamental issue which is Zanzibar's constitutional status.

This is even more intriguing bearing in mind that at the time of the ERB study's publication (in March 1999) several major public reports were in

circulation, each dealing in sufficient detail with the 'Zanzibar question'. These were the 'Nyalali Commission' and the 'Kisanga Committee', or, Commission for the Single and Multi-Party System in Tanzania, 1991, and the Report of the Committee for the Collection of Views on the Constitution, 1999, respectively (Baregu, 1993).

But rather than accepting to be swept away from the national constitutional discourse, the 'Zanzibar question' has held its ground (Jjuuko et, 2010, Hamad, 2010, Mahadhi, 2014). It has not only resurfaced in the nation's high politics but triggered unprecedented public debate and scholarly works. The highlights of the contemporary constitution making process probably began with the enactment of the Constitutional Review Act, in 2011, the inauguration of the Constituent Assembly on February 18, 2013, and the presentation of the Draft Constitution (more widely known as the 'Warioba Draft) before the Constituent Assembly, by the Chairperson of the Constitutional Review Commission, Judge Joseph Sinde Warioba that fateful day on March 18, 2014 (LHRC, 2011). Such was the dispute and acrimony in the august house that a section of members of the Constituent Assembly walked out in protest on April 16, 2014, at the rejection of the 'Warioba Draft', under a loose coalition better known by its Kiswahili acronym (*Umoja wa Katiba ya Wananchi* – UKAWA) (Mtulya, 2014:3).[7]

This unique situation, and bordering on a political crisis, despite giving rise to two court cases, did not prevent the remaining Members of the Constituent Assembly to proceed to adopt a fresh draft ('*Katiba Inayopendekezwa*') in October 2014 (Fimbo, 2014). However, the envisaged constitution review process was never able to run the full circle of definitively giving the nation a new Constitution, perhaps on account of the constitution review process colliding with the general elections itinerary. As a last and final step, the Constitution Review Act prescribes putting the Draft Constitution through a referendum and subsequent promulgation of the new Constitution.

What is pertinent for this study is that the 'Warioba Draft' recommended, among others, a 3-tier (ie, including autonomous Governments for Tanzania Mainland, and Zanzibar). To the contrary, the contemporary draft adopted by the Constituent Assembly ('*Katiba Inayopendekezwa*') retains the existing 2-tier Government – one for Zanzibar, plus the Union Government (*Mwananchi*, 2014:1,4).[8] In so doing, the existing ambiguity and complications with regard to Zanzibar's constitutional status and its relationship with the

EAC, rather than having put to rest, will in all likelihood continue to remain a festering wound.

It is equally worth noting the standoff between the ruling party, CCM, on the one hand, and its single largest challenger, UKAWA, on the issue of the constitution review process. While CCM appears content with the existing Draft Constitution ('*Katiba Inayopendekezwa*'), UKAWA has made it quiet clear that it intends to pursue the issue of giving the nation a new issue as one of its major planks in the post general election period (*The Citizen*, 2014).[9]

Resource Mobilisation and Broader Implications

Resource mobilisation and 'Ownership' by Partner States represents another patent challenge. In an interview with the then EAC Secretary General it was repeatedly stressed, how acute the issue of resource mobilisation is (and continues to be).[10] One encounters similar concerns in several key EAC documents, including the EAC Annual Report, the EAC Development Strategy, EAC Partnership Fund Annual Reports, and more notably, in EAC Budget Speeches by the Chairperson of the Council of Ministers. This is also evident from the budget estimates of the organisation (summarised in Table 1) over the last 5 to 6 years, at times spiking by as high as 41%.

Table 1: EAC Budget Estimates for the Financial Years 2009/2010 – 2014/2015

Financial year	Total amount	Percentage change
2009/2010	**USD** 54,257,291	-
2010/2011	**USD** 77,664,443	+11%
2011/2012	**USD** 109,680,319	+41%
2012/2013	**USD** 138,316,455	+26%
2013/2014	**USD** 130,429,394	-6%
2014/2015	**USD** 124,069,625	-5%

Source: Researcher

Subscription Formula and Implications

In the considered opinion of the Secretary General, the prevailing arrangement in which Partner States, contribute in 'equal' amounts is simply untenable, and a major determinant of one of the ten major weaknesses identified in the EAC Development Strategy. It was revealed to me that, in the 2010/2011 financial year, 48% of the EAC budget was derived from donations made by foreign governments and institutions, in particular, the

EU. And, that membership subscriptions barely suffice in covering staff remuneration and related administrative costs, leaving no funds for running development orientated programmes and projects. As captured in **Table 2** below, all the 5 Partner States, were at the time, were in significant arrears on their respective subscriptions.

Table 2: Status of Partner States Annual Subscriptions

	Partner State	**Arrears** (*mil of usd*)
1.	Burundi	11,461,131.00
2	Tanzania	8,629,775.00
3	Kenya	6,160,510.00
4	Rwanda	6,150,674.00
5	Uganda	3,106,458.00
	TOTAL	35,508,548.00

***Source*:** Researcher.

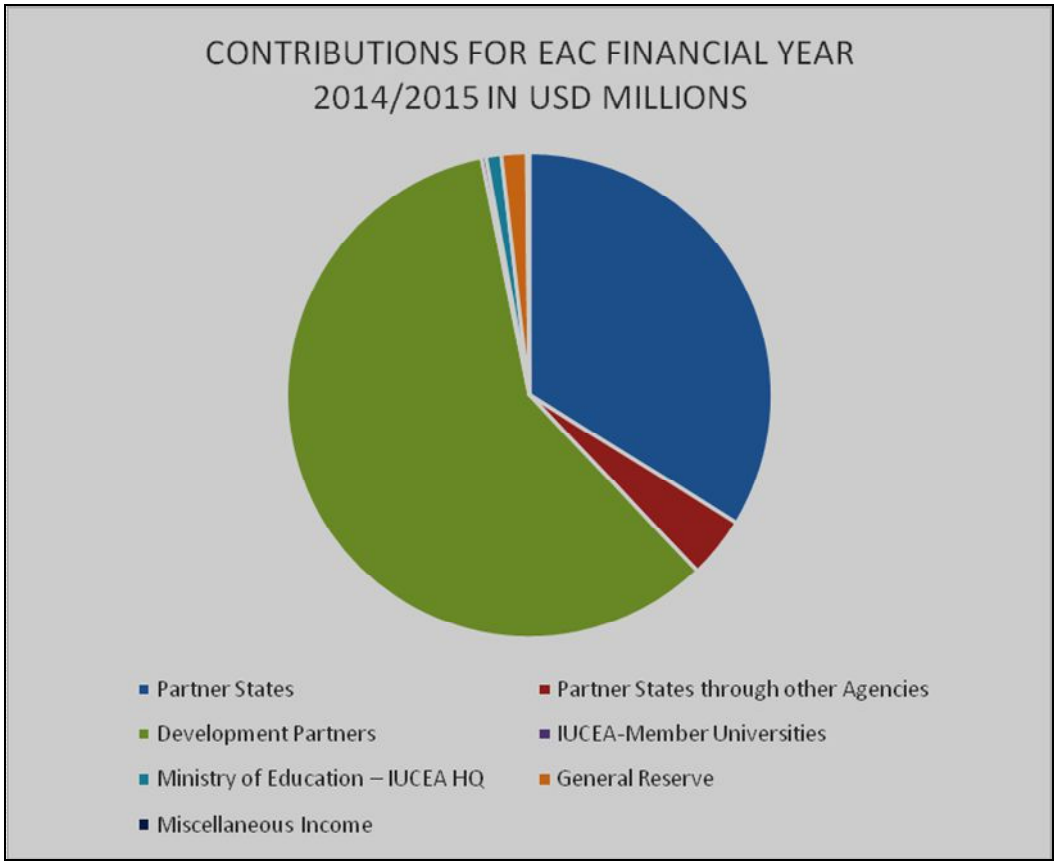
Opinion of the Council of Ministers

As intimated, EAC Budget Speeches present yet another opportunity to ascertain the status of resource mobilisation in the organisation. Highly pertinent observations, for example were made by Hon. Monique Mukaruliza, Rwanda's Minister for the EAC, and Chair of the Council of Ministers, in her remarks in respect of the financial year 2009/2010. In her assessment, the "percentage ratio of remittances to total budget by the Partner States stands at 73%" which is not surprising, given the prevailing "low performance in timely remittances of budget contributions by most Partner States" (EAC Budget Speech, 2009).

A sluggish pace in remittances is not the end of the financial woes of the organisation. The situation is complicated even further by a visible over dependence on financial support from the so called donor community. Such was the pre-eminent role of external funding, Mukaruliza conceded that "**[h]ad it not been** for funding from Development Partners, many EAC projects and programmes would not have been implemented" (*emphasis added*) This parasitic relationship was seen as compromising "sustainability of the regional integration process" and more pertinently, "ownership" of the process.

'Donor Dependence Syndrome'

Two clear trends stand out when one examines the EAC Budget Speeches for the period 2009/2010-2014/2015. In the majority of instances the quantum of external financial aid from 'Development Partners' either nearly matches that which is contributed by the EAC Partner States (2009/2010, and 2010/2011), or the contribution of the former outstrips that of the EAC Partner States (2012/2013, 2013/2014, 2014/2015).The following pie chart attempts to summarise the details found in the Budget Speeches named a minute ago.



It needs to be stressed that donor funding is also associated with two major threats: on the one hand, rarely is the pledged amount released in full, in fact by only 70%. On the other, funds are always released with a 5 – 6 months delay, and thus complicating "fund absorptive capacity" which stood at 74%.

A 'People-Centred Community'?

There is no escaping from the fact that absence of 'popular participation' lies at the heart of the collapse in 1977, of regional economic integration and cogent proof can be found in the preamble of the EAC Treaty, 1999. Incidentally, it goes to explain the motivation for elevating the aspiration for a "people-Centred EAC", into an "operational" principle of the EAC. The EAC Treaty, is quiet candid in its acknowledgement of how the 'downstream', 'top-down' architecture of the 1967 Community, proved to be an Achilles heel for integration, and ultimately contributed to the Community's collapse in 1977. But at the same time, while the principles of 'asymmetry', 'complementarity', 'subsidiarity', and, variable geometry' (which form part of the list of 'Operational Principles'), are elaborated in the 'Interpretation Clause', we are left guessing at what precisely is the meaning to be attached to a "people-centred" EAC. In turn, this has prompted us to propose that perhaps a sound and fair approach to interrogate whether the EAC is now more "people-centred", is by investigating to what extent if any, is there popular participation in the most politically, and socially, decisive processes within the EAC (AfriMAP et als, 2007), which takes us to the status of one key cluster of constituencies.

Civil Society and Youth

As we have pointed out already, not only was deficit of popular participation a major determinant of the collapse of East African Cooperation in 1977, but, that a 'people-centred Community' has been embraced by the EAC Treaty, 1999, as a major tenet of the new integration roadmap. There is the further argument that 'people' means the respective citizens of the 5 Partner States, with civil society and youth standing out as among the most strategic components. Youth, in particular, are not only the sub-region's single largest social group, but the most energetic section of the work force. According to one estimate, by mid-2012, East Africa's population stood at 144 million. Of this, those who belong to the 'youth' age group (ie, 15 – 35 years) account for 35 – 45% (SID, 2013, Sezibera, 2014).

Given the widely held acknowledgement of civil society as a key stakeholder in matters of governance, on the one hand, and numerical as well as socio-economic significance of youth, on the other, one would expect to find ample attention in the EAC Treaty, in respect of both civil society and youth. In reality, it requires some effort to locate elaborate, focussed provisions dedicated to these two constituencies. While a number of provisions are cited as being relevant, on close inspection it is only one provision which stands

the test of being dedicated, expressly. This is what distinguishes Articles 120, 128 and 129 on the one hand, from Article 127, on the other. Article 127 stands out as being part of a Chapter 25 of the EAC Treaty, and entitled 'The Private Sector and the Civil Society' (sic). The chapeau to Article 127 is explicit. It reads: 'Creation of an Enabling Environment for the Private Sector and the Civil Society'. In contrast, Article 120, 128, as well as 129, do not have, as their explicit concern, the issue of neither civil society nor the youth. The first of the three is dedicated to the broad issue of 'Social Welfare', whereas the second and third, have as their respective focus, the 'Private Sector', and 'Cooperation among Business Organisations and Professional Bodies'.

At the other extreme, one cannot help noticing that Article 127 is found at the tail end of the EAC Treaty (suggesting a diminished significance), being Chapter 25 of the Treaty's 29 Chapters. Even more importantly, close scrutiny of all the above 4 provisions reveal that the context and focus of the provisions in question, is far removed from facilitating or enhancing popular participation (which is the focus of the present discussion), and therefore as a strategy towards a 'people-centred Community' (AfriMAP, 2007). The gaps in the content of Article 127 do not end there. Although it is the only provision expressly dedicated to civil society, it suffers from two significant handicaps. It opens with the formulation that "Partner States agree to provide an enabling environment for the private sector and the civil society" a language quiet distinct from that found within the same provision, where the Treaty is explicit in stating the nature, and binding nature of a duty: "The Secretary General **shall** provide the forum for consultations between the private sector, civil society organisations, ..." (*emphasis added*)

To be fair, in recent years a fair amount of effort has gone into public awareness but also towards facilitating greater inclusion of East African citizenry in the EAC policy and decision-making processes. On the one hand, are publications aimed primarily at the general readership. On the other, has been the launch of a Consultative Dialogue Framework (CDF), which has the real and genuine potential for facilitating and even institutionalising popular participation, and therefore giving meaning to the principle of a 'people-centred Community.

According to the EAC, this framework is meant to facilitate "participation in the activities of the Community at all levels" including engagement with "the various organs of EAC such as EALA, EACJ, EAC, Secretariat..." The

adoption of an EAC Youth Policy is another major landmark, as is the launch of the EAC University Students Debate series, along with the EAC Youth Ambassadors' Platform.

'Coalition of the Willing': The Paradox of 'Variable Geometry'

'Variable geometry' constitutes one of the operational principles of the EAC, and defined by the EAC Treaty as "flexibility which allows for progression in co-operation among sub-groups of members in a larger integration scheme in a variety of areas and at different speeds" (EAC Treaty, 1999). Ostensibly, on the basis of this tenet the Presidents of Kenya, Rwanda and Uganda (to the exclusion of Burundi and Tanzania) held 3 successive summit meetings beginning 2013 to create the 'Tripartite Initiative for Fast Tracking the East African Integration' more commonly referred to as 'Coalition of the Willing' (CoW) (Gastorn, 2013). If the initiative is credited for successes in the area of joint infrastructure projects and the eradication of Non-Tarrif barriers (NTBs in the Northern Transport Corridor covering Kenya, Rwanda, South Sudan and Uganda (Sylvanus Wekesa: 2015), it also has its detractors (Isaac Mwangi: 2013). Among the latter is an enquiry into the legal impact of CoW (Gastorn, 2013).

Mwangi in particular, aptly captures the paradox inherent in operationalising the principle of variable geometry: "The danger for waiting for everyone to get ready is that we may never move. The danger of those who are willing moving on without the others, is that it creates divisions, suspicion and bad blood, the result of which could lead to a breakup". Indeed not long after the establishment of CoW, President Jakaya Kikwete of Tanzania was invited by his nation's irate Parliamentarians to explain what is his Government's response to being 'isolated' by the CoW initiative. What is relevant for the purpose of this paper is that President Kikwete openly and firmly questioned the sincerity and legality of the conduct of his fellow statesmen in CoW, but at the other extreme, used the occasion to reaffirm his nation's commitment to remain within the EAC, and has reiterated that position in several subsequent occasions, including his address to the Kenyan Parliament (on October 6, 2015) (*Daily Nation*, 2015).

Organs of the Community: An Overview

At the core of the main organs of the EAC are the Council of Ministers, Secretariat, the Legislative Assembly (EALA), and Court of Justice (EACJ). The Council of Ministers is not only the "policy organ of the Community". Its edicts (Regulations, Directives, Decisions, and Recommendations) "shall be

binding on the Partner States, on all organs and institutions of the Community..." The Secretariat, in turn, according to the EAC Treaty of 1999, is "the executive organ" and the Secretary General, the "principal executive officer of the Community" While it may be either premature and even unwarranted to draw parallels between the EAC Secretariat, and the European Union Commission, it is inconceivable, how EAC integration will ever fully flourish as a Monetary and Economic Union, leave alone a Political Federation, without a shared political and administrative nerve centre appropriately resourced, and sufficiently empowered as is the case with the EU Commission As one observer aptly notes, the EU Commission is not only the 'driving force' of EU policies, but is the starting point of every major EU initiative (Borchardt, 2010:64).

For its part, the Legislative Assembly assumes unique importance in examining the issue of a "people-centred" Community on account of two factors: its traditional and conventional role of law making. Secondly, for the broad 'social representativeness' in its composition. Another key organ, is the Court of Justice, or, EACJ. Like the EALA, in any political entity, the judiciary is a major constitutional pillar. In the contest of the EAC, the "interpretation and application of [the EAC] Treaty" is within the exclusive jurisdiction of the EACJ. Let us now direct attention to the issue of unravelling how much room exists, if any for 'popular participation' in respect of each of these 4 organs of the EAC, even if briefly, and we begin with the EAC Secretariat.

Secretariat of the Community

An analysis of the constitutive instrument of the EAC, the EAC Treaty, 1999, clearly marks out the Summit, and Council of Ministers, as exceptionally important organs. However, while in theory, matters get onto the agenda of either of the above two organs on the initiative of the EAC Coordination Committee, in practice, all major strategic programmes and projects are initiated by the Secretariat (EAC Treaty, 1999). The centrality of the Secretariat to the proper and effective functioning of the EAC is widely acknowledged to the point of advocating for an expanded mandate (Ruhangisa, 2011). Now, curiously, nowhere in the EAC Treaty, do we find structural or procedural mechanisms providing for popular participation in its decision making processes. In all fairness, the Consultative Dialogue Framework (CDF) has the potential to create a 'bridge' between the institution, and East African Citizenry, however, there exists no thorough, sustained empirical studies known on the matter as yet.

East African Legislative Assembly (EALA)

EALA is an equally vital organ with regard to policy and decision making within the EAC but whose work is compromised by the weak state of harmonisation between EAC Law, on the one hand, and that of laws of the Partner States (Ruhangisa, 2011). As the principal "legislative organ" of the Community, its potential for giving effect to the principle of a "people-centred" EAC, is real and considerable.

However, if the EALA is to accomplish this, a number of hurdles have to be recognised and addressed. *First*, is the circumscribed manner in which the Parliament's functions are set out in the EAC Treaty, especially in respect of safeguarding Parliament's autonomy and effectiveness in the context of separation of powers (.....). *Secondly*, is the manner in which EALA members are elected, which is not, by direct, popular ballot (that is, by universal suffrage) EAC Treaty, 1999). A *third*, and related constraint, is the '*representativeness*' of the EALA. The EAC Treaty is quiet clear it seems, to the extent that it does not confine representation in EALA to "various political parties represented in the [respective National Assemblies of Partner States]". Rather, the EAC Treaty takes a far more inclusive approach, by including "shades of opinion, gender, and other special interest groups" found in Partner States. Not surprisingly, the '*unrepresentativeness*' (and therefore, legitimacy) of EALA, has already been the subject of several petitions filed at the EACJ.

In *Anyang' Nyong'o*,[11] the applicants, drawing authority from Article 50 of the EAC Treaty, contended that "the process by which the representatives of the Republic of Kenya to EALA were nominated was incurably and fatally flawed in substance, law and procedure". In a development likely to foster respect for the principle of rule of law and accountability by high ranking EAC officials, EALA was able to obtain the removal of the EALA Speaker, the Right Honourable Margret Nantongo Zziwa. The relevant part of the enquiry team of EALA found Hon Zziwa guilty of misconduct, contrary to the EAC Treaty. On the basis of which, a recommendation was made calling for the Speaker's immediate removal from office (EAC, 2013).

East African Court of Justice (EACJ)

Besides its binding judgments, and the fact that its decisions "on the interpretation and application of the [EAC] Treaty shall have precedence over decisions of national courts on a similar matter", there are also the

Advisory Opinions, and Interim Orders, the EACJ is empowered to issue (EAC Treaty, 1999).

We need recall that within the EU, the European Court of Justice, has distinguished itself for its sterling work in determining the direction and even pace of the integration process, largely, through what have come to be known as '*integrationist judgments*' (Kamanga, 2010:702-703). In my interview with the EAC Registrar, in 2010, the Court's numerous achievements were pointed out. They included a robust staff recruitment initiative, specialised training for judges (on arbitration and ICT) and staff, acquisitions for the library, and an ever increasing case load.

S*econdly*, in a legally and politically controversial amendment to the EAC Treaty, 1999. The Court has not only assumed a bifurcated structure, with the original uni-cameral giving way to a bicameral structure of a Court of First Instance, and an Appellate Division, but the expansion of the grounds for removal is most notable given the far reaching consequences it brings to the existing arrangement, essentially leaving the 'hiring and firing' of judges at the whim of the Executive in the respective Partner States. Not only is the appointment of a judge exposed to the whims of the Executive arm, so too is the judge's tenure, and for the simple reason that a judge may be suspended for infringements of his respective country's laws, infringements which have been defined in the broadest fashion imaginable (.....). This situation holds the possibility of the Community finding itself with a bench whose occupants would lack the professional boldness to deliver judgements which are unpalatable to sections of the Executive (as was the case in *Anyang' Nyong'o* in a bench comprised of JJ Warioba, Ramadhani, Mulenga, ole Keiwua, and Mulwa) but otherwise, openly '*integrationist judgments*'.

In a remarkable revelation, the Registrar raised the issue of "sovereignty syndrome", which is reflected in the seemingly consistent pattern of reluctance to acknowledge the EACJ as the principal adjudicatory forum for matters pertaining to the EAC Customs Union, and Common Market. The Registrar maintained that several Partner States have proceeded to vest jurisdiction over EAC Customs Union, and EAC Common Market, in quasi-judicial national bodies. And indeed this osition is shared by several observers (.....). His conclusion from this, was, that Partner States' confidence in the EACJ remains questionable. This is hardly a far-fetched claim. The EAC Protocol on the Customs Union for example, creates a 'Committee on Trade Remedies' as a dispute resolution mechanism over a

wide range of trade related matters, and in that way, reduces chances of trade disputes coming before the EACJ, the end result being a likely retarded growth of jurisprudence of the court. Again, there is a sharp contrast with the situation within the EU where disputes (related to infringements of EU Law) allow for no 'forum shopping'.

Seventhly, and not too unrelated with the previous challenge is that of 'parallel jurisdictions'. This, the Registrar explained is largely on account of the multiple membership to RECs (for instance, COMESA and SADC), one finds among EAC Partner States. In the event of dispute this, again, gives raise to 'forum shopping'.

However, the challenge the Registrar was at pain to share, was the following, and the eighth in line. It is associated with the EACJ's "*ad hoc*" status. According to the EAC Treaty, judges appointed to the EACJ "shall serve on an *ad hoc* basis" and this situation shall continue "until such time as the Council determines" otherwise. While this situation did persist for a considerable time, affecting the effectiveness of the Court's unique potential (a la European Court of Justice) contribution in promoting economic regional integration it was mitigated in .... when the Judges of the Court began operating on a permanent basis (.....).

But of all the challenges facing the EACJ two stand out: insufficient jurisdiction regarding EAC Law related disputes; and erosion of existing jurisdiction through the establishment of parallel dispute resolution mechanisms within the EAC itself (Ruhangisa, 2011)

Conclusion

This paper set out to map the major achievements and challenges standing in the way of the EAC. As for achievements, high on the list is the EAC's sheer survival, having outlived the erstwhile East African Cooperation of 1967 – 1977, by a handsome 5 years. There has also been an evident consolidation and growth of the legal framework, as well as organs and institutions, especially, EALA and EACJ. The EAC has succeeded in attracting considerable and sustained financial support from its 'Development Partners'. Ironically, 'over-dependency' on external benefactors, may in a way also serve as a measurement of 'donor confidence' in the potential and prospects of the EAC.

The EAC Treaty, the bulwark of the EAC's legal framework, although not spared from gaps, is overall, a fairly comprehensive, forward looking legal text. It is explicit not only with respect to 'objectives' but is equally unambiguous about the 'means', and which, is *gradualism*. 'Principles of the Community' have been given ample attention, while powers of the 'main organs' have been demarcated with acceptable precision.

Expectedly, there are challenges (Kyambalesa et al, 2006, Mwapachu, 2012) and most of which, the EAC itself is bold enough to acknowledge. The most fundamental of these, in our view, is the governance deficit, on account of the fact that a "people-centred Community" (the bane of the 1967 EAC) continues to remain elusive despite the inauguration of the Consultative Dialogue Framework (CDF). Resource mobilisation, and largely on account of over-dependency on 'donor funding', coupled with an unrealistic subscription formula, continues to remain a chronic, acute matter.

Casting his gaze widely, Prof Tulya-Muhika sees no genuine attempt at "regional economic integration". In its place, instead, is a 'regional cooperation bloc'. So, ironically, one is filled with optimism when considering achievements, but caution, if challenges are taken on board. Hopefully, forthcoming anniversaries of the EAC will allow a more unequivocal verdict on the achievements and challenges confronting the EAC.

End Notes

1. The three original three 'Founding Partner States' – Kenya, Tanzania, and Uganda, werejoined by two more – Burundi and Rwanda, in July 2007.

2. Further details can be gleaned from http://en.wikipedia.org/wiki/European_integration as accessed on June 10, 2015.

3. More details of the dimensions of the conflict can be found in DRC v Uganda, ICJ Reports, and *Prosecutor* v *Germain Katanga* and *Mathieu Ngudjolo Chui*, ICC-01/04-01/07.

4. For example, in the newly launched Election Manifesto of the largest opposition party in Tanzania, *Chama cha Demokrasia na Maendeleo* (CHADEMA), the EAC is mentioned in general terms, along with SADC and the AU as institutions which a CHADEMA led Government will strive to work closely with in the context of promoting "African unity and cooperation"

5. Article 3 (3) (b) of the EAC Treaty.

6. Article 5 (2) of the EAC Treaty.

7. Athuman Mtulya (2014), "Opposition Coalition Goes for One Post, One Candidate", *The Citizen on Sunday* (Dar es Salaam), p 3.

8. *Mwananchi* "*Pinduapindua ya Rasimu*", Septemba 2, 2014.

9. *The Citizen*, "UKAWA, Warioba and CA Victors: Is the Battle Over?", October 3, 2014.

10. Interview with Ambassador Juma V. Mwapachu, the then Secretary General of the EAC, Arusha, November 22, 2010.

11. EACJ, Reference No. 1 of 2006.

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