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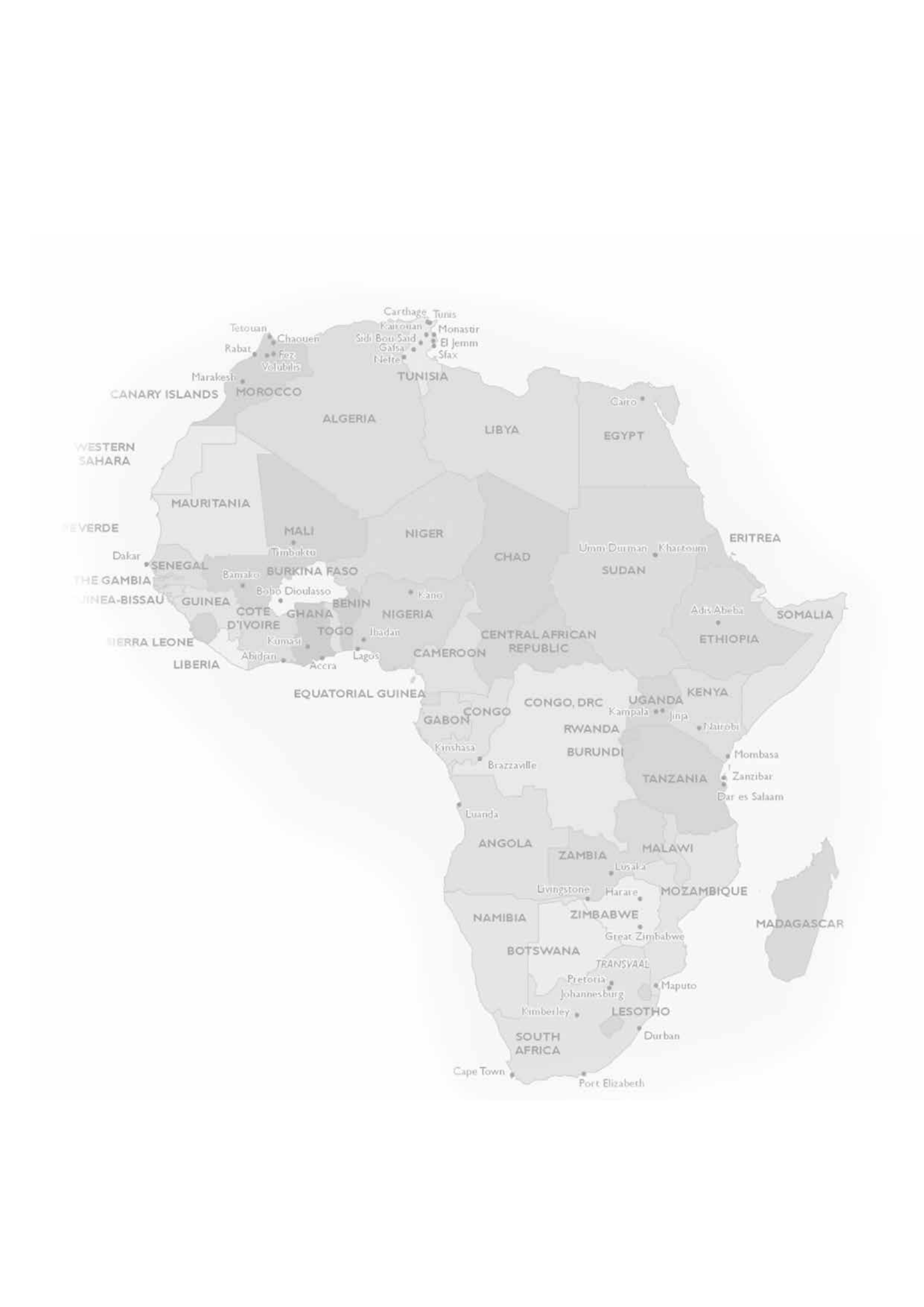
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VOLUME 18

FOREWORD

Volume 18 contains a first series of articles written by young researches from the National University of Rwanda. This volume therefore further contributes to the regional and international approach of the Rule of Law in Africa.

Two regional conferences at which authors of the KAS African Law Study Library from DR Congo, Burundi and Rwanda jointly discussed legal aspects for regional solutions preceded this publication. The first regional conference was organised by the National University of Rwanda, Butare, in November 2010. The second one took place in Nairobi, Kenya, in November 2012.

We thank National University of Rwanda for having made it possible to organise the seminar and the regional conference in Butare. Moreover, we wish to express our gratitude to the participants for their commitment. The opinions expressed in the articles are those of the authors and do not necessarily represent those of the undersigned or the Foundation

Hartmut Hamann **Emmanuel Ugirashebuja**

EXPLORING OPPORTUNITIES AND CHALLENGES TO THE EFFECTIVE PARTICIPATION OF CITZENS THROUGH 'PERFORMANCE CONTRCATS IN THE DECENTRALISATION PROCESS IN RWANDA:

A CASE STUDY OF HUYE AND NYAMAGABE DISTRICTS.

By **Tom Mulisa**[*]

1.0. INTRODUCTION

The term rule of law has been often employed by politicians, lawyers and policy makers to explain a certain type of regime and state of human rights in a given political, economical and administrative entity.[1] The term rule of law does not have a precise definition, and its meaning can vary between different nations and legal traditions. Generally, however, it can be understood as a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions.[2] In the most basic sense, the rule of law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power.

In an attempt to promote the rule of law through enhancing citizen participation in the decision making processes, means have been devised that include Decentralisation. Decentralisation has been defined as the devolution of powers to the lower entities of administration where citizens initiate decisions hence creating a bottom up structure than a top to bottom decision making processes.[3]

The Government of Rwanda is aware that while it has strong political will to decentralise the politics of the country as well as the management and administration of public affairs, there are limitations in terms of institutions, materials, human resources, systems, and indeed financial resources to implement the policy. There is therefore strong need to develop and strengthen, on a sustainable basis, the capacities of all actors and players involved to enable them sustain decentralised governance and effective local level service delivery in the country. Rwanda has introduced performance contracts known as *Imihigo* as a method of not only enhancing citizen participation but also strengthen accountability and transparence by the citizens towards their chosen leaders. In this case, the citizen does not act as a recipient but a contributor and evaluator to the process.

[*]Assistant at National University of Rwanda

1 R G Jensen, TC Heller (eds) *Beyond Common Knowledge Empirical Approaches to the Rule of Law* ,University of IOWA, Centre for International Finance and Development(2004),1.

2 As above,2.

3 Office of Evaluation and Oversight (OVE),Inter American Development Board,1300 Newyork Av. N.W, Washington D.C.20577,R E- 250,June ,29, 2011 available Http://www8.iadb.org/ove/Documents/uploads/cache/320116.pdf accessed on 10th November, 2010.

1.1. RESEARCH QUESTIONS

The research aims at exploring the opportunities and challenges to effective citizen participation in decentralised entities in Rwanda through performance contracts. The Rwandan Constitution provides for decentralisation and empowering the local entities where by the citizens participate in decision making.[4] The major question lies in determining the implementation of the right to citizen participation through performance contracts. This paper attempts to answer the question; as to whether performance contracts are a better form of citizen participation and an assessment as to whether their exists a legal frame work to ensure citizen participation through performance contracts.

1.2. HYPOTHESIS

The above research questions are based on the premise that effective citizen participation is major tool in the process of decentralisation. Decentralisation also empowers the citizens in the decision making process. Performance contracts (*imihigo*) that have been introduced in Rwanda are aimed at enhancing a greater role of citizen participation, evaluation and accountability.[5] It is through performance contracts that citizens hold their leaders accountable through a transparent procedure.[6] In order to strengthen this system of citizen participation (*imihigo),* the research presupposes that there is need to put in place a legal frame work with rules and procedures that would safe guard the existing institutional frame work.

1.3. CHOICE OF THE SUBJECT

Rwanda is among the states that are under going reconstruction and nation building. The Rwandan history indicates that the rule of law has been undermined to the extent where institutions and individuals were destroyed during the Tutsi Genocide of 1994. This created a state of lawlessness and inculcated the culture of impunity that finally led to the Tutsi Genocide of 1994 that saw over a million innocent citizens lose their lives. In order to restore the rule of law and limit the arbitrary and excessive powers of the state, there is need to promote and enhance citizen participation through decision making. This can only be effected through a policy of decentralisation where by the citizens will be at the focal point of decision making. Performance contracts have received a wide acclamation and support as a wheel to citizen participation.[7] Effective participation remains central in human rights law and good governance.

1.4. CHOICE OF DISTRICTS

The choice of Huye and Nyamagabe districts was not a factual coincidence or random sampling. The two districts neighbor each other and have performed differently during the

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4 See the Constitution of the Republic of Rwanda of 4th June 2003 as amended update.

5 See Ministry of local government ,Community development and Social affairs, *Making Decentralized service delivery work in Rwanda :* Putting the people at the centre of service delivery, a policy note based on the discussion at the 2005 National conference on the decentralization, Accountability and service delivery, available at www.minaloc.gov.rw/.../pdf_Rwanda_Policy_Note_-_16_octobre.pd on *1 ,December 2010.*

6 Minaloc (n 6 above), 2.

7 *Nigerian General hails performance contracts,* **The New Times of Rwanda, he put it that '**Rwanda has a good principle of setting its own goals when seeking NGOs' support and not the NGOs setting the conditions. He added that Rwanda had set typical example of how things ought to be done', available at http:// www.newtimes.co.rw/print.php%3Fissue%. Accessed on 15th April, 2011.

performance contracts evaluation. Where as Huye district has high percentage of a learned community due to the presence of a university, Nyamagabe harbours a less number of the educated class. The district of Huye has not appeared among the best five yet Nyamagabe has always appeared among the best districts five performing districts. Therefore, the two districts have been chosen as better samples of analysing citizen participation through performance contracts in the decentralization process.

1.5. RESEARCH METHIDOLOGY

The research will mainly use a non empirical method and the research will mainly base on the two districts in the southern province namely Huye district and Nyamagabe District. Data will be gathered from the two districts and the performance contracts of the districts will be evaluated as regards citizen participation in the decentralized entities. An analysis of the performance contracts (*Imihigo)* will provide us the extent at which citizens participate in the process. The concept of the rule of law and decentralization will be defined and the legal basis under the local government Act and policies.

1.6. ASSUMPTION OF THE RESEARCH.

The research questions are based on the premise that the rule of law enhances human rights and equality to all citizens. It sets from the background that decentralisation is one of the aspects that promote the rule of law through facilitating citizen's right participation in the decision making process. It is there fore purported that effective citizen participation empowers citizens and protects them from arbitrary government policies through ownership of the process and hence creating legitimacy to the institution.

1.7. RELEVANCE OF THE STUDY

Rwanda being a post conflict society has much to offer to the countries that are either under reconstruction or are forging for lasting unity between the diverse populations. The Democratic Republic of Congo (DRC) has come out of deadly conflict that has caused numerous deaths to the innocent population. Corruption, nepotism and lack of proper functioning institutions renders the citizens' rights useless. Burundi also suffers from a long history of state orchestrated violence and high levels of impunity. Kenya, Uganda and Tanzania have had their own experience of violence and lack of respect of the constitution and other laws. Whether the decentralisation mechanisms taken up by Rwanda can provide resourceful guidance to the approach to human rights and the respect of the fundamental principles of the Rule of law through performance contracts will be developed remains a matter of choice and application mechanisms. This could also facilitate other researchers and policy makers to enhance more policies that provide a greater level of citizen participation.

1.8 LIMITATIONS OF THE RESEARCH

While there is no standard and universally accepted definition and application of the rule of law to all the different jurisdictions and states, the Rwandan decentralization process can not be tailored to other states that have successfully carried out decentralisation. The choice of the two districts can not fully present a sufficient standard to all districts in Rwanda that have embraced citizen participation through performance contracts. Some critics may not appreciate the standards used by the local government and the state of Rwanda in determining effectiveness through evaluating performance contracts of each district.

This is subject to political, academic and economic factors that may render the judgment subjective and political. None the less, much literature on decentralisation and the rule of law in Rwanda has been explored and analysed.

1.9. LITERATURE REVIEW

There has been no standard definition of the concept of the rule of law. There seems also not to be an agreed position on the indicators and elements that make up the rule of law since it has been noticed by various scholars that it might apply to different states and jurisdictions differently. However, it seems to be a generally agreed principle that the rule of law aims to protect the citizens from the arbitrary actions of the state and its machinery. Christian Garuka attempts to discuss the concept of separation of powers in the Rwandan and Burundian constitution but he seems to provide fewer details on the rule of law and the compliance of the states as provided for by the Constitution of Rwanda and Burundi.[8] The Rwandan ministry of local government has published a paper on the Strategy for developing capacity for effective decentralized governance and local level service delivery in Rwanda and this was aimed at highlighting the objectives and advantages of capacity building mechanisms, however, there is need to analyse whether the strategies employed enhance citizen participation.[9]

John Mary Kauzya has briefly highlighted the need and purpose for decentralizing state services and the challenges involved in the implementation of this programme for post conflict societies. This paper solely deals with decentralization as a peace making instrument but does not devolve much into the right to participation through decentralization.[10]

10. OVER VIEW OF THE CHAPTERS

The first chapter will attempt to define the concept of the Rule law, decentralisation, participation and performance contracts. Chapter two will analyse the application of the concept of performance contracts in Rwanda and its legal regime. Chapter three will analyse and evaluate the extent of citizen participation through performance contracts in the districts of Huye and Nyamagabe.

CHAPTER ONE: THE RULE OF LAW, DECENTRALISATION, PARTICIPATION, AND PERFORMANCE CONTRACTS

1.1 The Rule of Law

Politicians, lawyers, economists and policy-makers often use the term rule of law to characterize a certain type of legal-political regime. As the pace of globalization has increased in the past two decades, many developing countries have prioritized their policy agendas to promote the rule of law. The rule of law does not have a precise definition, and its meaning can vary between different nations and legal traditions. Generally, however, it can be understood as a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country

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[8] C G Nsabimana, *The Concept of power sharing in the Constitutions of Rwanda and Burundi*, Masters thesis submitted to the Center for Human Rights, University of Pretoria, University of Western Cape(2005) 20 (unpublished)

[9] www.minaloc.gov.rw , *Strategy for Developing Capacity for Effective Decentralized Governance and Local Level Service Delivery* in Rwanda accessed on 30th march 2010.

[10] J Mary KAUZYA, Chief of governance and public administration branch, PAD/UNDESA ,2008,3

functions. In the most basic sense, the rule of law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power.[11]

1.1.2. Elements of the Rule of Law

In his book *The Morality of Law*, American legal scholar Lon Fuller identified eight elements of law which have been recognized as necessary for a society aspiring to institute the rule of law. Fuller stated the following:[12]

1. Laws must exist and those laws should be obeyed by all, including government officials.
2. Laws must be published.
3. Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed. For example, the court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed.
4. Laws should be written with reasonable clarity to avoid unfair enforcement.
5. Law must avoid contradictions
6. Law must not command the impossible.
7. Law must stay constant through time to allow the formalization of rules; however, law also must allow for timely revision when the underlying social and political circumstances have changed
8. Official action should be consistent with the declared rule.

Standing alone, these eight elements may seem clear and understandable. But they are actually difficult to implement in the real world because governments are often compelled to prioritize one goal over another to resolve conflicts in a way that reflects society's political choices. For example, making too many laws that are too detailed and specific may make the legal system too rigid. Inflexibility could cause the courts of a country (judiciary) to neglect the human element of each particular case. Additionally, instead of only applying prospectively, some laws are meant to apply retroactively, or to past conduct, because they were passed with the specific intent of correcting the conduct in question. Fuller recognized these conflicts and suggested that societies should prepare to balance the different objectives listed above.[13] Most governments have adopted decentralization as measure of ensuring citizen participation.

I.2 DECENTRALISATIONIT IS ONLY THROUGH EFFECTIVE

It is only through effective decentralisation policies that all nationals will have ownership of whatever policies that are in place. That way, we are involving them in decision making. Districts are supposed to deal with development and should be supported *by* the provinces, while sectors are supposed to carry out effective service delivery with the support of districts. This is the essence of the decentralization.[14]

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[11] University of IOWA, Centre for International Finance and Development, 2010,p2.

[12] See also L L Fuller, *The Morality of law, Yale* university press, 1964, 14. Fuller outlines the basic elements underlying the principles of the rule of law.

[13] University of IOWA, (n 12 above) 2.

[14] HE president Paul Kagame, *Decentralisation in Rwanda, Partnership Engineered towards sustainable development,* December 2008,3

Decentralization, defined broadly as the transfer of public authority, resources, and personnel from the national level to sub-national jurisdictions, has been a recurrent theme in African countries since independence. In this paper, we are concerned only with decentralization to the local level, which is supposed to result in local governments and local service delivery. This paper is not concerned with decentralisation at the regional, state or provincial levels, which typically has a different dynamic often tied closely to the very nature of the state and an explicit balance of political forces. We also distinguish between decentralisation, which we define as entailing transfer of political, administrative, and fiscal responsibilities, and deconcentration, which we define as the mere relocation of executing agencies to the local level with responsibility and power remaining at the center.[15] There is much debate concerning the definition of "*decentralisation*" (or "centralisation" as the converse), especially with regard to how its definition differs from that of "devolution" or "delegation". For the purposes of this paper decentralisation is taken to mean the locating of decision-making rights or responsibilities away from the centre. Typically decentralisation involves the spreading out of decision-making authority from a smaller to a larger number of actors. The discussion in this paper concerning the allocation of decision-making rights applies also to the decentralisation of operations, resources and the allocation of rights more generally. These rights might include: the right to initiate or propose, the right to ratify, the right to veto, the right to set conditions, the right to determine in the event of a dispute, the right to deal with exceptions, the right to allocate resources and so on.

Centralisation and decentralisation should, for the purposes of this paper, be interpreted in a broad sense. That is, centralisation does not necessarily refer solely to decision-making by central agencies or ministers. For example, centralisation may occur at a local level or at a regional level. The location of decision rights (centralised or decentralised) is not intended to be a linear concept for the purposes of this paper. Rather, it may be multi-dimensional with the solution to (de) centralisation questions likely to lie in a combination of centralised and decentralised decision rights. The issue of centralisation versus decentralisation is particularly relevant in the context of the new communications and information technologies becoming available, as well as in light of the Review of the Centre report.[16] Improved communications and information technologies change the costs of information and of information exchange. This may in some cases mean it is easier to centralise decision-making, as information is more easily transferred to the centre, similarly, in some cases it may make it easier to decentralise decision-making. One can not talk about decentralisation with out highlighting the concept of participation. Participation itself is not sufficient but should be effective in that all members of society participate equally and meaningfully.

1.3. THE CONCEPT OF PARTICIPATION.

A human rights approach to participation implies five key roles for children and young people:[17]

(a) Identifying unfulfilled rights and acting on them
(b) Claiming of rights

[15] For definitions, see Crook and Manor 1998, pp. 6-7, also generally UNDP 1999 and World Bank 2001. For overviews of decentralization, see Manor and Crook 1998; Manor 1999; McLean, Kerr, and Williams 1998; and UNDP 1998. For overviews of decentralization in Africa see Oyugi 2000, Tordoff 1994, Vengroff 2000, and Brosio 2001. For an excellent analytical review, see Litvack, Ahmad, and Bird 1998; and Azfar et al. 1999 for an especially useful literature review.

[16] The Review of the Centre report presents the findings and recommendations of a review of the centre of the New Zealand State sector conducted over a four-month period in 2001 by a Ministerial Advisory Group, available at Http://www.ssc.govt.nz/display/document.asp?docid=2776&pageno=1,1.

[17] Http//www.unicef.org/india/conecept note on participation accessed on 2nd November 2010.

(c) Identifying capacity gaps in rights not realized and duties not performed
(d) Participating in the implementation of solutions
(e) Involving in monitoring, evaluating and reporting

The programmatic implications of this approach imply the following the creation of specific opportunities for participation while strengthening capacities of children and adults including organizational capacities and Creating of a wider enabling environment for meaningful participation.

1.4 PERFORMANCE CONTRACTS

The use of Performance Contracts has been acclaimed as an effective and promising means of improving the performance of public enterprises as well as government departments. Essentially, a Performance Contract is an agreement between a government and a public agency which establishes general goals for the agency, sets targets for measuring performance and provides incentives for achieving these targets.[18] They include a variety of incentive-based mechanisms for controlling public agencies controlling the outcome rather than the process. The success of Performance Contracts in such diverse countries as France, Pakistan, South Korea, Malaysia, India, and Kenya has sparked a great deal of interest in this policy around the world.[19] A large number of governments and international organizations are currently implementing policies using this method to improve the performance of public enterprises in their countries. Performance Contracts represent a state-of-the-art tool for improving public sector performance. They are now considered an essential tool for enhancing good governance and accountability for results in the public sector. Performance contracts are undertakings by a community to fulfill a certain task and in the end an evaluation is made on how the task was fulfilled. In ancient Rwanda *Imihigo* was a cultural practice where an individual set him/her self targets to be achieved with in a specific period of time. Rwanda has institutionalised this practice but it not only entails setting objectives but means something larger than its original meaning. Today it also entails a society, family, village, community, leader setting up positive objectives to be delivered to the society. Since it's the communities that set up priorities and goals, this has been a form of ensuring public participation in the decision making exercise.

It has also facilitated development and progress that is people centered than that one that is imposed by the administration. The goal of a performance contract is to make the expectations of all parties clear so that the performance will go smoothly and to eliminate any causes for legal challenges in the future.

CHAPTER TWO: THE APPLICATION OF PERFORMANCE CONTRACTS AND ITS LEGAL REGIME

In the Planning process, performance contracts commonly known as *Imihigo* preparation is based on the 5 year District Development Plans which are implemented through the Medium Term Economic Framework (MTEF) and Annual Development Plans.[20] *Imihigo's*

[18] **Performance Contracts Steering Committee Secretariat Cabinet Office, Office of the President – Kenya,** ***performance contracts: an approach to improving public service delivery, March 12-23, 200****7 accessed at http://www.bide.com/Workshop%20II/Workshop2-04.html on 2nd November 2010.*

[19] As above .

[20] See Ministry of local government ,Community development and Social affairs, *Making Decentralized service delivery work in Rwanda :* Putting the people at the centre of service delivery, a policy note based on the discussion at the 2005 National conference on the decentralization, Accountability and service delivery, available at

central role, as mentioned earlier is to ensure adequate levels of program execution and policy implementation. Therefore a number of processes and mechanisms have been put in place to ensure that targets are achieved. Firstly, the political district leadership and their chief technicians on monthly basis hold *Imihigo* assessment meetings and agree on corrective actions for activities that are off tract. Secondly on quarterly basis, the District executive committee prepares a progress report to the District Council and after its approval it is presented to the public on an occasion called public *accountability day*.[21] Citizens are given opportunity to ask questions and offer advice on how to improve the program implementation. In most cases citizens indicate the additional contributions they can make Fourthly Provincial leadership, again on quarterly basis, make physical and documental assessment on progress of district *Imihigo* and rank the district according to performance criteria previously commonly agreed upon. These are then made public in the presence of central government officials lead by the Prime Minister.[22]

Fifthly, on annual basis during a national forum called the National Dialogue Meeting presided over by the President of the Republic of Rwanda, the Mayors present to the nation the *Imihigo* performance report. The event is transmitted in a live program to the populations. This practice is called "*kuvuga ibigwi*" "*kurata imihigo*" in the local language to measure the citizen satisfaction of the public service at local level, citizen report cards and community score cards are prepared on annual basis. Their findings are supposed to inform *imihigo* preparation in process and in content.

2.1 PERFORMANCE CONTRACTS IN RWANDA AS FORM OF EFFECTIVE PARTICIPATION.

2.1.1 Performance Contracts: The Genesis

Performance contracts in Rwanda have been tailored upon the Rwandan traditional concept called '*Imihigo*' to literally mean set priorities and outcomes. Today performance contracts *imihigo* has been a people driven process to accelerate local government reforms and stimulate progress and development. The community pledges to attain certain goals and work towards achieving the goals and expectations. In 2006, the government of Rwanda introduced the *Imihigo* performance contracts to reinforce the peoples' participation towards development. The aims of the *imihigo* are to work with a target and these are assessed every trimester and this is aimed at citizen evaluating themselves through all participatory process. *Imihigo* is a result-based management framework, where the communities and their leadership engage in an annual process of public contracting and evaluation with respect to the delivery of specific goals within the district plan and budget.

District Performance Contracts (*imihigo)* first signed between H.E The President of the Republic of Rwanda and Mayors of the District in April 2006 are a very important concept in the move to performance based planning and budgeting and are a revolutionary move towards accountability and transparency in service delivery. In 2007 *Imihigo* culture was practiced from the district down to the Village level- the lowest administrative unit; each family now has *Umuhigo* for the year.

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[21] See P Musoni former Rwandan Minister of Local Government, Good Governance, Community Development and Social Affairs; *Good Practices on African Policy Reforms which promote Transparency, Accountability, and Participation in Municipal Public Expenditure Management and Service Delivery* ,paper presented in Durban ,South Africa,10-14/03/2008. There is a detailed discussion on the citizen participation through local government systems. See also objectives of Imihigo, p.6.

[22] As above

The major objectives of *Imihigo* as process of performance budgeting is to promote the following good practices:-[23]

- Local community ownership
- Participatory planning
- Result- oriented management
- Self assessment
- Monitoring and Evaluation
- Transparency and Accountability
- Performance Reporting
- Effective utilization of resources

The *Imihigo* a performance management tool for reform has been one of Rwanda's response to the challenges of development and a people driven process through participation.

2.2. THE LEGAL REGIME OF PERFORMANCE CONTRACTS

There is no specific legislation regulating the practice of *Imihigo.* The performance contracts in Rwanda are regulated by the various laws that are aimed at ensuring accountability and responsibility of the governed and the governors. If *Imihigo* as positive practice are to safe guarded and protected, then there is need for an institutional legal frame work.

2.3 PERFORMANCE CONTRACTS: A FORM OF EFFECTIVE CITIZEN PARTICIPATION.

Performance contracts have provided a better forum for citizens to contribute to national development through pledging to achieve certain goals to which they have identified as a community priority. The performance contracts fulfill the following;

- **Consensus Oriented Process**.

Effective public participation ensures that the community contributes to the development of goals and objectives through consensus. Participation ensures that the emerging view is not a product of state or influence of strong politician but consensus and a common agreement by the beneficiary community.

- **The Rule of Law**

This is envisages as the leaders of the communities are accountable and have to fulfill their pledges to the community. The failure by one of the parties to achieve the set goals and objectives leads to dishonor. The *Imihigo* act as standards of evaluation for the leaders and the community. Poor performance does not only affect the leader but the community as it appears that there was no coordination among the team players.

- **Accountability**

The *Imihigo* have proved the best form of accountability to the leaders and the community. The leaders and the community that have given themselves targets and goals are evaluated

[23] See P Musoni (n 22 above),6-10.

at the end of the process. The leaders that seem not to have succeeded in their pledges are some held accountable by the state and the community and this can sometimes lead to severe administrative sanctions. This form of accountability is basic principle under the concept of participation since it's the population or beneficiaries that set the priorities and participate in the evaluation process.

- **Transparency and responsibility**

The performance contracts are spelt out publicly before a leader in each administrative entity. Finally the district mayors pledges before the president of the republic. The evaluation takes place thrice a year before the president of the republic, prime minister and the ministry of local government. The leaders at the end of the day work towards achieving success and the set priorities are evaluated too by their own constituencies.

CHAPTER THREE: AN ANALYSIS OF THE EXTENT OF CITZEN PARTICIPATION IN RWANDA THROUGH PERFORMANCE CONTRACTS: HUYE AND NYAMAGABE DISTRICTS

3.1. CITIZEN PARTICIPATION IN HUYE DISTRICT

The choice of Huye district has been due to a number of factors. Huye district houses a National University and Lecturers who can also contribute to the development of the district. However, the levels of education and economic status do not equally relate to public participation. In the years 2007 and 2008 Huye district has been one of the worst performers and hence the need to understand the level at which participation through performance contracts has been attained.

3.1.1 Huye's Performance Contracts

Huye district lies in the southern province and has a square area of 581.5 km with 14 sectors and 77 cells. In the year 2007 the district of Huye set priorities like;[24]

- Establishing schools and improving on the existing quality of education
- Health programmes (Immunization programmes for the children)
- Economical development (agriculture, modern market and infrastructure)
- Security provision
- Improve on the justice sector

The above mentioned are among the set objectives of Huye district. The setting of objectives ought to be done jointly with the citizens and beneficiaries. On paper, the set objectives appear great and important for the people of Huye district that poses of a high level of intellectual milieu. The set targets *Imihigo* begin with the small unit which is the family, cell, sector and district. On analysing the *Imihigo* of one of the cells known as Ngoma cell of Ngoma sector in Huye district shows the role and commitment of the local entities to participate in the decision making and planning process.[25] It is also with in this multi disciplinary community of the university elite that majority of the university students and

[24] Huye district performance contracts of 2007, 1.
[25] See the *Imihigo* of Ngoma cell of Ngoma sector of Huye district, 2010.

lecturers claim not to have participated in the process of setting priorities in the district.[26] In this case, it quite not clear whether the intellectual elite are not involved or whether they are too busy to turn for the district schedules and activities. This presents a different scenario in the neighbouring Nyamagabe district that has won trophies under the *imihigo* system of citizen participation as highlighted below.

3.2 CITIZEN PARTICIPATION IN NYAMAGABE DISTRICT

Bringing power and authority closer to the people is supposed to make it easier for the population to keenly follow up on things done for them, hence improving their involvement in planning and decision making. In this context, decentralization renders it easier for the governments to empower their citizens to be in charge of their own development agenda.

In Nyamagabe District as indicated by the *Imihigo* 2007, 2008, 2009 and 2010[27] clearly shows that participation begins with the village level, to the cell, sector and district level. Each community gathers and identifies priorities and sets goals and targets depending on the capacity of the district. The reason why Nyamagabe District has been the best performer in the last 3 years has mainly been due the role of the citizens of Nyamagabe to cooperate with the leaders in the implementation phrase of the action plan.[28]

3.3. ANALYSING PERFORMANCE CONTRACTS: HUYE AND NYAMAGABE DISTRICTS

An analysis of the performance contracts in the two districts has been attained through analyzing the results of the of the two districts at the end of the year. Instead of pointing out the reasons why one district performed better than the other, the research work has demonstrated the advantages and disadvantages of performance contracts. It was quite evident that Nyamagabe and Huye district had differences not only in geographical positioning, budgetary issues, levels of education and leadership. For whatever, reasons and standards used in the evaluation process of the two districts, Nyamagabe district leadership and cooperation with the population of the district has demonstrated that team work does not stop at the level of leaders but also the beneficiaries who are the citizens. The role of citizens in the process can not be under estimated and in order to register success, they ought to have a leading role in the process of society transformation. The reasons why Huye district has not been performing better can not be found in a single logical conclusion. This research work was not aimed at exploring the reasons why one district performed and the other did not, but only analysing citizen participation in the two districts through performance contracts. The research finally through the experience of Huye and Nyamagabe district found that there are some merits and demerits of evaluating citizen participation through performance contracts.

3.4.1. MERITS OF PERFORMANCE CONTRACTS

Performance contracts are result oriented and a people driven exercise. The communities are instilled with innovation and this encourages positive competition. Performance contracts

[26] Interview with a university lecturer at the national university of Rwanda, 2nd December 2010, (notes on file with the author)

[27] See Ministry of local government website for Imihigo of Nyamagabe districts.

[28] Interview with an executive secretary of a sector in Nyamagabe district, 2nd December,2010 (notes on file with the author)

are the only platform where the stake holders to the development process are engaged in the process of policy formulation and evaluation. (Civil society, donors etc)

The communities and the leaders work with zeal and determination with a sense of responsility and ownership. This instills the culture of regular performance evaluation and at the end this promotes accountability and transparency. The above merits of performance contracts *Imihigo* have been realized after an analysis of the goals set by both Huye and Nyamagabe Districts before and after evaluation. The evaluation is done by the ministry of local government and the results read out by the president of the republic before other government institutions and leaders. Although *Imihigo* have been hailed a best form of citizen participation and holding the leaders accountable, there have been some demerits to the process and there is need for more measures that could ensure effective citizen participation in decision making.

3.4.2. Demerits of performance contracts

The local government policies, laws and an extensive interpretation of the roles and responsibilities of the leaders have regulated the performance contracts process. Lack of a specific law that would provide guidance to those evaluating and sanctioning one the who has not fulfilled his set goals is as important as the process itself.

Effective or meaningful participation envisages prior consultation of the beneficiaries.[29] Participation also entails the level of awareness and knowledge of the subject by the direct beneficiaries. The misunderstandings that have some times occurred in the implementation process have been due the imposition of some policies and programmes that the beneficiaries have not commonly agreed upon with the leaders. This has happened in situations where the population is up against a particular agricultural activity since they think they have not been consulted. Even in situations where they are consulted they make an informed choice because they do not understand the rationale of the proposed activity.[30]

It has been observed that the leaders especially mayors are under constant pressure to deliver so that they perform better than others (*Kwesa imihigo kurusha abandi*).[31] This has affected quality in some particular areas as the leaders will need to beat the deadline so that they are not shamed in public or considered weak. In some areas the performed activities did not reflect the national and local priorities. Since these performance contracts are also aimed at speeding up development, some of the leaders tend to produce what the external donors especially market oriented cash crops like coffee and tea. This will always affect the quality of the produce towards the population as most of the beneficiaries tend to prefer to produce what they can consume at home. The essence of coffee and tea is as important as addressing the poverty issues in rural Rwanda but this defeats the major purpose of the performance contracts which was to place the individual at the centre stage of decision making.

The evaluation procedure of finding out the best performer needs to be improved. The team that goes around inspecting the activities is still not enough to make a satisfactorily

[29] See further discussion debate by prof. James Katorobo '*performance contracts will not work in public service*' posted on April 8 2011, available at http://mobile.monitor.co.ug/Oped/-/691272/1140858/-/format/xhtml/-/ql5xa1/-/index.html accessed on 12 April 2011.

[30] See further discussion by S J Barter, The *dangers of Decentralization Clientelism, the State, & Nature in a Democratic Indonesia,* University of British Columbia Department of Political Science, PhD Candidate, available at www.queensu.ca/iigr/apps/journal/fedg/content/...6/Barter.pdf *accessed on 15th November 2010.*

[31] See also P Musoni (n 22 above).6.

evaluation. A closer look at Nyamagabe and Huye districts will demonstrate a wide range of issues. Huye district posses a number of academicians, students and other university staff. Nyamagabe district that may not have high number of academicians and institutions like Huye district tends to offer more results. This may some times be interpreted in a double phenomenon where by an educated class may be resilient to change than the less educated or the more educated would need other methods and forums of sensitization different from the less educated communities. Nonetheless, there is a presumption that the inspecting and awarding team is objective and there could not be political influence in the choices taken. There is need of having clear and transparent procedure of evaluation since looking at the set goals and targets by the two districts seem comprehensive and enticing on paper. The is need to make the evaluation standards clear and known to all people, the examiners may be objective and have clear rules but it seems the general public and the respective constituencies are not fully aware of the methods of evaluation.

Differences in budget allocation and effective leadership as a factor to district performance. The two districts of Huye and Nyamagabe have different budget allocations. Huye district in 2007 and 2008 had more budgets due to its revenues than Nyamagabe district. This means that Nyamagabe was more dependent of the local government than Huye District and this will certainly affect the monitoring and evaluation process. Logically, Huye district would have performed better since it had more budget allocation but it seems not leading us that answer. This means that the budget allocation and distribution may not be a factor to faster development since the element of effective leadership can not be under estimated. There is also, a possibility of the central government and donors to have a strict monitoring on the most vulnerable and historically poor districts and this may also be an underlying factor to development. The reasons why Nyamagabe may have succeeded may be more than the above assumptions but what is not contested has been the effective leadership and collaboration of the beneficiaries and district administration.

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSION

The rule of law is a basic principle in governance and the ensuring of human rights in any society. Decentralisation allows the flow of resources and decision making from the bottom to the top levels of administration. One can not talk about decentralization with out ensuring effective participation and empowering the population. This has been done is Rwanda by putting in place performance contracts *Imihigo* that enable the citizens to own the process and set standards for themselves as well as evaluation and accountability. However, if performance contracts are to set a good practice and standard of effective participation by citizens then, there is need for a clear legal frame work that guides the process. The methods of evaluation should be consistent with the basic principles of the rule of law to avoid arbitrary decision making considering that effective participation means more than decision making but also includes the levels of awareness and availability of choices to make by the beneficiary.

RECOMMENDATIONS

Citizens often complain that governments provide services that are inadequate, inappropriate, inferior or too costly of their hard-earned incomes. Citizens expect improvements in the capacity of the public service to deliver more and better services at lower cost. In order to have an efficient Municipality, it is inevitable to have Municipality systems that are

responsive to the needs and demands of its people. The State should therefore endeavor to create equal opportunities for all citizens to access services. Service delivery Service delivery should be benchmarked on three principles for satisfaction to be realized.

Accessibility to the services should be seen in three folds; physical accessibility, which refers to the ease and proximity to the service delivery points, financial accessibility, which refer to the affordability of the services and accessibility to information on services available and procedures to be followed. For beneficiaries to the services to be satisfied, distances people have to travel to get service should be reduced, the cost must be affordable and information on standards of the services rendered and the procedures and process to follow to access the services made known to the people.

Services can only be useful when used. It is possible for the services to be accessible and not be utilized. Reasons must then be found out and solutions given. Service providers should be accountable to beneficiaries and also initiate a participatory monitoring and evaluation system to check on the quality and impact to the wellbeing of the population. The other practice is on municipal capacity and service delivery progress and planning analysis for Northern Cape Province in South Africa.[32] The assessment took into consideration key aspects like administrative, financial, political capacity and capabilities, it looked into service delivery progress and planning and also assessed integrated development plans, and the support required to improve the capacity and capabilities of municipalities were identified.[33] A questionnaire was developed, and sent to local governments, this was followed by phone calls. The services delivery relied on secondary data; while the integrated development plans assessment relied on their documents and workshops.[34] The program not only monitors performance, puts in place corrective measures it also assess the impact to the welfare of the population. All these are subsequently provided to the council in a feedback.

[32] A status Quo Analysis of Local Governance in Northern Cape, by the Department of Housing and Local Government 5 December 2000 to June 2002,4.

[33] As above, 4

[34] Cape Town (n 33 above) 5.

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Annex 1: The IMIHIGO Signing Document, 2006[35]

I, NAME OF THE DISTRICT MAYOR, *in the name of the population that I represent, I pledge the President of the Republic that during the year 2006, the population of the District will achieve the objectives that are stated in this contract document. The Republic of Rwanda, through the ministries and other state institutions, is going to support the activity program described in the following document.* (Translation from Kinyarwanda)

SIGNATURE **SIGNATURE**
District Mayor *H.E. President of the Republic*

1. Identification of priorities

The first step toward the preparation of IMIHIGOs was to plan the regional priorities. Given the time constraint, the district mayors could not proceed to a full participative planning process. Nevertheless the mayors could rely on stronger human resources at the district and sector levels, since the administrative and territorial reform of the

[35] See Rwanda Ministry of Local government, *IMIHIGO: A Performance Management Tool for Reform*,51

local governments was already well advanced. The new staff usually come from former local government institutions or are recently decentralized from the central government ministries. The mayors could also rely quickly on the sectors and cells to get rapid feedback on the local population's priorities. Although, going forward, more in-depth participative assessment would be desirable, the IMIHIGO preparation phase did rely on former district development plans and national sectoral targets that were presented and discussed during the Decentralized Management and Service Delivery retreat on 9–12 March 2006. Despite the time constraints, the 30 districts were able to prepare a document presented to the president on 4 April 2006, less than one month after they committed to prepare an IMIHIGO. The documents reflected both the needs of the local population and the national goals set out by Vision 2020, the Millennium Development Goals, and Rwanda's current poverty reduction strategy. Although each district's IMIHIGO is unique, a typical IMIHIGO identifies about ten regional priorities. These priorities can be related to social protection, good governance, public service delivery (health, education, public facilities, etc.), economic development, agriculture, justice, or social safety. The documents offer a balanced mix between national and regional priorities.

2. Specific targets backed by measurable Performance indicators

All IMIHIGO documents include a list of targets and measurable performance indicators for each sector.

The Ministry of Local Government and the Ministry of Finance jointly provided a database template to the districts to present a standardized performance measurement framework. The key information for 2006 is included a District Monitoring Framework and a District Activity Plan

3. Performance monitoring and evaluation

The ministries also provided a well-defined monitoring and evaluation process to measure and compare districts' performance. The IMIHIGO monitoring and evaluation system is structured around four predetermined steps. A monthly report sent to the Ministry of Local Government, Community Development and Social Affairs as a monitoring tool for activities. A quarterly review looking at the performance indicators between the leaders of local governments and the central government institutions. A midterm review (every six months) on the overall IMIHIGO performance, at which time the local government's leaders meet the president and the central government ministries.

NATIONAL AND INTERNATIONAL ARBITRATION IN RWANDA

By **Leonard Sebucensha**[*]

INTRODUCTION

Rwanda opted for arbitration effectively in early 2008 and two types of arbitration were recognized: national and international arbitration. National arbitration deals with disputes involving Rwandan nationals only while international arbitration deals with disputes with a foreign element. At national level the parties have two recourses i.e. public court and arbitral tribunal; in the international context however, such a choice is more difficult because there are no international public courts that handle international commercial disputes involving only private parties[36]. Therefore, international private parties at disputes have to decide whether they want a national court to resolve their dispute or opt for international commercial arbitration[37]… National and International Arbitration proceedings in Rwanda are regulated by the scattered Laws[38] which do not establish a clear difference between them. This study attempts in a nutshell to the national and international arbitration in Rwanda.

1. ESTABLISHMENT OF ARBITRATION IN RWANDA

Under Article 3 of the LAC 2008, arbitration is a "procedure applied by parties to the dispute requesting an arbitrator or a jury of arbitrators to settle a legal, contractual dispute or another related issue".

1. 1. BACKGROUND

Arbitration came into effect in 1993 by the initiative of the then Government to resolve the malfunctioning and corruption of the justice sector in commercial industry.

In this respect the stakeholders [Ministry of Industry and Commerce of Rwanda, World Bank, Traders, etc] created on January 2nd 2002, the "*Centre d'Arbitrage et d'Expertise du Rwanda*", *CAER A.s.b.l*[39] and the introduction of Arbitration procedures in the Code of Civil, Commercial, Labour and Administrative Procedures[40] followed suit. Another vital milestone in the creation of an environment conducive for arbitration was the enactment of the LAC 2008 which triggered the creation, at the initiative of the Government of Rwanda and Private Sector Federation (Rwanda), of the Kigali International Arbitration Center in 2011 by the Law on KIAC 2011.

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[36] The only exception is the European Court of Justice, which may deal with certain disputes between private parties under European Community law(W. MATTLI, 'Private Justice in a Global Economy: From Litigation to Arbitration', *International Organization*, Vol. 55, No. 4, Autumn 2001, p. 920.).

[37] The term jurisdiction clause in an international contract is generally used to describe a forum selection that designates a public court to hear a case, while an arbitration clause refers to private international dispute resolution.

[38] The Constitution of the Republic of Rwanda of June 4, 2003 as amended to date; Law N° 005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters (hereinafter LAC 2008), *O.G.* **N° special of 06/03/2008;** the Law N° 51/2010 of 10/01/2010 establishing the Kigali International Arbitration Centre and determining its organisation, functioning and competence (hereinafter Law on KIAC 2011), *O.G.* N°09 *bis* of 28/02/2011 and Ministerial Order N°16/012 of 15/05/2012 determining arbitration rules of Kigali International Arbitration Center, *O.G.* N°22 *bis* of 28/05/2012 (hereinafter KIAC Rules of arbitration 2012).

[39] The Centre was covered with the legal personality by the Minister of Justice's order N° 001/17..

[40] See articles 365-398 of the Law N° 18/2004 of 20/6/2004 as modified to date relating to the Code of Civil, Commercial, Social and Administrative Procedure [Rwanda], *O.G.* N° Special *bis* of 30/07/2004.

1. 2. TYPES– INSTITUTIONAL AND *AD HOC* ARBITRATION

There exist two types of arbitrations–institutional and *ad hoc*. In this vein *ad hoc* arbitration was established by LAC 2008 and Kigali International Arbitration Center (KIAC) was created by the Law on KIAC 2011[41] to satisfy the needs of economic and business operators who prefer arbitration to traditional court adjudication. In the *ad hoc* arbitration procedures the parties resort to individual arbitrators rather than arbitral institution to settle their disputes while for institutional arbitration, KIAC which is the only competent agency for arbitration [42]administers the process.

2. COMMENCEMENT OF ARBITRATION

To commence arbitration, there must be an arbitration agreement and a request must be made.

2. 1. Request for an arbitration

A party [Claimant] who wishes to commence arbitration under KIAC Rules of arbitration shall file a written request for Arbitration [to the Secretariat] in line with article 5 of the KIAC Rules of Arbitration 2012. The request of arbitration shall be accompanied by payment of USD 250 for non-refundable registration fee failure of which the Centre shall not register the request[43]. The date of receipt of a complete request of Arbitration shall be deemed to be the date on which the arbitration has commenced and within five (5) days of the receipt of the request, the Secretariat shall transmit a copy of the request and the documents annexed thereto to the respondent for its answer to the request. Once the respondent receives the request s/he shall, within fourteen (14) days, provide an answer in line with article 6 of the KIAC Rules of arbitration 2012.

2. 2. Arbitration agreement

The arbitration agreement is the milestone of the arbitration. It records the consent of the parties to submit the dispute to arbitration[44]. It is dependent on the voluntary accord of the parties and for an arbitration agreement to uphold, the wishes of the parties must be respected. The principles of contract law must be observed in order to make the arbitration agreement valid and binding[45]. The parties must comply with the capacity[46] requirements and fulfill the formalities required to make a commercial contract. There is no standard

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41 See Article 3 of the Law on KIAC 2011.

42 See Article 5 of the Law on KIAC 2011.

43 The very amount (US $ 250) is also applicable for the registration fee of a counterclaim: Articles 5 and 45 of the KIAC Rules of arbitration 2012.

44 N. BLACKABY, et al., *Redfern and Hunter on International Arbitration*, Oxford, OUP, 2009, p. 85.

45 This argument was corroborated by Article 9 of the LAC 2008 and the one set down by A. NUSSBAUM: "the validity and effectiveness of an agreement to arbitrate depend on the existence of such prerequisites as: a meeting of the minds of the parties; the observation of prescribed formalities for the making of the agreement; the necessary capacity of the parties to the agreement; the absence of defenses rendering the agreement voidable; freedom from implied conditions which cause the arbitration agreement to lose its effect"; see A. NUSSBAUM, 'Treaties on Commercial Arbitration: A Test of International Private Law Legislation', *Harvard Law Review*, Vol. 56, N° 2, (1942) p. 595. In Rwanda, no person shall be appointed to hold office as a director if he is under sixteen (16) years of age, in the case of public limited company is over seventy five (75) years of age, undischarged bankrupt; is prohibited from being a director or promoter of or being concerned or taking part in the management of a company, is not a natural person, has been qualified to be of unsound mind, or by virtue of articles of associations, does not qualify for the directors (See Article 175 of the Law N° 07/2009 of 27/04/2009 relating to companies, *O.G.* N° 17 *bis* of 27/04/2009).

46 The term "capacity" here is used in its extensive meaning to include the issues of incompetence (incapacity of the minor, insane and interdicted).

arbitration clause for *ad hoc* arbitration while for institutional arbitration; the KIAC sets two standard arbitration clauses[47]. The first is an *arbitration clause* [usually short and contained in the principal agreement] destined for future dispute:

> Any dispute arising out of or in connection with this contract, including any question regarding its validity or termination shall be referred to or resolved by arbitration under the KIAC Rules" and parties should consider adding
>
> (a) The number of arbitrators shall be ... (one or three);
> (b) The seat or legal place of arbitration shall be ... (town and country);
> (c) The language to be used in the arbitral proceedings shall be…

This standard arbitration clause does apply for Emergency Arbitrator provisions as provided under Annex II to the KIAC Rules of arbitration 2012 while for the non-emergent arbitration, there is an add-on to it: "… The Emergency Arbitrator Provisions shall not apply"[48].

The second standard arbitration clause is the *submission agreement* [not contained in principal agreement] which submits the existing dispute to arbitration:

> A dispute having arisen between the parties concerning (…), the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the KIAC rules.

The submission agreement is usually long though not a principle. This is justified by the fact that the submission agreement is on the existing matters and there is room for going into details to include arbitrators, procedures to be applicable to the disputes, the applicable law, the place of arbitration, etc.

2. 2. 1. Validity of arbitration agreement

The need for writing for formal validity: The arbitration agreement shall be in the form of writing[49]–the word "writing" being here used in its widest meaning to insinuate its content is recorded in any form –oral, conduct, electronic data interchange, Electronic mail, telegram, telex or telefax [to cite some].

The relationship between the parties must be defined: All arbitrations in Rwanda arise out of contractual relationship[50] which should be a 'defined legal relationship' between the parties, whether contractual or not.

The subject matter must be capable of settlement by arbitration: The Arbitrability in Rwanda is addressed under Article 2(2) of the LAC 2008 which provides that the enforcement of any other Rwandan Laws by virtue of which certain disputes may not be submitted to arbitration shall not be prejudiced including the respect of the public policy and good morals of Rwanda[51]. In this respect, the criminal matters and those which affect legal

[47] See Annex IV to the KIAC Rules of Arbitration 2012.
[48] See Article 2 of the Annex IV to Kigali International Arbitration Centre Arbitration Rules 2012.
[49] See Article 9(2) of the LAC 2008.
[50] See Article 9(1) of the LAC 2008.
[51] See Article 8 of the Law N° 42/1988 of 27/10/19988 establishing Preliminary Title and Book I of the Civil Code, *J.O.* 1989, p. 9.

status of individual (divorce settlements) and corporate entity (such as bankruptcy[52] and insolvency[53]) are usually considered as not arbitrable.

Parties to an arbitration agreement: Parties to an arbitration agreement must have legal capacity, otherwise the agreement is invalid. For a *natural person*, a member of the Board of Directors of the company must have eighteen (18) years of age[54], while for any other trader; s/he must have twenty one (21) years of age[55] or emancipated[56] to enter into valid arbitration agreement. The prohibited and the insane cannot also enter into a valid arbitration agreement[57]. For a *moral person* (corporation[58], States and its agencies, cooperative[59], association, etc), the contract they enter into becomes valid only if they have legal personality.

2. 2. 2. Effects of arbitration agreement[60]

The doctrine of separability: Article 18 (2) of the LAC 2008 recognizes the twin principles of "*Kompetenz-Kompetenz*"[61] and separability of the arbitration agreement from the underlying contract. The aforementioned article reads:

> An arbitration clause which forms the basic part of a commercial contract shall be treated as an agreement irrespective of the other terms of the basic contract. A decision of the arbitral tribunal indicating that the basic commercial contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

This means an arbitration clause survives the termination of the main contract. This is justified by the existence of two separate contracts: the primary contract concerning the commercial obligations of the parties and the secondary contract containing a dispute resolution by arbitration. This collateral contract may never come into operation; but if it does, it will form the basis for the appointment of arbitral tribunal and the resolution of any dispute arising out of the main contract[62].

2. 2. 3. Applicable laws

In arbitral proceedings, the arbitral tribunal gives much importance to the facts of the case. This was rightly highlighted in the *Redfern and Hunter on International Arbitration*.

> … the arbitral tribunal first needs to resolve the issues of the fact, as best it can, before moving on to interpret the contract and, if need be, to refer to any underlying system of law. Just as an arbitral tribunal reaches it decision on the merits of a dispute without

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52 See for example Title II, Chapter II of the Organic Law N° 01/2012/OL of 02/05/2012 instituting the Penal Code of Rwanda, *O.G.* N° special of 14 June 2012.

53 See Article 4 of the Law N° 12/2009 of 26/05/2009 relating to commercial recovery and settling of issues arising from insolvency, *O.G.* N° special of 26/05/2009.

54 See Article 176 of the Law N° 07/2009 of 27/04/2009 relating to companies in Rwanda.

55 See Article 431 of the Law N° 42/1988 of 27/10/19988 establishing Preliminary Title and Book I of the Civil Code.

56 See Article 427 of the Law N° 42/1988 of 27/10/19988 establishing Preliminary Title and Book I of the Civil Code.

57 See Article 432 of the Law N° 42/1988 of 27/10/19988 establishing Preliminary Title and Book I of the Civil Code.

58 See Article 18 of the Rwandan company law 2009.

59 See Section 3 of the Law N° 57/2007 of 18/09/2007 determining the establishment, organisation and functioning of cooperative organisations in Rwanda.

60 See Article 7 of the KIAC Rules of arbitration 2012.

61 *Kompetenz-Kompetenz* means an arbitral tribunal is allowed to make a decision on whether it has jurisdiction over an issue that needs to be settled and whether an arbitration agreement is valid (See G. CUIZON, "What is Doctrine of Competence-Competence?", available at http://www.bukisa.com, accessed on 23rd October 2010).

62 BLACKABY, N., et al., *op. cit.*, p. 117.

detailed reference to the law applicable to those merits, so an arbitral tribunal may well pay little or no attention to the law that governs its own existence and proceedings as an arbitral tribunal. Indeed, it may give more than fleeting recognition to the fact that such a law exists—any more than the average purchaser of a motor car gives at a fleeting recognition to the law of the contract that underpins the transaction[63].

Arbitration is in principle regulated in a dual way: by the rules of procedure that have been agreed or adopted by the parties and arbitral tribunal and by the law of the place of arbitration. The Rwandan national arbitration involves more than one set of rules. In this vein: the following sets of laws do apply:

- The law governing the arbitration agreement and the principal contract;
- The law governing the substance of arbitration is the law chosen by the parties to arbitration and in case they defaulted, the KIAC Arbitral tribunal shall apply the rules of law it determines to be appropriate[64];
- The law governing the rules of procedure is also the law chosen by the parties; in case of disagreement, the arbitral tribunal is free to determine the rules of procedure [as provided by Article 31 of Rwandan organic arbitration law[65];
- The law governing the recognition and enforcement of arbitration award[66].

3. ESTABLISHMENT AND COMPOSITION OF ARBITRAL TRIBUNAL

While traditional court is a standing body [with judges, court clerks…], ready to handle a dispute once seized, there is no permanent standing body of arbitrators.

3. 1. Instituting an arbitral tribunal

Absent some specific mechanisms in the applicable rules for a separate 'pre-arbitral' phase for urgent decisions, no decisions can be taken or relief sought until the tribunal has been established[67]. This may be relatively a lengthy process especially when one of the parties fails to appoint an arbitrator. Even though the KAC Rules of arbitration 2012 provides that the Centre appoints the President of the Arbitral Tribunal in case of the nomination of three Arbitrators save only where parties decide otherwise[68], the process to establish arbitration tribunal may be time consuming. The court issues interim measures and provisional orders[69] during the period pending constitution of arbitral tribunal.

3. 2. Arbitral Tribunal

Once a decision to refer the dispute to arbitration has been made, choosing the right arbitral tribunal is critical to the success of arbitral process. It is an important choice not only for the parties to the particular dispute, but also for the reputation and standing of the process

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63 *Idem*, pp. 163-164.

64 See Article 27 of the KIAC Rules of arbitration 2012. This Article repeals partly the Article 40 of the LAC 2008 as per Articles 11 (3), a, b, c, d and e and 20 of the Law on KIAC 2011.

65 In Rwanda, the institutional arbitration proceedings are governed by KIAC Rules of arbitration 2012 as aforementioned in note 30.

66 The recognition and enforcement of arbitral awards is governed by the LAC 2008 (Article 50); Convention on the recognition and enforcement of foreign arbitral awards 1958.

67 BLACKABY, N., et al., *op. cit.*, p. 241.

68 See Article 14 of the KIAC Rules of arbitration 2012.

69 See Articles 21-25 of the LAC 2008.

itself. It is, above all, the quality of arbitral tribunal that makes or breaks the arbitration and it is one of the unique distinguishing factors of arbitration as opposed to national judicial proceedings. While choosing a sole arbitrator or a presiding arbitrator who must effectively take control of the proceedings, the experience is particularly important. The rights of the parties and particularly the right to a fair hearing must be scrupulously observed. Although in principle the parties should be free to choose their own arbitrators, so that the dispute may be resolved by 'judges of their own choice', this choice is limited by the restrictions set down by the statutory rules in institutional arbitration.

In this regards, the article 1 of the Annex III to the KIAC Rules of Arbitration 2012 fixes the minimum standards for KIAC panel of domestic arbitrators:

- Educational degree(s) and/or professional license(s) appropriate to your field of expertise
- At least five(5) years post qualification experience;
- Have undertaken a recognized course of study in the law and practice of arbitration and/or have been at least qualified Associate Membership of the Chartered Institute of Arbitrators or any comparable professional arbitration Institute;
- Experience as an arbitrator in two or more cases;
- Membership in a professional association(s);
- Aged between 30 and 70 years.

The criteria to be member of the KIAC Panel of International arbitrators are set by Article 2 of the Annex III to the KIAC Rules of arbitration 2012:

- Education degree(s) and or professional license(s) appropriate to your field of expertise,
- At least ten (10) years post qualification experience or senior-level business or professional experience,
- Be fellow of Chattered Institute of Arbitrators or any comparable professional arbitration institute,
- Experience as an arbitrator in five or more cases,
- Membership in professional association(s),
- Aged between 30-75 years.

The admission to the KIAC Panel of domestic and international arbitrators is by the invitation from the Chairman of the Board advised by the Secretary General while the application fee is two hundred (200) United States Dollars[70].

3. 3. APPOINTMENT OF ARBITRATORS

In Rwanda, the methods used to appoint arbitrators are:

a. Appointment by Agreement of the parties

A major attraction of arbitration is that the parties submit their dispute to judges of their choice rather than letting such a choice be exercised by a third party on their behalf. Where there is more than one arbitrator, each party chooses one arbitrator, leaving the third arbitrator be

[70] See Articles 3 and 4 of the Annex III to the KIAC Rules of arbitration procedures.

chosen by one of the methods discussed below. In fact, the parties are free to agree on the procedures of appointing the arbitrators[71]. Sometimes, a party seeking to undermine the arbitration will refuse to appoint an arbitrator; or a party-appointed arbitrator will refuse to agree on the third arbitrator. This situation is best avoided by a provision in arbitral agreement, or in the applicable rules, that allows an experienced institution to intervene and make appointment[72]. In *ad hoc* arbitration, the *lex arbitri* [Rwanda] provides that in case the parties default in appointing an arbitrator, the competent court, for the purpose of this case the Commercial High Court, shall appoint one[73].

Although in most cases, the Rwandan court will make such appointment, it may not have a sufficiently international perspective to make a suitable appointment in an international case. As proned by BLACKABY, N. et al.,[74]it is wise to ensure that there is a fallback position in the clause, either through choosing an institutional arbitration or experienced appointing authority [non-existent in Rwanda] in the case of an *ad hoc* arbitration which will take responsibility for the appointment of the remaining arbitrators.

b. Appointment by arbitral institution

The appointment by arbitral institution is carried out in Rwanda by Kigali International Arbitration Centre. The KIAC Rules of arbitration 2012 provides that if a party fails to nominate the arbitrator, the Centre shall appoint the arbitrator[75]. The arbitral tribunal may be composed of a sole arbitrator or three arbitrators appointed by either parties to arbitration or KIAC in line with articles 13, 14 and 15 of the KIAC Rules of arbitration 2012.

c. Appointment by the court and chair by co-existing arbitrators

This procedure is not recognized by both the KIAC Law 2011 and the KIAC Rules of arbitration. However, for *ad hoc* arbitration, the procedure still applies. In this regards, the Article 13 of the LAC 2008 reads:

> In case an arbitration tribunal must be composed of three (3) arbitrators, each party who sought assistance of an arbitrator shall choose one arbitrator, and the two arbitrators thus shall chosen the third arbitrator; if a party fails to choose the arbitrator in a period not exceeding fifteen (15) days from receipt of a written request sent by the yet chosen arbitrator, or if the two arbitrators fail to agree on choosing the third arbitrator within fifteen (15) days after their appointment, the appointment shall be made, upon request of a party who sought assistance of the arbitrator, by the court specified in Article 7 of this Law. In case the arbitrator is one, and the parties who sought assistance from the arbitrator fail to agree over him or her, the arbitrator shall be appointed by the court mentioned in Article 8 of this Law, upon request by one of parties.

4. SUBSTANTIATION ON INTERNATIONAL ARBITRATION

International arbitration has become the main method to settle international disputes between States, individuals and corporations in various aspects of international trade,

[71] For further clarifications, read Article 13 of the LAC 2008 and Article 12 of the KIAC Rules of arbitration.
[72] Article 12 KIAC Rules of arbitration 2012.
[73] See Article 13 of LAC 2008.
[74] BLACKABY, N., et al., *op. cit.*, p. 252.
[75] Article 12 of KIAC Rules of arbitration 2012.

energy and mining, construction, investment, international public and private contracts, commerce, etc.

4. 1. AN INSIGHT ON INTERNATIONAL ARBITRATION IN RWANDA

Rwanda has adopted international arbitration to accommodate the aforementioned particular areas of dispute settlement. In this vein, several laws were enacted:

- New York Convention on the recognition and enforcement of foreign arbitral awards 1958;
- Law N° 51/2010 of 10/01/2010 establishing the Kigali International Arbitration Centre and determining its organization, functioning and competence;
- Law N° 005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters;
- Ministerial Order N°16/012 of 15/05/2012 determining arbitration rules of Kigali International Arbitration Center.

4. 1. 1. Meaning of 'international' arbitration

Under Article 3 of LAC 2008, arbitration is international if:

a) the parties to an arbitration […] have, at the time of the conclusion of that agreement, their places of business in different States, of which one shall include the Republic of Rwanda;
b) one of the following places is situated outside the State in which the parties have their places of business:

   - the place of arbitration […] if determined in, or pursuant to, the arbitration or […] agreement;
   - any place where a substantial part of the obligations of the commercial relationship is to be performed ;
   - the place with which the subject-matter of the dispute is most closely connected;

c) the parties have expressly agreed that the subject-matter of the arbitration […] agreement relates to more than one country.

The wide interpretation of this definition suggests that under Rwandan law 'international' arbitration refers to disputes involving a 'foreign element'. This means, the arbitration may be qualified 'international' even if the arbitration agreement was entered into between nationals of the same State provided they have expressly agreed that the subject-matter of the arbitration […] agreement relates to more than one country. The link of the dispute with the nationality of the parties is also evoked. It involves the review of nationality, residence, place of transactions, etc for which an arbitration agreement is made.

In Rwanda, the only accepted arbitration is arbitration in 'commercial matters'. It follows that the Article 2 of the Organic Law N°06/2012/OL of 14/09/2012 determining the organization, functioning and jurisdiction of commercial courts defines commercial matters as 'commercial, financial, fiscal and other related matters'[76]. This definition is a bit

[76] Rwanda precises commercial matters in the Article 2 of the Decree of August 1913 which cites the commercial acts. This decree however needs to be updated or repealed to match the current trend in commerce.

incomplete. I would therefore suggest Rwanda adopts the definition given under Article 1 of the UNCITRAL Model Law on International Commercial Arbitration 2006:

> The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

4. 1. 2. Seat of international arbitration

For *ad hoc* arbitration, the seat of arbitration is determined by the parties to arbitration and in case of default, Rwanda will be the place of arbitration under the provisions of Article 32 of the LAC 2008. The very principle is not applicable to the institutional arbitration. Though in principle the parties to arbitration are free to choose the seat of Arbitration as of Article 23 of KIAC Rules of arbitration and failure of which the Centre determines one, the Arbitral Tribunal may hold hearings in a place it deems to be convenient. In this case, if elsewhere than the seat of the arbitration, the arbitration shall be treated as arbitration conducted at the seat of the arbitration and any award as an award made at the seat of the arbitration for all purposes. However, in case the seat of arbitration is Rwanda, the sole competent institution to administer the arbitration must be the Kigali International Arbitration Centre[77]. I view this article as being not arbitration friendly though since it restricts the operation of other arbitration institutions in Rwanda. It is advisable that thus article be modified so that the arbitration in Rwanda could be friendly to accommodate other institutional arbitrations.

It follows for example that if parties agree on ICC arbitration with the seat of arbitration in Rwanda, the award rendered will be annulled and not enforceable in Rwanda. The set aside and non-enforcement of the award is justified under the provisions of Articles V (2) of the New York Convention 1958 and 51 (2°) (b) of the LAC 2008 which provide that recognition and enforcement of the award may be refused if the court finds out that the recognition or enforcement of the award is against the public policy of the Republic of Rwanda.

4. 2. QUALITIES OF INTERNATIONAL ARBITRATOR

Under Rwandan arbitration laws, any natural person may act as an arbitrator the only requirement being that this person has capacity[78]. In principle, 'No person shall be denied by reason of his or her nationality from acting as an arbitrator, unless otherwise agreed by the parties to the arbitration agreement' under the provisions of Article 13 of the LAC 2008. The experience and the knowledge of the subject-matter may also prove crucial to qualify the arbitrator.

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[77] See Article 5 of the Law on KIAC 2011.

[78] The capacity here refers to 'capacity in general': the age must be more than 16 years [Article 176 (2) (1°) of the Law N° 07/2009 of 27/04/2009 regulating companies, *O.G.* N° 17 bis of 27/04/2009], s/he must not be insane, interdicted

4. 2. 1. Restriction by the contract

As discussed by BLACKABY N. et al[79], I am of the view that in Rwanda some standard forms of international contracts, and in particular those used in shipping, commodity trades and the insurance and reinsurance industries, identify the kind of arbitrator to be chosen in the event of dispute. For *ad hoc* arbitration, the parties can choose any qualified arbitration from any panel of arbitrators throughout the world. However, Rwanda institutional arbitration works with the panel of International Arbitrators of KIAC and therefore limits the parties to follow their will.

For particular types of contract, the KIAC may appoint particular arbitrators. It follows that under the Law on KIAC 2011:

> International committee of arbitrators may be appointed on matters relating to international trade, international insurance, international investment and construction, administrative contracts on international commerce and finance entered into between public institutions and the private sector operators and such other fields as the Centre may deem expedient.

In general terms, it is not advisable to establish a list of arbitrator qualifications since there may not be someone who fulfils those criteria and is available to act as arbitrator at the time a dispute arises, with the corresponding risk that arbitration clause will be inoperable. Much attention however, should be put on the language of the arbitration.

4. 2. 2. Restriction by the law

There is no limitation as for *ad hoc* arbitration. However, KIAC Rules of arbitration 2012 sets for International Arbitrators on its panel some restrictions[80]:

- Education degree(s) and or professional license(s) appropriate to your field of expertise,
- At least ten (10) years post qualification experience or senior-level business or professional experience,
- Be fellow of Chattered Institute of Arbitrators or any comparable professional arbitration institute,
- Experience as an arbitrator in five or more cases,
- Membership in professional association(s),
- Aged between 30-75 years.

The problem with these restrictions is that there are broad and confusing. The Centre is strongly advised to remove these restrictions and set down clear and flexible restrictions.

4.2.3. Professional qualification

In appointing an International Arbitrator, C. T. SALOMON laid some criteria: [choose] Arbitrator with legal and professional expertise, Impartial but Known Party-appointed Arbitrator and Neutral Presiding Arbitrator, Arbitrator who manages people well, Arbitrator who demonstrates communicative proficiency and judicial open-mindedness, arbitrator

[79] N. BLACKABY et al., *op. cit.*, pp. 258-259.
[80] Article 2 of the Annex III to the KIAC Rules of Arbitration 2012.

with a manageable caseload[81]. For a sole arbitrator, it is always suitable to appoint a lawyer since even when the dispute is relatively simple, difficulty relating to procedure and conflict of laws do arise. These are problems a lawyer with suitable procedural and legal experience is generally better equipped to handle than a person whose expertise lies in another area.[82] For Arbitral tribunal constituted of three arbitrators, it is better one arbitrator be a lawyer [preferable the presiding arbitrator] or at least a person who has considerable experience as arbitrator in international dispute since someone will need to understand how to drive the process forward. This discussion is corroborated by Article 14 of the Law on KIAC 2011:

> The committees set up under this Article shall be composed of persons who, in the opinion of the Centre, are qualified to carry out duties and functions of arbitrators in a particular field of expertise.

4.2.4. Independence and impartiality of arbitrators

The arbitrator must be impartial and independent and his/her independence and impartiality must be maintained throughout the proceedings[83].

a. Independence and impartiality in Rwandan arbitral law

The impartiality and independence play a major role in the appointment of an arbitrator whether an *ad hoc* or an *institutional* arbitrator.

The KIAC Rules of arbitration precise under its article 16 that an arbitrator shall be and remain independent and impartial and shall not act as an advocate of the parties while the Centre, in appointing or confirming arbitrators, shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such consideration as are likely to secure an impartial and independent arbitrator. The concept of independence is related to the personal connection or relationship between the arbitrator and the parties or their counsel-personal, social and financial[84]relationship. In the view of B. M. BASTIDA, the stronger the connection between the arbitrator and one of the parties, the less independent the arbitrator is[85].

In choosing the arbitrator as of independence, the KIAC shall consider also the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or other arbitrators are nationals[86].

Rwandan law, without clearly defining the concept 'impartiality' considers it as a ground for disqualification of an arbitrator. The law does not distinguish the independence from impartiality while defining the appropriate test. I can therefore interpret the law as considering both of the two qualities as appropriate test.

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[81] C. T. SALOMON, 'Selecting an International Arbitrator, Five Factors', in *MEALEY'S International Arbitration Report 2002*, Vol. 17 #10, (Commentary), pp. 1-4, available at http://www.arbitralwomen.org, accessed on 12-01-2013.

[82] N. BLACKABY et al., *op. cit.*, p. 260.

[83] Article 14 of the LAC 2008.

[84] A. REDFERN and M. HUNTER.,*Law and Practice of International Commercial Arbitration*, London, Sweet & Maxwell, 2003, pp. 212-213, Article 16 of KIAC Rules of arbitration 2012.

[85] B. M. BASTIDA, 'The Independence and Impartiality of Arbitrators in International Commercial Arbitration, in *e-Mercatoria*, Vol. 6, N° 1, 2007, p. 4.

[86] Article 16 of KIAC Rules of arbitration 2012.

b. Challenge and replacement of arbitrators

The article 14 of the LAC 2008 reads:

> When parties to the conflict approach a person with an intention to appoint him or her as an arbitrator, he or she shall disclose all justified circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. From the time an arbitrator is appointed and throughout the arbitral proceedings, he or she shall disclose any such circumstances to the parties unless he or she had informed them earlier.

The provisions of this article highlight that each arbitrator and [prospective arbitrator] has the obligation to disclose material facts which may influence any reasonable person against one of the parties. The disclosure is also an ongoing obligation throughout the arbitral process. However material facts which have been previously disclosed to the parties cannot be held to be grounds for disqualification. In this vein therefore, an arbitrator may be challenged only if circumstances that exist give rise to justifiable reasons as to his or her impartiality or independence, or if he or she does not possess qualifications agreed to by the parties to the agreement. One of the parties who sought assistance from the arbitrator may challenge him, or an arbitrator in whose appointment he or she participated, basing only on reasons of which he or she knew after his or her appointment.

If a challenge under any procedure agreed upon by the parties is not successful, one of the parties that sought assistance from arbitration may request, within fifteen (15) days after having received notice of the decision rejecting the challenge, the competent court[87] to decide on the challenge, and the decision shall be subject to no appeal[88].

5. POWERS, DUTIES AND JURISDICTION OF AN ARBITRAL TRIBUNAL

In arbitration and particularly in international arbitration, the powers, duties and jurisdiction of an arbitral tribunal arise from a complex mixture of the will of the parties, law governing the arbitration agreement, the *lex arbitri*, law of the contract, and the law of the place where recognition and enforcement will be sought.

5. 1. POWERS OF ARBITRAL TRIBUNAL

The powers of an arbitral tribunal are those conferred by the parties and the law.

5. 1. 1. Powers conferred by the parties

The arbitration is a privately owned system to settle disputes. The parties are in charge of both the dispute and the proceedings. They alone know the disputed issue, establish the facts and advance the law. It is the parties who set the arbitral tribunal; it is 'their' arbitral tribunal. In a well-structured arbitration especially international arbitration, the conduct of proceedings moves smoothly from parties to arbitral tribunal. As the proceedings move on, the arbitral tribunal acquires knowledge of the fact and law for the dispute at hand. The powers may be conferred by parties to arbitral tribunal 'directly' or 'indirectly' but within the limits of law.

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87 This is the court specified in Article 8 of the LAC 2008 which must be a 'commercial court'.

88 Article 15 of LAC 2008.

A direct conferment of powers takes place when the parties agree expressly upon the powers they wish the arbitrators to hold possibly by setting them out in terms of appointment, or some other special agreement such as special agreement. An indirect conferment of powers to the contrary takes place when the arbitration is conducted according to rules of arbitration whether institutional or *ad hoc* which set out the powers of the arbitral tribunal. In the case of KIAC, some of these powers may be conferred to the Centre or the KIAC arbitral tribunal itself. For example, the place of the parties is determined by the parties and failure to that, the Centre fixes the place unless the Arbitral tribunal determines that another seat is appropriate having regards to the circumstances of the case[89].

5. 1. 2. Powers conferred by law

The powers conferred by the parties to the arbitral tribunal are not mandatory. They fall short over the powers exercised by the court by the operation of law. The parties cannot confer the coercive powers to ensure obedience to their orders. Rwandan law supplements the powers of arbitral tribunal by authorizing national courts to exercise powers on behalf of the arbitral tribunal. Under Article 50 and 51 of the LAC 2008, the court in charge of affixing enforcement formula on the awards has the powers to render it coercive. To this effect and under the law, the President of the Supreme Court of Rwanda issued the Order N°002/2012 of 24/10/2012 determining the in charge of affixing the enforcement formula and public auction during the enforcement of awards. This order provides:

> The enforcement formula on the award shall be affixed by the competent court if the arbitration did not take place [article 2] while the President of the Commercial court orders the public auction in this respect [article 6].

This means that the competent court in this regards should necessarily be a 'commercial court' since the only recognized arbitration in Rwanda is 'commercial arbitration'. Consequently the arbitral tribunal loses the powers in case the issues at dispute concern matters that are necessarily governed by the [traditional] court such as bankruptcy or which are against the public policy and good morals and which are not necessarily commercial.

5. 2. JURISDICTION OF AN ARBITRAL TRIBUNAL

The arbitral tribunal is competent to handle the dispute submitted by the parties and to rule on its jurisdiction.

5. 2. 1. Competence

Decision over the dispute submitted by the parties: The powers of an arbitral tribunal to rule over the case are limited to the 'dispute' submitted to them by the parties. This is a direct and proper consequence of private nature of arbitration. The authority of the arbitral tribunal comes from the agreement of the parties which is its unique source and the tribunal must act in accordance with their mandate.

Competence to rule on its own jurisdiction: The arbitral tribunal may examine and rule on its own jurisdiction, including any objections with respect to the existence or the validity of the

[89] Article 23 of KIAC Rules of arbitration 2012.

arbitration agreement[90]and its decision to annul the contract shall not mean the invalidity of arbitration clause. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

5. 2. 2. Additional competence

The Article 32 of KIAC Rules provides that unless the parties at any time agree otherwise, and subject to any mandatory limitations of any applicable law, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a proper opportunity to state their views, to:

1. Determine what are the rules of law governing or applicable to any contract, or arbitration agreement or issue between the parties;
2. order the correction of any such contract or arbitration agreement, but only to the extent required to rectify any mistake which it determines to be common to all the parties and then only if and to the extent to which the rules of law governing or applicable to the contract permit such correction:
3. allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes between them;
4. allow any party, upon such terms (as to costs and otherwise) as it shall determine, to amend claims or counterclaims;
5. conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient;
6. order the parties to make any property or thing available for inspection, in their presence, by the Arbitral Tribunal or any expert;
7. order the preservation, storage, sale or other disposal of any property or thing under the control of any party;
8. order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession or power which the Tribunal determines to be relevant.

6. ARBITRAL PROCEEDINGS

Arbitration may be conducted in many different ways though the principle is that the rules of procedure be determined by the parties to arbitration. They determine the rules of procedure, the place and the language of procedure. The arbitral tribunal also does intervene in the conduct of proceedings especially in the application of the principle of equal treatment.

6. 1. PARTY AUTONOMY

The party autonomy is guiding principle in the determination of the rules of procedure applicable to arbitration be it *ad hoc* or institutional. In *Ad hoc arbitration,* the detailed procedures are set down by the parties but they shall not be inconsistent with the rules of procedure provided for by the LAC 2008[91]. For institutional arbitration, the KIAC Rules of the procedure 2012 shall govern the proceedings and in case of default, the rules provided in the agreement of the parties[92].

[90] See Article 18 of the LAC 2008 and Article 31 of the KIAC Rules of arbitration 2012.
[91] See Article 31 of the LAC 2008.
[92] See Article 25 of the KIAC Rules of arbitration 2012.

6. 2. LIMITATIONS ON THE PRINCIPLE OF PARTY AUTONOMY

The principle of equal treatment, public policy and rules of arbitration are the major limitations to the principle of party autonomy.

i. Equal treatment: This principle is almost as important as the principle of party autonomy. It is given express recognition by the New York Convention[93], the KIAC Rules of arbitration 2012[94] and the LAC 2008[95]".

ii. Public policy: The powers conferred to the arbitral tribunal must not be inconsistent with the public policy of Rwanda. One of the mandatory rules which were already discussed for example is the principle of fair hearing whose respect of this principle is requested by the Article 30 of the LAC 2008 "…each party shall be given full opportunity of presenting his or her defence".

iii. Arbitration rules: Limitations may also be set by the operation of the arbitration rules. Some of these provisions are provided in the LAC 2008:

- under Article 30 "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his or her defence";
- under Article 36 "…unless otherwise agreed by the parties that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by one of the parties.
- under Article 35, there must be one consecutive exchange of submissions (a 'statement of claim' and a 'statement of defence') which must have some features;
- under Article 38, if the tribunal appoints an expert, it must give the parties the opportunity to question that expert at a hearing and to present expert witnesses in order to testify on the points at issue.

7. RECOGNITION AND ENFORCEMENT OF AWARDS

An award is a decision rendered by the arbitral tribunal. In this regard, specific rules apply to the substance and procedure. Once made, it must be recognized and enforced.

7. 1. MAKING OF AN AWARD AND TERMINATION OF THE PROCEEDINGS

The award is the decision made by the arbitral tribunal.

7. 1. 1. Award

Under the Article 40 of the LAC 2008, the arbitral tribunal shall decide the dispute in accordance with the rules as chosen by the parties and failure to choose by the parties, Rwandan law shall apply. The very provisions were reproduced by Article 27 of the KIAC Rules of arbitration 2012 with some nuances:

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[93] See Article V (1)(b) which reads: "Recognition and enforcement of the award may be refused…if…the party against whom the award was made…was unable to present his case".

[94] See Article 28 which reads: "In all cases, the Arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case".

[95] See Article 30.

'The parties shall be free to agree upon the rules of law to be applied by the Arbitral tribunal to the substance of the case. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. The Arbitral tribunal shall take into account of the provisions of the contract between the parties if any, and any relevant usages of trade. The Arbitral Tribunal shall decide as "*amiable compositeur*" or "*ex aecquo et bono*"only if the parties have expressly authorized the Arbitral tribunal to do so'.

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members although questions of procedure may be determined by the Presiding judge if so authorized by the parties or other arbitrators[96]. The Article 38 of KIAC Rules of arbitration 2012 reproduces the same idea but with some add-ons. In fact it regulates the situation where there was no agreement between the arbitrators and in this case the Presiding arbitrator makes the award. This article also gives powers to the Secretary General of the KIAC to intervene in the award making process:

Before issuing any award, the Arbitral tribunal shall submit it in a draft form to the Secretariat within forty-five (45) days of the closing of the proceedings unless the Secretariat extends this time. The Secretariat may as soon as practicable suggest modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be issued without approval of the Secretary General as to its form.

7. 1. 2. Form and contents of award

Under Article 43 of the LAC 2008, the award shall be in writing and shall be signed by arbitrator(s) who also mention(s) the reasons they base on while deciding unless the award is made following the agreement of the parties. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice and the reason for any omitted signature stated. The award shall state the place and date of arbitration as provided under Article 32 of the LAC 2008 and a copy shall be issued to the parties.

7. 1. 3. Termination of arbitral proceedings

The arbitral proceedings are terminated by the pronouncement of the decision in substance or by an order of the arbitral tribunal in the circumstances provided under Article 44 of the LAC 2008:

The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

1. the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
2. the parties agree on the termination of the proceedings;
3. the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

[96] Article 41 of LAC 2008.

7.1.4. Appeal against award

Under the Article 46 of the LAC 2008, sole the domestic awards can be subject to appeal. This appeal shall be filed upon the observation of the justifications set down in the Article 47 of the LAC 2008. Appeal against an international award is immaterial.

Under Article 48 of the LAC 2008, an application for dissolving an award decided by arbitrators shall not be made after thirty (30) days from the date on which the party making that application was notified of the award or, if a request was submitted in accordance with Article 45, from the day on which the arbitral tribunal pronounced the award on such a request.

7. 2. RECOGNITION AND ENFORCEMENT OF AWARD

Unlike in mediation and other methods of alternative dispute resolution, the purpose of arbitration is to reach a binding decision. The decision is made in the form of award and is enforceable.

7. 2. 1. Recognition and enforcement under the New York Convention

Rwanda is party to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958[97] which is the most important international convention providing for the recognition and enforcement of arbitration agreements and awards.[98]Under article II (1) of this convention, states are obliged to recognize an agreement in writing under which the parties undertake to submit to arbitration differences arising out of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. Accordingly, Rwanda must enforce the foreign arbitral awards.

In enforcing the 'foreign awards', the New York Convention adopts a strikingly international attitude under its Article I (1):

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

This article is of international approach in the sense that Rwandan is bound to recognize and enforce foreign arbitration awards regardless the fact they are made in the New York Convention signatory State or not. However, the Convention atones this international approach with the principle of reciprocity and commercial relationships under Article I (3):

> When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards *made only* in the territory of another Contracting State. It may also declare that it will apply the Convention

[97] Rwanda acceded to the United Nations Convention on the Recognition and Enforcement o Foreign Arbitral Awards on the 3rd November 2008.

[98] H. BOOYSEN, *op. cit.*, pp. 787-788.

only to differences arising out of le, al relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Rwanda takes full advantage of the principle of reciprocity limiting in this regards the scope of the New York Convention to the 'Convention awards'.

7. 2. 2. Recognition and enforcement of the awards under the LAC 2008

Rwanda recognizes and enforces the awards made in the countries which recognizes and enforces the awards made in Rwanda under the provisions of Article 50 LAC 2008:

> An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and without prejudice to provisions of this Article as well as Article 51 of this Law. However, this shall not be respected if the country in which the award was issued does not respect the provisions of this paragraph with reference to cases decided in Rwanda. The enforcement and recognition of awards under Article 50 and 51 of the LAC 2008, requires the court to affix on them the enforcement formula. In this regards, the President of the Supreme Court of Rwanda issued the Order N°002/2012 of 24/10/2012 determining the in charge of affixing the enforcement formula and public auction during the enforcement of awards.

For example, if a German company has got an Award in ICC-arbitration seated in Switzerland, asking a Rwandan company to pay 100,000 USD; once Switzerland recognizes and enforces Awards made in Rwanda, the German company will apply [in writing] for the enforcement formula to the President of the High Commercial Court. The latter will examine the recognition and enforceability of the award and order the affix of the enforcement formula or not. The process has already been applicable since 2008.

In an interview I conducted with the Chief Registrar of the Commercial High Court, she told me the court recently affixed the enforcement formula on the award of an *ad hoc arbitration* of 24/05/2012 made in the case *Raicon Rwanda Ltd vs Real Contractors Ltd*.

CONCLUSION

Both *ad hoc* and institutional arbitrations are recognized in Rwanda and do serve in commercial transactions.

The arbitration *per se* is not developed in Rwanda. The *ad hoc* arbitration, though applicable in some cases, it is not publicized. It is therefore hard to have some records thereof although some advocates affirmed that they did participate in these procedures. The institutional arbitration has been recently introduced with the creation of the Kigali International Arbitration Center. The Center is the sole agency to administer the arbitration in Rwanda.

The Center has started receiving cases but it is not yet to constitute an arbitral tribunal. According to the Registrar of the Center, NGOGA Thierry, this is due to the ill formulated arbitration agreements. However, the fact that the Kigali International Arbitration Center is the sole agency to administer arbitration in Rwanda is not arbitration friendly. It is therefore advisable to modify this provision and let other arbitral institutions being involved in the arbitration process.

Both national and foreign awards are recognized and enforced in Rwanda; the enforcement formula being affixed by the President of the court which should have been competent to try the matter in arbitration. For foreign arbitral awards, however, the principle of reciprocity is pronedby the law. This means, Rwanda cannot enforce the awards rendered in countries which do not recognize the awards rendered in Rwanda.

All in all, the arbitration is no longer a myth in Rwanda. It has a strong back up from the Government which continuously allocates resources–human and material for the better existence of arbitration. The costs and other procedures are being rendered fairer by this support.

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BALANCE OF POWER BETWEEN EXECUTIVE, LEGISLATURE AND JUDICIARY IN THE REPUBLIC OF RWANDA AND UGANDA

By **Richard Kayibanda** *

INTRODUCTION

In history of mankind there were, since time immemorial, different forms of governing the society. They range from those in which powers were concentrated in a single authority (monarchies, tyrannies and dictatorships) to those where all the people can participate in the government of their society (democracies). But, nowadays, many countries all over the world have opted for separation of the legislature, executive and judicial powers to prevent power from being overly concentrated in one arm of government[99] and thereby its abuse. The doctrine of separation of powers divides the government into three branches; namely the legislature, the executive and the judiciary. Generally, the legislature enacts the laws, the executive ensures the implementation of laws made by the legislature and the judiciary interprets them while adjudicating litigations. Powers and functions of each of three institutions are separate.

It is worthy to have a flashback on the origin (or the background) of the separation of power. The division of government into three main branches can be traced back to Aristotle who stated, basing on his study of Greek city states, that there are, in Politics, three main governmental agencies: the general assembly, deliberating upon public affairs; the public officials and the judiciary[100]. However, it first came into widespread use by the Roman Republic where it was outlined in the Constitution of the Roman Republic[101] even though some authors affirm that there was no complete differentiation in functions[102].

In seventeenth century an English philosopher John Locke advocated for separation of powers by noting the temptation of corruption where the same persons who have the powers of making laws have also in their hands the power to execute them[103]. The doctrine of separation of powers was further developed by the French philosopher *Baron de Montesquieu* in his *Esprit des Lois* (1748) and, later on, Blackstone in his *Commentaries* (1765) by putting forward the idea that where the three powers are united in the same person or body there can be no liberty[104].

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99 G. SPINDLER, « Separation of Powers: Doctrine and Practice » available at http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/E88B2C638DC23E51CA256EDE00795896, accessed on July 07, 2010.

100 J. A. FAIRLIE, « The Separation of Powers », in *Michigan Law Review*, Vol. 21, N° 4 (Feb., 1923), pp. 393-436.

101 See Separation of Powers in The Free Dictionary available at http://encyclopedia.thefreedictionary.com/Separation+of+powers, accessed on 10/07/2010.

102 See J. A. FAIRLIE, « The Separation of Powers », in *Michigan Law Review,* Vol. 21, N° 4 (Feb., 1923), pp. 393-436.

103 John Locke, *Second Treaties of Civil Government* in G. SPINDLER, « Separation of Powers: Doctrine and Practice » available at http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/E88B2C638DC23E51CA256EDE00795896, accessed on July 07, 2010.

104 See J. A. FAIRLIE, « The Separation of Powers », in *Michigan Law Review*, Vol. 21, N° 4 (Feb., 1923), pp. 393-436.

However, throughout ages, there was, repeatedly, opposition to the complete and absolute separation of powers which may lead to corruption, excess of power and tyranny resulting from unchecked power of each agency of government[105]. Thus, advocacy for the system of shared power: checks and balances. Each of three branches has certain powers and each of these powers is limited or checked by another branch[106]. A sound system of checks and balances exists, indeed, to ensure that there is interaction between all the three, on one side, and effective controls, on the other side[107].

Both the principle of separation of powers and of checks and balances are also contemplated, explicitly or implicitly, in constitutions of African countries including, among others, Rwanda and Uganda. Thus, this research paper is intended to carry out a comparative study of balance of powers under Ugandan and Rwandan law in order to find out what one country can learn from the other so as to improve their respective constitutions to fully promote the rule of law. This article will focus on constitutional provisions dealing with the balance of power between three branches in the two East African countries but with a quick look on what happens in practice. This work will comprise three major parts discussing respectively the relationship between the legislature and the executive, the executive and the judiciary and, finally, the legislature and the judiciary.

I. THE LEGISLATURE AND THE EXECUTIVE

In the system of checks and balances the legislature and the executive have powers to check and limit each other. This is done in different ways discussed below within a comparative perspective of what happens in the two countries under scrutiny. Focus shall be on the president's power to veto laws, the parliament's power to approve presidential appointments, parliamentary oversight of government's activities as well as the presidential power to dissolve the parliament.

I.1. PRESIDENT'S POWER TO VETO LAWS

In both Rwanda and Uganda the parliament is vested with the power to make laws[108]. In addition, in the two countries, a bill passed by the parliament must be assented to by the president of the Republic before it becomes a law[109]. Thus, he or she can request the parliament to reconsider the bill. This prerogative was effectively used by President Paul KAGAME when, in 2009, he sent back to the parliament for reconsideration the Media Bill which had already passed by parliamentarians.[110]

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[105] See Madison, *Federalist Paper* cited in J. A. FAIRLIE, *op. cit*. and G. SPINDLER, *op. cit.*

[106] See http://www.usconstitution.net:consttop_sepp.html, accessed on July 2, 2010.

[107] H. RUBASHA, *Constitutional Law and Political Institutions*, Study Manual, NUR, 2009, p. 72; see also P. NAMTVEDT, "Can Government be limited?", available at http://www.reasontofreedom.com/can_government_be_limited.html, accessed on July 2, 2010.

[108] Art. 62 of the Constitution of the Republic of Rwanda of 4th June 2003 as amended to date, *O.G.* no special of 4th June 2003 (hereinafter Constitution of Rwanda) and art. 79 of the Constitution of the Republic of Uganda of 1995 as amended to date (hereinafter the Constitution of Uganda).

[109] See articles 108 and 91 of the Constitution of Rwanda and Uganda respectively.

[110] See IFEX, "President sends media bill back to Parliament", available at <http://www.ifex.org/rwanda/2009/05/27/kagame_rejects_media_bill/>, accessed on 10/11/2010. Among clauses that the president wanted to be amended there a clause on who should be a journalist which he accused to be discriminative since it set out limitations on education level would leave behind many people with potential to practice the profession. He thus advised to require instead relevant training to practice journalism.

However, the Constitution of Uganda is clear on different alternatives the parliament can resort to when the president does not react or refuses to assent to the bill presented to him while it is not the case in Rwanda.

In Uganda, when the bill is presented to the president for assent he or she must assent to it, return it for reconsideration or notify the speaker in writing that he or she refuses to assent to the bill. The president can return the bill for the second time and if passed again with the majority of two thirds, the bill becomes law without the assent of the president.

When the president refuses to assent to the bill, the latter may be reconsidered by the parliament and presented again for assent. In case this bill passes with the support of two thirds as well as in case the law reconsidered for the second time passes with the same support and the president refuses to assent to it, it becomes law without his or her assent. Even in the event the president does not act within the time limit prescribed he or she is taken to have assented to the bill. Therefore, at the expiration of this period the bill becomes law without the assent of the president[111] or at least with the implied assent of the latter.

The constitutional provision on the matter in Rwanda; viz article 108 of the Constitution only says that the president promulgates the draft law presented to him within thirty days or may ask the parliament to reconsider the draft law. If the parliament adopts the law returned for reconsideration by a majority of two thirds in case of ordinary law and three-quarters in case of organic law the president promulgates them[112]. The meticulous analysis of the aforesaid provision reveals that it is silent on what shall happen if the president refuses to assent to the draft law without asking the parliament to reconsider it or in case he or she does not promulgate the law within the prescribed time limit. Shall the inaction be considered as an assent to the draft law? Shall it be considered as a refusal?

In my view, this is a vital issue which cannot be interpreted anyhow. May be, in case the president refuses to promulgate the law without taking any other action within the time limit prescribed by the constitution, he/she can be prosecuted for breaching the constitution. However, this does not solve the problem of the fate of the draft law. Thus, the necessity for precision in the constitution of Rwanda as it is the case in Ugandan constitution.

I.2. PARLIAMENT'S POWER TO ADVICE AND CONSENT TO PRESIDENTIAL APPOINTMENTS

The checks and balances between the legislature and executive is concretized among others through the power of the parliament to advise and approve the presidential appointments. In Rwanda, the president appoints some officials after the approval of the Senate which is the upper chamber of the parliament. These include president and vice-president and judges of the Supreme Court[113], president and vice-president of the High Court[114] and the Commercial High Court[115]as well as the prosecutor general and the deputy prosecutor general[116].

[111] See art. 97 of the Constitution of Uganda.
[112] Art. 108 par. 3 of the Constitution of the Rwanda.
[113] Art. 147 and 148 of the Constitution of Rwanda.
[114] *Idem*, art. 149.
[115] *Idem*, art. 155 bis.
[116] *Idem,* art. 161.

Likewise, the President of Uganda has power to appoint some officials after approval by the parliament. It is the case, for instance, for the director of public prosecutions[117], chief justice, deputy chief justice, the principal judge, justices of the Supreme Court, a justice of appeal, and a judge of the High Court[118].

However, some presidential appointments are subjected to parliament's approval in Uganda while they are not in Rwanda. For example the attorney general who is, in both countries, at the same time the minister of justice but subjected to parliament approval only in Uganda.[119] Moreover, in Uganda the appointment of cabinet ministers by the president must be approved by the parliament (article 113 of the Constitution of Uganda) while it is not the case in Rwanda (art. 117 of the Constitution of Rwanda). This, in my view, tends to overemphasize the control of the parliament over the executive. There is no vital need for this since the parliament can control the government through the accountability of the latter before the former as discussed below.

It follows from the above developments that in the two countries, power between the legislature and the executive is checked and balanced in both countries through some presidential appointments subjected to the parliament's approval or advice.

I.3. Parliamentary oversight of Government Activities

The cabinet responsibility is engaged either by the question of (motion) on a vote of confidence or the motion of no confidence[120]. It is to be highlighted that this inter-branch oversight is considered as a key feature of executive-legislature relations, in which the executive owes to the legislative branch certain obligations and/or information. This oversight is part of the institutional design established to guarantee a certain degree of control against excesses of the executive power, so dear to the checks and balances model[121].

Practically in Rwanda, the parliament (the chamber of deputies as well as the senate) exercise oversight of government action through oral questions, written questions, hearings before committees, commissions of inquiry and for the chamber of deputies through interpellation and motion of no confidence[122]. When a vote of no confidence is passed against a member of the cabinet or the cabinet, the said member or the prime minister respectively must tend resignation to the president of the republic[123]. In the same way, this is done, in Uganda, through the vote of censure[124].

Furthermore, the motion on a vote of confidence is initiated by the prime minister after a deliberation in the cabinet and consists of asking to the lower chamber of parliament (chamber of deputies) to express its confidence to the government either in respect to the government programme or adoption of a bill and in the event a vote of confidence is lost the government resigns[125]. This, however, is not envisaged in Uganda. In my opinion, this is

[117] Art. 120 of the Constitution of Uganda.
[118] *Idem*, art. 142.
[119] *Idem,* art. 119.
[120] H. RUBASHA, *op. cit.,* p. 83.
[121] See L. B. LEMOS, "Legislature oversight of the executive branch in six democracies in latin America", available at <http://www.princeton.edu/~pcglobal/conferences/GLF/lemos_glf.pdf>>, accessed on 15 october 2010.
[122] Art. 128 and 129 of the Constitution of Rwanda.
[123] *Idem,* art. 131.
[124] Art. 118 of the Constitution of Uganda.
[125] Art. 132 of the Constitution of Rwanda.

due to the fact that there is no prime minister and it is the elected president who is the head of the cabinet in this country. This may also be explained by the fact that, in Uganda, cabinet ministers are approved by the parliament contrary to Rwanda where this approval is not contemplated in the Constitution. Nevertheless, should all the ministers act inconsistently with the constitution, the parliament can vote censure for all of them each one individually. In case the president also is concerned, he or she can be removed from office but following special procedures established in the constitution[126].

I am of the same opinion as Jorge Silvero Salgueiro that this control is a constitutional one since it derives from constitutional provisions that limit the power of an organ in some activity or empower it to achieve some other activity under certain conditions[127].

I.4. DISSOLUTION OF PARLIAMENT AND PRESIDENT IMPEACHMENT

Under article 133 of the Constitution of Rwanda, the president of the Republic after consulting the prime minister, both presidents of the chambers of the parliament and the president of the Supreme Court may dissolve the chamber of deputies only once during his/her term of office if there are national interests at stake.

This constitutional provision is not sheltered from criticism. On one hand, the aforesaid provision constrains the parliament to act within limits of the national interest and this is commendable. However, on the other hand, the parliament may be led to serve the interest of the president which may be, in some circumstances, contrary to the general interest for fear of dissolution. Notably, this state of affairs can undermine and hinder totally the power vested with the parliament to vote for filing charges against the president of the Republic in case of high treason or grave and deliberate violation of the constitution.[128] Thus, the constitutional provision designed to make the president abide by the constitution may be devoid of its intended authority.

Even if the upper chamber of the parliament cannot be dissolved on one side, there is a two-third majority vote of each chamber of the parliament to file charges against the president in the aforementioned cases. One may rightly ask what will happen in case the president fears an eventual prosecution and preventively dissolves the lower chamber of the parliament! This is a crucial issue since when the president envisages dissolving the lower chamber of the parliament he/she is only required to consult the prime minister, both presidents of the chambers of the parliament and the president of the Supreme Court rather than seeking their prior approval.

Contrary to Rwandan constitution, under Ugandan constitution the parliament can decide to remove the president from office while he/she cannot dissolve the former.[129] Though the president cannot dissolve the parliament noteworthy is that a member of parliament can be recalled by the electorate of any constituency and of any interest group before the expiry of the term of the parliament[130] for among other misconduct and misbehavior.

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[126] Art. 107 of the Constitution of Uganda.

[127] See J. S. SALGUEIRO, "Constitutional Checks on the Executive" available at <<http://www.law.yale.edu/documents/pdf/Constitutional_Checks_on_the_Executive.pdf>>, accessed on 20 august 2010.

[128] See art. 145, 8° of the Constitution of Rwanda.

[129] See art. 77, 96 and 107 of the Constitution of Uganda.

[130] See art. 84 of the Constitution of Uganda.

II. THE EXECUTIVE AND THE JUDICIARY

Power control and limit between the executive and the judiciary is reflected by the fact that the executive especially the president intervenes in the appointment of judges on one side. On the other side, the judiciary may declare executive's act inconsistent with the constitution.

II.1. APPOINTMENT AND REMOVAL OF JUDGES BY THE PRESIDENT

As discussed above, in Rwanda as well as in Uganda, some judges in high positions are appointed by the president with the approval of the parliament[131].
The president also plays a role in the removal of justices in Uganda as per article 145 of the Constitution of Uganda. On the contrary, in Rwanda the president does not have any power to remove judges from office[132]. Here, in my opinion, the Constitution of Rwanda is fit to promote the checks and balances of power between the judiciary and executive through an emphasized independence of the former. In effect, the impossibility for the president to intervene constitutionally in removing judges from office increases the level of independence of the judiciary from the executive which is vital in checks and balances of power between the two branches[133]. This independence becomes more vitally required when the government (executive) is itself litigant[134].

II.2. CONTROL OF CONSTITUTIONALITY AND LEGALITY OF ACTS OF THE EXECUTIVE

The power of the executive is limited by the judiciary by subjecting this policy making branch to the review by courts for its compliance with the constitution[135]. in the sense that the former (the Supreme Court in Rwanda and the Court of Appeal sitting as the Constitutional Court in Uganda) is empowered to control the constitutionality of acts of the executive in general and specifically of the president[136]. However, it is important to note that under Rwandan law, the laws precise that the Supreme Court may check the constitutionality of among others decree-laws and international treaties and agreements.

In fact, it must be highlighted that the researcher mention the above legal instrument only since the president has authority to legislate by way of decree-laws having the same effect as ordinary laws in case of absolute impossibility of parliament holding session[137]. Furthermore, the president has power to negotiate and ratify some international treaties and agreements[138]

Other acts of executive members like presidential orders and ministerial orders are reserved to the High Court which controls their legality[139].

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131 See art. 147, 148, 149 and 155 of the Constitution of Rwanda and art. 142 of the Constitution of Uganda.
132 See articles 147 and 157 of the Constitution of Rwanda.
133 R. LA PORTA et al., "Judicial Checks and Balances", in *Journal of Political Economy,* 2004, Vol. 112, no 2, pp. 445-470.
134 *Ibidem*
135 *Ibidem*
136 See art. 145 of the Constitution of Rwanda, art. 137 of the Constitution of Uganda and art. 45 of the Organic Law no 01/2004 of 29/01/2004 establishing the organization, functioning and jurisdiction of the Supreme Court as amended to date, *O.G.,* no 3 of 01/02/2004.
137 Art. 63 of the Constitution of the Republic of Rwanda.
138 *Idem,* art. 189.
139 See article 93 of Organic Law no 51/2008 0f 9/09/2008 relating to Organization, Functioning and Jurisdiction of Courts, *O.G.,* no special of 10 September 2008.

III. THE LEGISLATURE AND THE JUDICIARY

The legislature checks on the judiciary by approving the president nominations of judges (justices) and removing them from office. Reciprocally, the legislature's power is counterbalanced by the judiciary through the control of constitutionality of laws made by the legislature commonly know in some countries as the judicial review[140].

III.1. CONTROL OF CONSTITUTIONALITY OF PARLIAMENT'S ACTS AND INTERPRETATION OF THE LAWS

In Rwanda the constitution gives the parliament the power to deliberate and pass laws[141], but the judiciary is vested with the power to check the constitutionality of these laws which it can uphold or overturn in case they are inconsistent with the Constitution.

In fact, the legislature would wish to pursue policies and pass laws that benefit themselves, democratic majorities, or allied interest groups. By the way of constitutional review the judiciary limits these powers and self-serving efforts. Then, the judiciary (courts) rather than legislators become final arbiters of what is law[142].

In this perspective the Supreme Court has jurisdiction to hear petitions on constitutionality of organic laws, laws, decree-laws and international treaties and agreements[143]. Therefore, the court may overturn the entire law or suspend only the provision which is inconsistent with the constitution[144]. The Supreme Court of Rwanda has, in its ruling of 11th January 2008, held that paragraph two of article 121 of the Law nº 13/2004 relating to the code of criminal procedure was inconsistent with the constitution. It was held that the very provision was violating the principle of separation of powers since it gave the judge the power to summon people against whom there are strong evidence they committed a crime when the prosecutor is not willing to prosecute them[145] while the power to prosecute crimes is vested with the National Public Prosecution Authority by article 160 of the Constitution. Thus, the former article was inconsistent with article 160 of the Constitution as it gave the judge to exercise the function reserved by the constitution to the Public Prosecution Authority[146].

Furthermore, the Supreme Court of Rwanda also repealed the first paragraph of article 354 of the Penal Code which provided for different penalties for man and a woman convicted of adultery and was thus inconsistent with the constitutional provision which provides for equality of all people without any discrimination[147]. In addition, the court modified the second paragraph of the very article[148].

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[140] See for instance H. RUBASHA, *op. cit.*, p. 73. He avers that "…judicial review… is the power [of federal courts] to invalidate those actions of the Congress, the executive, and the states that are, in the view of courts, contrary to the constitution".

[141] Article 62 of the Constitution of Rwanda.

[142] R. LA PORTA et al., "Judicial Checks and Balances", *Journal of Political Economy,* 2004, Vol. 112, no 2, pp. 445-470.

[143] Art. 145 of the Constitution of Rwanda.

[144] Supreme Court, Judgment no RS/Inconst/Pén.0001/07/CS of 11/01/2008.

[145] Art. 121 of the Law no 13/2004 of 17/05/2004 relating to code of criminal procedure, *O.G.,* no special of July 30, 2004.

[146] Supreme Court, Judgment RS/Inconst/Pén.0001/07/CS of 11/01/2008.

[147] Supreme Court, Judgment RS/Inconst/Pén.0001/08/CS of 26/09/2008: in this case the Supreme Court declared art. 354 of the Penal Code of Rwanda to be inconsistent with the Constitution of the Republic of Rwanda of 2003 as amended to date since it provides for different punishments in case of adultery basing on sex. Men were leniently punished compared to women.

[148] *Ibid.*

This decision of the Supreme Court however leaves room for criticism. One may rightly ask whether the court did not go far and encroach on the powers of the legislature in modifying the legal provision? In fact, the Constitution of Rwanda is clear on who is vested with the power to legislate, *i.e* the parliament[149] and in case of its absolute impossibility to hold session this power is vested with the president of the republic who promulgates decree-laws with the same effect as ordinary laws[150].

Furthermore, there is no legal provision in the Constitution entitling the constitutional court to act in this regard. In my opinion, the motivation of the court cannot hold since it refers to decisions of constitutional courts of South Africa and Canada respectively[151].

The two countries are, indeed, of common law background and which apply the system of the precedent where the court ruling is a primary source of law and thus has the force of law and binding[152]. Even this system of precedent is questioned, according to Ewoud HONDIUS, when it comes to the justification of the binding force of judgments within the perspective of a separation of powers[153].

The court should have left the situation pending and recommend the legislature to hold a session promptly and fill the vacuum left by the legal provision declared to be inconsistent with the Constitution. Otherwise, the court assumed and took over the legislative power that is clearly vested with the parliament and in exceptional circumstances with the executive specifically the president of the Republic.

In fact, granting to the judiciary the power to declare acts of the parliament inconsistent with the constitution is necessary and enough; but granting to the former also the power to legislate is going a bit far and granting to the judiciary excessive powers. This may undermine principles underlying the checks and balance of power between the legislature and the judiciary.

In Uganda on the other side, also the constitution gives the judiciary the power to check the constitutionality of laws passed by the parliament. This is within the jurisdiction of the Court of Appeal of Uganda which sits also as the Constitutional Court and in this case it can declare an act of parliament or any law inconsistent with the Constitution[154].

Practically, the Ugandan Constitutional Court has also declared some legal provisions and acts inconsistent with the constitution[155]. However, contrary the Rwandan Supreme Court,

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[149] See art. 62 of the Constitution of Rwanda.

[150] See art. 63 of the Constitution of Rwanda.

[151] See Supreme Court, Judgment RS/Inconst/Pén.0001/08/CS of 26/09/2008.

[152] In English law, the concept of precedent in broad sense involves treating previous judicial decisions as authoritative statements of the law which can serve as good legal reasons for subsequent decisions; and in narrow sense, precedent (often described as *stare decisis* requires judges in specific courts to treat certain previous decisions, notably of superior courts, as binding reasons (J. Bell, *Sources of Law, in* P. Birks (Ed.), English Private Law, I (2000) p.1, 29 cited by E. HONDIUS, "Precedent and Law", in *EJCL,* Vol. 11.3 of December 2007, p. 8.

[153] See E. HONDIUS, "Precedent and Law", in *EJCL,* Vol. 11.3 of December 2007.

[154] Art. 137 of the Constitution of Uganda.

[155] *Rubaramira Ruranga v. Electoral Commission & the Attorney General,* Constitutional Petition n° 21 of 2006, 3rd April 2007: The Constitutional Court declared various regulations of sections of the Local Government Act, the National Women's Council Act and the National Youth Council Act for instance to be respectively inconsistent with the Constitution of the Republic of Uganda in regard to free and fair elections and the freedom of association. See also *Law & Advocacy for Women in Uganda v. Attorney General of Uganda,* Constitutional Petition Nos 13/05/& 05/06, 5th April 2007: in this case section 154 of the Penal Code Act and various sections of the Succession Act and Rules of the Second Schedule of the same Act were declared inconsistent with articles 20 (1) (2) (3), 24, 31 (1), 33 (6) of the Constitution of Uganda and therefore null and void.

in the case brought before it, the Ugandan Constitutional court held that the constitution only grants authority to declare any act of the parliament or any other law or anything done under authority of any law or any act or omission by any person or authority is inconsistent with or contravenes the Constitution; but it does not seem to give mandate to modify the law which it has found to be inconsistent with the Constitution to bring it in line with the latter[156]. I strongly support the argument of the court and I share the opinion with the General Attorney of Uganda who requested the court to recommend amendment of the offending part to bring its provisions in line with the constitution[157] rather than asking the court to do so itself.

However, the Ugandan constitution gives exclusively the constitutional court the power to interpret the constitution[158] while under the Constitution of the Republic of Rwanda it is not the case. In fact, the authentic interpretation of laws (the Constitution is also impliedly included, in my view, since it is also a law and this is a fortiori asserted in some article 200 of the Constitution) shall be done by both chambers of the parliament acting jointly and the Supreme Court which is the constitutional court only gives a prior opinion[159] which can, in my view, be given more or less consideration. It is, thus, obvious that the constitutional court is given insignificant power in regard to the interpretation of the constitution in Rwanda. This state of affairs in subject to some observations since, the Rwandan parliament legislative power is increased since it makes laws and gives their authentic interpretation. There is room to fear that it may make a law and interprets it as it pleases. In this situation, the only way the judiciary can intervene is through the judicial review.

Furthermore, it is argued that for the judiciary to accomplish its task of sanctioning excesses committed by the legislature (and the executive) it must be autonomous[160]. This requires an independent judge who enforces the law without interference from not only the legislature but also the executive[161]. This autonomy as well as independence is enshrined in both the constitutions of the Republic of Rwanda[162] and Uganda[163] respectively.

III. 2. APPROVAL OF JUDGES BY THE PARLIAMENT

As set forth above, under Rwandan and Ugandan constitutional law the legislature has certain say on the judiciary. The parliament must approve some judges (justices) especially those of superior courts like the Supreme Courts, High Courts, Court of Appeal, High Commercial Court are appointed by the president in the two countries[164]. Though in carrying out its judicial duties, the judiciary is independent and autonomous both in Uganda and in Rwanda, it is worth mentioning that fact that its top officials are approved by the parliament shows clearly that there is no sharp separation of powers between the two branches. This is in line with the doctrine of checks and balances of powers[165].

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156 *Law & Advocacy for Women in Uganda v. Attorney General of Uganda,* Constitutional Petition Nos 13/05/& 05/06, 5th April 2007.
157 *Ibid*.
158 Art. 137 of the Constitution of Uganda
159 Art. 96 of the Constitution of Rwanda.
160 N. H. GALLEGUILLOS, "Checks and Balances in New Democracies: the Role of the Judiciary in the Chilean and Mexican Transitions: a Comparative Analysis", in 1997 meeting of the Latin American Studies Association, April 17-19, 1997.
161 See R. LA PORTA et al., « Judicial Checks and Balances », in *Journal of Political Economy,* 2004, Vol. 112, No 2, p. 2.
162 See articles 60 and 140 of the Constitution of Rwanda; see also article 36 of the Organic Law no 01/2004 of 29/01/2004 establishing the organization, functioning and jurisdiction of the Supreme Court as amended to date, *O.G.,* no 3 of 01/02/2004.
163 See articles 28 and 128 of the Constitution of Uganda.
164 See art. 147, 148, 149 and 155 of the Constitution of Rwanda and art. 142 of the Constitution of Uganda.
165 In this respect see H. RUBASHA, *op. cit.,* pp. 72-73

CONCLUSION

In this comparative study of the balances of power between the legislature, the executive and the judiciary in the republics of Rwanda and Uganda respectively, it is obvious that two countries under scrutiny endeavored to contemplate in their constitutions legal principles underlying the balances of power between three branches of the government. Each country legal framework has got, however, some commendable points while at the same time it leaves also room for criticism on some other issues.

Indeed, the Rwandan constitution, contrary the Ugandan one, is not explicit on what happens when the president refuses to promulgate the law and does not ask for its reconsideration. This leaves a much to be desired on this crucial issue.

In both countries, some acts of the president (who is the head of the executive) like some appointments are subject to the approval of the parliament with slight differences in either of the two systems.

It should be highlighted that, contrary to the Ugandan constitutional law, under Rwandan constitution the president can dissolve the lower chamber of parliament. Seemingly and theoretically, this undermines or diminishes the weight of the say of the parliament on the executive.

In as far as the executive-judiciary relationship is concerned, contrary to the constitution of Rwanda where the president is only empowered appoints judges, in Uganda the president can in addition remove them from office. This may negatively impact on their required independence so vital to checks and balances doctrine.

Finally, noteworthy is that in controlling the constitutionality of laws the Supreme Court of Rwanda (the constitutional court), contrary to the constitutional court of Uganda, assumes more power. In fact, the former not only repeals provisions it finds inconsistent with the constitution; but also modifies them. This is seemingly taking over the power of the legislature rather than only constraining it within constitutional limits.

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EAC (EAST AFRICAN COMMUNITY) LEGAL BASE AND LEGAL POSSIBILITIES TO INFLUENCE THE SETTLEMENT OF REGIONAL DISPUTES

By **Pie Habimana***

List of Abbreviations

ADR	:	Alternative Disputes Resolution
AU	:	African Union
EAC	:	East African Community
EACJ	:	East African Court of Justice
EALA	:	East African Legislative Assembly
ECOMOG	:	ECOWAS Monitoring Group
ECOWAS	:	Economic Community of West African States
EU	:	European Union
Ex-FAR	:	Ex Force Armée Rwandaise (Ex Rwanda Defense Force)
CEPGL	:	Communauté Economique des Pays des Grands Lacs
ICTR	:	International Criminal Tribunal for Rwanda
LRA/M	:	Lord's Resistance Army/Movement
NUR	:	National University of Rwanda
ODM	:	Orange Democratic Movement
PKOs	:	Peace Keeping Operations
RPA	:	Rwanda Patriotic Army
RPF	:	Rwanda Patriotic Force
SADC	:	Southern African Development Community
UN	:	United Nations
UPDCA	:	Uganda People's Democratic Christian Army
UPDF	:	Uganda People's Democratic Force

1. INTRODUCTORY REMARKS

The East African Community is a regional intergovernmental organization, established by a Treaty signed on 30th November 1999. This treaty entered into force on 07th July 2000 after being ratified by EAC partner states of that time, namely Kenya, Tanzania and Uganda. On 30th November 2006, the Summit of EAC Heads of States decided to admit Burundi and Rwanda as full members of the EAC effective 1st July 2007[166]. On June 18, 2007, the EAC Summit of Heads of States together with the Presidents of Burundi and Rwanda signed, subsequent to recommendation by the EAC Council, the Treaties of Accession of the Republic of Burundi and the Republic of Rwanda respectively. The Summit decided that their membership to the EAC was to become effective from 01st July 2007[167].

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[166] See the Preamble of the Treaty of Accession of the Republic of Rwanda into the EAC.

[167] See Article 11 of the Treaty of Accession of the Republic of Rwanda into the EAC & *Communiqué of the 5th Extraordinary Summit of the EAC Heads of State*, Kampala, Uganda, Serena Hotel 18th June 2007, p. 3, available on http://www.eachq.org, accessed on 25th May 2010.

The EAC constitutes a legal order in international law, the main purpose of it being the mutual economic and social benefit of the Partner States. The Partner States of the EAC have long time been together cooperating on different issues. The cultures and living styles of citizens of EAC member states are also almost the same, and used to share certain common features. This is mainly due to refugees and displacement movements which characterized the history of EAC member States.

The influx of refugees and displaced persons resulted from wars, disorders and disputes which took place in EAC member states for many years. In some cases, conflicts and wars have been internal, i.e. happening within the border of one country, in other words occurring between citizens of the same country. In other cases conflicts happened between opposing two or more countries. Almost all, EAC member states have experienced conflicts during the last two decades. Some still exist like in Burundi and Uganda, whereas others are still recent so that people are still suffering from its consequences like in Rwanda and Kenya.

From this point of view, it is logical to wonder at what extent the EAC member states and people will benefit from this community as far as the settlement of disputes is concerned. It is from this standing point of view that we want to analyze, the EAC legal base and legal possibilities to influence the settlement of regional disputes. As the experience of EAC in resolving regional disputes is not rich enough to withdraw a conclusion, the emphasis shall be put on the possibilities within the EAC legal framework to influence the settlement of regional disputes.

This study attempts to examine the legal effect of the EAC in settling disputes within its member states. It attempts to analyze at what extent the set up and adhesion to EAC can help resolve disputes which has occurred and can occur, either between the EAC members or from outside the EAC but against one or more state member of the EAC. The existing mechanisms set up in the EAC are analyzed as well as other practices favorable to resolve disputes within the EAC. Such mechanisms and practices are analyzed and compared to those of other regional integrations on African continent.

In this article, the terms dispute settlement are referred to in general sense of settling disputes including disputes prevention, disputes management, disputes resolution, as well disputes settlement. To make it clear, the four terms are different in conflicts related sciences.

The dispute prevention consists in anticipation of a dispute that seeks to redress causal grievances to avoid the escalation of violent forms of disputes engagement or to curtail the re-occurrence of violent exchanges or some combination of these elements[168]. This can be done through different ways such as preventive diplomacy, early warning systems, crisis prevention, etc. However, this is more theoretical than practical as in most cases the concern is often to resolve conflict at hand or more typically to prevent escalation or violent manifestations of already existing conflict. And, processes of conflict prevention to be successful, first one has to diagnose carefully the pre-conflict stage and eliminate the eventual causes of conflict and this involves avoiding circumstances, situations or anything that may lead to violence in a conflict situation. Indeed, it is not enough to detect early warning signs, but also to learn creative and effective ways of responding to that.

[168] C. E. Miller, *A Glossary of Terms and Concepts in Peace and Conflict Studies Africa Program*, University for Peace, 2005, p. 24.

Apart from disputes prevention, there also exists disputes management. This refers to interventionist efforts towards preventing the escalation and negative effects, especially violent ones, of ongoing conflicts[169]. These efforts are of great importance as in most cases disputes are rarely completely resolved, but rather reduced and/or downgraded and like to resume again upon a simple catalyzer. By conflict management, one refers to the way people or parties behave/conduct themselves in a conflict and this process suggests terms like reconciliation, resolve, consensus building, mitigation, restitution, and prevention, reduction of destruction of relationships, lives and properties.

The dispute resolution refers to a variety of approaches aimed at resolving conflicts through the constructive solving of problems distinct from the management or transformation of conflict[170]. In addition to dispute resolution, the term dispute transformation refers to a set of combination of matters regarding a conflict like the general context or framing of the situation, the contending parties, the issues at stake, the processes or procedures governing the predicament, or the structures affecting any of the aforementioned[171]. Disputes transformation occurs through the unintended consequences of actions taken by parties internal or external to the conflict.

2. Overview on EAC

The EAC is an intergovernmental organization composed of five east African countries namely Burundi, Kenya, Rwanda, Tanzania and Uganda. The membership of Kenya, Tanzania and Uganda is recorded in 2001 whereas the membership of Burundi and Rwanda is recorded in 2007.

The EAC was originally founded in 1967, but collapsed in 1977, causing celebrations and wine toasting in Kenya. It was officially revived on 07th July 2000. The East African region covers an area of 1.8 million square kilometers with a combined population of about 126 million (July 2008 estimation). This region has significant natural resources, especially Tanzania and Uganda. In contrast Burundi and Rwanda are poor in natural resources and overpopulated. Kenya is also in good position economically due to its geographical position. It lands on the Indian Ocean and the majority of goods commercialized in Burundi, Rwanda and Uganda pass by Kenya ports. The most prevalent languages of East Africa are Swahili, English, Kirundi and Kinyarwanda. French is also spoken in Burundi and Rwanda.

Tanzania has had a relatively peaceful history since achieving independence, in contrast to the wars and civil strives that have occurred in Kenya, Rwanda, Burundi, and Uganda. Nowadays, the States of EAC have to pay attention to maintain the stability in the region and to block ongoing conflicts which surround this region like in DRC, Southern Sudan, Somalia, in the Horn of Africa, etc.

The EAC started in 1967 as a Treaty of East African Cooperation but collapsed in 1977 and then resumed in 1999. It is in this year that the Treaty Establishing the EAC was signed among Kenya, Tanzania and Uganda. Having been duly ratified, the Treaty entered into force on 7th July, 2000 following the conclusion of the process of its ratification and deposit of the Instruments of Ratification with the Secretary General by all the three Partner States.

[169] *Idem*, p. 23.
[170] *Idem*, p. 25.
[171] *Idem,* p. 26.

On 18th June 2007, the 5th Extraordinary Summit of the EAC Heads of State that took place in Kampala, Uganda decided to admit Burundi and Rwanda as new members. The Summit "warmly welcomed and congratulated the Republic of Burundi and the Republic of Rwanda upon becoming full members of the EAC with effect from 1st July, 2007."[172]

The EAC today plans to introduce monetary union i.e. to have a common currency among EAC members which will be the East African Shilling, a common market, a political union, the East African Federation which means that the member states of EAC will have one president, a common parliament, etc.

2.1. ORIGIN OF THE EAC

Kenya, Tanzania and Uganda have had a history of co-operation dating back to the early 20th century, including the Customs Union between Kenya and Uganda in 1917, which the Tanganyika joined in 1927, the East African High Commission (1948-1961), the East African Common Services Organization (1961-1967) and the East African Community (1967-1977). The close relationship between Kenya and Uganda are easily understandable considering their colonial history. The two countries are former British colonies.

It is in 1967 that the East African Common Services Organization, created in 1961, was superseded by the East African Community. This body aimed to strengthen the ties between the members through a common market, a common customs tariff and a range of public services so as to achieve balanced economic growth within the region.

Unfortunately, in 1977, ten years after, the East African Community collapsed due to demands by Kenya to have more seats than Uganda and Tanzania in decision-making organs. One of other causes of this collapse has been also the differences in governance between the three countries. The Kenya was Capitalism oriented, Tanzania was socialism oriented whereas the Uganda was under the dictatorship regime of Idi Amin.

Later, Presidents Moi of Kenya, Mwinyi of Tanzania, and Museveni of Uganda, signed the Treaty for East African Co-operation in Arusha, Tanzania, on 30 November 1993, and established a Tri-partite Commission for Co-operation. A process of re-integration was embarked on involving tripartite programs of co-operation in political, economic, social and cultural fields, research and technology, defense, security, legal and judicial affairs.

On 30th November 1999, after 22 years, the East African Community revived. It is on this date that Kenya, Tanzania and Uganda signed an agreement to re-establish the EAC. This Treaty came into force on 07th July 2000 after conclusion of the process of its ratification and deposit of the instruments of ratification with the Secretary General by all the three Partner States[173]. The EAC was finally officially inaugurated in January 2001. After this revival, the EAC has grown till today as we see it.

2.2. EVOLUTION OF THE EAC

As seen above, the first EAC was established in 1967 but collapsed in 1977. Some of the causes of its collapse are the colonial legacy, the inequitable fiscal redistribution of gains,

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[172] See the Preamble of the Treaty for the Establishment of the East African Community, as amended to date & Khoti Kamanga, "*EAC & Constitutionalism: Some constitutional dimensions of EAC*", presented to *Kituo cha Katiba* in 2003, Faculty of Law, University of Dar es Salaam, available at *www.kituochakatiba.co.ug,* accessed on 10th May 2010.

[173] Article 152 of the Treaty.

the inter-territorial imbalances in trade, the currency system disharmony, the absence of political good will,[174] and lastly, the constitutional impediments[175].

Following the dissolution of the East African Community in 1977, former Partner States negotiated a Mediation Agreement for the Division of Assets and Liabilities,[176] which they signed in 1984. However, pursuant to the provisions of article 14 of the Mediation Agreement, the three States agreed to explore and identify areas of future co-operation and to make concrete arrangements for such co-operation[177].

In 1986, a meeting of the Heads of State of Tanzania, Kenya and Uganda was held in Nairobi, two years after the formal liquidation of the Community assets. The summit agreed to establish a mechanism to rekindle the spirit of co-operation among the three countries. A follow up meeting in 1991 directed the respective Ministers in charge of Foreign Affairs and International Co-operation to work out a program to reactivate and deepen co-operation and draw up an appropriate institutional framework for this purpose.

Subsequent meetings of the three Heads of States led to the signing of the Agreement for the establishment of the Permanent Tripartite Commission for East African Co-operation on November 30, 1993. However, full East African Co-operation efforts began on March 14, 1996 when the Secretariat of the Permanent Tripartite Commission was launched at the Headquarters of the EAC in Arusha, Tanzania. On 22nd January 1999, the Heads of States of Tanzania, Kenya and Uganda resolved to sign the Treaty re-establishing the East African Community (EAC) by the end of July 1999[178], which was finally done on 30th November 1999. The Treaty provides for the establishment of a customs union, common market and monetary union and sets the ultimate objective as the birth of a political federation of east African states.

2.3. EAC TODAY

The real picture of the EAC can be viewed through the Treaty establishing this Community. The Treaty for the Establishment of the EAC has 153 provisions grouped into 29 chapters, and addresses all conceivable important issues a constitutive and political document of its type may contain[179]. The Treaty provides how integration will be achieved through a

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[174] President Nyerere put it aptly: "The only reason why the Community broke up was a lack of political will to deal in a spirit of unity and in the awareness of our interdependence with the inevitable difficulties of international cooperation between poor countries. I think we have now learnt this basic lesson." He was speaking as Chairman of the Heads of State Meeting at the signing ceremony of the Mediation Agreement, May 14, 1984 in Arusha, as quoted in UMBRICHT, V., H., *Multilateral Mediation: Practical Experiences and Lessons*, Dordrecht: Martinus Nijhoff Publishers, 1988, p. 194. See also KAMANGA, Khoti (Prof.) "*EAC & Constitutionalism: Some constitutional dimensions of EAC*", contribution for the *Kituo cha Katiba,* Annual Evaluation of Constitutional Development in East Africa, Faculty of Law, University of Dar es Salaam, 2003, p. 10.

[175] See Kamanga, *op. cit.*, p.10

[176] Agreement for the Division of Assets and Liabilities of the former East African Community, reproduced in V. H. Umbricht, above.

[177] See 'East African Community', available at *www.eac.int*/, accessed on August 14th, 2008.

[178] See TULYA-MUHIKA, Sam (Prof.), 'Revival of the EAC and its Institutional Framework', in '*Perspectives on Regional integration and Co-operation in East Africa*', Proceedings of the 1st Ministerial Seminar on EAC, Arusha, 25-26, March, 1999, pp. 33-38.

[179] K. Kamanga, *op. cit.* p. 17. Prof. Kamanga acknowledges that this is far from stating an opinion on the adequacy with which issues are addressed. According to him, a distinctive mark of the Treaty is the caution with which the question of integration is generally approached. On the issue of adequacy, this researcher observed that the Treaty has been amended twice, and a third important amendment is under consultation, which is an evidence of some inadequacies in the original text signed in 1999.

gradual process.[180] The launching of each of the stages of integration, as well as co-operation in various areas shall be regulated by a Protocol to be adopted at an unspecified time[181]. Systematically, the EAC today can be viewed considering its objectives, structures, principles and strategies.

2.3.1. Objectives and principles of the EAC

The objectives of the EAC are provided for in article 5 of the Treaty. In summary, they are the attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of partner states; the strengthening and consolidation of co-operation in agreed fields; the promotion of sustainable utilization of natural resources and the taking of measures that would effectively protect the natural environment of the Partner States; the strengthening and consolidation of long standing political, economic, social, cultural and traditional ties and associations between the people of the Partner States; the mainstreaming of gender in all its endeavors and the enhancement of the role of women in cultural, social, political, economic and technological development; the promotion of peace, security and stability within, and good neighborliness among, the Partner States; the enhancement and strengthening of partnership with the private sector and civil society; and the undertaking of such other activities calculated to further the objectives of the Community, as the Partner States may from time to time decide to undertake in common.

Pursuant to that, article 6 of the EAC Treaty provides for a number of principles that shall govern the achievement of the objectives of the Community. Such are among others the mutual trust, political will and sovereign equality; peaceful co-existence and good neighborliness; peaceful settlement of disputes; good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and People' s Rights; equitable distribution of benefits; and cooperation for mutual benefit.

To ensure the practical achievement of the objectives of the EAC, article 7 of the Treaty provides the operational principles that shall govern it[182].

2.3.2. Structure of the EAC

Article 9 of the EAC Treaty provides for the creation of the Organs and Institutions of the EAC. The organs of the Community are: (a) The Summit, (b) The Council, (c) Coordination

[180] Articles 2 and 5(2).

[181] Articles 75(1), 76(1) & (2) and 151 of the Treaty. The Treaty provides for co-operation in development of infrastructure and services (roads, communications, rails, air, and water), meteorological services, energy, Science and technology, Free movement of Persons, Labor, Services, Right of Establishment and Residence; Agriculture and Food security, Environment and natural resources, Tourism and wildlife, Health, social and cultural activities, Role of women in socio-economic development, Industrial Development, Standardization and Quality Development, Political matters, Legal and Judicial Affairs and Private sector and civil society promotion and development, etc.

[182] These operational principles are the people-centered and market-driven cooperation, the provision by partner states of an adequate and appropriate enabling environment such as conducive policies and basic infrastructure, the establishment of an export oriented economy in which there shall be free movement of goods, persons, labor, services, capital, information and technology; the principle of subsidiarity with emphasis on multi-level participation and the involvement of wide range of stakeholders in the process of integration; the principle of variable geometry which allows for progression in cooperation among groups within the EAC for wider integration schemes in various fields and at different speeds; the equitable distribution of benefits accruing or to be derived from the operations of the EAC, and measures to address economic imbalances that may arise from such operations; the principle of complementarity and finally the principle of asymmetry.

Committee, (d) Sectoral Committees, (e) The East African Court of Justice (EACJ), (f) The East African Legislative Assembly (EALA), (g) The Secretariat, and (h) such other organs as may be established by the Summit.

The Summit of the EAC consists of the Heads of States members of the EAC. The five presidents take the Chair of the Summit in turns of one year and meet at least once per year. Its function is to give general direction and impetus to the achievement of the objectives of the Community.

The Council of the Ministers consists of the respective ministers for regional co-operation of each State and other ministers to be determined by the member States. The Council of Ministers meets twice a year; and one of the meetings is held immediately preceding a Summit Meeting. The Council is the policy organ of the Community. Among its functions, the Council monitors, promotes and keeps under constant review the implementation of the programs of the Community, and ensures the proper functioning and development of the Community in accordance with the Treaty.

The Coordination Committee consists of the Permanent Secretaries responsible for EAC affairs in each Member State. It is charged to implement the decisions of the Council, reports to the Council of Ministers and co-ordinates activities of the Sectoral Committees[183].

The Sectoral Committees of the EAC are established by the Council of Ministers and report to the Co-ordination Committee. Their task is to prepare programs to implement the objectives of the Treaty and programs of the EAC and set out priorities with respect to the various sectors, as well as monitor their implementation[184].

The East African Legislative Assembly is the Parliament or the Legislative organ of the EAC. It has 52 members i.e. nine members from each member State, plus seven *ex-officio* members, namely the five Ministers responsible for regional co-operation, the Secretary General and the Counsel to the Community[185].

The East African Court of Justice has the major responsibility to ensure the adherence to law in the interpretation and application of and compliance with the Treaty.

The Secretariat of the EAC is the executive organ of the EAC and runs the day-to-day business. It is headed by the Secretary General. This is deputized by five Deputy Secretary Generals who are in charge, one by one, of Planning and Infrastructure, Productive and Social Sectors, Finance and Administration, Political Federation and finally Directorate General of Customs and Trade. It includes also the Office of the Counsel to the Community[186].

There is also the Counsel to the Community, who is appointed by the Council of Ministers and acts as the principal legal adviser to the Community. The Counsel is also entitled to appear in the Courts of the Partner States in matters regarding the Community and its Treaty.

Apart from those organs of the EAC, there are also a number of autonomous institutions. Such are:

[183] Articles 17, 18 and 19 of the Treaty.
[184] Article 20, 21 and 22 of the Treaty
[185] Articles 48 – 65 of the Treaty.
[186] Articles 66 – 73 of the Treaty.

- Lake Victoria Basin Commission (LVBC) which oversees the management and development of Lake Victoria Basin and serves as a centre for promotion of investments and information sharing among the various stakeholders.
- Inter-University Council of East Africa (IUCEA) to encourage and develop mutually beneficial collaboration between member universities and Governments and other public and private organizations.
- East African Development Bank (EADB) to redress the development disparities between the member states of the former East African Community. EADB has a critical role to play in setting up the East African Common Market in terms of mobilizing external lendable resources for the East African Market.
- Civil Aviation Safety and Security Oversight Agency (CASSOA) which is a specialized agency of the EAC, responsible for ensuring the development of safe and secure civil aviation system in the region. The main objectives of the Agency are to ensure coordinated development of an effective and sustainable civil aviation safety and security oversight infrastructure in the Community.

2.3.3. Achievements and challenges of the EAC

Since its creation, the EAC has achieved some remarkable success in different fields. However, all are not green as some failures are also recorded. For example, the cross border movements from one country to another within the EAC have increased since the creation of the EAC. Even though the EAC one passport system has not been introduced, people from this Community have developed their mind so that they feel closer one another. Therefore, they have increased the relationships in various fields such as commerce, studies, agriculture, etc. Another factor which has permitted the increase in cross border movements is the removal of visa charges, the harmonization of transport procedures, etc. The five States have also consented to improve their respective infrastructures like roads, airports, etc. It is within this perspective that there is a project to set up a railway which will connect the five states of EAC. In telecommunication, telephone services providers have harmonized their systems so that a person uses his/her telephone number wherever he/she is in EAC.

Another big achievement shall be the Customs Union, which means the elimination of all internal tariffs and other similar charges between EAC states, a stage which has already started and whose implementation shall be done step by step.

Although the successes of EAC are great, there exist some challenges too. The EAC has planned the establishment of the Common Market. This was supposed to enter into force on 01st July 2010. After the establishment of the EAC Common Market, goods and services as well as people will move from one country to another freely. Even if at the beginning people will need to use ordinary passports, it is envisaged that later people will move freely using only their national identity cards. Such identity cards shall be harmonized so that the fraud detection shall be made possible and easy. Other features of Common Market shall also include the free movement of capitals, free movement of labor related issues as well as freedom of establishing companies and business.

However, the actual implementation of this Common Market requires a number of infrastructures and institutional framework, which is not easy for some states. This needs sensitization of EAC member states also considering that the benefits of each state in this Common Market differ. For example Tanzania is now reluctant in this process saying that it has enough land so that Rwanda and Burundi will benefit freely its land. Rwanda and

Burundi are also feared to compete with Ugandans and Kenyans in Business, who are mostly used to do business easily.

As said above, the fear of Tanzania is reasonable and constitutes one of the big challenges in the field of agriculture. Considering that a big number of Rwandans and Burundians are farmers, the free movement will permit them to move towards Tanzanian forests as they currently lack enough lands to cultivate and exercise livestock activities.

3. OVERVIEW ON REGIONAL DISPUTES

The East African region is known worldwide for the persistence of conflicts in this region. From the history, Rwanda ranked the top conflicting country in the 1990s, Burundi is still struggling to eradicate conflicts in this country, Uganda failed to overcome the conflict between the Government of Museveni and the LRA, the post-election violence in Kenya showed to what extent Kenyans are violent and aggressive. In the whole region, at least Tanzania tries to be peaceful even if it is not saved from suffering consequences of conflicting neighbors. While some of those conflicts are today historical, others are new and fresh. In this part, only recent conflicts are concerned. The major issues which are covered in this part are the overview of some regional conflicts, the main causes of each conflict, its birth, its evolution, its consequences, the way they have been resolved/settled, etc.

3.1. CONFLICTS BETWEEN UGANDA AND RWANDA

While friends, combating together against Kabila, the DRC President of the time, Rwanda entered into serious fights with Uganda. This occurred in August 1999, only a month after the signing of the Lusaka ceasefire agreement. At the beginning, people thought it was a simple battle even a joke or a war system due to confusion, but it rather resulted very soon into a serious battle which took lives of a big number of civilians and militaries, including a Rwandan Major Wilson Rutayisire. The real causes of this conflict are still unknown, as people diverge and say what they think can be the truth.

Even though this conflict ended quickly, the border between Rwanda and Uganda has never been totally secured. Sometimes, one country accuses another of having a big number of soldiers and military materials around the border[187], of having caught nationals of another country suspected of spying, etc. Even though the situation is like that, people from the two countries continue to move from one country to another. However, this influx movement[188] of people is also sometimes interpreted negatively. For example, in the meeting held in May 2010, Rwanda accused Uganda of harboring opposition people whereas Uganda said that Rwandans who are in Uganda are spies.

Anywhere, Rwanda and Uganda ended themselves this conflict and many times resolve themselves a number of conflicts. One can hope that communications between the two countries, said to be brothers, will continue and upgrade so that no conflict between the two will occur again. Also the fact of being members of one regional integration will demotivate

[187] According to principles of international law, this is legal and permitted. Article 2.1 of the UN Charter recognizes this Organization to base on the principle of equal sovereignty of its member states. This principle allows each state to exercise its power on its territory as it wants. Therefore, the deployment of militaries and military materials falls within the state's sovereignty, even though it becomes threatening on the other side.

[188] Historically, Rwandans and Ugandans use to be in touch and cooperate in various fields including economic, social, cultural, etc. Rwandans and Ugandans have long been seen as brothers at the extent that nothing can obstacle the movements of people between the two countries.

any aspect of conflict. It is not easy for presidents who sit many times to discuss issues of customs unions, common markets, monetary unions, etc to fight against one another.

3.2. Conflict between Uganda and Kenya on Migingo island

Migingo island (also called Bugingo or Ugingo for some) is a small island in the Lake Victoria. This island is many times claimed by the Kenya and Uganda. Each state claims this island to be its own territory.

However, sometimes Uganda recognizes this island to belong to Kenya but says the fishermen from this island fishes in Ugandan waters, surrounding this island. After some confrontations between the two countries in 2008 and 2009, the conflict between the two is now sleeping as they negotiated but never settled definitively this problem.

Fortunately, the two countries tried to resolve this problem amicably and the result has been good. Another aspect to be happy with is the fact that during this period when the two were conflicting, other members of the EAC even though they have not played a serious active role, they raised their voices and called Kenya and Uganda to resolve this problem amicably.

3.3. Uganda crisis: LRA

The Lord's Resistance Army (also called Lord's Resistance Movement or Lakwena Part Two) is a sectarian Christian militant group based in northern Uganda. This group was formed in 1987 and is engaged in an armed rebellion against the Ugandan government in what is now considered as one of Africa's longest-running conflicts. It is led by Joseph Kony, who proclaims himself the "spokesperson" of God and a spirit medium, primarily of the Holy Spirit, which the Acholi believe can represent itself in many manifestations. The group adheres to a syncretistic blend of Christianity, Mysticism, traditional religion, and witchcraft, and claims to be establishing a theocratic state based on the Ten Commandments and Acholi tradition.

The LRA operates mainly in northern Uganda, but also in southern parts of Sudan and in east parts of Democratic Republic of Congo. The LRA is accused of widespread human rights violations, including murder, abduction, mutilation, sexual enslavement of women and children, and forcing children to participate in hostilities or armed conflicts. The LRA is currently proscribed as a terrorist organization by the United States of America.

The LRA has been known by a number of different names, including the Lord's Army (1987 to 1988) and the Uganda Peoples' Democratic Christian Army (UPDCA) (1988 to 1992) before settling on the current name in 1992. They are also sometimes referred to as Lord's Resistance Movement (LRM).

Obviously, the LRA has been and is still a big challenge of human rights and security in Uganda especially in Northern Uganda. LRA, itself violates human rights seriously as the majority of their actions are done with cruelty, dangerosity, inhumanity and animosity. When counter-attacking them, the UPDF also commits some human rights violations. And this cannot be prevented considering the nature of the war between LRA and UPDF.

The LRA has become like a terrorist movement. When combating with them, it becomes very difficult to protect people who do not have any difference between them and LRA

officers. It is difficult to differentiate a LRA abductors and LRA abductees. At this point, I think that Uganda needs special training forces to combat LRA without engaging lives of the innocent Ugandans. This can be possible if there exists a special Unit in UPDF, trained especially for this kind of wars and attacks, and if need be, the other EAC member states may intervene in favor of UPDF.

Otherwise, the LRA will continue to be a threatening movement in Uganda and this shall later affect the whole region. Unfortunately, nothing has been done from the EAC to stop this long existing conflict. In my view, as Uganda is now sharing the common interests with Rwanda, as members of one regional community, Uganda should better learn from Rwanda on how this succeeded to fight against and eradicate forever the problem of infiltrators[189] in 1997-2000s years. As Rwanda came in this situation safely, it should teach Uganda how to fight successfully rebels like LRA and if need be conduct a joint action.

3.4. Kenya crisis

In January 2008, Kenya faced conflicts in which a number of people lost their lives. Before this time, one can say without error that Kenya was a peaceful place, prosperous country, developing economically, with united people, etc. Conflicts occurred in a very short event so that many people have been surprised of having such conflicts in a country like Kenya. In the first lines, Kenya conflict is detailed enough showing its causes, conflicting parties, how it evolved, how it ended, etc. Thereafter, problem solving mediation is explained before explaining to what extent it has been the best type of moving towards a peace resolution.

While Kenya has remained fairly stable and peaceful during most of the post-independence period, violence between ethnic groups has tended to erupt around elections since the introduction of competitive multiparty politics. More recently violence and general lawlessness escalated to unprecedented levels following the general elections in December 2007. The conflict resulted in loss of hundreds of lives, exodus of a quarter of a million people and widespread destruction of property[190]. The unprecedented level of violence that Kenya experienced is just one of the many African examples that raise questions about what factors determine voting behavior in African countries and whether democracy can have stabilizing effects in countries with tribal dominancy.

Fighting between supporters of Mwai Kibaki and the Party of National Unity, mainly members of the Kikuyu tribe, and supporters of Raila Odinga's Orange Democratic Movement Party, mainly members of the Luo and the Kalenjin tribes, occurred both in Nairobi and the Rift Valley Province. The February 2008 agreement between Kibaki and Odinga was held and a Truth Commission has been scheduled to prosecute those responsible for the violence in March of 2008. Following nearly two months of violent turmoil, a power-sharing deal between re-elected president Mwai Kibaki and opposition leader Raila Odinga was signed in February 2008. The accord, brokered under the leadership of Kofi Annan, divides power between Kibaki and Odinga and has brought an end to hostilities. However, the agreement does not address ethnic rivalries that will continue to plague any prospects for Kenyan stability.

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[189] These Infiltrators have existed in Rwanda in 1997-2000s years. They were composed of Ex-FAR (Force Armee Rwandaise i.e. former Rwandese Armed Forces) plus Interahamwe. They inflitrated from DRC and came in Rwanda secretely to commit acts of violence and other inhuman acts against innocent people, most of them civilians.

[190] http://www.iig.ox.ac.uk/research/09-elections-ethnic-polarization-kenya.htm, accessed on 27th May 2010.

In this Kenyan conflict, there were many parties, which can be counted at six, even if the main were two. There was first Kenyan President Mwai Kibaki and his Party of National Unity (PNU). During the December 2007 presidential elections the President is said to have used an array of illegal vote-tampering methods in order to declare victory against rival opposition leader Raila Odinga. On the other side, there was the Opposition leader Raila Odinga and his Orange Democratic Movement Party (ODM). Following the December 2007 presidential poll, opposition leader Raila Odinga claimed that incumbent Mwai Kibaki tampered with the electoral process, resulting in fraudulent victory. Odinga refused to accept the results of the election and his supporters engaged in violent clashes with those of Kibaki.

Apart from the two, there were also the Kenyan forces engaged in Operation Okoa Maisha (Operation Save Lives). The military and police forces engaged in Operation Okoa Maisha (Operation Save Lives) have been accused of committing human rights abuses in the Mt. Elgon area. The intent of the operation was to eliminate the Sabaot Land Defence Forces (SLDF) and protect civilians in and around the district of Mt. Elgon in the Western Province. This Sabaot Land Defence Forces (SLDF) was another conflicting party, formed in 2006 to seek redress for alleged injustices during land distribution and composed largely of a sub-group of the larger Kalenjin ethnic community. Other conflicting party is the Mungiki Sect, which is a quasi-religious militia recruited to protect the interests of Kenya's largest ethnic group, the Kikuyu. In addition to these big parties, there were also other various Kenyan and non-Kenyan ethnic groups, which were part of a higher level of violence in part due to the post-election crisis. Such are for example the Samburu, the Maasai, the Pokot, etc.

As pointed out by the Christian Science Monitor, usually the problem is between two biggest tribes, Luos and Kikuyus, but this time it is all other tribes against Kikuyus[191]. On this point, one may wonder what is causing conflict between tribes in Kenya. Replying this question, Sylvia Kang'ara, a law professor at the University of Washington, who grew up in Kenya's Rift Valley, said that this problem went far in the history of colonization[192]. He explained that when the British colonizers came in Kenya, their first settlements were in the Rift Valley and central Kenya, inhabited primarily by the Kikuyu. Because the British took Kikuyu land, the Kikuyu were obliged to move from their homeland to other parts of Kenya, being then dispersed throughout the country. The struggle for independence was led by Kikuyu, including the Mau Mau movement, which meant the transfer of power from British to Kikuyu elite. Also, when British left, the Kikuyu who were the agricultural community dispersed away from central Kenya were first to acquire land that the Whites vacated. They also had easy access credit which allowed them to start business and become more economically dominant and have access to education more than other tribes. With economic power, they began control politics. As a result, tribalism has been in people's minds and greediness and selfishness seems to be the cause of all.

Although this conflict was based on some territory of Kenya, the whole region suffered its consequences. One cannot ignore that the majority of imports and exports in Burundi, Rwanda and Uganda pass by Kenyans ports. The few months of this conflict resulted into a remark increase of prices of imported goods in the above said countries. This conflict even played a reluctant role to the development of the EAC. During that period, the EAC developmental processes were reluctant and even stagnant. However, also the EAC as a regional community has done nothing great to help resolve this Kenyan conflict.

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[191] Christian Science Monitor, January 29th, 2008.

[192] Interview with Seattle Times staff reporter, by Kristi Heim, available on http://seattletimes.nwsource.com/html/nationworld/2004108435_webkenyaqampa05.html, accessed on 16th June 2010.

4. Influence of the EAC in resolving disputes within the region: EAC disputes settlement mechanisms

Although primarily conceived as an economic community, the EAC cannot forget that it has to play a big role in resolving regional conflicts. Otherwise, it shall be like building a luxurious villa in a non master planned quarter. The EAC member states should never forget that the security constitutes the base and the foundation of everything. The economy can never survive without strong security. We therefore challenge the EAC of keeping silence when issues of security are concerned.

Even though it doesn't act actively, the EAC has some mechanisms, which can better serve to consolidate the security in the region, if they are used efficiently. Some of these mechanisms already exist and are conceived to that purpose, whereas some others are used indirectly. In any case, the EAC has to get lessons from other regional integrations which have scored success in influencing the resolution of the concerned regional conflicts and avoid mistakes done by other regional integrations, which failed on this.

4.1. EXISTING MECHANISMS OF DISPUTES SETTLEMENT

This part covers the existing mechanisms to settle disputes set up within the EAC. Such mechanisms are evaluated one by one, assessing whether they have succeeded or failed. Elements/factors of success will be highlighted as well as those of failures.

4.1.1. Mechanisms from the EAC constitutive act

Article 123 (4) (d) of the Treaty stipulates that the Community shall pursue the objectives set out in paragraph 3 of this article[193] by peaceful resolution of disputes and conflicts between and within the Partner States. Also, article 124 of the Treaty stipulates that the Partner States agree that peace and security are pre-requisites to social and economic development within the Community and vital to the achievement of the objectives of the Community. In this regard, the Partner States agree to foster and maintain an atmosphere that is conducive to peace and security through co-operation and consultations on issues pertaining to peace and security of the Partner States with a view to prevention, better management and resolution of disputes and conflicts between them.

From the two articles, the first and the sole mechanism envisaged by the EAC Constitutive Act is the resolution of disputes through peaceful ways. Such peaceful ways include but are not limited to negotiation, arbitration, mediation, consultation, bargaining, facts finding, etc. We will come back on some of these peaceful resolutions of disputes in 4. 2. under the term ADR[194].

However, we don't agree with the EAC Treaty to limit the peaceful resolution of disputes to conflicts which are pending between and within Partner States only, as it is worded in this Treaty. In our view, the Treaty should also oblige the Partner States to resolve peacefully

[193] Such are objectives of the common foreign and security policies and consist in (a) safeguard of the common values, fundamental interests and independence of the Community; (b) strengthen the security of the Community and its Partner States in all ways; (c) develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedom; (d) preserve peace and strengthen international security among the Partner States and within the Community; (e) promote co-operation at international for a; and (f) enhance the eventual establishment of a Political Federation of the Partner States.

[194] ADR refers to Alternative Disputes Resolution.

conflicts between them and even non Partner States. And this would be reasonably as today, almost all world's states are member of the UN, and it is worthy to mention here that the UN Charter also prefer and recommend the resolution of disputes through peaceful ways[195].

4.1.2. East African Court of Justice

This is the judicial branch of the Community. The jurisdiction of this Court lies in interpreting the Treaty establishing the EAC as well as to deal with matters relating to its application. This includes the issue of Advisory Opinions with regard to the Treaty. It is based at Arusha

- Tanzania. This Court is one of the organs of the EAC. It has legal base in article 9 of the Treaty establishing the Community.

The EA Court of Justice exists since 2001. However, it operates on *ad hoc* basis and its judges stay in their respective countries and meet temporarily when there is case to decide upon. It has ten judges in total, i.e. two from each country member of the Community. Judges, including the President and the Vice President are appointed by the Summit whereas the Registrar is appointed by the Council of Ministers. The Court has two divisions namely the First Instance Division and the Appellate Division.

Cases can be brought before this Court by the partner states, the secretary general, referenced by a legal or a natural person resident of member states. To decide, the Court applies the Treaty, the established rules of procedure as well as the established rules of arbitration. Member states and the Council are obliged to execute voluntarily judgments of the Court. However, the execution can follow rules of civil procedure into force in concerned states in some circumstances, for example when the judgment concerns pecuniary obligations.

The main critics with regard to this Court, is that its importance in dealing with conflicts is minimized. Its role in settling disputes among Community members is at low level, given its mandate. As its mandate consists in interpretation and application of the Treaty, it doesn't have jurisdiction to decide on a matter which oppose two or more countries, if the matter concern an affair outside the Treaty. For example the dispute which opposes Uganda and Kenya on Migingo Island, the EACJ cannot intervene as it does not have competence in this matter.

In our view, the mandate and jurisdiction of this Court should be extended to make it relevant, otherwise it is not relevant to have a regional court which cannot resolve a conflict pending among partner states. In addition to conflict issues, such regional court should also deal with issues of human rights violations like other regional courts. Examples here include African Court of Human and People's Rights, European court of human rights, Inter-American Court of Human Rights, etc. In addition to human rights issues, this Court should also deal with economic and financial issues especially when there are implications of cross border elements. Brief, the powers of this Court should be strengthened to make it sensible, otherwise its existence shall not mean anything to East African people.

[195] Abstention from the use of force and threat is the fourth objective of the UN and its members as highlighted in article 2 of the UN Charter.

4.1.3. East African Legislative Assembly

The East African Legislative Assembly (EALA) is a legislative branch of the Community. Like the East African Court of Justice, the EALA has legal base in article 9 of the Treaty too. The EALA has a broad range of functions including the approval of the Community budget, discussion of all matters pertaining to the Community; liaise with national parliaments of member states on affairs pertaining to the EAC[196], etc. The EALA has also the power to establish any committee or committees[197] for purpose of carrying out its functions as well as to recommend the Council any action to be taken with regard to the implementation and application of the Treaty[198]. It is also competent to make its rules of procedure as well as rules of its committees. In brief, the EALA has a legislative, a representative and an oversight mandate.

As the mandate of the EALA is sufficiently large, this organ must significantly play a great role in resolving regional disputes. Although article 49 of the Treaty doesn't state it expressly, in our view the EALA has this mandate considering its function *to discuss all matters pertaining the Community* as stated in article 49 of the Treaty. By terms of this clause, any affair connected to the Community can be dealt with by the EALA. Therefore, this EALA has the power to deal with disputes related issues within the Community.

It is within this perspective combined with the power to create committees that the EALA has established a number of committees. Among created committees figures the Committee on Regional Affairs and Conflict Resolution. Even though the work of this committee is not much today, since its creation, it is a basic step to resolve regional disputes. Therefore, the EALA should take a strong step forward and deal with a number of existing regional disputes. In other words, the EALA has to stand up and play a significant role in settling disputes within the region.

4.2. RECOGNITION AND APPLICATION OF ALTERNATIVE DISPUTES RESOLUTION MECHANISMS WITHIN THE EAC SYSTEM

Alternative dispute resolution refers to a wide range of procedures and approaches other than litigation that aim to identify resolutions to conflicts that will be mutually accepted by the constituent parties[199]. According to the same author, ADR has evolved and been adapted to address conflicts in political and international affairs, civil and human rights, corporate and commercial interests, and community and family issues[200].

ADR comprises a wide range of mechanisms, including but not limited to negotiation (hard and principled negotiation), arbitration, mediation (sometimes referred to as problem solving mediation), fact finding, peace keeping operations, compromising, conciliation, peer review, mini-trials, rejuvenated/reformulated endogenous means of attending to disputes, etc. Not relying on litigation mechanism, in our case EACJ, ADR mechanisms should be more used, facilitated, emphasized, strengthened and promoted within the EAC member

[196] Article 49 of the Treaty.

[197] To date, the EALA has established a number of committees like the House Business Committee, the Accounts Committee, the Committee on Legal, Rules and Privileges, the Committee on Agriculture, Tourism and Natural Resources, the Committee on Regional Affairs and Conflict Resolution, the Committee on Communication, Trade and Investment and the Committee on General Purpose.

[198] *Ibidem.*

[199] C. E. Miller, *op. cit.*, p. 14.

[200] Ibidem.

states as they are in most cases cheap, rapid, confidential, etc compared to classic systems of resolving disputes.

4.3. COMPARATIVE STUDY

This comparative study aims at highlighting lessons to learn from other regional integrations across Africa. The study here concerns the success and failures of different African regional integrations and highlight what EAC can learn from those various regional integrations.

4.3.1. Lessons to learn from CEPGL

The CEPGL is the economic community of the great lakes countries. It is an acronym of French words "Communaute Economique des Pays des Grands Lacs". This is an international organization created in September 1976 for an economic integration of the great lakes countries. It aims at facilitating movements of goods and services within this region. This community has three members namely the Republic of Burundi, the Democratic Republic of Congo and the Republic of Rwanda.

Even though created in 1976, it suffered much the Burundian crisis as well as the Genocide against Tutsis which happened in Rwanda in 1994[201]. After the Genocide against Tutsis being stopped by RPA of RPF, the Interahamwe who have organized and committed the Genocide as well as the Ex FAR fled in Congo and started to organize infiltration attacks on the territory of the Republic of Rwanda from the land of DRC. This situation created a misunderstanding between the government of Rwanda and the government of DRC. This hindered a lot the development of the great lakes region and resulted into the closure/ suspension of the CEPGL. It is in 2004 that the three countries members of the CEPGL decided to resume activities of this Community. From that time till today, different actions have been taken to revive the CEPGL.

As this Community was and is still mainly economic oriented, it has achieved a number of economic activities. However, officers of this Community have forgotten that no economic activity can survive a conflict. This Community should have not played a passive role in regional conflicts. All member state of the CEPGL had disputes from 1990s years to 2000s years. Those conflicts have destructed a large number of economic activities within the region.

As the EAC is a current well developing Community, it has to pay attention and learn from CEPGL as far as the sustainable economic development is concerned. The EAC should not be busy with economic development only and forget the resolution of disputes. Otherwise, one can well develop economic infrastructures and actions, but the occurrence of conflict turns all into zero. So, EAC should never be like the CEPGL, and close eyes before conflicts pretending being busy with economic development.

4.3.2. Lessons to learn from the ECOWAS

The ECOWAS is the Economic Community of West African States. This Community combines 15 countries of West Africa. It has been created on 28th May 1975 upon signing

[201] According to the Constitution of the Republic of Rwanda of 04th June 2003 as amended todate, the Genocide against Tutsis took place in Rwanda from 01st October 1990 to 31st December 1994 (article 14 of this Constitution). However, according to the Statute of the ICTR, the Genocide against Tutsis has been committed from 01st January 1994 to 31st December 1994.

the Treaty of Lagos. It aims principally to the promotion of an economic integration within the region. Today, ECOWAS's members are Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea-Bissau, Liberia, Mali, Nigeria, Senegal, Sierra Leone, Togo, whereas Guinea and Niger have been suspended due to coup d'etat which took place respectively in 2008 and 2009.

The suspension of Guinea and Niger from the ECOWAS membership is a good example of an economic community which also serves in settling disputes. Apart from this wonderful action in keeping the security within the member states of the Community, the ECOWAS has undertaken other actions so that today, one can say that ECOWAS is no longer an economic Community but a multipurpose community.

For example, in 1978 and 1981, the ECOWAS facilitated its members to sign agreements on non-aggression and a consecutive protocol in 1990. On 29th May 1981, also a Protocol on Mutual Defense Assistance has been signed in Freetown, Sierra Leone, which resulted into the establishment of an Allied Armed Forces of the Community.

Like the EAC, the ECOWAS has also the ECOWAS Community Court of Justice. This Court was created in 1991 but came into force in 1996. Like other Community courts, like the EA Court of Justice, the European Community Court of Justice, etc the ECOWAS Community Court of Justice has the mandate primarily of ruling on disputes between member states with regard to ECOWAS Treaty interpretation. However, in addition to that, the ECOWAS Community Court of Justice also deals with human rights issues within the Community. The EA Court of Justice should take this example of the ECOWAS Community Court of Justice and empowers its Court to deal with human rights issues among others.

The ECOWAS has also the Commission for Peace and Security which consists of the Early Warning and Observation Centre, the Council of the Wise and Special Mediators as well as the Unit on Peacekeeping and Security. This Commission and Unit deal with issues of security within the Community and the EAC should create a department or a unit in charge of security issue, with a clear mandate to initiate and coordinate activities relating to peacemaking and peace building within the EAC.

The ECOWAS has also the so called Conflict Prevention Framework (ECPF), which seeks to mainstream conflict prevention into ECOWAS's policies and programs; strengthen capacity within ECOWAS to pursue concrete and integrated conflict prevention and peace building initiatives; and to strengthen awareness, capacity and anticipation within member states and civil society. Brief, the main lines of ECPF consist in prevention, reaction and rebuilding actions with regard to security and conflicts.

ECOWAS has in addition set up Conflict Early Warning and Response Mechanism, the West African Network for Peace building (WANEP). To all those disputes resolution mechanism, one can't forget to talk also of ECOMOG. This is the Economic Community of West African States Monitoring Group. It was a multilateral armed forces established by the ECOWAS to ensure security in West African conflicts. This ECOMOG intervened successfully in Freetown, Sierra Leone and in Liberian civil war of 1989-1996. Hence, one can say that ECOMOG has been the first credible and successful attempt at a regional security initiative. Therefore, the EAC has to take this example of ECOMOG and set up a strengthened allied military force, capable to intervene where there is issue of security in East African region.

4.3.3. Lessons to learn from the AU

The African Union was created in 2000, replacing the Organization of African Union. The AU replaces the OAU mainly because the mandate bestowed to OAU seemed to have expired. In the framework of the mandate bestowed to AU, this organization takes many efforts to prevent conflicts instead of resolving them. This philosophy rose after 1994 Genocide against Tutsi in Rwanda. From that time, African regional organizations sought to incorporate preventive measures. It is the same philosophy which guides AU. It is hereby worthy to state the President of the Republic of Rwanda, H.E Paul Kagame, who said that "Never again should the international community's response be left wanting. Let us resolve to take collective action in a timely and decisive manner. Let us also commit to put in place early warning mechanisms and ensure that preventive interventions are the rule rather than the exception"[202].

The AU enshrines the principle of echoing the responsibility to protection of law. This switches from the non interference approach of the OAU to the non indifference approach of the AU. The Constitutive Act of the AU defines clearly the core objectives of the AU as the promotion of peace, security and stability and the promotion and protection of human and people's rights. It also identifies the respect for democratic principles, human rights, rule of law and good governance, the respect for the sanctity of human life, etc. Mostly important, the AU has the right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity[203].

The AU, convinced that the security and peace constitute a basic core stone for any sustainable development, being economic, social, cultural, political, decided to set up Architecture for AU's peace and security. This includes the Peace and Security Council (PSC), the Continental Early Warning System (CEWS), the Panel of the Wise, a Peace Fund and the African Standby Force (ASF).

In addition to those, other bodies of the AU also play a significant role in dealing with disputes. Such are like the AU Assembly, competent to decide on the intervention in a member state when issues of genocide, war crimes and crime against humanity are concerned. The Assembly is also competent to give directives to the Executive Council, the Peace and Security Council as well Commission on the management of conflicts, wars, emergency situations and the restoration of peace. The EALA should also be given powers and competences to give directives to relevant organs of the EAC as far as issues of security and peace are concerned.

Within the AU, there is also the AU Commission, which includes the department for Peace and Security. There exists also the AU Peace and Security Directorate, the AU Peace and Security Committee, the African Commission on Human and People's Rights.

4.3.4. Lessons to learn from SADC

This is a Southern African Development Community. Primarily created for economic development like EAC, SADC has also the promotion and defense of peace and security

[202] President of the Republic of Rwanda, H.E Paul Kagame, 2005 World Summit.
[203] Article 4 of the AU Constitutive Act.

like core objectives of the Community[204]. SADC member states are also urged to cooperate beyond their collective borders in the areas of politics, diplomacy, international relations and peace and security[205]. In addition to those articles within the SADC Treaty, this Community has also a Protocol on politics, defense and security cooperation. This protocol allows the SADC to intervene, through its organs on politics, defense and security, in situations of intra states or inter states conflicts.

Always in the line of the peace and security, the SADC has a Regional Early Warning System (REWS), a Standby Brigade and a regional Tribunal. All those mechanisms and systems play a significant role in maintaining peace within the SADC member states. All those shows to what extent, the sustainable economic development lies much on the stability in terms of peace and security. Therefore, the EAC should get a good example from mechanisms and systems set out by the SADC, which is mainly an economic regional community like EAC.

5. GENERAL CONCLUSION

East African Community has been primarily established as an economic regional integration. However, the truth is that no economic goal can be achieved if not supported by the political maturity and stability. Along this study, our forces have been concentrated to the political side of the EAC.

After its creation, this Community has been able to attain some achievements, despite the challenges that it has been facing. Some of those challenges are the incessant series of disputes that happened in EAC members. Some of these disputes still even exist today. One can confirm that, except Tanzania, all EAC member states have at least faced one serious dispute in the recent years. It is then time for EAC member states to overcome this situation. One of the tools in hands of the EAC member states is the exploitation of already existing mechanisms including but not limited to the Treaty, EALA, EACJ, etc. To maximize the benefits of the EAC in the settlements processes of disputes through EAC, this Community should also take example from other regional integrations which have succeeded to resolve disputes that their members suffered.

In April 2008, EAC has presented its second draft Protocol on Peace and Security, in which the Partner States re-affirm their faith in the purposes and principles of pursuing security in the region, through various mechanisms like establishing an early warning system in order to facilitate the anticipation and early responses to prevent, contain and manage disputes and crisis situations. We believe well that this shall be realized very soon and be seen not only in theories but also in practice.

[204] Article 5 of the SADC Treaty.
[205] Article 21 of the SADC Treaty.

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