'Treaty Constipation' as a Critical Factor in Treaty Implementation: The Case of Kenya, Tanzania and Uganda[1]

ABSTRACT

Signature and ratification are supremely important in bestowing upon treaties, 'entry into force' at the international level. Within the jurisdictions of individual States, far much more legal procedures must be satisfied, for the signed and ratified treaty to find its way into the body of applicable and enforceable laws of the land. Treaty domestication must follow signature and ratification. However, experience demonstrates quiet clearly, that there is remarkable procrastination on the part of Kenya, Tanzania, and Uganda, in domesticating ratified treaties on human rights.

Of the 10 major treaties on human rights, and which include the so called 'International Bill of Rights' and key sub-regional treaties, the rate of domestication is below 5%. Given that the focus of human rights treaties, comprises matters of 'life and death' (capital punishment, reproductive health, public safety, sustainable environment, social security) for the respective right bearers, especially women, children, and the elderly, this omission has grave, even fatal consequences.

It becomes highly desirable therefore, to identify the factors standing in the way of domestication of treaties, and in doing so, contribute towards ensuring that treaty-based rights, are meaningful and accessible. But also, to propose alternative approaches to dealing with the problem of the bloated body of ratified, but unfulfilled treaties, in other words, 'treaty constipation'. The questionable multiplicity (and attendant duplicity) of treaties is in a way, similar to what medical experts term 'constipation'. In our context, it entails a bloated body of ratified treaties, which are 'too hard and dry' the end result being 'indigestion'.

In jurisdictions belonging to the dualist legal system, tackling 'treaty constipation' is rendered particularly complex and difficult. And, as a result, the capacity of ratified, but undomesticated treaties, to 'nourish' their respective rights bearers, becomes severely compromised. In the world of medicine, constipation is addressed through a variety of procedures. Likewise, treaty constipation can be remedied.

Three possible options may be considered. The first entails termination or 'weight loss' of the bloated body of existing human rights treaties, thus attaining an acceptable 'body mass index'

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in other words, retaining only those treaties, which are fulfillable. *Secondly*, is the full exhaustion of the capacity and opportunities of existing human rights treaties. A third, and complementary option, is the declaration of a moratorium on the adoption of new human rights treaties, unless existing frameworks are proven to be wholly unsatisfactory.

INTRODUCTION

It is abundantly clear that one of the major setbacks in the promotion and protection of human rights is the unfortunate and pervasive trend of abandoning signed and ratified treaties, without the crucial step, of bringing such treaties into the statute books of the country in question.[2] Even the most cursory inspection of any of the various data bases on human rights treaties, easily exposes the magnitude of the problem. [3] Not content with the mere statement of a problem, the present chapter, delves into one of the most pressing but least examined questions in international law discourse. This is the issue of identifying the possible determinants of this legislative procrastination, but also, to offer possible remedies to the malaise.

So far, scholarly and other forms of enquiry seem content with pointing out the accession, ratification, and domestication status without delving into the root causes behind the seeming reluctance of States to walk the extra mile, towards full treaty implementation. Accession and ratification, important as they are, mean very little to right bearers, the ultimate beneficiaries of human rights treaties, if not followed up with prescribed implementation measures, most notably, an enabling and appropriate legal regime, at the centre of which lies an enabling Act of Parliament.[4] Ratification, when not accompanied by an enabling legislation denies national authorities and other human rights players, the firm and unequivocal legal basis to act, be it in respect of initiating litigation, or making demands on errant parties. Absence of an enabling legislation, carries with it the additional burden of denying potential beneficiaries a firm legal ground on which to stake their respective claims. And as Nyirenda J (as he then was) stated in the case *Malawi Human Rights Commission* v *AG*, "human rights, by their very expression, are

[2] See discussion in section 2 *infra*. Pertinently, practically all human rights treaty monitoring bodies scrutinize status of treaty domestication.

[3] Illustrations include the University of Minnesota human rights library, www1.umn.edu/humanrts/research/ratification-kenya.html (as visited on June 21, 2012) and www2.ohchr.org/English/law/ of the UN Commission for Human Rights, as visited June 22, 2012.

[4] Treaties routinely oblige States Party not only to enact enabling legislation but demand that States take "judicial, administrative and other measures". For an illustration see Article 1 of the African Charter on the Rights and welfare of the Child, 1990 which, reads, inter alia, that "…member States of the [African Union]…undertake to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter"

bestowed on human beings. It is the human being who is the intended beneficiary of human rights".[5] Onoria provides further illustrations and with remarkable lucidity, the implications of the absence of a statute on the right to access of information, in Uganda, a right provided for by the Ugandan Bill of Rights, and pertinently, in several human rights treaties.[6]

And incidentally, it is in this legal void that often, violations, and especially of a gross and systematic nature, are likely to occur, with the end result being direct misery, abject poverty, lack of access to basic social services, insecurity, displacement, and even untimely death, especially for women and children. When left totally unbridled, and, over a considerable period of time, such wanton violation of human rights engenders the scourge of impunity.

Given this context, getting to the root of the problem of the poor state of affairs in respect of human rights protection, assumes extraordinary relevance and significance. This article suggests that among the core factors responsible for the existing dismal performance of States in respect of domesticating human rights treaties, three stand out. *Firstly*, is the unique relationship between public international law, on the one hand (and to which human rights treaties belong to), and national law, on the other.[7] A *second*, and related factor, is the doctrine of *dualism*, often articulated in the Constitution, primarily through the entrenchment of the Parliamentary prerogative of enacting laws, including enabling legislation with regard to ratified treaties.[8] A *third,* and not totally unrelated to the previous two, is the level of transparency, public scrutiny, and accountability characterizing the ratification and domestication process.[9] At a secondary level, one would also want to point to the issue of low legal literacy among the citizenry, a severely constrained body of civil society organizations, and media.[10]

The general body of human rights treaties is vast. Inevitably, it becomes prudent to resort to sampling. In this case, focus is confined to two categories of treaties. In the first group are 'core' global human rights treaties, namely, the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, the International Covenants of 1966,[11] CEDAW, 1979,[12] the

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[5] Miscellaneous Civil Cause No. 1119 of 2000 (unreported). Cited in the extensively researched work of Malawian scholar, Danwood M. Chirwa, **Human Rights Under the Malawian Constitution**, JUTA, 2011, p 7.

[6] Henry Onoria, "Realization and Enforcement of the Right of Access to Information in Uganda, 1995 – 2005", *Makerere Law Journal*, 2004/2005, pp 39 – 58.

[7] A detailed discussion follows in the immediate next section to this paper.

[8] As set out in Articles 63 (d) and (e) of the Constitution of the United Republic of Tanzania, 1977

[9] For details regarding the ornate legal and administrative proceedings see K. Kamanga, '"International Human Rights Law as Reflected in Tanzania's Treaty & Court Practice" in W. Binchy et al (2006), **Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives**, Clarus Publishers, pp. 53 – 70.

[10] Note for example the challenges confronting the media in Tanzania as captured in LHRC, **Tanzania Human Rights Report 2013**, LHRC & Zanzibar Legal Services Centre, 2014, pp 68 – 72.

[11] That is, the Covenants on Civil and Political Rights, and, on Economic, Social and Cultural Rights, respectively.

[12] That is, the Convention on the Elimination of All Forms of Discrimination Against Women.

Convention Against Torture, 1984,[13] and the Convention on the Rights of the Child (CRC), 1989. In the second category are Regional treaties, notably, the African Charter on Human and Peoples' Rights, 1981, the African Charter on the Rights & Welfare of the Child, 1990, the Protocol to the African Charter on Human & Peoples' Rights on the Rights of Women, 2003,[14] Protocol to the Pact on Security, Stability & Development relating to Democracy and Good Governance, 2006.

These are examined with the purpose of not only ascertaining the status of domestication, which is the key concern of this article. They are also discussed with the intention of exposing possible overlaps in their coverage, but also for occasioning multiplicity and duplicity in terms of obligations, which gives rise to dissipation of resources. The sheer volume of undomesticated treaties is also ground for presenting 'treaty constipation' as a clear obstacle in the general protection of human rights in the countries of concern. Finally, the glut in undomesticated treaties, throws up two related challenges. At one extreme, it becomes important to understand the root causes of such 'treaty constipation'. On the other, there arises the imperative for proposing concrete and realistic interventions.

Holding on to treaties without following them up with domestication, gives the body of ratified treaties, girth resembling obesity, with the attendant distorted 'body mass index'. The analogy does not end there, because a bloated body of undomesticated treaties resembles yet another medical condition, that is, constipation.[15] Finally, just as obesity, a distorted body mass index, and constipation, are indisputably a sign of ill health, so too is 'treaty constipation', because its victims are the dissatisfied beneficiaries envisaged by the human rights treaties under discussion.[16]

But prior to investigating the implementation status, and domestication, in particular, let us spare time to set out the conceptual outlook, hypotheses, and the legal dynamics informing this article. The relationship between public international law (and to which human rights treaties belong to), on the one hand, and domestic law, is particularly relevant, and so too is the doctrine of *dualism*. Another critical factor is the uniqueness of international law as compared to national law and its enforcement. It emerges that in some respect, it is fair to say that the former is characterized by a 'dependency syndrome', largely on account of the fact that in large

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[13] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[14] Often, cited as the 'Maputo Protocol'. The Treaty was approvingly cited in the Zambian case of *Rosaria Mashita Katakwe* v *Edward Hakasenke et als*, Civil Jurisdiction, High Court of Zambia, Sitting at the Principal Registry, Lusaka, 2006/HP/0327.

[15] I had been pushed to adopt the term 'international legislative constipation' while drawing up a Concept Framework (pp 5 – 21, and especially at p 10) leading to the study on '**Marginalisation: The Plight of Refugees and Internally Displaced Persons in East Africa**' commissioned by the Kituo cha Katiba and edited by the eminent Ugandan scholar, Zachary Lomo (2012), as Kituo cha Katiba Occasional Publication No. 7, Fountain Publishers.

[16] See the *obiter* in the case cited in footnote 5 supra.

part, international law relies for its implementation and enforcement, on the national mechanisms, States are willing to offer.

More than any other factor, 'dependency' seems to define the general and broader context and parameters within which international law, including human rights treaties, operate. More often than not, the robustness and swiftness with which domestic laws unroll to deal with infringements, is far more superior than the equivalent responses known to public international law, save of course, those isolated cases of unilateralism by individual States or a group of them, as was the case of the NATO attacks on the regime of Col. Muammar Gaddafi in Libya. Typically, the 'international community' takes a far much longer time frame to respond, let alone provide remedies which are meaningful and acceptable.[17]

THE CONVOLUTED, TROUBLED RELATIONSHIP BETWEEN TREATY LAW AND NATIONAL LAW

The human rights treaties at the bull's eye of this article, form part of international law, and yet their realization to a large extent is designed to take place within the jealously guarded territorial boundaries of sovereign States. To their credit, the 'Westphalia treaties', signed in 1648 in Germany, put to rest several major, long running wars (including the so called "Eighty Years War" between Spain and the Dutch Republic), and contributed towards bringing harmony between the major christian faiths of the time. But the state-centric political order, or 'westphalian sovereignty' following the signing of the treaties, also brought into greater focus, and pushed to the fore, contradictions in the relationship between the laws of the sovereign, on the one hand, and the emerging law of nations, on the other. This discourse continues to trouble thinkers, and practitioners alike to this day, to the extent of constituting a standard theme in practically all known textbooks on public international law.[18]

For example, Brownlie[19] gives it extensive coverage accompanied by a long line of authority on the broad issue of rules of international law and their effect within the municipal sphere. At the outset it is important to stress, that the root of the 'problem' would appear to be the need to safeguard parliament's prerogative for making law. As the line of authority quoted below shows, the direct application of a treaty in respect of a non-State Party seemingly runs into the

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[17] The unfolding political, security and humanitarian disaster in Syria, is a typical example. UN, and Arab League Special Envoy, Kofi Annan threw in the towel and the UN Security Council is seemingly unable to reach unanimity, necessitating the appointment of a new Special Envoy, Lakhdar Brahimi.

[18] They include M.D. Evans (ed), **International Law** (3rd ed), Oxford University Press, 2010, I. Brownlie, **Principles of Public International Law** (7th ed), Oxford University Press, 2008, D.J. Harris**, Cases and Materials on International Law** (6th ed), Sweet and Maxwell, 2004, and S.K. Verma, **An Introduction to Public International Law**, Prentice Hall of India, 1998.

[19] Ibid., pp 31 – 54.

face of 'westphalian sovereignty'. And no less importantly, it is incompatible with the Parliament's monopoly over law making, a principle enshrined in many a Constitution by way of the doctrine of separation of powers. So, whereas the Executive arm may rightfully, negotiate and conclude treaties, the act of bringing such treaties into the municipal sphere and hence giving them the force of law, must be preserved for Parliament (or the National Assembly), and an enabling legislation to be specific.[20] Chirwa puts it succinctly where he states: "…allowing international treaties, which are negotiated and ratified by the Executive, to apply in domestic law without involving Parliament in the endorsement process will constitute a serious inroad into the separation of powers doctrine"[21]

This in turn, brings us to the issue of 'incorporation' of customary international law and 'transformation' of treaties. The dictum entered by Atkin, LJ, in *Commercial and Estates Co. of Egypt* v *Board of Trade*,[22] is often cited, as is the opinion of the UK Privy Council in *Chung Chi Cheung* v *The King*,[23] are often cited as authority. In the former, the essence of treaty transformation was captured in this manner:

> "International Law as such can offer no rights cognizable in the municipal courts. It is only in so far as the rules of International Law are recognized as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations".

Nearly two decades later, the Privy Council would opine, and in quiet categorical terms but also point to the role and significance of international law on the hierarchy of sources of the law of England.

> "[S]o far,… as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals"

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[20] This indeed is the case in Tanzania, Uganda, and Malawi.
[21] D.M. Chirwa, **Human Rights and the Malawian Constitution**, JUTA, 2011, p 29.
[22] Cited in Ian Brownlie, **Principles of Public International Law** (7th ed), Oxford University Press, 2008, p 44.
[23] *Ibid*.

It is clear from the foregoing that a signed and (even) ratified treaty, does not form part of the laws of Tanzania, and as such, cannot be deemed to confer any rights which Courts are under obligation to recognize, and demand compliance. Indeed this constitutes a central tenet of the dualist doctrine and practice. It finds legal articulation in the constitutional and statutory requirement to have treaties ratified, and then, domesticated.[24] One major practical implication of this situation is that the rights, entitlements and other opportunities spelled out in the treaty in question, remain practically out of reach for potential right bearers. In other words, the absence of an enabling legislation in respect of a particular treaty must be recognized as a critical factor in frustrating the promotion and protection of human rights, and therefore deserves to be high in the priorities of any legal reform process.

To summarise, the convoluted, troubled relationship between treaty law and national law is one major factor in contributing to the modest speed and pace of implementing human rights treaties. Let us examine this thread of argument more closely. To begin with, is the lack of sufficient coordination between the various Government agencies in the course of negotiations, signature and ultimately, ratification and domestication. It is not rare for treaty negotiations to be undertaken by one Government agency, but subsequent follow up, and especially in respect of preparing the relevant Parliamentary Bills, being left to another Government institution.

It is common, for example, for Government negotiation teams to be headed by representatives of the Ministry with responsibility for foreign relations.[25] However, the task of preparing draft Bills, is the prerogative of the Chief Parliamentary Draftsmen (CPD), located in the Attorney General's Chamber, itself constituting a unit within the Ministry with responsibility for Constitutional Affairs and Justice. Hypothetically, in such an arrangement, poor coordination and communication can be a significant hindrance. But there is a second consequence to the complicated relationship between treaty law and municipal law. As I have tried to show elsewhere, the process by which Parliament exercises its constitutional function of treaty ratification, is hardly a perfunctory affair. It is characterized by lengthy and ornate procedures,[26] all of which have the effect of unduly prolonging the operationalization of the

[24] See Article 123 of the Constitution of Uganda, 1995 along with the Uganda Ratification of Treaties Act, Cap 204. Finally is Article 2 of the Constitution of the Republic of Kenya, 2010, and Article 89 (1) (f), Constitution of Malawi, 1994 (as amended by Act No. 4 of 2001) and the related case, *In re Adoption of Chifundo James* (a female toddler), *MSCA Adoption Appeal No. 28 of 2009* (unreported)..

[25] From my personal observation of the 2005/2006 negotiations leading to the signing of the 2006 Pact of the International Conference on the Great Lakes Region (Details of the ICGLR can be found at www.icglr.org)

[26] See *fn* 8 *supra,* but also the Seminar Paper by Mr. Michael Kamba, then Director of Treaties and Contracts, Attorney General's Chambers, titled 'The Process of Ratification of International Treaties and Protocols, Domestication and Challenges Facing the Process' excerpts of which were captured by a correspondent in "Advise Govt on International Treaties, MPs Urged", *Daily News* (Dar es Salaam), September 3, 2013, p 2.

treaty in question, and by the same token, delaying the enjoyment of the prescribed rights. Kamba aptly terms it "cumbersome double parliamentary action in treaty-making process.[27]

Thirdly, and perhaps precisely because treaty ratification is a time-consuming exercise, and of matters generally seen as not falling within the category of pressing matters of national importance, a draft Bill will either be readily accepted and speedily disposed of, or become the victim of procrastination and ceaseless postponements. In sharp contrast to the fate of most ratified human rights treaties, enabling legislation such as the Prevention of Terrorism Act, 2002, were processed and enacted into law with astonishing expedite. A fourth and related factor is the question of timing. Parliament, in the Tanzanian context, but typical of many, only meets twice per year with one of the two sessions, almost exclusively dedicated to the issue of discussing and passing the nation's budget.[28] In the course of what is commonly termed the 'budgetary session' there seems to be no appetite in Parliament for any other preoccupation than sorting out the nation's books.

Finally, the tardiness in domestication of treaties is probably also a function of political priorities and choices. The full implementation of economic, social (and cultural) rights imposes fairly onerous demands on financial and related resources available to a State.[29] As a matter fact, the International Covenant on Economic, Social and Cultural Rights (ICESCR) is characterized, among others, for formulating a number of obligations "subject to the availability of resources", coupled with the "progressive realization".[30] In other words, the greater the number of ratified human rights treaties relating to economic and social rights, proportionally bigger are the resources required to bring those treaty obligations to fruition. Another critical issue but of secondary significance to the present discussion is the debate regarding the justiciability or otherwise, of economic, social and cultural rights.[31]

Aren't policy makers aware of this elementary truth? What explains the enthusiasm and amazing appetite for signing and ratifying treaties, which the EAC States are not in a hurry to honor fully? These questions deserve heightened attention. In answering them, we will be getting closer to developing a better understanding of the seemingly contradictory practice of States in respect of human rights treaties. For, on the one hand, is an amazing appetite for

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[27] Kamba, ibid., p 8.

[28] According to the official website of the Parliament of the United Republic, the 14th Ordinary Meeting of Parliament, for example lasted from November 30 – December 12, 2013.

[29] It is revealing that of the 8 clusters of interest for the UN Millenium Development Goals (MDGs), 6 are directly related to economic and social rights, namely, in the area of poverty, education, health and environment. For details see www.undp.org/content/undp/en/home/mdgoverview.html as visited on July 20, 2012.

[30] Steiner, H.J. *et al*, International Human Rights in Context: Law, Politics, Morals (2nd ed), Oxford University Press, 2000, p. 246.

[31] See for example J.C. Mashamba, 'Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights', *LL.M.* Thesis, Open University of Tanzania, 2007

signing on to treaties, while on the other, is a distinct reticence in allowing citizens to fully enjoy the rights as set out in those very same treaties.

It would appear that at the point of signing and to some extent, even ratifying the treaty, State officials will not have undertaken a thorough assessment of the 'cost implications' of implementing the treaty provisions. Such an assessment is not a prerequisite to signing. And, besides, staying away from the signing ceremony at an international conference is likely to invite negative publicity and diplomats the world over are trained to avoid this come what may. To the contrary, appearing on the list of 'founding fathers' of a treaty, has the potential of translating into political mileage for the incumbent Government in its relations with influential sections of the international community, 'development partners', in particular.[32] It is probably true also, that it is in the context of this strategy that countries like Tanzania rarely enter reservations at the point of signing treaties.

The 'honeymoon' between the State and the undomesticated treaty comes crashing, when the domestication process gets underway. It is probably only at this stage, that the relevant Government authorities come face to face with the full impact of the nature of the commitments they have assumed, as a consequence of the liberal practice of signing, acceding and ratification of treaties. Indeed, Kamba acknowledges the cost implication as one of the biggest challenges treaty implementation presents to Government. [33]As treaty depository, after treaty depository, come knocking at the door,[34] demanding to see what treaty implementation measures have been undertaken (since ratification), State authorities find themselves confronted by an overwhelming dilemma. Although legally free to withdraw from (and even terminate) a ratified treaty,[35] and therefore keep out the probing, 'intrusive' eye of the treaty monitoring agent,[36] it is not always a feasible option, particularly given the negative diplomatic and political publicity such a course of action invites.

But neither is the option of rapid and full domestication, a practical option either, given the dependency syndrome afflicting international law, and by the same token, human rights

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[32] Tundu Lissu, Chief Whip of the official opposition in the Parliament of the United Republic of Tanzania. Interview in Dodoma, July 2, 2012.

[33] Kamba, ibid., p 7

[34] Whether under the erstwhile UN Human Rights Country Reports or the Universal Peer Review system, States Party remain obliged to compile and submit regular, and comprehensive feedback as regards the status of human rights implementation within their respective jurisdictions. And this is beside private initiatives such as those authored by human rights NGOs, such as the annual Tanzania Human Rights Report authored by the Legal and Human Rights Centre (LHRC).

[35] This right is secured by the provisions of the Vienna Convention on the Law of Treaties, 1969. Implicit in the invalidation (Article 52) of treaties, whose conclusion has been procured through coercion, is the voluntary nature of expressing consent to be bound, itself underpinned by the general principle of equality of States as sovereigns.

[36] As evidenced, for example, by the vast scope of Human Rights Country Reports.

treaties. First of all, is the astounding backlog of ratified but un-domesticated treaties,[37] and the attendant pressure this creates for the Office of the Attorney General's (AG's) Chamber.[38] *Secondly,* once the Chief Parliamentary Draftsman (CPD) in the AG's Chamber has a Bill ready, one must contend with the ornate, bureaucratic procedures the Bill has to undergo in Parliament, before a statute is enacted. *Thirdly,* unlike the Executive arm of Government (but similar to the Judiciary), Parliament is in session for a limited period of time in any given year.[39] This gives rise to competition in getting an issue onto Parliament's agenda for the session in question. Evidently, matters that are perceived to be not of a pressing nature will fall to the sidelines, giving way to those which are deemed to enjoy higher priority.

Fourthly, the full and rapid domestication of a treaty would ordinarily require an extensive and thorough review of existing laws, policy documents, practices and institutional frameworks for purposes of ensuring harmony and synergies. While enquiring about the possible domestication of the Rome Statute, it emerged that such domestication will require a review of a string of statutes, most notably, the Penal Code, Evidence Act, National Defense Act.[40] This again, requires considerable resources – human, material and financial, none of which appear to be in abundance for the countries in question. The result is the impasse we are all witness to today in the East African region. This is the propensity of States, for signing, acceding and ratifying human rights treaties which they seem to have no intention of following up with a domesticating instrument, an enabling legislation, and other associated implementation measures.

And this disjoint between the broad issue of ratification, and meaningful implementation measures is particularly felt in States such as Kenya, Tanzania and Uganda, where the legal system is premised on the doctrine of dualism, a central tenet of which is that treaties must be 'domesticated', as a precondition to acquiring the force of law within the territorial jurisdiction of the State, most notably, for law enforcement agencies such as the judiciary and prosecution.

Beyond these first line factors is a broader and larger issue, and of particular concern for the present author. In the view of this author, the glut in undomesticated treaties is also a function of the unfortunate trend of adopting new treaties without first interrogating and exhausting

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[37] See Tables A, B, and C to this paper.

[38] In my interviews with officials at the Chief Parliamentary Draftsman (CPD), I was assured that the task of preparing a Bill domesticating a treaty is far less complicated, than obtaining the requisite political will within the executive arm of Government to embark on domestication.

[39] See footnote 26 Supra.

[40] See K. Kamanga, "The Rome Statute and Tanzania Legislation" in J.H. Manda et al, **Towards Domesticating the Rome Statute in Tanzania: A Position Paper**, Nairobi: Children Education Society (CHESO), 2012, pp 14 – 15. His also has been experience from investigating implementation status of another set of treaties namely, the Geneva Conventions of 1949. For details see K. Kamanga, "Implementation of International Humanitarian Law in Tanzania: A Legal Enquiry", *Africa Yearbook of International Humanitarian Law*, 2012 edition, pp 40 – 63.

the adequacy or otherwise, of existing treaties and related mechanisms. Often, one encounters, for example, treaty obligations over essentially, one and the same basic right or fundamental freedom, in a string of distinct and independent treaties. A more detailed discussion, accompanied by illustrations can be found in the next immediate section.

Given the modest and sometimes even crude resources[41] available to Least Developed Countries (LDCs) such as those under discussion, one must question the wisdom behind the unfettered appetite for new treaties, regardless of the value added.

SCOPE OF HUMAN RIGHTS OBLIGATIONS IN THE GREAT LAKES

Tables A, B, and C try to capture the ratification and domestication status of a number of key human treaties, in respect of 3 East African Community (EAC) States, that is, Kenya, Tanzania and Uganda.[42] Several trends easily come forward. *Firstly*, that the countries in question rank high, among State Parties to major global, and regional human treaties. Between them, they are signatories, most notably, of the Genocide Convention, 1948,[43] 2 Covenants of 1966,[44] CEDAW,[45] the African Charter on Human & Peoples Rights, 1981, CAT,[46] CRC,[47] African Charter on the Rights & Welfare of the Child, 1990, and the Maputo Protocol.[48] The Universal Declaration of Human Rights, 1948 (UDHR) though not a treaty, is widely held as a legal text of unique significance such that Constitutions and jurisprudence of courts of law, make direct reference to it.[49]

In so doing, these States have not only affirmed their commitment to the protection and promotion of human rights but have also lent (political, diplomatic and legal) credibility to the 'universality' of these legal texts.

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[41] According to the UNDP's authoritative ranking of 166 nations for the year 2013, both Kenya, Tanzania, and Uganda find themselves in the 'Low Human Development' bracket. Kenya at position 147, Tanzania at 159, and Uganda trailing at 164. For details see http://hdr.undp.org (as accessed October 3, 2014).

[42] The remaining two, are Burundi, and Rwanda.

[43] Convention for the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948

[44] International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, both adopted in 1966, but entered into force ten years later.

[45] That is, Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

[46] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

[47] Convention on the Rights of the Child, 1989.

[48] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, as adopted in Maputo, Mozambique on July 11, 2003 and entered into force on November 25, 2005.

[49] Among them is the Constitution of the United Republic of Tanzania, 1977.

Secondly, a relatively large percentage of the signed treaties have been accompanied with ratification. Parallel to this is the small, but vital detail, that ratifications have come, not immediately on the heels of signature of a treaty but after several years. Ratification, according to the Vienna Convention on the Law of Treaties, 1969 is an explicit and solemn affirmation to be bound by the treaty. So, the longer the gap between signing and ratification the greater the delay in bringing the benefits of the human rights treaty to its respective beneficiaries, since, treaty domestication is predicated not only on signature, but ratification of a treaty.

Just as ratifications are fewer in numbers and far apart (as compared to treaty signatures), enabling legislation are even far more modest in number and scope. Equally, exceedingly sparse are also other implementation measures (in addition to domestication) required of State Parties. It need be borne in mind, that besides domestication, human rights treaties invariably require States to "adopt judicial, administrative and other related measures", essential to operationalising the treaty.[50] This is a supremely important detail since an enabling legislation in and by itself is insufficient in bring into operation its provisions. To operationalise the legislation (leave alone the treaty), several measures must be taken, especially where the legislation is addressing a totally unregulated issue, or where the legislation is thrust into a domain hostile to the new statute. In either of these instances, new institutions along with rules and regulations have to be adopted, or a sweeping review and harmonization of laws has to be undertaken. Not least of all, law enforcement agents, especially the judiciary and prosecutors have to be re-tooled to facilitate a robust and competent enforcement of the newly introduced statute.

Thirdly, there appears to be considerable overlap in a number of treaties as regards their respective subject matter. This situation in turn, gives rise to questionable duplicity (and multiplicity) of legal frameworks, institutions, mechanisms and related pressures on finite national resources. It surely produces more treaties than the Office of the Attorney General (AG) is able to 'transcribe' into municipal law, by way of enabling legislation.[51] The end result is the phenomenal backlog of 'undomesticated' (as captured in Tables A, B, and C), but signed and ratified treaties, and more pertinently, severe constraint on the full and meaningful enjoyment of prescribed human rights by the rights bearers.

The subsequent section discusses in better detail this duplicity and multiplicity, along with the attendant consequences.

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[50] The 'Maputo Protocol' in Article 26, for one, enjoins State Parties to "adopt all necessary measures" including providing "budgetary and other resources for the full and effective implementation" of the Protocol.

[51] See fn 25 supra.

CONVERGENCES AND CONTRADICTIONS IN TREATY OBLIGATIONS

In the Introduction section to this article several trends were identified in respect of the ever expanding body of human rights treaties to which the EAC Partner States in question, have opted to be bound to. The observation was made that there are clear overlaps between the subject matter of several treaties, which is the basis for the suggestion that this amounts to 'duplicity'. And if this is indeed the case, this must be a matter of heightened concern, given the evident resource constraints confronting these EAC Partner States. Put differently, if greater rationalization of treaty obligations from the various enforceable human rights treaties is achieved, conditions will be created for a more cost effective, full and rapid enjoyment of prescribed human rights.

As things stand at the present, multiplicity of treaties has bred duplicity. In turn, these have conspired to throw up the hard boiled challenge of dissipation of already modest resources, between conflicting treaty obligations. The present section therefore begins by pointing out what seem to be the areas in which one notices an evident multiplicity, and the practical dilemmas this situation creates for policy makers, rights bearers, and the human rights regime, at large. It is suggested that this is particularly visible in the area of treaties relating to the rights of two significant social groups, that is women, and children.

Chronologically, we must begin with the Universal Declaration of Human Rights, 1948.[52] However, the pre-eminent global, women-specific treaty, is CEDAW, 1979.[53] One will have to be forgiven for assuming that CEDAW is confined to the singular issue of discrimination. The truth of the matter is that CEDAW has a fairly broad remit, and addresses itself, most notably to such issues as reproductive rights, gender equality and socio-economic rights. As a leading team of feminists have observed, "[CEDAW] is a major step toward laying out not only passive provisions forbidding discrimination but also active provisions… for remedying historical inequality".[54] The 1966 Covenants,[55] both address human rights of women in a fairly substantive manner. Experts, including feminists often make this acknowledgement as does Stamatopoulou, who observes that besides CEDAW, "there are two main human rights treaty-monitoring bodies explicitly mandated to deal with the human rights of women: the Human Rights Committee (CCPR), which supervises the International Covenant on Civil and Political

[52] Adopted by the UN General Assembly on December 9, 1948 "as a common standard of achievement for all peoples and all nations".
[53] UN Convention Against all Forms of Discrimination Against Women, 1970.
[54] Peters, J et al (eds) **Women Rights: International Feminist Perspectives**, Routledge, 1995, p 4
[55] Kenya, Tanzania and Uganda are parties of these treaties.

Rights; and the Committee on Economic, Social and Cultural Rights (CESR), which supervises the International Covenant on Economic, Social and Cultural Rights"[56]

The 'Beijing Declaration' at the Fourth World Conference on Women in 1995 is another, regulatory milestone, even if in the form of 'soft law'.[57] Among others, government delegates, including Kenya, Tanzania and Uganda made the lofty pledge to "advance the goals of equality, development and peace for all women everywhere in the interest of all humanity". It is the argument of this author that, therefore, as African Heads of State and Government assembled in the Mozambican capital of Maputo in 2003 to adopt, the Protocol on the Rights of Women,[58] practically all African States were already saddled with considerable treaty obligations as regards to rights of women.

It is in this regard that the wisdom of adopting yet another treaty on the rights of women is questioned and in light of the fact that neither of the two Covenants has ever been explicitly domesticated by any of the 3 EAC Partner States. One can not also ignore the Banjul Charter, 1981,[59] with its elaborate array of human rights and most notably for the solemn declaration prohibiting discrimination of whatever kind in the enjoyment of prescribed rights, and therefore firmly encompasses discrimination against women.[60]

The situation described above in respect of human rights treaties relevant to women is hardly different from that of children. The EAC Partner States of Kenya, Tanzania and Uganda have gone ahead to assume fresh treaty obligations, while leaving behind a string of unfulfilled obligations from other prior treaty engagements. And, more importantly, without the value of the new treaty mechanisms and obligations being apparent. In respect of children, we note that the leading treaty global treaty is the CRC, 1989.[61] Kenya, Tanzania and Uganda are parties (See tables A, B and C). The CRC has the further characteristic of being among the most widely accepted treaty, having mustered around 140 signatures and 193 ratifications, a feat surpassed by only the Geneva Conventions, 1949.[62]

Curiously, against this background of 3 substantive undomesticated treaties specific to the rights of children, African States and with them, Kenya, Tanzania and Uganda embarked on a process of designing a fresh and new human rights treaty for children.[63] As in the case of

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[56] Stamatopoulou, Elissavet, "Women's Rights and the United Nations" in J. Peters et al (eds), ibid., p 43.
[57] Text of the Declaration can be found at www.un.org/womenwatch/daw/beijing/ (accessed on August 28, 2012.
[58] Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, 2003.
[59] African Charter on Human and Peoples' Rights, 1981.
[60] See in particular, Article 2.
[61] UN Convention on the Rights of the Child, 1989. Text of the treaty can be accessed at the www.unicef.org/crc/ . The Convention is accompanied by two Protocols, the Optional Protocol on the Involvement of Children in Armed Conflicts, and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.
[62] See www.icrc.org
[63] African Charter on the Rights and Welfare of the Child, 1990

women, several substantive rights and freedoms, of children can be found within several other human rights and related treaties and legal texts, including the Universal Declaration on Human Rights, 1948, the Geneva Conventions, 1949[64] and the Covenants of 1966. Here again, to an already bloated body of undomesticated human rights treaties, EAC Partner State, were not deterred from assuming fresh treaty obligations. Other than a situation of treaty constipation there is very little evidence, if any, to show how this bloated body of undomesticated treaties has added value to the promotion and protection of human rights.

One must however acknowledge that the possible justification and motivation for adoption sub-regional treaties lies in the indisputable socio-economic, political and cultural peculiarities of these States. However this initial enthusiasm practically fizzles out the moment robust implementation, especially, domestication of these 'home grown' instruments and mechanisms is demanded. And this trend is hardly confined to the area of human rights.[65]

THE WAY FORWARD

There can be no denying that the EAC Partner States have been, and continue to 'bite more than they are able to chew'. Signed and ratified treaties keep growing, without a corresponding appetite for domestication, and without which, the promised rights remain illusory in so far as the rights bearers are concerned. The result is a situation which can be best described as 'treaty constipation', a glut in the number of treaties which have been signed or ratified, but have not been brought into the statute books. In the context of the prevailing dualist legal system, such treaties remain outside the body of applicable and enforceable laws of the land. The end result is that the enforcement of the said treaties becomes impaired, and, severely so.

The general remedy of this 'treaty constipation' would require a rationalization and harmonization of the numberless obligations arising from the liberal signing and ratification of treaties. The expected outcome of this exercise would be a 'treaty weight loss' and a more acceptable 'treaty body mass index'.

Secondly, should be the drive to addressing the problem of multiplicity and duplicity of treaty obligations. This in turn, would require the optimal exploitation of the capacity and opportunities of existing human rights treaties. *Thirdly*, and related, should be the declaration of a moratorium on the adoption of new human rights treaties (global, regional, sub-regional or bilateral), unless existing frameworks are proven to be wholly unsatisfactory.

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[64] Especially the 'fourth' Geneva Convention whose concern is the protection of the civilian population.

[65] Procrastination in following up signature with domestication and other pertinent implementation measures is particularly noticeable in the area of International Humanitarian Law, as well International Criminal Law.

It is in this trilogy of remedies, probably lies the panacea for effectively confronting the challenges posed by ‘treaty constipation’, a condition for which no other prescription is known to exist.

TABLE A: Ratification and Domestication Status in TANZANIA[66]

TREATY	SIGNATURE/ACCESSION	RATIFICATION	DOMESTICATION
Genocide Convention, 1948	Accession Apr 5, 1984		**No Domestication.**
International Covenant on Civil & Political Rights, 1966	Accession May 1, 1972		**No Domestication.**
International Covenant on Economic, Social & Cultural Rights, 1966	• Accession May 1, 1972 • Not Signed neither of 2 Optional Protocols		**No Domestication.**
Convention on the Elimination of All Forms of Discrimination Against Women, 1979	• Accession March 9, 1984 • No accession to Optional Protocol		**No Domestication.**
African Charter on Human & Peoples' Rights, 1981	Accession Jan 23, 1992		**No Domestication.**
Convention Against Torture, & Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984	Accession Feb. 21, 1997		**No Domestication.**
Convention on the Rights of the Child, 1989	• Signature Jan 26, 1990 • Signed Optional	• Ratification Jul 30, 1990 • Ratification	**Domesticated by way of the Law of the Child Act,**

[66] Information has been gathered from three sources: the webpage of the UN Treaty Series – https://treaties.un.org/pages/viewdetails.aspx?, as accessed on June 10, 2015, webpage of the University of Minnesota Human Rights Centre (www1.umn.edu/humanrts/research/ratification.html) as visited on June 10, 2015, coupled with interviews at the Chambers of the Attorney General, in Dar es Salaam.

	Protocol Sep 8, 2000	Jan 28, 2002	**2009**
Protocol to the African Charter on Human & Peoples' Rights on the Rights of Women, 2003	Signed Dec 17, 2003	No ratification	**No domestication**
African Charter on the Rights & Welfare of the Child, 1990	Accession Jul 25, 2000	No ratification	No domestication
Protocol to the Pact on Security, Stability & Development(2006) relating to Democracy and Good Governance, 2006	Signed Dec 15, 2006	No ratification	No domestication

TABLE B: Ratification and Domestication Status in KENYA[67]

TREATY	SIGNATURE	RATIFICATION	DOMESTICATION
Genocide Convention, 1948	Not Signed		
International Covenant on Civil & Political Rights, 1966	• Accession May 1, 1972 • Not Signed either of 2 Optional Protocols		
International Covenant on Economic, Social & Cultural Rights, 1966	Accession May 1, 1972		
Convention on the Elimination of All Forms of Discrimination Against Women, 1979	• Accession Mar 9, 1984 • Not Signed Optional Protocol		
African Charter on Human & Peoples Rights, 1981	Accession Jan 23 1992		
Convention Against Torture, Cruel, Inhuman and Degrading Treatment or Punishment, 1984	Accession Feb 21, 1997		Not domesticated
Convention on the Rights of the Child, 1989	• Signed Jan 26, 1990 • Signed	• Ratified Jul 30, 1990 • Ratified Jan	

[67] Information has been gathered from three sources: the webpage of the UN Treaty Series – https://treaties.un.org/pages/viewdetails.aspx?, as accessed on June 10, 2015, webpage of the University of Minnesota Human Rights Centre (www1.umn.edu/humanrts/research/ratification.html) as visited on June 10, 2015, coupled with interviews at the respective Chambers of the Attorney General, in Nairobi.

	Optional Protocol Sep 8, 2000	28, 2002	
Protocol to the African Charter on Human & Peoples' Rights on the Rights of Women, 2003	Signed Dec 17, 2003		
African Charter on the Rights & Welfare of the Child, 1990	Accession Jul 25, 2000		
Protocol to the Pact on Security, Stability & Development(2006) relating to Democracy and Good Governance, 2006	Signed Dec 15, 2006		Not Domesticated

TABLE C: Ratification and Domestication Status in UGANDA[68]

TREATY	SIGNATURE	RATIFICATION	DOMESTICATION
Genocide Convention, 1948	**Accession Nov 14, 1995**		
International Covenant on Civil & Political Rights, 1966	• **Accession Jun 21, 1995** • **Optional Protocol on Communication signed Nov 14, 1995** • **Death Penalty Protocol – Not Signed**		
International Covenant on Economic, Social & Cultural Rights, 1966	**Accession Jan 21, 1987**		
Convention on the Elimination of All Forms of Discrimination Against Women, 1979	• **Signed Jul 30, 1980** • **Not Signed Optional Protocol**	**Jul 22, 1985**	
African Charter on Human & Peoples Rights, 1981	**Signed Aug 18, 1986**		
Convention Against Torture, Cruel, Inhuman and Degrading			

[68] Information has been gathered from three sources: the webpage of the UN Treaty Series – https://treaties.un.org/pages/viewdetails.aspx?, as accessed on June 10, 2015, webpage of the University of Minnesota Human Rights Centre (www1.umn.edu/humanrts/research/ratification.html) as visited on June 10, 2015, coupled with interviews at the respective Chambers of the Attorney General, in Kampala.

Treatment or Punishment, 1984			
Convention on the Rights of the Child, 1989	**Signed Aug 17, 1990**	**Ratified Aug 17, 1990**	
Protocol to the African Charter on Human & Peoples' Rights on the Rights of Women, 2003	Signed Dec 18, 2003		
African Charter on the Rights & Welfare of the Child, 1990	Signed Feb 26 1992	Ratified Aug 17, 1994	
Protocol to the Pact on Security, Stability & Development(2006) relating to Democracy and Good Governance, 2006	Signed Dec 15, 2006		