Good Governance, People-Centeredness and Transparency on the Spot: Somalia's Mysterious Journey Towards EAC Membership

By:

Tomasz Milej

March 14, 2024

After receiving a friendly invitation from the East African Law Society to present on Somalia's admission to the EAC in a webinar, I dove into my research. With a prestigious organization, an esteemed audience, and a critical topic at hand, failure was not an option. My goal was clear: ground my talk in primary sources. I intended to dissect the admission procedure, analyze Somalia's Accession Treaty, and scrutinize the EAC verification mission report. Additionally, I aimed to track civil society engagement and grasp parliamentary discussions across Partner States. However, my aspirations were met with a resounding failure.

Despite my best efforts – the most desperate one was maybe scrolling through the United Nations Treaty Series – I could not access any of the above. And this is when I realized that the procedure for admission of new Partner States

procedure exemplifies a fundamental issue with the 1999 Treaty establishing the East African Community. While the Treaty declares key principles like good governance, people-centeredness, transparency, and democracy, the specific procedures and rules that it provides for, do not do justice to those principles.

The Treaty regulates the substantive standards that the State wishing to join the EAC must fulfill. It does so, however, in a very general way. For example, the compliance with the standard of "adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice" – the wording corresponds to the well-known fundamental and operational principles of the Community – is difficult to assess. A discussion, for example, about Somalia's – but also Kenya's – progress towards social justice is not an easy one. And this is why the procedure used for such assessments really matters.

According to Article 3 (3) of the Treaty, the procedure for admission is to be prescribed by the Council. However, it is apparently governed by a mysterious "Protocol for Admission to the East African Community". Why "apparently" and why "mysterious"? It is because the Protocol is not to be found online, and I will quote it as reproduced (in parts) in the 2015 EACJ judgment in the case Patrick Ntege Walusimbi and others v The Attorney General of the Republic of Uganda and others Reference No. 8 of 2013 concerning admission of South Sudan to the EAC. It is a case in which a group of Ugandan traders opposed the admission, alleging widespread human rights abuses perpetrated by South Sudanese authorities.

According to the set of rules cited in the judgment, the admission procedure is purely a bureaucratic exercise. As observed by the EACJ, the decision on the start of admission negotiations is within the "discretionary powers" of the Summit, which means that it is the Heads of State who decide as they want, as long as they reach a consensus. Apparently the same applies to the decision on the admission as such. The Summit makes it upon the recommendation of the Council which is made up of Partner States' ministers, mostly appointed by the same Heads of State. From the press releases of the EAC Secretariat, we know that the Council makes its recommendation based on a report to be tabled by a so-called "verification mission" sent to the state seeking admission.

The verification mission to Somalia comprised “experts from the EAC Partner States” and spent in Somalia the whole eight days from 25th January to 3rd February, 2023. No details on selection, appointment and even the identity of the mission members (save for the Chairperson) are available on the EAC websites. From a news video posted by one of Ugandan news broadcasters that we learn about the identity of one other member. According to the news report, the mission was composed of “experts assigned by the Secretary General of the East African Community”. But one may wonder how the preparedness for the accession of a State of over half a million square kilometers inhabited by over 18 million people can be assessed within 8 days. How can even the most competent and committed experts evaluate Somalia’s performance across 18 EAC cooperation sectors within this time? Did the experts speak to the stakeholders, Somali business associations, civil society, communities, fishermen, and farmers? Did they venture outside of Mogadishu? We don’t know. The Ugandan news video only clarifies that the mission had “several engagements with Somali authorities”. Political appointees talking to political appointees? Not really a relief…

The mission report is not publicly available. The Summit communique of 31 May 2023 devotes to it just one paragraph towards the end of the text (paragraph 26). The communique is silent on the conclusions of the mission’s report. It merely states that the report was “circulated to the EAC Partner States”. Interesting. What does it mean “to the EAC Partner States”? To the State Houses, EAC Ministries only, or also to the national Parliaments? I do not know, but I suspect it is the first option, maybe also the second… The communique goes then on to state that the report was discussed and “adopted” by the Summit, and the Summit directed the Council to start the negotiations with Somalia. This is cryptic. What were the reasons for this decision? What did the verification mission actually recommend? We are not told, but frankly, do the conclusions of the verification mission’s report even matter? Interestingly, in the case of South Sudan, the Summit recommended starting the negotiations with South Sudan despite the conclusions of the verification mission “which concluded that the Republic of South Sudan does not adhere to the core principles enshrined in the Treaty” as per affidavit of the applicants in the *Walusimbi case*.

The negotiations with Somalia were conducted at an absolutely breathtaking speed because the information on the Summit's decision to admit Somalia is included already in the Summit Communique of 24 November 2023. Not even six months after the "adoption" of the verification's mission report. And then things move even faster. The Treaty of Accession is signed on 15 December 2023 by President Salva Kiir "on behalf of the Summit" as per the respective Communique of the Secretariat. Somalia is given 6 months to deposit the instrument of ratification with the Secretary General. According to media reports, the lower house of the Parliament of Somalia agrees to the ratification on the 12 of February 2024 and the instrument of ratification was deposited with the Secretary General on 4 March 2024, which is when Somalia becomes a full member of the Community. The text of the Treaty of Accession is, however, not publicly available.

What is apparently not required is the ratification of the Treaty of Accession by the actual Partner States. A signature of the Chairperson of the Summit (in the case of Somalia, it was President Salva Kiir signing on behalf of the Summit) seems to be regarded as an expression of the Partner States' consent. It is quite an unusual situation in which the Accession Treaty requires a formal ratification from the accessing State, while the actual Partner States are bound by a (delegated) signature only. In addition, the press release of the Secretariat of 4 March 2024 seems to treat the 1999 Treaty Establishing the EAC and the Treaty of Accession of Somalia to the EAC of 2023 as the same document. So, what exactly did President Salva Kiir sign on the 15 December 2024? I assume it was a Treaty between the existing Partner States of the EAC and Somalia concerning the latter's accession to the Community. It is this – publicly unavailable – Treaty that became binding on the existing Partner States and Somalia by President Salva Kiir's signature and Somalia's ratification. Depending on the wording of the mysterious "Protocol for Admission to the East African Community" mentioned above, this procedure may be covered by the consent of the involved parties, which would make the Treaty of Accession and the membership of Somalia valid under the Public International Law. But is it how transparency – a fundamental principle of the Community according to Article 6 (d) of the EAC-Treaty – should look like?

Moreover, as a consequence of this procedure, the parliaments of the existing Partner States were not given an opportunity to deliberate upon the accession

of Somalia. I have gone through the reports of the Regional Integration Committee of the current Kenyan National Assembly and the exit report of the same committee of the previous Assembly. Since 2017, there has been no mention of any debate on the accession of new States to the EAC, although two accessions (of the DRC and of Somalia) happened during this time. Similarly, the publicly available EALA committee reports do not even touch on the issue of accession of new States to the EAC. This means that parliamentary organs, which are best positioned to organize a public debate on the accession and to channel the views of citizenry, business associations and the civil society, do not seem to be involved in the accession procedure. This brings another fundamental principle of the EAC into play, namely the principle of accountability. How do we know that everything possible was done to assess Somalia's preparedness to join the EAC if it was not subject to any parliamentary scrutiny in the EAC? How can the East Africans own the decision on accession, the opportunities and also the risks that it comes with if no parliamentary debate and hardly any broader and inclusive debate at all has taken place? According to Article 49(2)(d) of the EAC-Treaty, the EALA "shall discuss all matters pertaining to the Community". And it knew how to use these powers in the past. Did EALA debate the accession of Somalia? Even if it did, it is difficult to trace it. The publicly available Hansard reports go only up to 2018. Available are also video recordings of EALA sessions, but how to search them using keywords such as "accession", "Somalia", or "New Partner States"?

Taking into consideration that the crucial documents on the admission procedure are not publicly accessible, that the accession negotiations were concluded within a few months and that the verification mission stayed in Somalia only for a couple of days, that the Summit decided on the admission at full discretion and without giving any reasons for its decision, that the Summit acted based on recommendations of political appointees or appointed technocrats (Members of the Council and members of the verification mission), and that no parliamentary debates have taken place or such are not traceable in publicly available records, it must be concluded that the procedure leading to the admission of Somalia has been at odds with the principles of good governance, transparency, accountability, democracy and people-centeredness. It has been driven purely by the executive. It has been shrouded in secrecy and has offered hardly any opportunities for public participation.

But the problem has deeper roots. The Treaty provides for good governance principles but does not provide for good governance policy and institutions that would be in charge. The participants of the EALS Society webinar drove my attention to the Consultative Dialogue Framework (CDF), which urgently needs to be revived. According to a recent study, the EAC Secretary's General Forum – a key CDF element and the main avenue of engagement with civil society – has been cancelled for two years in a row. The same study also decries that the EAC organs have generally become less responsive to the voices of civil society. My students, who have worked on the accession of the DRC to the EAC and whose memorandum will soon be published, have come to the conclusion that it would be useful to establish an independent EAC Good Governance Agency. The Agency would watch over the observance of the good governance principles proclaimed by the Treaty in the Community's actual operations. It could also be tasked with evaluating the adherence to the good governance principles by the actual and prospective Partner States. The Agency could collaborate with EALA and National Parliaments, urging them to take an active role in promoting good governance principles and fostering public participation in regional integration. For it is the people who should own the Community and not the political elites.

Lastly, none of the above is meant to suggest that Somalia should stay outside of the EAC. It is rather a call for a reform of the EAC institutions that would bring those institutions further away from elitism and bureaucracy and closer to the people-centeredness envisaged by the Treaty. And then it would also be the Somali people who would benefit not only from the improved business opportunities but would also feel the embrace of the spirit of democracy. The EAC can and should do better.

View online: Good Governance, People-Centeredness and Transparency on the Spot: Somalia's Mysterious Journey Towards EAC Membership

Provided by Afronomicslaw