

The democratization of international organizations



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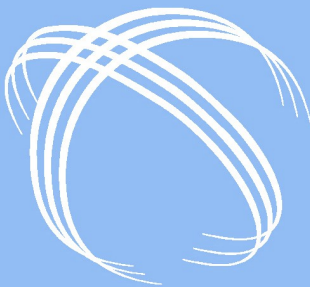
CENTRE FOR STUDIES ON FEDERALISM

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East African Community

by
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CENTRE FOR STUDIES ON FEDERALISM

I. Introduction

The drive for the transformation of the East African region, particularly Kenya, Tanzania and Uganda, into a functioning entity with rights and duties in international relations is not new. It dates back to the time when the three East African colonies were still objects of international law.¹ The completion of the *Uganda Railways* (as it was originally known) from Mombasa (Kenya) to Kampala (Uganda) by the British colonial administration (1895-1903), set the stage for *Phase I* (1903-1947) of the formal socio-economic and political cooperation and integration in the region. A number of institutional mechanisms were established with the objective of promoting and institutionalising the colonial administration's project on cooperation. They included, among others, the East African Posts and Telegraphs (EAPT-1890), the East African Currency Board (EACB-1905), the Customs Union (1917), the East African Income Tax Board (EAITB-1940), and the East African Airways (EAA-1946).² However, a more structured cooperation was realised with the formation of *Phase II* (1948-1961) of East African cooperation under the framework of the East African High Commission (EAHC), the corporate judicial body, by the colonial Office for the three Governors of Kenya, Tanganyika and Uganda as well as with the creation of the East African Central Legislative Assembly (EACLA-1948), also known as the Legislative Council (LEGCO), as the main decision-making body (Tulya-Muhika 1995: 6). The common serves thereafter gradually acquired a centralised feature, with the EAHC and the EACLA as the key decision-making bodies with functional responsibilities in the region.

However, in 1961, the EAHC was again restructured into the East African Common Services Organization (EACSO) which established *Phase III* (1961-1967) of the East African regional cooperation, broadening the scope for the administration and operationalisation of the common services. The persistence of the market inequalities coupled with the centralisation of most of the headquarters of the common services in Nairobi, Kenya, continued to pose structural challenges to the EACSO, creating a centre-periphery relations in the region. As Newlyn (1971: 348) observes: "the gains from East African common market were unevenly distributed between the

¹ For details on the historical origins and the collapse of the East African Community see, for example Adar and Ngnyi (1992); Delupis (1970); Nye (1965); Potholm and Fredland (1980); Mugomba (1978).

² Tanganyika joined the Common Services at various stages after it became a British Mandate and later a Trustee Territory at the end of WW I and WW II respectively.

participating countries. This was a result of the fact that the industry[...]tended to cluster in Kenya.” These enduring historical structural challenges, among other reasons, necessitated the reconceptualization and restructuring of the EACSO into the East African Community I (EAC I, 1967-1977). The treaty establishing *Phase IV* of the East African regional cooperation signed by Kenya, Tanzania and Uganda in 1967 broadened the scope of the economic and political integration responsibilities of the EAC I. The EAC I disintegrated in 1977 due to the political, economic, institutional, structural and personality conflicts. It was not until 1999 that the treaty establishing *Phase V* of the East African regional integration was signed by the member states, Kenya, Uganda and Tanzania. The EAC II treaty entered into force on 7th July 2000 after its ratification by the member states.

The study is divided into three broad parts. Part one provides the historiographical trajectory of cooperation efforts, that is, *Phase I*, *Phase II* and *Phase III*, under pre-EAHC, the EAHC and EACSO frameworks. Part two puts into proper context the governance structures and the operational functions of the EAC (1967-1977). More specifically, part two assesses the impact of these governance structures on democratization of the EAC during the *Phase IV* period. Part three focuses on the core of the study, that is, governance structures of the EAC and their impact on democracy enlargement or lack thereof. The analysis of the EAHC, EACSO and the EAC I governance structures and their operational functions will provide a useful basis for contextualising the evolution of *Phase V* of the 2000 EAC II governance structures as well as their impact on democratization of the member states and the region. More specifically, part three identifies and analyses the governance structures and the role they play in the process of the transformation and consolidation of democracy in the region and the member states, that is, Burundi, Kenya, Rwanda, Tanzania and Uganda. The analysis will also include an assessment of, among other interlocking issues, input legitimacy, participation, control, inter-state democracy, supranationalism, power limitation, human rights, output legitimacy, and multilateralism. An assessment of the correlation or linkage between governance structures and democratization is critical in isolating the extent to which the EAC II is transforming into what might be called a *regional state* (an emerging sovereign entity) with the objective of democratizing the

region (Schmidt 2004). Burundi and Rwanda became fully fledged member states of the EAC II following their ratification of the treaty in 2006 (Mushega 2006: 19).

2. Part one

2.1. The EAHC and the EACLA: governance structures and legislative powers

The debate on the question of cooperation in the East African region at the time acquired three pronged and competing viewpoints namely, economic cooperation, political cooperation, and decolonization advocated mainly by the Governors, the settlers, and African nationalists respectively. For Africans, the issue of de-colonization was more critical than securing appointments to serve in the LEGCO. The EAHC consisted of the Governors of the three colonies, Kenya, Tanzania and Uganda, with an Administrator, Commissioner for Transport, Finance member, and Postmaster General as its principal executive officers. The EACLA, on the other hand, comprised of seven *ex-officio* members, three nominated official members, and thirteen unofficial members respectively (Delupis 1970: 27-28). Even though the EACLA or LEGCO was the legislative body, it had limited powers. Prior to tabling them in the LEGCO for debate, for example, the bills were subjected to scrutiny by the three Governors and could be vetoed by the EAHC, making the latter body “the supreme organ of the organization” (Delupis 1970: 29). What is important to note is that the Acts of the Assembly once assented to by the EAHC had the force of laws within the region. This was an important development at the time given that the laws were applicable to all the three territories. However, the direct linkage of the three colonial territories with Britain making them objects of International Law undermined the autonomy of the EAHC as a legitimate international organization.³

2.2. EACSO governance structures, operational and structural powers

The EACSO was transformed in 1961 with a view to accommodating the East African presidents to replace the Governors once the territories acquired their sovereignty. The EACSO had three main organs namely, the East African Authority, the Central Legislative Assembly, and the Triumvirates. The *East African Authority*, the supreme

³ The EACH was responsible for more than 30 common services, most of which had their Headquarters in Nairobi, Kenya (Delupis 1970).

organ of the EACSO, initially comprised of the president of Tanganyika following the country's independence in 1962 and the Governors of Kenya and Uganda, with *unanimity* used as the key to its decision-making process. The Authority was responsible for, among other things, assenting to the bills passed by the Central Legislative Assembly, the legislative organ. The *Central Legislative Assembly* had 27 elected representatives, that is, 9 from each of the East African countries Kenya, Uganda and Tanganyika, a Speaker, 15 members of the Ministerial Committees, the Secretary-General and a Legal Secretary (Delupis 1970: 43). The *Triumvirates*, comprising of five Ministerial Committees, the main policy-making organs of the organization, as well as the *Secretariat* headed by the Secretary-General, were new innovations, providing a clear departure from the EAHC's operational structure. The *Triumvirates* included the Communication, Finance, Commercial and Industrial Coordination, and Labour Committees. The other governance structures included the *Common Services* of the EACSO and the *Court of Appeal for Eastern Africa*. The Court was empowered, through the Authority and with the acquiescence of the United Kingdom, to hear appeals from colonies such as Aden, St. Helena, the Seychelles and Somaliland (Delupis 1970: 47). These developments notwithstanding, common market inequalities and the centralisation of the services in Nairobi continued to pose challenges and undermining the spirit of cooperation in East Africa, with Uganda and Tanzania questioning the historical structural imbalances (Delupis 1970 and Tulya-Muhika 1995).

3. Part two

3.1. Towards broadening the scope of regional integration and democratization: from EAC I to EAC II

The aspirations for regional cooperation in East Africa acquired individual sovereignty and legitimacy in the post colonial state in the 1960s driven largely by the Pan-Africanist East African leaders, Jomo Kenyatta (Kenya), Julius K. Nyerere (Tanzania) and Milton A. Obote (Uganda). More specifically, the three East African leaders were, initially at least, interested in ushering in political federation as a springboard for regional integration. This desire was reinforced with their 1963 *Nairobi Declaration* in which the leaders committed themselves to establishing an East African political

federation in 1964 reiterating, among other things, that, “we believe a political federation of East Africa is desirable by our people. There is throughout East Africa a great urge for unity and an appreciation of the significance of federation” (East African Community Secretariat, no date: 30-31). The decision by the three East African leaders to opt for a political federation as opposed to economic cooperation agreement was influenced by two main factors such as similar historical experiences and Pan-Africanist aspirations sweeping the continent at the time of decolonization. However, the independence national interest realities undermined the drive for political federation.

Realising that political federation objective was not achievable, the East African political and ruling elites under the leadership of Kenyatta, Nyerere and Obote reconceptualised their strategy by opting for economic-driven neo-functionalist-cum-functionalist regional integration process. Following the 1966 recommendations contained in Kjeld Philip report, in 1967, the leaders signed the East African Co-operation treaty, which established the EACI, with economic cooperation as the driving force.⁴ Specifically, in *Phase IV*, integration process in the East African region was guided by the principle of *joint ownership of common services* as the key to the EAC operational functions (Adar 2005: 37).

3.2. The 1967 EAC: governance structures

The key organs of the EAC included the *East African Authority*, the *East African Legislative Assembly*, the *East African Ministers*, the 5 *Councils* (the Common Market Council, the Communications Council, the Economic Consultative and Planning Council, the Finance Council, and the Research and Social Council), the *Tribunals*, the *East African Community Services Commission*, the *East African Industrial Council*, and the *East African Development Bank*. The *East African Authority* (or simply the Authority) consisted of the three presidents. The members of the *East African Legislative Assembly* comprised of the 3 East African Ministers, 3 Deputy East African Ministers, and 27 appointed members of EALA (9 from each partner state), the Chairman of the Assembly, the Secretary General and the Counsel to the EAC (Delupis 1970: 59-60).

⁴Prof. Kjeld Philip, the former Danish Minister of Trade and Finance was chosen by the three East African leaders to study the feasibility of establishing an EAC. For purposes consistency, the acronym EAC will be used in this study to refer to the EAC I and the EAC II. The name East African Community has been retained even with the accession to the treaty by Burundi and Rwanda in 2006.

The *East African Ministers* were nominated by the heads of state and government and must resign if holding other official posts in the appointing government. Some of the key innovations of the 1967 EAC included the following; permanent location of the EAC Ministers and the EALA representatives at the Headquarters in Arusha, Tanzania, giving them international status and executive authority as well as directing their loyalties to the affairs of the organization; the establishment of the *Tribunals* (the Court of Appeal for East Africa, the Common Market Tribunal, and the East African Industrial Court), and the establishment of the *East African Development Bank* (EADB). The Tribunals and the EADB were new governance structures established to serve specific purposes for the EAC.

3.3. Assessment on impact on democratization

The *Authority* remained the supreme organ of the EAC, with *consensus* as its key decision-making process. The location of the Ministers at the EAC headquarters meant that the Authority served as the central link between the national governments and the organization. As in the case of the Authority, *consensus* was incorporated in the treaty to serve as the guiding principle of decision-making process during the deliberations by the five *Councils* whose membership included, among others, all the three EAC Ministers and national Ministers responsible for relevant portfolios in the partner states. What is important to stress is that the Councils were responsible for, *inter alia*, promoting East African cooperation and addressing any potential disintegrative ramifications between the EAC and the organization thereof. Article 30 of the 1967 Treaty, for example, empowered the Common Market Council to issue a *binding directive* to the partner states, a statutory responsibility which promoted democratization at the national and the EAC levels (my emphasis) (East African Secretariat 1967: Article 30). The *East African Legislative Assembly* was responsible for law-making through Bills passed during its deliberations. The Authority, with the advice and consent of the EALA, was responsible for the enactment measures which became Acts of the Community. Article 95 (b) of the treaty provided that the *Acts of the Community* and the *Rules and Orders* emanating from the Authority, once gazetted, became *force of law* of the organization and the partner states, a process which had

impact on democratization at the regional and national levels and led to what might be called *East African law* (my emphasis).

The role of the Tribunals, particularly with respect to dispute settlement at the national and EAC levels was an important one given the history of market-related disputes. As international courts, the *Court of Appeal for East Africa* and the *Common Market Tribunal*, for example, applied sources of law enshrined in the EAC treaty, the previous EACSO and the EAHC as well as sources of international law in their interpretation and adjudication of alleged breaches. These developments did not prevent the Tribunals from preserving the constitutional *raison d'être* of the partner states, particularly where there was conflict between municipal law and international law (Ojwang 1990; Kuria and Ojwang 1979). The *East African Development Bank* was an important innovation established to address the regional socio-economic imbalances through financial and technical assistance to the less industrially developed member states. The underlying objective was to bridge the economic gap through “distribution of its investments between the partner states[...]and[...]to act as a catalyst for complementary industrial investment,” an important historical disintegrative issue for East Africa (Hazlewood 1985: 176).

Under the 1967 EAC treaty, East African Common Market (EACM) operational functions were institutionalised, establishing four economic cooperation related regimes.

- *Common external tariff regime*: Except where circumstance would warrant deviation from the general practice, under this arrangement the partner states agreed to harmonise tariff on specific goods.
- *Inter-territorial trade regime*: Under this regime, transit of goods within the region was restricted, that is, customs duties were not levied by the member states. On the other hand, customs duties collected from a non-member state for transit to another EAC member was to be deposited to the receiving state.
- *Protection of EAC trade regime*: This arrangement restricted the import of goods from non-member states if such items were readily available in the region.
- *Transfer tax regime*: was meant to address the historical economic imbalances through the promotion of balanced development that is, providing opportunities

for industries in Tanzania and Uganda to compete with those of Kenya. The EADB was the organ responsible for providing the necessary technical assistance.

As I have explained, one of the main reasons behind the incorporation of economic-oriented regimes in the EAC was the historical trade imbalances which were in favour of Kenya (Gitu et al 2003; Goldstein and Ndungu 2001; Maasdorp 1999; Nixon 1973). The envisaged impact of economic co-operation on the EAC integration process with inherent spill-over effect did not withstand the intra-and inter-national complexities and differences, culminating into the disintegration of the regional organization in 1977. More specifically, the centralisation of decision-making process within the Authority and reliance on the harmonious relations between the heads of state and government undermined the effectiveness of the other governance structures encouraging national-oriented pursuit of interests as opposed to EAC interests.

4. Part three

4.1. The 1999 EAC: recent history and evolutionary process

The disintegration of the EAC in 1977, did not bury the aspirations of the East African ruling elites from re-establishing a viable regional organization for harnessing areas of co-operation. These aspirations were tangibly incorporated in the East African Community Mediation Agreement (hereinafter, the Mediation Agreement) concluded in 1984 by the three countries for purposes of the division of the 1967 EAC assets and liabilities. Article 14 (2) of the Mediation Agreement, for example, provided that “the States agree to explore and identify further areas for future co-operation and to work out concrete arrangements for such co-operation” (Kenya 1988). These developments were further reinforced by the October 1991 meeting between Presidents Daniel arap Moi (Kenya), Ali H. Mwinyi (Tanzania) and Yoweri K. Museveni (Uganda) in Harare, Zimbabwe, during the Commonwealth Heads of State or Government Summit. The meeting and the evolving rapprochement among the East African leaders set the stage and momentum for tangible actualisation of the spirit of the Mediation Agreement.

The East African Presidents met in Nairobi, Kenya, in November 1991 and set up a committee of Foreign Affairs Ministers with the mandate to explore the modalities for

promoting further cooperation in the region. The negotiations by the Ministers culminated into the establishment of a Permanent Tripartite Commission (hereinafter, the Commission) for East African Cooperation in November 1993 and a Permanent Secretariat for the Commission in November 1996. The Secretariat for the Commission set in motion regional reconstruction and more specifically, the operational structures and functions of the East African Cooperation. The core mandate of the Commission was to lay the foundation for economic-political and socio-cultural development for the benefit of the people of the region. In order to achieve these objectives, the Commission developed specific strategic plans for action and implementation.

The Commission prepared the first East African Cooperation Development Strategy (EAC-DS) covering the period 1997-2000. The core objective was to, *inter alia*; upgrade the Mediation Agreement into a treaty, a mandate which was successfully accomplished. The treaty establishing the EAC was signed by Presidents Moi (Kenya), Museveni (Uganda), and Benjamin Mkapa (Tanzania) on 30th November 1999, which thereafter came into force on 7th July 2000. For the first time in the history of cooperation of the East African region, specific stages of integration process was clearly incorporated in the 1999 EAC treaty. These are outlined in Article 5 (1-3) of the Objectives of the Community which are to:

- Develop policies and programmes aimed at widening and deepening cooperation;
- Establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation;
- (a) ensure the attainment of sustainable growth and development, (b) ensure the strengthening and consolidation of cooperation, (c) ensure the promotion of sustainable utilisation of natural resources, (d) ensure the strengthening and consolidation of the long standing political, social, cultural and traditional ties...so as to promote people-centred mutual development, (e) ensure the mainstreaming of gender, (f) ensure the promotion of peace, security and stability within, and good neighbourliness, (g) and ensure the enhancement and strengthening of partnerships with the private sector and civil society (EAC Secretariat 2002).

Article 5 (2) of the treaty not only captures the historical experiences by the East Africans on the question of regional cooperation but also addresses specific ways and means of achieving the objective focusing largely on a functional oriented integration process. The EAC Development Strategy 2001-2005 on cooperation on socio-cultural and econo-political sectors dealt with a number of issues such as HIV/AIDS policies, strategies and treatment. The East African Integrated Disease Surveillance Network (EAIDSNET), and the EAC Partner States National Regulatory Authorities and Experts Committee on Pharmaceutical and Medical Products, for example, were established. The EAC-DS 2001-2005 realised a number of achievements which included the protocols on, among other, the East African Legislative Assembly, 2001; East African Court of Justice, EACJ, 2001; Combating Drug Trafficking, 2001; Tripartite Agreement on Road Transport, 2001; Inter-University Council for East Africa, 2002; Sustainable Development of Lake Victoria Basin, 2003; and the East African Customs Union, 2004.

4.2. The operational structure and functions of the 1999 EAC Treaty: impact on regional democracy enlargement

Underlying the objective of the EAC is democratization of the region broadly based on socio-cultural and econo-political foundation. Specific operational structures and functional responsibilities thereof for the implementation of the objectives of the EAC are clearly provided for in the treaty. This section identifies and analyses these governance structures of the EAC and the role they are envisaged to play in broadening the scope of democracy in the region. However, before focusing on the operational structure and functions of the EAC, it is necessary to put into perspective the objectives of the EAC, which are inscribed *expressis verbis* in the treaty.

As I have argued elsewhere, the objectives of the treaty and the treaty in general take neo-static and neo-functionalist characteristics (Adar 2005: 37-39). First, the treaty empowers the Community to broaden the scope of cooperation among the EAC member states in socio-cultural, econo-political and security issue areas. Secondly, this development objective is envisaged to take an *incrementalist process*, that is, the transformation of the region is to be accomplished in stages (my emphasis).

- *Stage 1: Customs Union* deals with a Common External Tariff (CET), the objective of which is to eliminate internal tariff as well as intra-EAC non-tariff barriers.
- *Stage 2: Common Market*, the objective of which is to lay the foundation for free movement of goods and services and natural persons.
- *Stage 3: Monetary Union* aims at creating a single currency area in the EAC.
- *Stage 4: Political Federation* aims at the creation of a single regional and policy entity with rights and duties in International Relations.

Even though specific timeframes are not provided for in the treaty, the EAC is the only regional organization in Africa that specifically provides for the stages of its integration process. The Wako Committee established in 2004 by the Summit to study the feasibility of fast tracking the EAC political federation attempted to fill this gap by suggesting ambitious timeframes for political federation (EAC Secretariat 2004). Inherent in this process are a number of factors one of which is its specificity and inclusiveness in all respects. In other words, it leaves room for self evaluation prior to the commencement of another stage. However, the decision by the Summit to authorise a study on fast tracking the EAC political federation in 2004 seemed to have leapfrogged the envisaged process.

4.3. The 1999 EAC Treaty: *appointment and governance structures of the organization*

There are 7 organs of the EAC established under Article 9 of the treaty. Whereas the *Summit of Heads of State or Government*; the *Council of Ministers*, the *Coordination Committee*; the *Sectoral Committee*, and the *Secretariat* share executive powers, the *East African Court of Appeal* and the *East African Legislative Assembly* share federal judiciary and federal legislative powers respectively (Kamala 2006: 8). These organs are discussed hereinafter with the objective of underpinning their structural and operational functions.

4.3.1. *The Summit*

The Summit is composed of the Heads of State or Government, whose main mandate is to ensure that the organization is pursuing its objectives in conformity with the obligations of the treaty. In the absence of a member of the Summit, the member may appoint a Minister as a replacement. Unless an extraordinary meeting is requested by a member state, the Summit holds its meetings once a year, with the Office of the Chairperson held on a yearly rotational basis. Decisions of the Summit are arrived at through a *consensus*. Its other operational functions include, among other things, reviewing progress on political federation; considering and approving annual reports; and assenting to Bills of the EALA. The Bills assented to by the Summit become the Acts of the Community. The treaty also confers legislative powers on the Summit, a statutory responsibility which has the potential of undermining the role of the EALA. Article 11 (6) of the treaty provides that “An Act of the Community may provide for the delegation of any powers, including legislative powers, conferred on the Summit by this treaty or by any Act of the Community, to the Council or to the Secretary General” (EAC Secretariat 2002).

4.3.2. *The Council*

The Council is the main policy organ of the EAC with statutory responsibility to, *inter alia*, oversee and promote the implementation of the EAC’s vision and mission; give directions to the EAC organs, except the Summit, the EALA and the EACJ; scrutinise the budget and submit reports to the Summit; establish Sectoral Councils and Sectoral Committees for purposes of proper operations of the EAC; and initiate Bills to the EALA. As in the case of the Summit, the legislative responsibility conferred on the Council has the potential of usurping the role of the EALA, particularly in a situation where the two organs disagree on policy issues (Oloo 2005: 86). The Council of the EAC comprises of the Ministers who are in charge of regional cooperation in each of the partner states.

The Council meets twice a year, with one of its meetings held in advance before the Summit meeting. The Council is the organ that directly reports and advises the Summit on the implementation and development of the EAC objectives. This is not to argue that the Summit does not have the authority to request a meeting with any

other organ of the Community. The Council also has the option of convening an extraordinary meeting, usually at the request of a member state or the Chairperson of the Council. Extraordinary meetings are convened to deal with pending or pressing EAC-related issues. As in the case of the Summit, *consensus* is the main principle that guides its decision-making process during the Council's meetings.

4.3.3. The Coordination Committee

The Committee consists of Permanent Secretaries of Ministries of regional cooperation of the partner states. Its meetings are held twice a year prior to the Council's meetings to enable the Committee to coordinate the programme for the Ministers for Regional Cooperation for whom they are directly accountable. The Chairperson, who is appointed on a rotational basis among the members, may convene an extraordinary meeting to deal with specific issues. The Committee's functions include, for example, preparation of reports for the Council; implementation of the recommendations of the decisions of the Council; and coordination of the reports of the Sectoral Committees.

4.3.4. The Sectoral Committees

Sectoral Committees consist of experts on a specific sector. The Committees are established by the Council, through the recommendation of the Coordination Committee, to deal with EAC-related issue areas. The Committees meet as frequently as circumstances may warrant, particularly in order to ensure that proper implementation of the sectoral programmes are adequately fulfilled.

4.3.5. The East African Court of Justice

The EACJ is the judicial organ of the Community responsible for ensuring adherence to the law, that is, interpretation and application of the treaty. The EACJ comprises of two judges from each member state and shall be appointed for a maximum of seven years by the Summit. The President and Vice-President of the Court are appointed by the Summit on a one-term rotational basis. A judge is expected to serve the full term of office as prescribed in the treaty unless he or she resigns; is seventy (70) years of age; dies; or removed by the Summit after the submission of a recommendation of an

independent tribunal, a body comprising of legal experts who are also appointed by the Summit.

The EACJ has the initial jurisdiction over the interpretation and application of the EAC treaty. The Court also has the original, appellate and human rights jurisdictions on issues associated with the treaty. For example, partner states; the Secretary-General as well as legal and natural persons have the right to seek redress on the grounds of the infringement of the EAC treaty by a member state. The EACJ also has jurisdiction to hear cases involving the EAC and its employees.

4.3.6. The East African Legislative Assembly

The EALA, as in the case of national legislative assemblies, is the law-making organ of the EAC. As the legislative organ of the Community, the EALA is responsible for, among other things, approving budgets of the EAC; debating audit reports; performing an oversight function; and initiating Bills in the Assembly. Bills are normally introduced by any member and/or members of the Assembly. The Assembly may request the Council, as it has done over the years; to submit to it proposals on EAC related matters that may require its attention and scrutiny (Terlinden 2004: 7).

The EALA holds its proceedings once a year and such meetings are presided over by the Speaker. The Speaker is elected from among the representatives for a five year term on a rotational basis. The EALA representatives hold office for five years and are eligible for re-election once for a further term of five years. Decisions in the Assembly are guided by a majority vote of the representatives present and voting (EAC Secretariat 2002: Article 58 (1)). Once a Bill has been enacted by the Assembly and assented to by the Heads of State or Government, it becomes an Act of the Community.

To help it discharge its legislative functions, the EALA is organized in seven Standing Committees namely: Accounts; Legal, Rules and Privileges; Transport, Trade and Investment; Tourism, Wildlife, and Natural Resources; Regional Affairs and Conflict Resolution; General Purposes; House Business; and Appointment. These Standing Committees serve important functions in providing useful and detailed information for further deliberation in the Assembly. It is with the help of the Standing Committees that a number of Acts have been passed which include, for example, the

Community Emblem Act; the EAC Legislative Assembly Power and privileges Acts; the Acts of the Community; the EAC Interpretation Act; and the Appropriation Acts (Kamala 2006: 9).

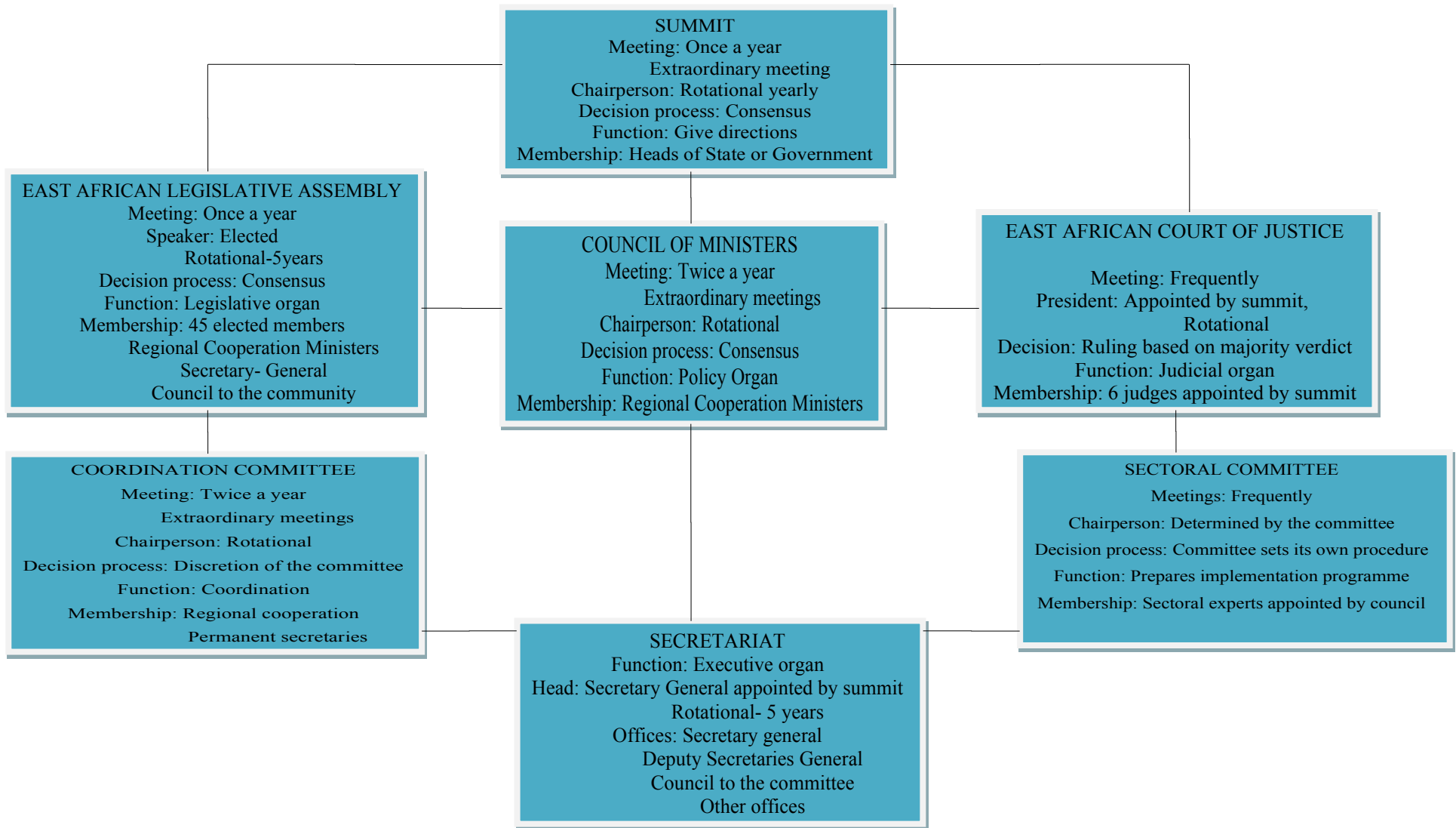
4.3.7. *The Secretariat*

The Secretariat is the executive organ of the EAC, responsible for the operations of the Community in conformity with the treaty. The Secretary-General is the EAC's principal executive officer appointed by the Summit on a fixed five year rotational basis. The Secretary-General is not only in-charge of the Secretariat but also serves as the EAC accounting officer and secretary of the Summit. The other key officers of the EAC are the Deputy Secretaries General and the Counsel, with the latter serving as the legal adviser to the Community (EAC Secretariat 2002: Articles 68 and 69). The Secretary-General and the EAC staff are immune from civil process and immigration restrictions while performing their official duties prescribed in the treaty. As international civil servants, they are charged with the responsibilities to exercise their duties without due influence from a partner state and to uphold the Community's international legal personality within the spirit of the treaty.

As the Figure 1 indicates, in many respects, the EAC organs play both symbiotic and complementary roles in furtherance of the EAC objectives and principles.

These structural functional linkages provide the EAC with mechanisms for maintaining the flow of information across the various organs. The debate regarding the approval of the budget would provide a good example in this case. The initial stage for the EAC budget process begins with the Secretary General who prepares the draft and submits it to the Council for consideration. The Chairperson of the Council, as in the case of Ministers of Finance in the partner states, reads the budget in the EALA, the body responsible for debating and approving the budget. However, the EALA does not have the right to revise the budget but merely to debate it and approve, making the Assembly to be a “rubber stamp” (Morara 2001: 2). Similarly, irrespective of these processes, the dominance of the Summit *vis-a-vis* the other organs, particularly with respect to the power of appointment of individuals directly or indirectly in charge of key positions at the national and regional levels is still a major challenge for democracy enlargement in the region.

FIGURE 1: EAC OPERATIONAL FUNCTIONS AND DECISION MAKING PROCESSES



These limitations notwithstanding, the EALA still has law-making authority, having passed important bills such as the Customs Union, the Common Market and the Lake Victoria Commission, among others, which have been transformed into protocols.

4.4. Decision-making within EAC

As I have explained, decision-making within the executive organs of the EAC, particularly the *Summit* and the *Council* is carried out through a *consensus* as the guiding principle. On the other hand, the Sectoral Committees is empowered by the treaty to determine its own procedures for conducting its business. All the rules and orders made by the Summit and gazetted become into force as published thereto. Even though the treaty is silent on the voting system, it would not be far-fetched to assume that each member state has one vote, a practice which has historical roots in the EAC integration endeavours. President Julius K. Nyerere's refusal to convene a meeting of the EAC Authority in the 1970s because of his differences with President Idi Amin Dada of Uganda, by implication not only stalled the Community's functions but in many respects vetoed its *raison d'être*.

5. Assessment: democracy at EAC and national levels

The East African region is not static. It is being transformed holistically, that is, performing functions necessary for regional democracy enlargement by the Community, through actions and activities of the EAC's organs. The EAC, like any other international governmental organizations (IGO) conceived in a similar way, in many respects, performs functions akin to nation-states. This is not to argue that the EAC has acquired sovereignty in the traditional *Westphalian* sense, that is, nation-state sovereignty. However, the fact that the partner states have transferred aspects of their sovereignty through treaty obligations in what has been characterised as "shared regional sovereignty" (Schmidt 2004) or "pooled sovereignty" (Keohane and Hoffman 1991 and Ignatieff 2003) characterises the EAC as a regional sovereign state. The decision by Kenya, for example, to conform to the directives of the EACJ, that is, the EAC, in 2006 to conduct fresh elections of the EALA representatives indicates the impact of the regional organization in the region and more specifically its emerging sovereign power *vis-a-vis* the member states. This process is what would best be characterised as *Eastfricanisation*. Specifically, this is a process whereby a change at the domestic level of a partner state is caused by integration at the regional level (Vink 2002 and Page 2003). In other words, a partner state or partner states of a regional organization transform their policies after receiving directives from the regional organization. In the European Union system which has more compound governance system, Borzel (1999: 574) describes *Europeanization* as a

“process by which domestic policy areas become increasingly subject to European policymaking.” These inter-regional organization-partner states relations and decisions, inchoate as they may be in the case of the emerging EAC, are, in my view, critical in understanding the integration process, democratisation and *Eastafricanisation*.

As sovereignty continues to be shared between the member states and the regional organization through decision-making processes, the EAC democracy enlargement, inchoate as it may be, gradually permeates and takes root in the region. The concept shared sovereignty has both domestic and regional or global dimensions. In this study, shared sovereignty is defined to mean a situation in which the partner states accept, through treaty obligations, to put limits on their individual sovereignty and transfer aspects of it to the centre (Kirschner 2007; Krasner 2004; Krasner 2004a; Snyder 2005).

The EAC is founded on normative principles which are people-centred and market-driven and are based on mutual trust; peaceful co-existence; good governance; good neighbourliness; peaceful settlement of disputes; democracy, rule of law; and equitable distribution of benefits, most of which are commonly documented in similar organizations. Decisions which take place within the organs are meant to operationalise these normative principles, in part or *in toto*. When operationalised, in many respects the norms are internalised/constitutionalised and internationalised. The 2006 EACJ ruling against Kenya’s EALA representatives, for example, internationalised the regional rule of law and democracy and forced Kenya’s National Legislative Assembly to democratise its electoral process.⁵ However, other scholars have argued that the EACJ lacks institutional support and authority to enable it to perform its statutory role effectively (Bossa 2006). To put it differently, Kenya’s internationalisation of the EAC’s international normative principles such as the rule of law and democracy indicates that the member state accepts the normative prescriptions enshrined in the treaty legitimising the EAC’s regional sovereign impact in East Africa. It would not be incorrect to argue that the other member states also adhere to the normative values. It means that there is a convergence of understanding on the application and operationalisation of the principles both within the EAC and the partner states (EAC Secretariat, EALA 2006).

In a nutshell, the Community is responsible for, among other things, the enlargement and consolidation of econo-political and socio-cultural linkages. The key actors or drivers of these statutory processes are the member states and the regional organization both empowered to play symbiotic and complementary roles. What needs to be emphasized is that the objective of the Community is to promote development and democratization of the region. As I have explained,

⁵ For a critique of the EACJ, see Bossa (2006) and Bossa (2005).

one of the key operational principles for the actualisation of the EAC objectives is that the integration process is to be people-centred and market-driven (EAC Secretariat 2002: Article 7(1) (a)). The treaty, therefore, attaches importance to the sovereignty of the East Africans and the impact it is bound to have on democracy and legitimacy of the EAC's *raison d'être* (EAC Secretariat, EALA, 2006).

However, lack of clear linkage between the people of East Africa and the EAC cannot be over emphasised. Democracy enlargement cannot take root and be realised in the EAC unless the East Africans are empowered by the treaty to participate directly in electing the EALA representatives, a process which has the potential of legitimising the people's genuine ownership of the Community (Adar 2010). In this regard, political federation of the EAC, discussed extensively during the 11th Sitting of the First Assembly in 2002, must pass the test of a referendum within the region (Kamanyi 2006 and EAC Secretariat 2002).

5.1. Input legitimacy: EAC and gender

Prior to the conclusion of the drafting of the treaty, gender experts from Kenya, Uganda and Tanzania met in 1998 to strategize on ways and means of making the treaty as inclusive as possible to cater for the interests of all the stakeholders (EAC Secretariat 2004a: 61-62). Sustainability of the EAC development and integration process is contingent upon the involvement and participation of the stakeholders. Unlike the 1977 treaty, the issue of gender is expressly enshrined in the treaty recognizing the role of woman in development and integration.

The 1999 treaty recognizes the role of women in development and integration. In this regard, Art 121 of the treaty provides that the partner states shall:

- promote the empowerment and effective integration and participation of women at all levels of socio-economic development especially in decision making.
- abolish legislation and discourage customs that are discriminatory against women.
- promote effective education awareness programmes aimed at changing negative attitudes towards women.
- create or adopt technologies which will ensure the stability employment and professional progress for women workers, and
- take such other measures that shall eliminate prejudices against women and promote the equality of the female gender with that of the male gender in every project (EAC Secretariat 2002: Art.121).

This perceived and anticipated role of women is also prescribed in the treaty in relation to business. More specifically, the role of women is expected to be enhanced at the policy formulation and implementation levels within the EAC and the partner states. The incorporation of the *principle of subsidiarity* which recognizes the importance of multi-level participation and the input of a multiplicity of stakeholders in development has broadened the scope for the potential success of the EAC integration process. Suffice it to say, it will provide a window of opportunities for women in the region as well.

5.2. Input legitimacy: civil society and participation in the EAC

One of the main facts that led to the collapse of EAC I was the “lack of strong participation of civil society” (EAC Secretariat 2006b: 30). The inclusion of civil society and private sector in the treaty therefore is an important ingredient for regional integration and development in general. The opening up of democratic space in the EAC, though limited in some partner states such as Rwanda and Burundi, have provided opportunities for the formation of CSOs across the borders within the EAC. The key here is that with the democratization trends taking root in East Africa, the civil society and other stakeholders will become more involved in the EAC transformation and development process. The involvement and particularly ownership of the EAC activities by the civil society and other non-governmental organizations (NGOs) is critical for the sustainability of the community’s *raison d’être* and success. The RECINET and other CSOs have held meetings and joint workshops with the EAC organ such as the EALA for purposes of confidence building. As I have explained, inherent in these CSOs-EAC activities is the question of the EAC integration project. As one scholar has aptly put it (Deya 2006:8), “a strong and vibrant civil society is vital, if we are to achieve our[...]goals of thriving East African Community that is economically prosperous and in which constitutionalism, democracy and good governance, a just rule of law and an efficient and efficacious administration of justice are the norm; and in which the human rights of all peoples[...] are recognized, observed, respected, protected and promoted.”

The CSOs have been active participants in the election observation at national and regional levels within the East African region. The Campaign for Good Governance (CGG), the Voters Education Trust (VETO), the National Youth Forum (NYF) and Dunamis Applied Research and Consult (DARC) of Tanzania, for example, have been participating in monitoring and observing electoral processes of the EALA representatives of the partner states. Similar CSOs in Kenya and Uganda have also been involved in election observations and monitoring at the national and regional levels.

Election monitoring and observations are important mechanisms which help in determining the extent to which an electoral process is free and fair. The objectives set out by the CGG, VETI, NYF, and DARC among others are:

- to assess the extent to which election results can be said to have been free and fair,
- to monitor and observe to the whole EALA electoral process in Tanzania, Kenya, and Uganda, including implementation and translation of article 50 (1) of the EAC treaty, registration of candidates, campaigning, voting, vote counting and assessing final electoral results,
- to observe and assess the fairness of the administration of the elections, and
- to take stock of major lessons that can be learnt from the elections with a view to improving electoral efficacy and fairness (CCG, VETO, NYF and DARC 2001: 4).

The involvement of election monitors or what some scholars have called *invited contributors*, contribute in many respects, albeit with limitations at least in the East African context, in policy formulation processes. The limitations and constraints experienced by the CSOs and NGOs in East Africa arise mainly because the EAC treaty is largely state-driven (Oloka-Onyango 2005). This notwithstanding, the participation by the CSOs and NGOs in the construction of the EAC inchoate as it may be in the initial stages, is an important development in integration process in the region. Apart from the CSOs and the NGOs, the private sector is also envisaged to play positive roles in the EAC integration process. With respect to people- centered development, the private sector is expected to play three dimensional roles.

First, the character of the EAC enables the people through the private sector to participate in development. Secondly, the diversity which prevails in the private sector has broadened the opportunities for the East Africans and the other stakeholders at the national and regional levels. Thirdly, through private sector development, “sharing of benefits from regional economic integration....will brings broad gains to the people of East Africa” (EAC Secretariat 2006a: 8-9).

5.3. Control

One of the main limitations of the EAC treaty is that it does not confer sovereign rights on the people of East Africa through participatory electoral process. More specifically, the East Africans do not participate in direct elections of the EALA representatives, who by virtue of their legislative responsibilities are supposed to serve the interests of the people. The electoral process is largely state-driven, right from the level of the nomination of candidates by political parties to the elections of the EALA representatives by the national assemblies of the partner states as provided

for in Article 50 of the EAC treaty. Suffice it to say, the East Africans were not consulted when the EAC was being re-established by the partner states. The decision by the Summit in 2004 to establish the Wako Committee to study the feasibility of fast tracking the EAC political federation points to the state-driven nature of the EAC integration project (Kenya 2007; Tanzania 2007; Uganda 2007). As one scholar has aptly observed, “the initial approach of trying to fast track the establishment of the east African federation without asking the people was against the spirit and provisions of the treaty and a departure from a people-centred Community to a leaders-centred Community” (Kabudi 2007: 26-27).

What is also critical to observe on the issue of the elections of the EALA representatives are the following: first, the fact that the political parties of the partner states are still grappling with their own internal democracy enlargement, that is, how to consolidate institutional structures necessary for broadening their own internal democratic space, renders the process of nomination of the EALA representatives questionable and perhaps nugatory? Secondly, the political parties in the region are in most cases dominated by personalities, which by extension make the issue of patronage and nepotism the key determining factors for the candidacy of the EALA membership. The electoral process becomes even more undemocratic if the nomination exercise is clouded with bribery, vote buying and rigging, let alone the intimidation of opponents and the opposition political parties. Thirdly, Uganda’s experiment with a no-party political system or *movementocracy* since President Yoweri K. Museveni and the National Resistance Movement (NRM) promulgated the new constitution in 1995, puts the issue of participatory competitive multiparty politics into question. Article 269 of the Ugandan constitution, for example, prohibits political parties from, *inter alia*, “opening and operating branch offices; holding delegates conferences; sponsoring or offering a platform to or in any way campaigning for or against a candidate for any public election; and carrying on any activities that may interfere with the Movement political system” (Uganda 1995).

Even where the Civil Society Organizations (CSOs) could have been involved in advocacy and civic education, their roles in the election of Uganda’s representatives in the EALA are restricted to election monitoring and observation (Olum 2007). If the recent elections in Burundi (2010), Kenya (2007) and Rwanda (2010) are anything to go by, the issue of control of the participatory and sovereign rights of the East Africans and the civil society in general are worrying trends in the EAC.

5.4. Inter-state democracy

Decisions of the Summit during its meetings are arrived at through a consensus, a process which not only allows debate among the members but that it discourages the winner-take-all system inherent in the majority rule. More, specifically, by incorporating consensus as the most viable option for decisions within the Summit meetings, the founding fathers took cognizance of the difficulties the EAC may face if a stalemate arises over an issue. Disagreements within the Authority of Heads of State or Government of the EAC I, the equivalent of the EAC II Summit, particularly between Presidents Nyerere and Idi Amin Dada of Uganda in the early 1970s, was one of the key factors that rendered the operations of the Community dysfunctional and its eventual disintegration. Suffice it to say, the drafters of the treaty took cognizance of the potential *déjà vu*, if a stalemate were to encroach the Summit deliberations.

Theoretically, the EALA should serve as the custodian of regional democracy enlargement and consolidation. However, in my view, certain operational and structural limitations hamper the Assembly's role as the organ responsible for promoting democracy in the region through its legislative Acts. First, each partner state is empowered by the treaty to elect nine (9) representatives, a practice which has roots during the 1961 EACSO period and which, in my view, does not take cognizance of the population of the partner states.

As Table I indicates, the 127 million East Africans are represented by 45 Members of the EALA representatives, which translate into an average of 3 million East Africans per EALA representative. These figures vary markedly when the 9 EALA representatives are calculated against the total population of each partner state. For example, one EALA representative from Burundi, Kenya, Rwanda, Tanzania and Uganda represents nearly 889,000, 4 million, 1 million, 5 million and 3 million people respectively. As Table I, indicates, a similar anomaly holds true with respect to the issue of equal financial contributions by the partner states to the EAC. The contributions are mainly pegged on the principle of equality as opposed to proportional representation. Limitation of funding notwithstanding, proportional representation provides a better option, at least in terms of fair distribution of population. Suffice it to say, electorates feel attached to their representatives than other government officials, that is to say, representatives are expected to draw public attention on issues that affect their constituents.

East African Community – Korwa G. Adar

Table 1: Socio- Economic and Political Indicators of the EAC, 2007*

COUNTRY	TOTAL SURFACE AREA 1000 Sq.km	POPULATION (Millions)	POPULATION GROWTH RATE (%)	ACCESS TO SAFE DRINKING WATER (%)	REAL GDP (US \$ Mill)	GDP GROWTH RATE (%) (2008)	GDP PER CAPITA (%)	GDP (2006)	External Debt to Official Creditors (%GDP) (2008)	GNI per capita (US \$)	INFLATION (2006) %	ARMED FORCES (2006) **	EALA REPRESENTATIVES	EAC YEARLY CONTRIBUTIONS	TOTAL EXTERNAL DEBT
BURUNDI	28	8	2.7	71	864	3.6	119	\$2 billion	126.7	110	3.1	35,000	9	\$4,296,532	\$1 billion
KENYA	583	38	2.7	57	19,842	7.0	725	\$17 billion	17.9	590	11.5	24,000	9	\$4,296,532	\$6 billion
RWANDA	26	10	2.6	86	1,973	7.9	365	\$4 billion	15.4	320	5.5	33,000	9	\$4,296,532	\$1 billion
TANZANIA	939	40	2.9	67	10,154	7.1	440	\$11 billion	30.7	410	5.2	27,000	9	\$4,296,532	\$7 billion
UGANDA	242	31	3.2	68	9,123	8.6	473	\$9 billion	11.7	370	6.5	45,000	9	\$4,296,532	\$3 billion
EAC	1,818 (total)	127	3.4 (total)	82.8 (average)	83,912 (total)	8.2 (average)	424.4 (average)	\$43 Billion (total)	40.5 (average)	360 (Average)	6.4 (average)	164,000 (total)	45 (total)	\$21,482,660 (total)	\$18 billion (total)

Sources: EAC (2009: 2-6, 24-25); EAC Secretariat (2007: 24-27); IISS (2007); IMF (2009); World Bank (2009).

*Unless otherwise indicated, the figures are for 2007. In a number of cases figures tend to vary from sources to source.

**Figures exclude paramilitary and reservists.

Secondly, the electoral procedures of the EALA representatives conducted by the National Assemblies of the partner states as prescribed in the treaty, puts into question the legitimacy of the representatives and by extension the Assembly itself. There is no Community-wide uniformity in the electoral process. Each member state is empowered to employ its own electoral laws, rules and regulations when electing the representatives. Article 50 (1) provides:

The National Assembly of each partner state shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in the partner state, *in accordance with such procedure as the National Assembly of each partner state may determine* (my emphasis) (EAC Secretariat 2002).

This indirect electoral process undermines the principles of popular participation and individual sovereignty. More specifically, it is the electorates who confer sovereign rights on elected representatives who, in turn, make laws on behalf of the electorates. This is the key to liberal democracy which, in many respects, is also inscribed in the EAC treaty. The founding fathers of the EAC seemed to have been more interested in national representation as opposed to the people's (East African's) representation. There is, therefore, no clear nexus (or what I have called a missing link) between the EAC and the people of East Africa (Adar 2008a).

The view that the EALA should be the link between the Community and the people of East Africa was reiterated when one representative observed that “one of the major considerations in establishing the EALA was because it would create and be a link between the Community and the East African people” (EAC Secretariat, EALA, 2004: 26). In order to fill this gap, that is the missing link, the EALA pursues what it calls “taking the Assembly to the people through tours, of the partner states by the EALA representatives” (Adar 2005: 44). Even though the EALA representatives acknowledge this anomaly, they have not, to my knowledge, passed any law directing the partner states to introduce direct elections as the most viable and democratic option. These tours cannot substitute the sovereign rights of the East Africans in participating in popular elections, one of the foundations for liberal democracy also envisaged in regional integration processes, including the EAC (Eze 2004; Salih 2004 and Ssempembwa 2004).

Parliaments, the EALA included, derive their mandate and legislative authority from the electorate to whom they also owe allegiance (Oloo 2005: 84 and Morara 2001: 68). The provision in the EAC treaty which empowers the political parties and other interest groups, to participate in the nomination and thereafter election by parliament of the EALA representatives shift allegiance

to the nominating bodies as opposed to the electorates. In Kenya and Tanzania, for example, the political parties represented in parliament are the key players responsible for nominating and electing the EALA representatives. In Uganda on the other hand, those interested in seeking nomination in the country's "no-party *movementocracy*," have to be supported by at least 50 members of parliament (Oloo 2005: 84). An individual interested in seeking the nomination and election to be a member of the EALA has to meet certain criteria namely: be a citizen of a partner state; not be a member of parliament; not be a minister in a partner state; and not be an employee of the Community.

5.5. Supranationalism

The EAC is an international governmental organization (IGO) established by a treaty. Like other IGOs, its activities are largely state-driven and elite-led, with the Summit being the key organ responsible for giving the general direction to the regional body (Gibb 2009 and Sidaway 2002). The EALA lacks autonomous sovereign authority, particularly in relation to the Summit and the Council as well as national legislative assemblies of the partner states. The institutional and operational structural weaknesses of the EALA, in our view, centre on a number of factors. First, the fact that the EALA generally meets once a year as provided for in Article 59 of the treaty to deal with matters of enormous magnitude and great importance that affect the EAC, in our view, reduces the legislative authority of the assembly. Secondly, the fact that Article 11 of the treaty confers sweeping powers, including legislative functions on the Summit, also puts into question the autonomy and legislative authority of the EALA. More specifically, the EALA's supranational role is minimised by the power and authority of the Summit as well as the Council.

Even though the EAC organs are empowered with distinct functional roles, in many respects, areas of overlap, complementarity and symbiosis exist. It would be simplistic to expect rigidity and that such institutional administrative and operational linkages do not exist. Decision-making processes exerted by the organs on behalf of the Community give the regional organization its authoritative existence as a functioning international legal person prescribed in Article 4 of the treaty (EAC Secretariat 2002). To put it differently, by invoking its statutory duties and responsibilities, the EAC promotes and consolidates its existence as a legally functioning actor, that is, a regional sovereign entity.

5.6. Human rights practice in the EAC

Human rights remain one of the contentious questions in the EAC, particularly because of the volatile situation in the region. The partner states have at one point or another experienced

internal instability, with the post 2007 elections violence in Kenya causing uncertainty on the country's political survival as well as that of the EAC. Two issues need to be put into proper perspective in order to understand the potential impact of the violence in Kenya if the situation was not resolved. First, as the economic driving engine of the EAC, unresolved conflicts in Kenya could have had negative repercussions in the region, a potential disintegrative *déjà vu* for the EAC. The level of Kenya's economic dominance is clearly evident over the years. Table 2 provides a general picture which indicates the advantage Kenya has continued to enjoy in the intra-EAC trade. Kenya is the only EAC member state that continues to experience positive intra-EAC trade balance.

The concerns and potential implications in the region about Kenya's economic advantage featured prominently during the 2007 National Consultative Committee (NCC) surveys, particularly in Tanzania (Tanzania 2007).

Secondly, Uganda was the only EAC partner state which recognized President Mwai Kibaki as the winner of elections even when violence was still raging in the country over the disputed electoral outcome. The former United Nations Secretary-General, Kofi Annan and his team of eminent Africans, the former Tanzanian President Benjamin Mkapa and Graca Machel of South Africa successfully negotiated a settlement between Raila Amollo Odinga-led the Orange Democratic Movement (ODM) and Mwai Kibaki-led Party of National Unity (PNU), culminating into the formation of the Government of National Unity (GNU) or the Coalition Government.⁶ The post 2007 election violence in Kenya culminated into the killings of over 1,500 people and wide spread human rights violations (Adar 2008d). At the time of writing this paper in October 2010, a team of the International Criminal Court (ICC) are in Kenya investigating those implicated in crimes against humanity.

The EAC treaty does not provide for human rights instruments in the region. As such the regional body is yet to establish through a protocol and other instruments, human rights regime in the region. The EAC plan of action on human rights is still at the exploratory stage with more responsibilities bestowed on the national human rights institutions of the partner states (EAC Secretariat 2008).

⁶ For the details on the Coalition Government established following the Kofi Annan-led reconciliation efforts, see Adar (2009).

Table 2: Intra- East African Community Trade, 2007.
(Millions US \$)

COUNTRY	EXPORTS TO EAC								IMPORTS FROM EAC								BALANCE TO/FROM EAC							
	2000	2001	2002	2003	2004	2005	2006	2007	2000	2001	2002	2003	2004	2005	2006	2007	2000	2001	2002	2003	2004	2005	2006	2007
BURUNDI	8.3	5.7	9.3	2.9	5.4	4.0	5.5	5.3	21.5	21.9	31.2	50.8	54.1	59.1	60.9	79.5	-13.3	-16.2	-22.0	-47.9	-48.7	-55.0	-55.5	-74.2
KENYA	448.6	622.5	667.2	710.5	810.1	974.3	735.8	952.2	18.5	17.0	19.1	31.7	38.4	61.5	84.1	191.6	+430.1	+605.4	+648.2	+678.8	+771.7	+912.8	+651.6	+760.6
RWANDA	X	X	X	X	25.0	34.9	33.0	40.0	X	X	X	X	68.9	99.1	143.4	207.1	X	X	X	X	-43.9	-64.2	-110.4	-167.1
TANZANIA	56.7	58.6	57.1	102.4	123.8	128.9	157.8	X	99.1	107.8	97.9	124.2	137.8	160.5	175.5	X	-42.4	-49.2	-40.8	-21.8	-14.0	-31.6	-17.7	X
UGANDA	79.2	87.2	86.0	114.7	132.0	144.3	152.3	274.6	305.8	288.6	415.0	414.9	485.3	551.8	430.4	531.4	-226.6	-201.4	-329.0	-300.2	-353.3	-407.5	-278.1	-256.8

Source: East African Community Secretariat, *East African Community Facts & Figures-2008* (Arusha: East African Community Secretariat, January 2009), pp. 53-57.

X: Figures not available.

To this end, the National Human Rights Institutions (NHRIs) met in Kigali, Rwanda on 27th-28th October 2009 to, *inter alia*, explore ways and means “of promoting and protecting human rights in the East African Community,” with an association of NHRIs of EAC partner states established to provide for a forum for future deliberations (www.kitu0cha-katiba.org).

The Kigali –NHRIs conference recommended the following as their main goals:

- promotion of accountability and good governance.
- advocate for legal mechanisms to deal with hate speech spread during election campaigns.
- develop common standards and jointly monitor the whole electoral processes in their countries
- empower the population to know their rights and duties at elections
- send early warnings and demand rapid responses from their governments in situations of potential violations of human rights (www.kituochoa-katiba.org).

The issue of hate speech featured prominently during the July-August 2010 referendum campaigns on the new constitution in Kenya, with certain members of Parliament arraigned in court to answer charges against hate speech as recommended by the National Cohesion and Integrity Commissions (NCIC) (Kenya 2008, 2008a). An MP who is facing the same charges was recently appointed a Cabinet Minister at the end of the referendum with the Kenya National Commission on Human Rights (KNHCR) as well as NGOs and CSOs raising concerns whether those charged with *hate speech* will face due processes of the law as provided for in the NCIC. However, it was the presence of Sudanese President Omar al-Bashir during the promulgation of the New Constitution in Nairobi, Kenya, on 27 August 2010, which raised national and international doubts about Kenya’s commitment in honoring international obligations. President Al-Bashir has been indicted by the ICC for war crimes and crimes against humanity and is waiting to be tried at the Hague. Kenya ratified the Rome Statute in 2005 and therefore should have adhered to its obligations by arresting and handing over to the Hague of the President of Sudan, Al-Bashir. My prediction is that the Government of Kenya is not going to co-operate with the ICC to hand-over the suspects of the post 2007 elections violence.

The NHRIs of the partner states are state-driven, which in our view, are subject to state control and have limited functional and operational powers. The concerns on the human right violations during the Kenya 2007 as well as Burundi and Rwanda 2010 elections are the cases in point. The most the NHRIs can do is to record the violations. As a follow up of the October 2009 Kigali, Rwanda recommendations the NHRIs met in Kampala, Uganda, in November 2009 and prepared a draft bill of rights for the EAC with a view of broadening the scope of good governance and human rights practice in the region. In the report, the NHRIs took cognizance of the fact that:

while some of the constitutions made reference to economic, social and cultural right...all the constitutions of the EAC partner states do not provide satisfactory protection of these rights. Another serious omission[...]is the failure by some of the constitutions to protect the rights of vulnerable groups such as the rights of women, children and persons with disability, the elderly and minorities (www.kituochoa-katiba.orgn).

Enforcement of human rights supranationalism within the EAC, in many, respects, remains at the rudimentary level, with cases in member states dealt with at the state levels.

5.7. Output legitimacy

The EACJ may be called upon by a partner state to arbitrate an agreement to which the EAC or a partner state is a party. Rulings of the Court are based on majority verdict. The Court has attempted, albeit with difficulties and challenges, to exert and consolidate its independence by delivering rulings brought before it for adjudication, some of which are considered controversial. One such example is already examined briefly above but is provided hereafter again for purposes of illustration.

The dispute was on the legality of the election of Kenya's EALA representatives in 2006. The case brought before the EACJ by Kenya's member of parliament (MP), Hon. Prof. Peter Anyang' Nyong'o and 10 others as applicants versus the Attorney General of Kenya and 5 others as respondents averred, *inter alia*, that the Clerk to the National Assembly of Kenya submitted an illegal list of the East African Legislative Assembly

(EALA) representatives from Kenya and requested the EACJ (EAC Secretariat, EACJ, Ref. No. 1 of 2006):

- To interpret and apply the treaty to the process of nominations and election of Kenya's representatives to the EALA.
- To declare that the rules of election applied by the Kenya National Assembly constitute a breach of Article 50 of the treaty.
- To declare that the process of election, selection and/or nomination of members to the EALA by Kenya is null and void.
- To direct Kenya to repeat its nomination and election process in compliance with Article 50 of the treaty.
- To declare that Kenya's Vice President and Leader of Government Business and the Chairman of the National Rainbow Coalition (NARC) have no mandate to determine persons to represent Kenya at the EALA, and
- To restrain and prohibit the EAC Secretary General and the Clerk to the EALA from assembling, convening, recognizing, and administering oath of office or otherwise presiding over or participating in election of the Speaker or issuing any notification in recognition of the EALA representatives from Kenya.

The Attorney General of Kenya and the other respondents raised objections on key legal questions in relation to the EAC treaty and the partner states. Their submissions centred on the following:

- That the EACJ lacks jurisdiction to determine the case and the jurisdiction vested in the Court in clause 27 (1) of the EAC treaty is restricted (EAC Secretariat, EACJ Ref. No. 1 of 2006). Article 27 (1) of the treaty provides that "the Court shall initially have jurisdiction over the interpretation and application of this treaty" (EAC Secretariat 2002).
- That Article 52 (1) of the treaty reserves the right of jurisdiction to determine such cases to the institution of the partner states. Article 52 (1) states, "any question that may arise whether any person is an elected member of the Assembly or whether any seat on the Assembly is vacant shall be determined by the institution of the partner state that determines questions of the election of

members of the National Assembly responsible for the election in question” (EAC Secretariat 2002).

In its ruling, the EACJ invoked Articles 30 and 27 (1) of the treaty, stating, *inter alia*, that the Court has jurisdiction to determine the “legality of any Act, regulation, directive, decision or action of a partner state or an institution of the Community (EAC Secretariat, EACJ, Ref. No. 1 of 2006: 5). Article 30 of the treaty provides:

Subject to the provisions of Article 27 of the treaty, any person who is resident in a partner state may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a partner state or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this treaty.

On the question relating to the legality of the election of the EALA representatives from Kenya, the Justices of the EACJ concluded that they “are satisfied that the EALA and the Community itself stand to suffer irreparable damage if” Kenya’s EALA representatives were not legally elected and directed the elections to be repeated (EAC Secretariat, EACJ, Ref. No. 1 of 2006: 10). The ruling of the EACJ not only forced the National Assembly of Kenya to address its internal electoral process but also infringed on its sovereignty. Specifically, the EACJ ruling can be interpreted to mean that regional sovereignty (read, EAC sovereignty) takes precedence over a partner state’s sovereignty. It is one of the cases in which the EAC supranational legal order established by the treaty, that is the EAC sovereignty, took precedence over absolute theory of sovereignty enshrined in the national constitution. It can be argued that the supremacy of the EAC legal regime is slowly taking root in the region. Even though the partner states reacted with hostility against its ruling, the decision by the EACJ has set precedence within the EAC that will go a long way in laying the foundation for the recognition of the EAC institutions for governance.⁷

⁷ The EACJ, in August 2010, ordered the Government of Kenya, through the Attorney-General, to pay the applicants the legal costs with interests amounting to over \$ 2,000,000 which had accrued since the ruling was reached in 2006. On this EACJ decision reported widely by the dailies, see Barasa and Kiplagat (2010).

6. Multilateral process

6.1. Tripartite COMESA-EAC-SADC Process

The Tripartite COMESA-EAC-SADC process was concluded in 2008, with a communiqué committing the 26 states to broaden their co-operation in the areas of socio-cultural and econo-political issue areas (EAC Secretariat 2008a).⁸ Of immediate importance to the countries, is the issue of the enlargement of the free trade area, with the objective of eventual establishment of a Customs Union. What is important to reiterate is that the EAC negotiates in these fora as a bloc, giving the regional body more leverage in terms of regional consensus. The EAC Trade Negotiations Act assented into law by the Summit in 2008 has provided useful legal and policy mechanisms for negotiations as a bloc in bilateral, regional and international fora. The EAC also stands-in for a partner state in negotiating fora in situations where a representative is absent or a partner state is unable to send a representative. Except where a disagreement arises among the Sectoral experts of the EAC which would require the matter to be referred to the Council for further directive, the Act provides for the application of consensus as the principle that guides its decisions. The issue of multiple memberships by partner states in different organization is not only a concern to the EAC but that it has the potential of negating integration process (Jakobeit, Hartzenberg and Charalambides 2005). It is also a burden on meagre resources of the partner states. Tanzania, for example, is a member of the EAC, COMESA and SADC.

6.2. The Nile Basin Initiative and Lake Victoria Commission

The Nile Basin Initiative (NBI) was established in 1999 and comprises of the 10 Nile River Basin riparian states.⁹ It was established by the riparian states for purposes of

⁸ The Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC) comprise of 21 and 14 member states respectively. All the EAC member states belong to the COMESA grouping. Tanzania is the only EAC member state that is part of SADC. However, in 1999, Tanzania indicated that it is going to withdraw its membership from the group.

⁹ The 10 Nile River basin riparian states include: Burundi, Democratic Republic of Congo (DRC), Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, and Uganda. For details on the evolution and conflict resolution initiatives on the Nile River question see, for example, Adar (2008b).

finding amicable solutions to the utilisation of the Nile River waters and resources. The NBI's objectives are fourfold (Kenya 2004: 1384-1385):

- To develop the water resources of the Nile Basin in a sustainable and equitable manner,
- To ensure prosperity, security and peace for all people in the basin,
- To ensure efficient water management and optimal use of the resources and promote cooperation and joint action between the riparian countries, and
- To improve socio-economic status of the member states through harnessing of their resources and promoting economic integration.

The EAC partner states' policy position in the negotiations is centred on "reasonable and equitable utilisation" principle (Adar 2008b; EAC Secretariat; EALA, 2004a: 29-32; Kenya 2004: 1385).¹⁰ As one EALA representative observed during the debate on the question of the Nile River and the Lake Victoria waters and other resources: "we have agreed to negotiate as a bloc[...]we want to approach this issue as East African Community" (EAC Secretariat, EALA, 2004a: 31). What is important to emphasise is that the degree of consensus employed by the EAC not only gives it more leverage in harmonising its position *vis-a-vis* the other riparian states but also empowers the regional organization's multilateral diplomacy, which gradually consolidates elements of sovereignty.

The Lake Victoria Basin protocol elaborates on the principle of reasonable and equitable utilisation into more details stipulating, *inter alia* (EAC Secretariat 2004b: 9-11):

- The partner states shall utilise the water resources of the basin...in an equitable and reasonable manner.
- The water resources shall be used and developed...with a view to attaining optimal and sustainable utilisation...taking into account the interests of the partner states.

¹⁰ For details on the evolution and codification of the principle of "reasonable and equitable utilization" of international rivers see for example, International Law Association (1967); Ngwandu (2003); Okidi (1994); Okodi (1980); Sandwidi and Stein (2003); Schroeder-Wildberg (2002).

- Each partner state is entitled to an equitable and reasonable share.
- In view of the relationship between the Lake Victoria and the Nile River Basin, the partner states shall cooperate with other interested parties, regional or international bodies...and...shall negotiate as a bloc.

The decision to negotiate as a bloc on these critical regional issues of interests to the member states is, again, useful in understanding the emerging influence of the EAC on its member states. However, the EALA is encumbered by certain functional weaknesses one of which is worth re-examination. The EALA, like other parliaments is, supposedly, the people's representative and the law-making organ of the EAC. However, as I have explained, it meets only once a year, which in many respects, limits its authoritative value and usefulness in dealing with complex and salient EAC issues. Similarly, the absence of direct political participation by the East African electorates in the electoral processes and referenda puts into question the legitimacy of the EALA. My observation is made more relevant and legitimate because electoral processes in the member states let alone within the political parties themselves in East Africa in most cases do not meet democratic expectations. The electoral debacle during the December 2007 elections in Kenya which led to ethnic-oriented killings of more than 1,500 people, forced over 300,000 Internally Displaced People (IDPs) and culminated into the establishment of the Government of National Unit (GNU) is a case in point (Adar 2008a). The electoral debacle in Kenya almost caused a serious rift within the EAC because Uganda was the only partner state that immediately recognised the outcome of the elections even prior to the conclusion of the electoral outcome.

7. Summary and conclusions

This study has demonstrated that the EAC has made positive strides, albeit with difficulties, towards democratization of the region, with a number of protocols already put in place and being implemented. The main achievements of the EAC-DS 1997-2000 and 2001-2005 are threefold. First, the two development strategies witnessed the completion and ratification of the treaty, which established the EAC as an international legal person with rights and duties in International Relations. The regime established within the East African region is guided by the legal principles enshrined in the treaty,

with the EAC, the regional international governmental organization (IGO), as one of the key actors. Secondly, they laid tangible foundation for the establishment of the organs of the EAC. More specifically, the development strategies set in motion the reconstruction of the region, putting in place mechanisms for the pursuit of democracy enlargement. Thirdly, they laid the groundwork for confidence building and cordial understanding in the area of cooperative diplomacy within the region, particularly among the East African leaders. Fourth, the Customs Union protocol entered into force on 1st of January 2005, laid the groundwork for the next stage, the EA Common Market. The Common Market protocol also ratified by the member states in August 2010, is a major milestone for the 2006-2010 Development Strategic Plan.

Notwithstanding lack of provisions setting out the timeframe for integration, at least prior to the 2004-2006 fast tracking political federation surveys, the 1999 treaty provides for specific stages of the EAC integration process, a complete deviation from the EAC I treaty, which was silent on this issue and encumbered with ambiguity. For the first time in the post independence East African integration agenda, the ultimate objective of political federation is clearly incorporated in the treaty, an indication of the level of commitment on the part of the EAC partner states. However, a number of challenges still plague the EAC, some of which require tangible and immediate resolution. Suffice it to say, the EAC is still an emerging regional organization confronted with complex intra- and extra- EAC economic and political challenges. These challenges are numerous, all of which cannot be identified and exhausted in this study (Adar 2010).¹¹ However, a few examples would suffice.

First, the dispute between Kenya and Uganda over the ownership of the twin rocky islands of Mizingo in Lake Victoria located 5.4 nautical miles from Sori Bay, Karungu Division, and Nyatike District, Kenya and on the eastern part of Bugiri District, Uganda, if not resolved amicably in the spirit of the EAC treaty, may culminate into a major confrontation. Secondly, for the EAC to deal adequately with some of the complex and salient issue areas it faces, the suggestion that the Ministers responsible for regional affairs and the EALA representatives (with the Assembly given full law-making powers and oversight functions), should be residents at the EAC Headquarters in Arusha, Tanzania is a pressing one (EAC, EALA, 2004a; EAC, EALA, 2006). This was

¹¹ For details on the concerns raised by the East Africans, see Kenya (2007), Tanzania (2007) and Uganda (2007).

the practice during the EAC I period and should be viewed as a step towards the acceleration of integration in the region. Thirdly, the EALA should be given full law-making powers and oversight functions. Fourthly, lack of political will on the part of the leaders continue to negate the acceleration of integration, particularly political federation. The recommendation by the Wako Committee that at the initial stage the EAC presidency should rotate among the sitting presidents is misplaced, particularly because the East African electorates are not given an option of exercising their sovereign rights (EAC Secretariat 2004). Fifthly, there is reluctance among the member states to institutionalise the emerging consensus on democratic and normative principles emerging in the region. The case in point is lack of empowerment of the East African electorates in the EAC activities either through direct elections or referenda. The conclusion of the Customs Union and the Common Market protocols as well as the admission of Rwanda and Burundi as members of the EAC, for example, should have gone through the test of the electorates. Sixthly, there should be clear functional and operational relationship between the EALA and the national assemblies of partner states. The idea is not for the National Assemblies to usurp the powers of the EALA but that this EAC-National Assemblies nexus will provide avenues for cascading information to the electorates. Currently, mistrust and uneasiness exist between the national and regional legislative bodies.

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