

# Between supranationality and intergovernmentalism: Re-evaluating the relationship between the African Union and regional economic communities

Anopa Tamuka\*

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## Abstract

*The Casablanca-Monrovia debate outlined two possible paths for African regional development. These were: pursuing regional integration through a supranational organisation, or fostering regional cooperation via an intergovernmental framework. This raises an important question about the relationship between regional economic communities (RECs) and the African Union (AU). This article argues that direct control of RECs by the AU is not a practical solution to this issue. Through a thorough historical and legal analysis of regional development in Africa, this paper illustrates that the trajectory of regional economic development has always favoured an intergovernmental relationship characterised by subsidiarity and complementarity between the RECs and the AU. Historically, RECs in Africa*

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\* Anopa Tamuka is an LLM candidate at the University of Cape Town, Rondebosch, Cape Town, South Africa. ORCID iD: 0009-0009-8827-915 (https://orcid.org/0009-0009-8827-915X).

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*were never designed to be under direct oversight. Instead, a relationship based on subsidiarity and complementarity was and is preferred. Thus, this paper proposes the Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement) as a foundational model for establishing a robust framework for the REC-AU relationship. While not perfect, the AfCFTA Agreement recognises the region-specific interests of RECs and is sufficiently flexible to accommodate them, yet concrete enough to define the relationship.*

**Keywords:** subsidiarity, complementarity, direct control, regional economic communities, African Union, AfCFTA Agreement, Organisation of African Unity, African Economic Community, supranationality, intergovernmentalism, African integration

## Introduction

This article illustrates the evolving relationship between regional economic communities (RECs) and the African Union (AU). It argues that this relationship has largely favoured subsidiarity and complementarity over direct oversight of the former by the latter.<sup>1</sup> In this paper, subsidiarity and complementarity are understood as characteristics of intergovernmentalism. They describe a cooperative relationship among member states within an international organisation, where no single state has authority over the others. Where a chain of command does exist, power is decentralised.<sup>2</sup> This allows individual states to maintain a degree of decision-making autonomy.

This stands in contrast with direct control, which denotes a supranational arrangement characterised by a clear decisional hierarchy among member states, with authority centralised at the top.<sup>3</sup> The pursuit of points of common interest informs the nature of regional cooperation with Africa. As such, intergovernmentalism proves favourable as it gives RECs and their member states decision-making power to tailor

<sup>1</sup> AU Commission and others, 'Memorandum of Understanding on Cooperation in the Area of Peace and Security Between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa', 2008, Article 4(iv); Herpolsheimer, 'AU-REC Relations: The practices of inter-regionalism between ECOWAS and the African Union', 33(1) *Comparatio* (2023) 75.

<sup>2</sup> Sheriff Ghali Ibrahim, David Ogbedi and JW Adams, 'An intergovernmentalist approach to regional integration in Africa: The efficacy of the African Union', 1(1) *International Journal of Multidisciplinary Research and Modern Education* (2015) 462; Klaus Detterbeck and Eve Hepburn, 'Introduction to the handbook of territorial politics', in Klaus Detterbeck and Eve Hepburn (eds) *Handbook of territorial politics*, Edward Edgar Publishing, 2018, 6; Anastassia V Obydenkova and Phillippe C Schmitter, "'Real existing democracies", and "real existing autocracies": Their relation to regional integration and regional cooperation', 16(1) *Taiwan Journal of Democracy* (2020) 5.

<sup>3</sup> Peter Hay, *Federalism and supranational organisations: Patterns of a new legal structure*, Urbana, University of Illinois Press, 1966, 69; Babatunde Fagbayibo, 'Common problems affecting supranational attempts in Africa: An analytical overview', 16(1) *Potchefstroom Electronic Law Journal* (2013) 33; Obydenkova and Schmitter, "'Real existing democracies" and "real existing autocracies": Their relation to regional integration and regional cooperation', 5.

the integration process to their specific needs, rather than supranationalism, which would undermine it.

The objective of this paper is not to conduct a comparison of the advantages and disadvantages between supranationalism and intergovernmentalism. Rather, it intends to demonstrate a trend within the trajectory of regional development in Africa in which intergovernmentalism is preferred instead of supranationalism and to provide reasons thereof.<sup>4</sup> It further demonstrates that any regulatory framework defining the REC-AU relationship must account for the reasons behind this trend.

To effectively build my argument, I will conduct a historical-legal analysis of African RECs. This analysis will demonstrate that they emerged organically in response to region-specific interests rather than as a result of a mandate from the Organisation of African Unity (OAU). This indicates that from their inception, RECs did not view themselves as extensions of the OAU but rather independent organisations. Additionally, through a comprehensive examination of the various instruments that define the relationship between RECs and the AU, this paper aims to show a trend in which RECs resist supranational control.

This paper further argues that, while it appears increasingly evident that RECs prefer a relationship of subsidiarity and complementarity over direct control, it is essential to clearly define their relationship with the AU.<sup>5</sup> Therefore, any viable attempt at creating a robust legal

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<sup>4</sup> Discussions on the feasibility of a supranational AU have been discussed extensively by Babatunde Fagbayibo. See, Babatunde Fagbayibo, 'A supranational African Union? Gazing into a crystal ball', *De Jure* (2008) 493-503; Babatunde Fagbayibo, 'Looking back, thinking forward: Understanding the feasibility of normative supranationalism in the African Union', 20(3) *South African Journal of International Affairs* (2013) 411-426; Fagbayibo, 'Common problems affecting supranational attempts in Africa: An analytic overview', 32-69.

<sup>5</sup> Commentators such as Herpolsheimer, 'AU-REC Relations', 74, have questioned the nature of the relationship of the AU and RECs and conducted similar research, although, with a focus on coordination between the AU and RECs in the context of peace security and conflict management. Richard Frimpong Oppong 'The African Union, African Economic Community and Africa's regional economic communities: Untangling a complex web', 18(1) *African Journal of International and Comparative Law* (2010) 92-103.

framework outlining the relationship between RECs and the AU effectively must account for this resistance. In this regard, the Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement) serves as a blueprint for such a model legal framework.

The foregoing analysis is built on the background of what has been termed the 'spaghetti bowl'.<sup>6</sup> The 'spaghetti bowl' phenomenon is characterised by a multiplicity of regional trade agreements (RTAs) and overlapping memberships within RECs, resulting in members facing overlapping and often conflicting obligations.<sup>7</sup> For James Thuo Gathii, this phenomenon represents the diverse and flexible nature of African regional trade agreements and RECs as they exist as 'flexible legal regimes'.<sup>8</sup> Where the needs of states are vast, ranging from sharing of ports and water basins, and access to trade routes to security concerns, these flexible legal regimes allow for states to derive benefits from multiple RECs than they would under a single REC.<sup>9</sup>

Gathii, however, acknowledges that this multiplicity of RECs has become a hindrance to the establishment of the African Economic Community (AEC).<sup>10</sup> Considering that, in the context of establishing the AEC, RECs are supposed to be the building blocks, their erratic and often poorly regulated establishment suggests further fragmentation rather than the consolidation of RECs to form the AEC.<sup>11</sup>

<sup>6</sup> Peter Draper, Durrel Halleson and Philip Alves, 'SACU, regional integration and the overlap issue in Southern Africa: From spaghetti to cannelloni?', Trade Policy Report No 15 (2007) 7. Term originally coined by Jagdish N Bhagwati in 'Preferential trade agreements: The wrong road', 27 *Law & Policy in International Business* 865 (1996).

<sup>7</sup> Barbara Kolbeck, 'Legal analysis of the relationship between the AU/AEC and RECs: Africa lost in a "spaghetti bowl" of legal relations?', Unpublished LLM Dissertation, University of Cape Town, 2014, 52.

<sup>8</sup> James Thuo Gathii, 'African regional trade agreements as flexible legal regimes', 35(3) *North Carolina Journal of International Law and Commercial Regulation* (2010) 571.

<sup>9</sup> James Thuo Gathii, *African regional trade agreements as legal regimes*, Cambridge University Press, 2011, 65-66. Kolbeck, 'Legal analysis of the relationship between the AU/AEC and RECs', 52.

<sup>10</sup> Gathii, 'African regional trade agreements as legal regimes', 76.

<sup>11</sup> Kolbeck, 'Legal analysis of the relationship between the AU/AEC and RECs', 52.

Currently, there are 15 RECs on the African continent, including the newly formed Alliance of Sahel States (AES).<sup>12</sup> However, as of 2006, the AU only recognised eight in an attempt to curb the further formation of RECs.<sup>13</sup> Draper, Halleson and Alves report that Southern and Eastern Africa register the highest number of RECs.<sup>14</sup> Apart from Mozambique, all the other countries belong to more than one REC.<sup>15</sup> The United Nations Economic Commission for Africa, in its 2006 report, argued that there is a need to coordinate and align the various activities and programmes of RECs.

The report highlighted that the current status quo was ineffective, as it failed to provide a solution for the overlapping memberships and duplication of obligations that arose from RECs. Kolbeck posits that, without a clear regulatory framework between RECs and the AU, its intergovernmental or supranational institutions remain fragile and incapable of establishing an AEC.<sup>16</sup> This speaks to the central question of this paper: In light of this spaghetti bowl phenomenon, what should be the nature of the relationship between RECs and the AU?<sup>17</sup>

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<sup>12</sup> Draper, Halleson and Alves, 'SACU, regional integration and the overlap issue in Southern Africa', 7; Osuchukwu Cynthia Nkechi, Iteke Wilson Chibuzor and Emesiani Ifeanyi Godspower, 'The Alliance of Sahel States and the future of West African regional integration', 13(1) *Direct Research Journal of Social Science and Educational Studies* (2024) 32-33. A list of African RECs include: Alliance of Sahel States, Arab Maghreb Union, Common Market for Eastern and Southern Africa, Community of Sahel-Saharan States, East African Community, Economic and Monetary Union of Central Africa, Economic Community of the Great Lakes Countries, Economic Community of West African States, Indian Ocean Commission, Intergovernmental Authority on Development, Mano River Union, Organisation for the Harmonisation of Business Law in Africa, Southern African Development Community, Southern African Customs Union, and West African Economic and Customs Union.

<sup>13</sup> African Union, 'Decisions and declarations: Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs)', AU Doc Assembly/AU/Dec. 112 (VII), Assembly of the African Union, Seventh Ordinary Session, para 3.

<sup>14</sup> Draper, Halleson and Alves, 'SACU, regional integration and the overlap issue in Southern Africa', 9.

<sup>15</sup> Draper, Halleson and Alves, 'SACU, regional integration and the overlap issue in Southern Africa', 9.

<sup>16</sup> Kolbeck, 'Legal analysis of the relationship between the AU/AEC and RECs', 4-5.

<sup>17</sup> Herpolsheimer, 'AU-REC Relations', 74.

This paper is structured into four sections. First, it draws the historical trajectory of the development of RECs from the OAU through the Casablanca-Monrovia debate, arguing that direct control of the AU on the RECs was not envisaged. Thereafter, using the viewpoints of the EAC, Economic Community of West African States (ECOWAS), and South African Development Community (SADC), it argues that RECs developed as independent institutions addressing region-specific challenges and interest. A trend that continues in their current practice. And so, the actions of the RECs aim to maintain a degree of decisional autonomy and subjecting them to the direct oversight of the AU would undermine this autonomy.

Section three analyses the pre-AfCFTA Agreement instruments that is: Treaty Establishing the African Economic Community (the Abuja Treaty), the Constitutive Act of the African Union, and the 2008 Protocol under Treaty Establishing the African Economic Community on Relations between the African Union (AU) and the Regional Economic Community (RECs), arguing that they succeed to the extent that they are intergovernmental and fail to the extent that they attempt to be supranational. The final section, serving as the crux of the paper, posits the AfCFTA Agreement as the blueprint for a conscious agreement that appreciates the nuances behind why RECs prefer a relationship based on subsidiarity and complementarity as opposed to being subjected to direct control.

## **A historical analysis of regional development under the Organisation of African Unity**

Granting the AU direct control over RECs as a solution to the question regarding the nature of their relationship deviates significantly from the historical trajectory of regional development in Africa since the establishment of the OAU. A thorough historical analysis reveals that the idea of direct control by the AU over RECs was never fully envisioned, especially to any considerable degree. To underscore this point, I

must acknowledge that the OAU was fundamentally designed to foster regional cooperation rather than regional integration. Although some commentators posit that these two concepts are interchangeable,<sup>18</sup> they carry distinct connotations.

Regional cooperation is characterised by a voluntary commitment among states to collaborate in pursuit of shared objectives, whether political, social, or economic, while maintaining their political independence.<sup>19</sup> In contrast, regional integration envisions a progressive unification of states, where they gradually converge into a singular socio-political entity, compromising some degree of their sovereignty.<sup>20</sup>

The historical Casablanca-Monrovia debate best contextualises the argument; that the OAU operated more as a mechanism for regional cooperation rather than for regional integration. Two contrasting schools of thought emerged among African leaders. The Casablanca group advocated for a bold and transformative approach toward regional integration, envisioning the creation of a single political entity across the African continent. In contrast, the Monrovia group endorsed a more tempered strategy of regional cooperation that emphasised the preservation of state sovereignty, while still enabling nations to collaborate in achieving collective socio-political goals.<sup>21</sup>

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<sup>18</sup> Willie Shumba, 'Towards the African Economic Community: Legal and historical perspectives', 26 *Potchefstroom Electronic Law Journal* (2023) 5.

<sup>19</sup> Obydenkova and Schmitter, "'Real existing democracies" and "real existing autocracies": Their relation to regional integration and regional cooperation', 5; Detterbeck and Hepburn, 'Introduction to the handbook of territorial politics', 6; Viet Bachmann and James D Sidaway, 'African regional integration and European involvement: External agents in the East African Community', 92(1) *South African Geographical Journal* (2010) 1. Bachmann and Sidaway use regionalism to mean regional cooperation as proposed by Julius Nyerere, and continentalism to refer to regional integration as proposed by Kwame Nkrumah.

<sup>20</sup> Hay, *Federalism and supranational organisations*, 69; Fagbayibo, 'Common problems affecting supranational attempts in Africa', 33; Obydenkova and Schmitter, "'Real existing democracies" and "real existing autocracies": Their relation to regional integration and regional cooperation', 5; Ibrahim, Ogbedi and Adams, 'An intergovernmentalist approach to regional integration in Africa', 462.

<sup>21</sup> Gerrit Olivier, 'Regionalism in Africa: Cooperation without integration?', 32(2) *Strategic Review for Southern Africa* (2010) 27; Kwame Nkrumah, *The autobiography of Kwame Nkrumah*, International Publishers, 1957, 164 where he famously states, 'seek ye first the political kingdom'.

Leading the Casablanca Group was Kwame Nkrumah, who championed a supranationalist framework and argued fervently for the concept of a united Africa. He believed that this unity was crucial for attaining true independence and ensuring the efficient utilisation of Africa's vast resources, both material and human, for the advancement of its people.<sup>22</sup> However, this vision faced considerable opposition, as it necessitated that newly independent states relinquish their hard-won autonomy and submit to a continental governing authority.<sup>23</sup> This proposition was a steep price that most African leaders were unwilling to pay, as they resonated more with the Monrovia Group's perspective.

The Monrovia approach, propagated by statesmen such as Nnamdie Azikiwe of Nigeria, championed a state-centric, transnational organisation that fostered cooperation among sovereign states without compromising their independence.<sup>24</sup> It is important to note that from the time of the Casablanca-Monrovia debates to the adoption of the OAU Charter, the role of RECs was never considered at length.

Julius Nyerere of Tanzania was equally a major proponent for regional organisations for greater Pan-African Unity, but I must stress that this was more in connection with the East African Community (EAC). For Nyerere, RECs such as the EAC served as a foundational basis for the realisation of a United States of Africa.<sup>25</sup> Kamata concludes that Nyerere started as a nationalist (championing a state-centred ap-

<sup>22</sup> Kwame Nkrumah, *Africa must unite*, New York, Frederick A Praeger Publishers, 1963, xvii.

<sup>23</sup> Leila J G Farmer, 'Sovereignty and the African Union', 4(10) *The Journal of Pan African Studies* (2012) 97. The countries that sided with Nkrumah included, the Algerian provisional government, Egypt, Guinea, Libya, Mali and Morocco.

<sup>24</sup> Maano Ramutsindela, 'Gaddafi, continentalism and sovereignty in Africa', 91(1) *South African Geographical Journal* (2009) 1-3. For a comprehensive discussion on the Monrovia-Casablanca debates, see Constantinos Berhutesfa Constantinos, 'Monrovia, Casablanca and Addis Ababa: The struggle, the story and legacy of African unity', 9(18) *Respublica Literaria* (2017) 4-9.

<sup>25</sup> Ng'wanza Kamata, 'Julius Nyerere: From a territorial nationalist to a Pan African nationalist', 11(46) *The African Review* (2019) 317; J Hatch, *Two Africa statesmen: Kaunda of Zambia and Nyerere of Tanzania*, London, Secker and Warburg Publishers, 130.

proach to African regional development) and spent much of his political career as a Pan-Africanist preaching a collective unity for Africa.<sup>26</sup>

I argue that the question has never been whether Africa should be united or not, but rather what form that unity must take. An intergovernmental approach, upon which the OAU was founded did not necessarily negate this unity. For Nyerere, the formation of the EAC was a regional necessity that would have future continental implications, which informed his stance on African regionalism.<sup>27</sup> I believe that meaningful discussions about the role of RECs emerged much later, particularly when the need for their contribution to Pan-African unity and regional economic development became apparent, not at the inception of the OAU.<sup>28</sup> This may have been so because at the time of the establishment of the OAU, on 25 May 1963, over 21 countries were still under colonialism.<sup>29</sup> The focus was strongly on ensuring countries attained independence and that such independence was protected.<sup>30</sup>

In furtherance to this, the wording of the OAU Charter itself supports this notion. Nowhere are RECs mentioned in the OAU Charter. The word ‘cooperation’ – not integration – is listed under objectives of the OAU.<sup>31</sup> Article II(1) and (2) of the OAU Charter is structured in

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<sup>26</sup> Kamata, ‘Julius Nyerere’, 329.

<sup>27</sup> Kamata, ‘Julius Nyerere’, 318. Kamata relies on an extract from a letter from Jomo Kenyatta to Julius Nyerere, ‘we have at the moment a situation where all the people of East Africa are conscious of and believe in Federation, and have the enthusiasm necessary to make it succeed. Indeed, I see in them a readiness not only to federate, but even to merge our different political parties into one Federal Party – and this readiness has great meaning, because it is the nationalist parties which are the channelling focus for the people’s enthusiasm’.

<sup>28</sup> Organisation of African Unity, ‘Monrovia Declaration of commitment of the heads of state and government of the Organisation of African Unity on guidelines and measures for national and collective self-reliance in social and economic development for the establishment of a new international economic order’, AGH/ST.3 (XVI) Rev.1, 1979, para 1-2.

<sup>29</sup> B O Agara and Morris K O Edogiawerie, ‘African Union and governance in Africa’, 1(1) *Journal of Social Sustainability Impact* (2023) 18.

<sup>30</sup> Babatunde Fagbayibo, ‘Rethinking the African integration process: A critical politico-legal perspective on building a democratic African Union’, 36(1) *South African Yearbook of International Law* (2011) 213; Kamata, ‘Julius Nyerere’, 318.

<sup>31</sup> Charter of the Organisation of African Unity, 25 May 1963, 479 UNTS 39, Article II.

such a way that suggests that socio-political and economic cooperation among African states was a necessary means to ensure the attainment and safeguarding of independence, state sovereignty, and territorial integrity of all African countries to better the lives of all African people.

Pursuant to regional cooperation as the form in which African regional development was to take place under the OAU, Article III(3) of the OAU Charter emphasised that the OAU was to be built on, amongst others, the principle of non-interference with the domestic affairs of member states. This further reinforces the notion that RECs had no defined place within the OAU, and direct control of the RECs would inevitably clash with the principles of non-interference, as it would entail the OAU exercising power over the affairs of the RECs and their member states.

About 16 years after the establishment of the OAU there began a paradigm shift in the objectives of regional development in Africa. Member states began to look into securing regional economic development, having been influenced in part by the United Nations Economic Commission of Africa (UNECA),<sup>32</sup> in conjunction with securing the independence of African countries. In 1979, at the sixteenth Ordinary Session of the OAU, the Monrovia Declaration was adopted. It was a pronouncement by heads of state and government of the OAU of their commitment towards the implementation of guidelines and measures that would ensure socio-economic development and the establishment of a new economic order.<sup>33</sup>

This marked the first OAU declaration expressly pledging a commitment to regional 'economic integration' as a means to ensure self-reliance and self-sustenance on the continent.<sup>34</sup> From the Monrovia

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<sup>32</sup> Shumba, 'Towards an African Economic Community', 5; Francis Mangeni and Calestous Juma, *Emergent Africa: Evolution of regional economic integration*, Headline Books Terra Alta, 2019, 49.

<sup>33</sup> OAU, 'Monrovia Declaration of commitment of the Heads of State and Government, of the Organisation of African Unity on guidelines and measures for national and collective self-reliance in social and economic development for the establishment of a new international economic order', para 1-2.

<sup>34</sup> OAU, 'Monrovia Declaration of commitment of the Heads of State and Government, of the Organisation of African Unity on guidelines and measures for national and col-

Declaration emerged the Lagos Plan of Action for the Economic Development of Africa, 1980-2000 (Lagos Plan of Action).<sup>35</sup> This was a policy document that provided a framework by which the economic development of Africa was to be realised.

The Lagos Plan of Action acknowledged the urgent need for the regional economic integration of Africa as a gateway to economic development and self-sufficiency.<sup>36</sup> It is through this instrument that the notion of RECs, although not expressly referred to in the Lagos Plan of Action, first appeared in an OAU instrument.<sup>37</sup> The Lagos Plan of Action called for the establishment of regional and sub-regional institutions as vehicles for fostering economic development and self-sufficiency in Africa.<sup>38</sup> However, despite its extensiveness, the Lagos Plan of Action remained silent on what these regional or sub-regional institutions (RECs) were and their relationship with the OAU.<sup>39</sup> The document merely expressed a need for such institutions to exist.<sup>40</sup>

Notably, RECs had already begun to form before the Lagos Plan of Action was enacted.<sup>41</sup> Additionally, the plan was never implemented due to several reasons, including lack of political will amongst signatory states.<sup>42</sup> However, I argue that a more compelling reason for the failure to implement the Lagos Plan of Action is the vast array of region-specific challenges that were faced by countries across Africa. Focus was therefore placed on solving these problems on a regional level; hence the independent emergence of RECs and not on a continental

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lective self-reliance in social and economic development for the establishment of a new international economic order', para 1-2.

<sup>35</sup> Organisation of African Unity, Lagos Plan of Action for the Economic Development of Africa, 1980-2000, Preamble, para 2.

<sup>36</sup> Lagos Plan of Action, Preamble para 2-3.

<sup>37</sup> Lagos Plan of Action, Preamble para 3(iii).

<sup>38</sup> Lagos Plan of Action, Preamble para 3(iii).

<sup>39</sup> Shumba, 'Towards an African Economic Community', 6.

<sup>40</sup> Shumba, 'Towards an African Economic Community', 6.

<sup>41</sup> Some examples: East African Community (EAC) 1967, the Economic Community of West African States (ECOWAS) 1975, Southern Africa Development Coordination Conference (SADCC) 1980.

<sup>42</sup> Shumba, 'Towards an African Economic Community', 6.

level through a unified framework. This will be further explored in the later sections of my analysis.

### **Case studies of the emergence of RECs in Africa: the EAC, SADC, and ECOWAS**

To build on the previous discussion, I will examine the emergence of three RECs: the EAC, the ECOWAS, and the SADC. My objective is to support the earlier arguments that RECs developed as independent institutions addressing region-specific challenges and that this trend continues in their current practice. Thus, as will be elaborated further in the analysis, the actions of the RECs aimed at maintaining a degree of decisional autonomy.

#### **East African Community**

Like the other RECs under discussion, the EAC must be understood within its unique context. It was initially constituted in 1967 to establish a unified voice for addressing socio-economic and political issues among its member states: Kenya, Uganda, and Tanzania.<sup>43</sup> These three countries share a common colonial heritage of integration under British rule. Lily Njenga traces East African regional integration back to the establishment of British colonial presence in East Africa in the 19th century, at the time Frederick Lugard worked for the Imperial British East African Company.<sup>44</sup>

Between 1905 and 1940, Britain adopted an institutional approach by establishing common structures, such as the East African Currency Board, the East African Court of Appeal, and the East African Gover-

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<sup>43</sup> Joana Bar 'East African Communities (1967-1978, 1999) and their activity for political stability of the region', 15(5) *Politeja* (2018) 252-53.

<sup>44</sup> Lily N Njenga, 'Legal status of the East African Community', 22(3) *RUDN Journal of Law* (2018) 370-71.

nors' Conference, to maintain its dominance in the region.<sup>45</sup> Efforts to integrate Kenya, Tanganyika (now Tanzania), and Uganda began about 1919.<sup>46</sup> Under British administration, a customs union for the three countries was formed.<sup>47</sup> In 1948, the East African High Commission (EAHC) was formed to implement common initiatives, including economic integration schemes.<sup>48</sup>

After Tanganyika gained independence in 1961, the EAHC was replaced by the East African Common Service Organisation (EACSO).<sup>49</sup> The EACSO was tasked with facilitating coordination between the three East African countries within a post-colonial context.<sup>50</sup> As a structure, EACSO was criticised for its closeness to the former colonial structures.<sup>51</sup> Nonetheless, Njenga highlights a series of achievements under EACSO, such as the appointment of the new President of the East African Court of Appeal, Sir Samuel Quashie-Idun. This followed the retirement of the previous President, Sir Ronald Sinclair, who had been appointed by the British colonial government.<sup>52</sup>

Arguably, East Africa's rich colonial history of integration under British colonialism served as a template for the conceptualisation and establishment of the EAC. Its formation, like that of the other RECs under discussion, came from a point of common interest. Having shared a common colonial history, the question among the three countries revolved around defining the nature of their post-colonial relationship. As stressed by Bar, following Uganda's independence in 1962 and Kenya's independence in 1963, there were calls for continued cooperation and integration within the region.<sup>53</sup>

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<sup>45</sup> Bar, 'East African Community', 251.

<sup>46</sup> Stefan Reith and Ritz Boltz, 'The East African Community: Regional integration between aspiration and reality' *Konrad-Adenauer-Stiftung International Reports* (2011) 92.

<sup>47</sup> Reith and Boltz, 'The East African Community', 92.

<sup>48</sup> Bar, 'East African Community', 251.

<sup>49</sup> Reith and Boltz, 'The East African Community', 92.

<sup>50</sup> Bar, 'East African Community', 252.

<sup>51</sup> Reith and Boltz, 'The East African Community', 92.

<sup>52</sup> Njenga, 'The legal status of the East African Community', 372.

<sup>53</sup> Bar, 'East African Community', 252.

The discussions leading up to the formation of the EAC occurred about the same time as the Monrovia-Casablanca debate leading up to the formation of the OAU. Sena Eken submits that talks for the establishment of the EAC began in 1961.<sup>54</sup> This is about 2 years before the establishment of the OAU in 1963. Acknowledging that the primary focus of the OAU was to ensure and preserve the independence of African nations,<sup>55</sup> it becomes clear that there was no alignment between the regional needs of the EAC and the continental needs of the OAU.

In contrast to the primary objective of the OAU, Eken posits that the formation of the EAC was largely premised on securing economic integration within the region. Regional instruments such as the Kampala Agreement of 1964, which provided for quotas for intra-EAC trade as a means to remedy trade imbalances between the three countries, serve as a testament to this contrast in objectives between the OAU and the EAC.<sup>56</sup> In addition, although discussions around establishing a political federation emerged, no substantial plans were formed, and such a union ultimately did not materialise. This fact further supports the argument that from a point of common interest, the EAC concerned itself primarily with economic integration. Other than that, the three countries had significantly different political ideologies.<sup>57</sup>

Driven by a shared desire for regional economic integration, the Treaty for East African Cooperation of 1967 (the EAC Treaty of 1967) was signed and adopted. However, this project only lasted a decade before it collapsed in 1977.<sup>58</sup> The disintegration of the Community has been attributed to several factors, including the unequal distribution of benefits, its purely intergovernmental structure – which meant EAC decisions could not effectively bind state parties – and the irreconcilable

<sup>54</sup> Sena Eken, 'Breakup of the East African Community', *Finance and Development* (1979) 38.

<sup>55</sup> Fagbayibo, 'Rethinking the African integration process', 213; Agara and Edogiawerie, 'African Union and governance in Africa', 18.

<sup>56</sup> Eken, 'Breakup of the East African Community', 37.

<sup>57</sup> Bar, 'East African Community', 252; Eken, 'Breakup of the East African Community', 37.

<sup>58</sup> Eken, 'Breakup of the East African Community', 38.

ideological differences between Tanzania's president, Julius Nyerere and Uganda's president, Idi Amin.<sup>59</sup>

The Treaty had been signed at a time when cooperation and integration seemed natural, given the countries' shared history of cooperation and integration under British colonialism. However, as time progressed, their interest diverged. For instance, Kenya championed a pro-private and foreign investment economic domestic policy while Tanzania championed a more socialist-centred economic domestic policy.<sup>60</sup> These ideological differences became a source of friction within the EAC. The more divergent the objectives, the more difficult it became for the EAC to make and implement decisions.<sup>61</sup>

The efficacy of the success of the EAC rested on the member states having points of common interest. As previously alluded, the EAC and the OAU focused primarily on different objectives; hence, at their inception, a relationship between them was not defined, and they acted independently. Once the member states of the EAC took on diverging political and economic interests, the REC collapsed. In the later parts of my analysis, I will further demonstrate how the success of the Treaty Establishing the African Economic Community (Abuja Treaty), by extension the AfCFTA Agreement can be attributed to shared common interests (universal trade interests) between RECs and their members.

The EAC would only reconstitute in 1999 in response to the pressing need for regional economic development highlighted by the Abuja Treaty and the guidelines established at the Conference on Security, Stability, Development, and Cooperation (the Kampala Conference).<sup>62</sup> The new EAC was formed from a place of common interest and the three countries shifted from regulating their economic affairs through multi-

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<sup>59</sup> Reith and Boltz, 'The East African Community', 92-93; Eken, 'Breakup of the East African Community', 38.

<sup>60</sup> Reith and Boltz, 'The East African Community', 93; Eken, 'Breakup of the East African Community', 38.

<sup>61</sup> Eken, 'Breakup of the East African Community', 38.

<sup>62</sup> Bar, 'East African Community', 252.

lateral agreements to establishing the EAC.<sup>63</sup> The Preamble of the Treaty Establishing the East African Community (EAC Treaty of 1999) states that the Treaty draws its mandate from the history of regional integration efforts in East Africa, including the East African High Commission of 1948, the East African Common Services Organisation of 1961, and the Treaty of East African Cooperation of 1967.<sup>64</sup> This augments the idea that RECs arise to further the common goals of their member states.

A primary goal of the EAC Treaty of 1999, which serves as a common objective for the Community, is to ensure that the partner states progressively establish a customs union, a common market, and ultimately a political union.<sup>65</sup> In this context, the EAC Treaty of 1999 outlines various provisions centred on economic and political integration such as the establishment of a customs union protocol that aimed at the elimination of internal tariffs and non-trade barriers (NBTs), the establishment of a common external market, rules of origins, dumping regulations, competition regulations, subsidies and countervailing duties, and the progressive establishment of a common foreign and security policy pursuant to the realisation of a political union.<sup>66</sup>

<sup>63</sup> Reith and Boltz, 'The East African Community', 93.

<sup>64</sup> Treaty Establishing the East African Community, 2144 UNTS 215, 30 November 1999, Preamble. The treaty's Preamble recognises the Community's history of regional integration. It acknowledges the colonial regional integration framework that saw the establishment of, among others, the East African Customs Union in 1919, the East African High Commission in 1948 and the East African Common Services Organisation in 1961. The wording suggests that the 1999 EAC Treaty is a continuation of a long line of regional integration efforts within the region and acknowledges the various agreements that the party states entered into leading up to its establishment. These include: the East African Community Mediation Agreement of 1984 and the Agreement for the Establishment of a Permanent Tripartite Commission for Co-operation Between the Republic of Kenya, the Republic of Uganda and the United Republic of Tanzania for the establishment of the Permanent Tripartite Commission for Co-operation of 1993.

<sup>65</sup> Treaty Establishing the East African Community, Article 5(2); Wanyama Masinde and Christopher Otieno Omolo, 'Road to East African integration', in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds) *East African Community: Institutional, substantive and comparative EU aspects*, Brill Nijhoff, 2017, 13.

<sup>66</sup> Treaty Establishing the East African Community, Articles 5(2), 75, 76 and 123.

Membership in the Community is premised on the compatibility of a state with these common objectives. For a foreign country to be considered for membership, the Community will consider, amongst other factors, its adherence to acceptable principles within the Community, its geographical contiguity to the other partner states, its potential to contribute to the Community's regional integration agenda and the compatibility of its socio-economic policies with those of the EAC.<sup>67</sup> Evidently, at the heart of the EAC is its concern for advancing the Community's shared goals.

In the pursuit of its goals, the EAC Treaty does not position itself as a subordinate of the AEC, and by extension, the AU. Instead, it articulates a vision for a united Africa and emphasises a cooperative relationship (subsidiarity and complementarity) with the AU in pursuit of their shared goals.<sup>68</sup> This supports my argument that RECs prefer a relationship of subsidiarity and complementarity with the AU to advance their common objectives instead of being subjected to the direct control of the AU.

### **Economic Community of West African States**

My analysis of ECOWAS reveals findings similar to those regarding the EAC discussed above. At its core, ECOWAS is a REC that formed organically in response to specific challenges in the region, independent of the supranational control of the OAU. Founded on 25 May 1975, ECOWAS aimed primarily to promote economic cooperation and integration among West African states.<sup>69</sup> The formation of ECOWAS co-

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<sup>67</sup> Treaty Establishing the East African Community, Article 3. Current membership of the East African Community has increased to include the republics of Rwanda, Burundi, the South Sudan, the Democratic Republic of the Congo and the Federal Republic of Somalia.

<sup>68</sup> Treaty Establishing the East African Community, Article 130(2) and (4).

<sup>69</sup> Treaty of the Economic Community of West African States (ECOWAS Treaty, 1975), 1010 UNTS 18, 28 May 1975, Article 2(1); Samuel O Oloruntoba, 'ECOWAS and regional integration in West Africa: From state to emerging private authority', 14(7) *History Compass* (2016) 295; John Abiodun Babalola, 'ECOWAS historical assessments and future legacies', Unpublished Masters Dissertation, Istanbul Kultur University, 2021, 28;

incides with the period when the West African states started gaining independence.<sup>70</sup>

The purpose of ECOWAS was to enhance development within the region by facilitating the free movement of goods and people across borders.<sup>71</sup> It emerged from a shared desire by both francophone and anglophone states to be economically and politically self-reliant from their former colonial masters.<sup>72</sup>

Theirno Thiam argues that, while the realisation that individual domestic markets of West African countries could not successfully compete in an international environment – dominated by large trading blocs – was pivotal to the formation of ECOWAS, it was the realisation that these economic goals could only be achieved in a secure region that added a security dimension to ECOWAS.<sup>73</sup> I must note that West Africa serves as among the most conflict-ridden regions in Africa.<sup>74</sup>

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Obiora Chinedu Okafor and Okechukwu Effoduh, 'The ECOWAS Court as a promising resource for pro-poor activism', in James Thuo Gathii (eds) *The performance of Africa's international courts: Using litigation for political, economic and social change*, Oxford University Press, 2020, 110.

<sup>70</sup> Cynado CNO Ezeogidi, 'The historical overview of the problems of ECOWAS in effective economic integration and conflict management in West Africa', SSRN, 2020, 2.

<sup>71</sup> ECOWAS Treaty, 1975, Preamble; Okafor and Effoduh, 'The ECOWAS Court', 110; Babalola, 'ECOWAS historical assessment', 28; Nneoma Nwogu, 'Regional integration as an instrument of human rights: Reconceptualising ECOWAS', 6(1) *Journal of Human Rights* (2007) 347-48.

<sup>72</sup> ECOWAS (Economic Community of West African States) was the first regional economic community (REC) to unite countries with diverse colonial backgrounds. Currently, ECOWAS has twelve member states, which include five French-speaking nations, five English-speaking nations, and two Portuguese-speaking nations. The current member states are Benin, Cape Verde, Côte d'Ivoire, Nigeria, The Gambia, Ghana, Liberia, Senegal, Sierra Leone, Togo, Guinea, and Guinea-Bissau. As of January 2025, Mali, Niger, and Burkina Faso have formally left ECOWAS to form the Alliance of Sahel States (AES). This marks the second significant exit from ECOWAS since Mauritania left in 2000.

<sup>73</sup> Theirno Thiam, 'The emergence of the Economic Community of West African States (ECOWAS) and the limits of the paradigms of international politics', 29(3) *Politeia* (2010) 45.

<sup>74</sup> Thiam, 'The emergence of the Economic Community of West African States (ECOWAS) and the limits of the paradigms of international politics', 46.

Consequently, the formation of ECOWAS arose to address this challenge in its bid to foster regional economic integration.

This is not to say that other RECs do not concern themselves with regional security. They do, but not to the same extent as ECOWAS.<sup>75</sup> This emphasis on regional security dates back to the aftermath of the Nigerian civil war, 1967-1970.<sup>76</sup> It is noteworthy that ECOWAS states entered into defence agreements on three occasions; in 1978 and 1981, they signed the Protocol on Mutual Assistance on Defence, and in 1999, they signed the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.<sup>77</sup>

Important to West African states is their proclivity to violent conflict.<sup>78</sup> After the collapse of Liberia due to civil war in 1989, a consensus grew to transform ECOWAS into a security community.<sup>79</sup> Thiam makes the case that it was the Liberian conflict in 1989 that saw the emergence of a specialised military group, the ECOWAS Monitoring Group (ECOMOG), the *de facto* military wing of the Community.<sup>80</sup> In establishing ECOMOG, ECOWAS became among the first REC to mobilise its members to establish an institution for mobilising military forces to address

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<sup>75</sup> Thiam, 'The emergence of the Economic Community of West African States (ECOWAS) and the limits of the paradigms of international politics', 46. For a comprehensive discussion on peacekeeping efforts and regional security structures of other RECs see, Eric G Berman and Katie E Sams, 'Peacekeeping in Africa: Capabilities and culpabilities' United Nations Institution for Disarmament and Research Geneva, Switzerland and Institute of Security Studies, Pretoria, South Africa, 2000.

<sup>76</sup> Ezeogidi, 'The historical overview of the problems of ECOWAS in effective economic integration and conflict management in West Africa', 2.

<sup>77</sup> Morison Siaffa Gbaya, 'The legal framework for regional organisations in Africa and the proactive role in addressing threats to international peace and security', 2(8) *International Journal of Law and Policy* (2024) 16.

<sup>78</sup> Thiam, 'The emergence of the Economic Community of West African States (ECOWAS) and the limits of the paradigms of international politics', 46.

<sup>79</sup> Thiam, 'The emergence of the Economic Community of West African States (ECOWAS) and the limits of the paradigms of international politics', 46.

<sup>80</sup> Thiam, 'The emergence of the Economic Community of West African States (ECOWAS) and the limits of the paradigms of international politics', 47; Oloruntoba, 'ECOWAS and regional integration in West Africa', 296.

a collective security matter.<sup>81</sup> This securitisation further supports the notion that RECs emerged organically to deal with their region-specific matters.

As such, understanding the conflict-ridden context in which ECOWAS was formed is critical in understanding its relationship with the AU. Jens Herpolsheimer agrees with the findings here but focuses specifically on conflict management. He notes that it was not until 2019 that the establishment of a more regular coordination between ECOWAS and the AU in matters of conflict management occurred.<sup>82</sup> This is despite the existence of various instruments that articulated a relationship between ECOWAS and the AU, such as the Protocol Relating to the Establishment of the Peace and Security Council of the African Union.<sup>83</sup>

Before, this relationship was characterised by ‘informal contacts and personal relationships’.<sup>84</sup> This means that these interactions were largely informal, interconnected relationships among the staff and personnel of the RECs and the AU.<sup>85</sup> This observation supports the assertion that RECs generally prefer to retain their decision-making power. The efforts to formalise the cooperative relationship between the ECOWAS and the AU in practice are a formalisation of these informal channels. The aim is to establish, among others, formal communication channels, institutionalised meetings, and proper record keeping.<sup>86</sup> They do not contemplate direct control of RECs by the AU.

<sup>81</sup> Margaret Aderinsola Vogt, ‘The involvement of ECOWAS in Liberia’s peacekeeping’, in Edmond J Keller and Donald Rothchild (eds) *Africa in the new international order: Rethinking state sovereignty and regional security*, Lynne Rienner Publishers, 1996, 165-183.

<sup>82</sup> Herpolsheimer, ‘AU-REC Relations’, 72 and 86; African Union Commission, ‘Report on the division of labour between the African Union, regional economic communities and member states’, 4th mid-year coordination meeting between the African Union, the Regional Economic Communities and the Regional Mechanisms, Lusaka, Zambia, 17 July 2022, MYCM/AU/7(IV)Rev.1, para 2.

<sup>83</sup> Herpolsheimer, ‘AU-REC Relations’, 75. See also, African Union, *Memorandum of Understanding on Cooperation in the Area of Peace and Security between the AU, the RECs and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa*, African Union, 2008.

<sup>84</sup> Herpolsheimer, ‘AU-REC Relations’, 85.

<sup>85</sup> Herpolsheimer, ‘AU-REC Relations’, 85-86.

<sup>86</sup> Herpolsheimer, ‘AU-REC Relations’, 86.

Furthermore, the Treaty of the Economic Community of the West African States of 1975 (ECOWAS Treaty) conceptualised ECOWAS as an organisation independent of the OAU. Its relationship with regional and/or continental organisations like the OAU was premised on the extent to which such a relationship is compatible with the objectives of the Treaty.<sup>87</sup> It is only with the advent of the Revised Treaty of the Economic Community of the West African States of 1993 (Revised ECOWAS Treaty) that it set an objective to ensure that its objectives align with those of the AEC.<sup>88</sup> I argue that the progress of the AEC, as reflected in initiatives such as the AfCFTA, stems from common interests shared by RECs and their member states.

Therefore, the influence of the Abuja Treaty on ECOWAS, similar to that on the EAC, is undeniable. This relationship proved effective to the extent that it was intergovernmental, but fell short where it sought to be supranational. While common objectives are a key driving force behind establishing a defined REC-AU relationship, credence must be placed on the reality that RECs prioritise preserving their decision-making autonomy. I will discuss these points in greater detail in the sections to follow.

### **South African Development Community**

This sub-section discusses the emergence of the SADC to illustrate a recurring theme in the analysis; that as a REC, it developed independently in response to challenges its member states faced. Similar to the previous case studies discussed above, the formation of the Southern African Development Coordination Conference (SADCC), the precursor to SADC, formed on 1 April 1980, occurred independent of the direct influence of the OAU. Established through the Lusaka Declaration titled, 'Southern Africa: Towards economic liberation', the SADCC was a response to the hegemonic influence that apartheid South Africa

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<sup>87</sup> ECOWAS Treaty, 1975, Article 59.

<sup>88</sup> Revised Treaty of the Economic Community of West African States, 24 July 1993, 2373 UNTS 233, Article 78.

had on the region. Maxi Schoeman submits that the SADCC was a 'politically motivated defence mechanism'.<sup>89</sup>

The objectives of the organisation set out under the Lusaka Declaration included: reducing the economic dependency of member states on South Africa, rehabilitating transport, telecommunication and infrastructure, mobilising resources, and securing support for SADCC projects.<sup>90</sup> The SADCC arose from a place of common interest as heightened from the objectives above. Moreover, the SADCC operated on a loose cooperation basis in that, member states were not explicitly legally bound by the organisation. Rather the organisation relied upon member states voluntarily subjecting themselves to its objectives.<sup>91</sup> SADCC favoured cooperation over integration and this could be argued to have been aimed at preserving their sovereignty. At no point did the SADCC contemplate being subjected to direct control by the OAU.

Tapiwa Shumba points out that the formation of SADC, replacing the SADCC, shifted its objectives from promoting economic self-sufficiency as a 'defence mechanism' against apartheid South Africa, under the SADCC, to promoting, *inter alia*, economic growth and socio-economic development, to enhance the quality of life for all persons within the region.<sup>92</sup> Further, unlike its predecessor, SADC is a legally binding REC rather than a loose cooperation agreement.

In connection with the previous case studies, a trend can be observed where the RECs emphasise economic integration to advance the AEC, either implicitly or expressly, an extension of the AU.<sup>93</sup> All three

<sup>89</sup> Maxi Schoeman, 'From SADCC to SADC and beyond: The politics of economic integration', *Alternative-regionalism.org*, 2009, 2.

<sup>90</sup> Bernard Weimer, 'Southern African Development Coordination Conference: Past and future', 21(2) *African Insight* (1991) 79.

<sup>91</sup> Dawn Nagar and Mark Peterson, 'History of regionalism in Southern Africa: From SADCC to SADC', Centre for Conflict Resolution, 2013, 10.

<sup>92</sup> Tapiwa Shumba, 'Rising from its ruins? The Southern African Development Community Tribunal', 26 *Law Democracy and Development* (2022) 289.

<sup>93</sup> Revised of the Economic Community of West African States, Article 78; Treaty Establishing the East African Community, Article 130; Treaty of the Southern African Development Community, TRT/SADC/001, 17 August 1992, Article 24, read with Article 3(1) and Article 6(1).

treaties currently in force, namely the EAC Treaty (1999), the Revised ECOWAS Treaty (1993), and the SADC Treaty (1992), were established in the aftermath of the adoption of the Abuja Treaty on the African Economic Community in 1991.<sup>94</sup>

While the SADC Treaty does not explicitly state the goal of advancing the realisation of the AEC, it was enacted around the time the Abuja Treaty was adopted. In addition to this, its member states are part of the Abuja Treaty's framework, which identifies RECs as 'building blocks' of the AEC. This provides a clear implication of a connection.<sup>95</sup> It also a shift from their independent emergence with a region-specific focus to the acknowledgement of the need to tackle matters of common interest on a continental level. Hence, the start of a relationship between RECs and the OAU, later AU.

A distinct feature of SADC is its intergovernmental operational framework. This arguably demonstrates the clearest example of a REC resisting supranationalism both internally and in a continental context. This contrasts with both the EAC and the ECOWAS, which, albeit formerly intergovernmental bodies, have supranational leanings. The supranational structure recognises a separation of powers consisting of three branches: the executive, made up of heads of state; the legislative, composed of parliamentarians; and the judiciary, which includes independent judges.<sup>96</sup> The aim of this supranational structure is transfer and/or share of national sovereignty and the direct application of legal effects.

SADC's intergovernmental framework can be explained by the fact that the legislative and executive power is concentrated in the Summit and the Council of Ministers, to which all members have equal deci-

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<sup>94</sup> Abuja Treaty was adopted on 3 June 1991.

<sup>95</sup> Treaty Establishing the African Economic Community, Reg No 55375, 3 June 1991, Article 6; African Union, 'Decisions and declarations: Decision on the moratorium on the recognition of Regional Economic Communities (RECs)', AU Doc. Assembly/AU/Dec. 112 (VII), Seventh Ordinary Session, para 3; Kolbeck, 'Legal analysis of the relationship between the AU/AEC and RECs', 52; Oppong, 'The African Union', 2.

<sup>96</sup> Treaty Establishing the East African Community, Article 9; Revised Treaty of the Economic Community of West African States, 1993, Article 6.

sion-making power.<sup>97</sup> Efforts for a separate legislative body have been noted with the agreement establishing the SADC Parliament signed on 11 July 2024, however, it is yet to be seen whether the REC is prepared to surrender legislative power to a parliament.<sup>98</sup> Presently, there exists the SADC Parliamentary Forum which is predominantly advisory.<sup>99</sup>

Aside from the Parliamentary Forum, the events leading up to the abolition of the SADC Tribunal reveal that SADC member states are not willing to surrender their sovereignty and adhere to supranational judicial authority. In 2010, the SADC Summit of Heads of State suspended the SADC Tribunal, its judicial arm, following the ruling against the Zimbabwean government in *Mike Campbell and others v Zimbabwe*.<sup>100</sup> In 2015, a SADC Administrative Tribunal was established, but its jurisdiction is limited to labour disputes within the SADC Secretariat and its institutions.<sup>101</sup> This highlights SADC's reality of legislative and executive power being concentrated in the Summit of Heads of State – a tendency towards an intergovernmental operational framework.

<sup>97</sup> Treaty of the Southern African Development Community, Articles 10 and 11.

<sup>98</sup> SADC, 'SADC Parliamentary Forum transforms into Parliament', 11 July 2024.

<sup>99</sup> Treaty of the Southern African Development Community, Articles 9(2) and 10(6); Constitution of the SADC Parliamentary Forum, 2004 (before amendments), Articles 5 and 8(3).

<sup>100</sup> *Mike Campbell (Pvt) Ltd and others v Republic of Zimbabwe*, (2/2007), [2008], SADCT 2, (28 November 2008). This case involved a challenge by Mike Campbell and about 77 other Zimbabwean white farmers, of Amendment 17 of the Constitution of Zimbabwe that permitted the government to seize agricultural land for resettlement purposes. The Applicants argued that the law was designed on a racial basis to dispose of white farmers of their land. The Tribunal held in favour of the white farmers that Zimbabwe had violated the prohibition on racial discrimination. Others have argued that this decision failed to take into account of the history and politics of race in that former settler colony. See E Tendayi Achiume, 'Transformative vision in liberal jurisprudence on racial equality: Justice Moseneke's legacy' in Penelope Andrews, Dennis Davis and Tabeth Masengu (eds) *A warrior for justice: Essays in honour of Dikgang Moseneke*, Juta Press, 2018, 13-14; E Tendayi Achiume, 'The SADC Tribunal: Socio-political dissonance and the authority of international courts' in Karen Alter, Laurence Helfer and Michael Rask Madsen (eds) *International court authority*, 2018, Oxford University Press, 135-140, what she describes as 'socio-political dissonance'; Constitution of Zimbabwe Amendment Act (No 17 of 2005) Section 2. Compare with, Laurine Nathan, 'Solidarity triumphs over democracy: The dissolution of the SADC Tribunal', *The Development Dialogue* December 2011, United Nations and Regional Challenges, 2011, 124 and 126.

<sup>101</sup> SADC, 'SADC Administrative Tribunal'.

Similar to the EAC and ECOWAS, the SADC Treaty does not purport to be subordinate to the AU. SADC, as a distinct legal entity, is committed to maintaining good relations, cooperating with and entering into agreements with other states and regional or international organisations (such as the AU), as long as their objectives align.<sup>102</sup> It identifies itself as a distinct organisation, not an extension of the AU.

I propose that a cooperative relationship between the RECs and the AU is preferable because it allows the RECs to guide their integration process, which may not always align with the AU's perspective. This is reminiscent of Gathii's argument about African RTAs being flexible legal regimes designed to allow countries to join multiple RECs in line with their best interests.<sup>103</sup> Likewise cooperative relationship between the AU and RECs will similarly allow for a degree of flexibility in which RECs retain their decision-making autonomy in line with their best interests.

It is evident from my analysis of these case studies that the EAC, ECOWAS, and SADC have significantly different experiences of regional integration. Any framework aimed at accurately defining this relationship must account for these differences. As will be discussed in the following sections regarding the Abuja Treaty and the AfCFTA Agreement, their effectiveness in defining and implementing the relationship between RECs and the AU largely depends on the intergovernmental nature of this relationship that emphasises areas of common interest. They succeed in cooperation but fall short when trying to establish a supranational framework.

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<sup>102</sup> Treaty of the Southern African Development Community, Article 24, read along with Article 3(1) and 6(1).

<sup>103</sup> Gathii, 'African regional trade agreements as flexible legal regimes', 571.

## **An evaluation of the pre-AfCFTA Agreement instruments affecting the relationship between RECs and the AU**

To further strengthen the arguments made earlier, I will now analyse some of the instruments adopted prior to the adoption of the AfCFTA Agreement, that is: the Abuja Treaty, the Constitutive Act of the African Union, and the 2008 Protocol under Treaty Establishing the African Economic Community on Relations between the African Union and the Regional Economic Community, that have defined the relationship between RECs and the AU. As will be shown, these instruments succeed to the extent that they are intergovernmental and fail to the extent that they attempt to be supranational.

### **Treaty Establishing the African Economic Community**

The Lagos Plan of Action, previously mentioned, did not achieve its intended goals. However, as Shumba argues,<sup>104</sup> it laid the groundwork for the adoption of the Abuja Treaty. I posit that the Abuja Treaty, evident in both its text and implementation, defines the relationship between the AU and RECs. This relationship is grounded in the principles of 'subsidiarity' and 'complementarity', rather than direct control of the RECs by the AU.<sup>105</sup>

As I previously alluded, 16 years after the formation of the OAU, the enactment of the Monrovia Declaration represented a significant shift among African countries, moving their focus from merely securing political independence to pursuing regional economic development.<sup>106</sup> Similarly, the Abuja Treaty marked a key milestone by establishing a framework for how the continent would approach regional development from both regional and continental perspectives. This treaty is noteworthy as it was the first regional instrument to define the relation-

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<sup>104</sup> Shumba, 'Towards an African Economic Community', 7.

<sup>105</sup> Herpolsheimer, 'AU-REC', 75.

<sup>106</sup> Shumba, 'Towards an AEC', 5; Mangeni and Juma, 'Emergent Africa', 49.

ship between the AU and RECs. It positions the AEC to which RECs are to be 'building blocks' as a subsidiary of the AU with separate legal personality.<sup>107</sup>

This subsidiary relationship exists despite the AEC and the AU sharing a common Secretariat. Klaus Detterbeck and Eve Hepburn emphasise that the principle of subsidiarity dictates that 'decisions are best taken at the lowest, most appropriate' level.<sup>108</sup> They argue that anything achievable at the lowest level should remain within that level.<sup>109</sup> In the same light, Paul Craig, in his analysis of the European Commission, posits that under the principle of subsidiarity, decisions suitable for national levels ought to be left to the members.<sup>110</sup> Despite a shared Secretariat, it is the Council of Ministers (the Council), which derives its authority from the Assembly of Heads of State and Government (the Assembly), that oversees the operations of the AEC.<sup>111</sup> This structure establishes a hierarchy in which power is delegated from the Assembly to the Council and ultimately to the AEC through its Secretary-General. Consequently, although the AEC derives its authority from the AU, it operates with a certain degree of independence, making decisions in accordance with the stipulations of the Abuja Treaty.

This subsidiarity-based framework extends to RECs. The Abuja Treaty identifies RECs as the foundational elements of the AEC.<sup>112</sup> It expresses a need to strengthen existing RECs and establish new ones where they are lacking.<sup>113</sup> The treaty further places an obligation on member states to take steps for the progressive enhancement of cooperation between RECs and the AEC.<sup>114</sup>

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<sup>107</sup> [Abuja] Treaty Establishing the African Economic Community, 3 June 1991, Articles 1, 4 and 11.

<sup>108</sup> Detterbeck and Hepburn, 'Introduction to the handbook of territorial politics', 6.

<sup>109</sup> Detterbeck and Hepburn, 'Introduction to the handbook of territorial politics', 6.

<sup>110</sup> Paul Craig, 'Subsidiarity: A political and legal analysis', 50(1) *Journal of Common Markets* (2012) 73.

<sup>111</sup> Treaty Establishing the African Economic Community, Article 11.

<sup>112</sup> Treaty Establishing the African Economic Community, Article 4.

<sup>113</sup> Treaty Establishing the African Economic Community, Articles 4 and 5.

<sup>114</sup> Treaty Establishing the African Economic Community, Articles 4 and 5.

The Abuja Treaty is conscious of this subsidiary relationship between RECs and the AEC, and by extension, the AU. It leaves room for member states at the regional level to lead in the regional integration and/or cooperation process. This approach allows member states some autonomy to tailor the process according to their specific needs. Thus, given the subsidiarity-based framework underpinning the AEC, the idea of direct control marks a significant departure from existing legal norms. Implementing this concept would necessitate a complete overhaul of African regional instruments, which would likely be more challenging than simply building upon the current framework.

I must point out that despite RECs being identified as building blocks of the AEC, neither the Abuja Treaty nor the Constitutive Act of the African Union provides a clear indication of how these 'building blocks' would establish the AEC. Outside the references made above that illustrate a subsidiary relationship between the RECs and AEC, the treaty does not provide specific details about the nature of this relationship.

I argue as before that this is by design to afford discretion to RECs as self-governing entities to regulate and build on to regulate and build on the AEC according to their unique interests. I will demonstrate later in this paper that the relationship between the RECs and the AEC mentioned above has further developed under the AfCFTA Agreement. This indicates a continued devolution of decision-making power as outlined in the Abuja Treaty. It shows that, in terms of cooperation between the RECs and the AEC, the RECs, through their member states, are responsible.

Apart from the textual analysis of the Abuja Treaty above, an investigation into its implementation indicates, as I previously noted, RECs favour a subsidiary relationship with the AEC as opposed to direct control of the former by the latter. In the case of the Abuja Treaty, the behaviour of RECs is more concerned with safeguarding individual interests than with what was collectively agreed. For instance, while the Abuja Treaty outlines a subsidiary relationship between the RECs and AEC as indicated above, it further envisions a supranational relationship in the long term.

The treaty proposes a eurocentric, Vinerian market-based integration formula consisting of six sequential stages.<sup>115</sup> This framework anticipates an evolution from the intergovernmental subsidiary structure to a more supranational structure within 40 years of its entry into force.<sup>116</sup> The first stage entails consolidating existing RECs and establishing new ones where they do not exist, to be achieved between 1994 and 1999.<sup>117</sup> This is followed by stabilising and eliminating tariff and non-tariff barriers (NBTs) within RECs as well as coordinating and harmonising their activities, which was to be implemented between 2000 and 2007.

After this, free trade areas (FTAs) and customs unions (CUs) were to be established in each REC, between 2007 and 2017. Thereafter, a continental CU would be established between 2018 and 2019.<sup>118</sup> This would be followed by the establishment of an African Common Market, which would include rights to establishment, residence, and movement between 2020 and 2023.<sup>119</sup> Lastly, the creation of a single currency and institutions for implementing the AEC is expected between 2024 and 2028.<sup>120</sup>

Shumba notes that only the first three have been achieved.<sup>121</sup> By 1999, each region had an REC.<sup>122</sup> Also, significant work has been done

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<sup>115</sup> James Gathii, 'African regional trade agreements as flexible legal regimes', 579-587. For a comprehensive discussion on the Vinerian market-based integration, see the following: CA Cooper and BF Massell, 'Toward a general theory of customs unions for developing countries', 73(5) *Journal of Political Economy* (1965) 475; Amr Sadek Hosny 'Theory of economic integration: A survey of the economic and political literature', 2(5) *International Journal of Economy Management and Social Science* (2012) 133-155; Bela Balassa, 'Types of economic integration', in Fritz Machlup (ed) *Economic integration: Worldwide regional and sectoral*, International Economic Association, 1976, 18-21; Richard Frimpong Oppong, *Legal aspects of economic integration in Africa*, Cambridge University Press, 2011, 6-29.

<sup>116</sup> Nagu, 'From OAU to AFCTA', 2019; Treaty Establishing the African Economic Community, Article 6(5).

<sup>117</sup> Treaty Establishing the African Economic Community, Article 6.

<sup>118</sup> Treaty Establishing the African Economic Community, Article 6(2)(d)

<sup>119</sup> Treaty Establishing the African Economic Community, Article 6(2)(e).

<sup>120</sup> Treaty Establishing the African Economic Community, Article 6(2)(f).

<sup>121</sup> Shumba, 'Towards an African Economic Community', 11.

<sup>122</sup> Shumba, 'Towards an African Economic Community', 11.

through these RECs to lower tariffs and NTBs, and FTAs and CUs have been formed.<sup>123</sup> These instances further supports my assertion that RECs are resistant to supranational control. The implementation of the Abuja Treaty was successful to the extent it was intergovernmental and failed to the extent it was supranational. For African countries and their RECs, what is important is that they cooperate on points of common interest without having to yield decision-making autonomy. If my argument holds, then one cannot envision a supranational body such as the AU having direct control of RECs because that would be contrary to how RECs in Africa behave.

## **Constitutive Act of the African Union**

I will now provide additional support for my argument that RECs and their member states prefer to maintain their decision-making authority rather than submit to supranational control. My focus will shift from the AEC to a discussion of the AU in particular. The AU formally replaced the OAU in 2002. This was in response to the OAU's inadequacy to deal with challenges facing the continent at the time.<sup>124</sup>

John Mukum Mbaku notes that by the middle to late twentieth century, the continent faced a host of challenges such as economic mismanagement, poor economic performance, political turmoil, and political and bureaucratic corruption.<sup>125</sup> To Mbaku, post-independent Africa gave the ruling elite enough opportunity to undermine national laws for their self-interest at the expense of their people.<sup>126</sup>

It is this class of people that thinkers such as Peter Ekeh termed the African 'bourgeois' class, characterised by wielding significant economic

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<sup>123</sup> Shumba, 'Towards an African Economic Community', 11.

<sup>124</sup> Ibrahim Yusuf, 'Has the African Union outlived its relevance?: A retrospective and introspective analysis', 8(3) *Journal of African Union Studies* (2019) 36 and 38-39.

<sup>125</sup> John Mukum Mbaku, 'Providing a foundation for wealth creation and development in Africa: The role of the rule of law', 38(3) *Brooklyn Journal of International Law* (2013) 2.

<sup>126</sup> Mbaku, 'Providing a foundation for wealth', 6.

and political control at the expense of the rest of the population.<sup>127</sup> What had emerged as an independence movement aimed to liberate African peoples turned into an opportunity for post-colonial politicians to capture state machinery and use it to redistribute wealth in their favour.<sup>128</sup>

For instance, Uganda, under Idi Amin Dada, was an autocratic government characterised by arbitrary killings and other extreme human rights violations.<sup>129</sup> It would appear that the OAU gave legitimacy to these actions through its principle of non-intervention.<sup>130</sup> To add salt to the wound, the same Idi Amin Dada became chairperson of the OAU.<sup>131</sup> This vividly outlined a disregard for human rights, which the AU, through the principle of non-indifference, sought to remedy.

The principle of non-difference articulates a collective responsibility on African states to protect their citizenry from atrocities committed within their borders.<sup>132</sup> Anselmo Otavio, Guilherme Ziebell de Oliveira and Nilton Cesar Fernandes Cardoso point out that the transformation of the OAU into the AU was less a mere name change and more a fundamental paradigm shift on the issue of security on the continent.<sup>133</sup> This

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<sup>127</sup> Peter P Ekeh, 'Colonialism and the two publics in Africa: A theoretical statement', 7(1) *Comparative Studies in Society and History* (1975) 94; Franz Fanon, *The wretched of the earth*, Grove Press, 1963, 149-150.

<sup>128</sup> Mbaku, 'Providing a foundation for wealth', 6.

<sup>129</sup> Khabele Matlosa, 'Pan-Africanism, the African Peer Review Mechanism and the African Charter on Democracy, Elections and Governance: What does the future hold?' Occasional Paper No 190, The South African Institute of International Affairs (SAIIA), June 2014, 8.

<sup>130</sup> Matlosa, 'Pan-Africanism, the African Peer Review Mechanism and the African Charter on Democracy, Elections and Governance', 8.

<sup>131</sup> Matlosa, 'Pan-Africanism, the African Peer Review Mechanism and the African Charter on Democracy, Elections and Governance', 8.

<sup>132</sup> Marina Sharpe, 'From non-interference to non-indifference: The African Union and the responsibility to protect', International Refugee Rights Initiative, 4 September 2017. See, Organisation of the African Union (OAU), 'Report of the Secretary-General on the fundamental changes taking place in the world and their implications for Africa', June 1990; Constitutive Act of the African Union, Article 4(h); Antony Karol Muma, 'Transforming African diplomacy: Salim Ahmed Salim's vision of non-indifference and the evolution from OAU to AU', 3 *Kabarak Law Review* (2024) 237.

<sup>133</sup> Anselmo Otavio, Guilherme Ziebell de Oliveira and Nilton Cesar Fernandes Cardoso, 'The limits of the African Union's non-indifference principle: A critical analysis', 2(1)

manifested in a commitment to intervene in instances of human rights abuse.<sup>134</sup> This would imply that a member state's sovereignty was limited to the extent its citizens were not subjected to human rights atrocities.

However, despite the several conflicts that occurred between 2002 and 2021, the AU has intervened in few conflicts with notable ones in Burundi, Sudan, and Somalia.<sup>135</sup> As previously noted by Herpolsheimer, most of the groundwork in conflict management in Africa is left to the RECs despite the existence of formal legal frameworks guaranteeing AU intervention.<sup>136</sup>

I must reiterate that this relationship has been characterised as largely informal, based on subsidiarity and complementarity, with the AU playing a more technical role instead of providing on-the-ground support.<sup>137</sup> I argue that despite the shift in focus to a more interventionist approach, the reality has largely been different. African countries seldom yield their sovereignty, and although the rationale behind the formation of the AU was to safeguard human rights, this is difficult to execute through supranational organs.

Unlike under the OAU, there appears to be support for the proposition that the AU was designed to be a supranational body aimed at spearheading African regional integration.<sup>138</sup> The dispute, however,

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*Journal of African Peace and Security* (2024) 17; Abdulqawi Yusuf, 'The right of intervention by the African Union: A new paradigm in regional enforcement action?' 11 *African Yearbook of International Law* (2003) 3-4.

<sup>134</sup> Otavio, de Oliveira and Cardoso, 'The limits of the African Union's non-indifference principle', 17.

<sup>135</sup> Otavio, de Oliveira and Cardoso, 'The limits of the African Union's non-indifference principle', 17. I acknowledge that the issues of military, humanitarian, preventive and peacekeeping efforts in Africa are more nuanced than portrayed above, but the illustration still makes the point. An in-depth discussion would have been beyond the scope of this research. For a comprehensive discussion of peacekeeping in Africa, see, Andrew E Yaw Tchie, 'Generation three and a half peacekeeping: Understanding the evolutionary character of African-led peace support operations', 32(4) *African Security Review* (2023) 421-439.

<sup>136</sup> Herpolsheimer, 'AU-RECs', 80-81.

<sup>137</sup> Herpolsheimer, 'AU-RECs', 80-81; Tchie, 'Generation three and a half peacekeeping', 426.

<sup>138</sup> Constitutive Act of the African Union, Article 3.

rests on whether, in its operations, it has done so, especially relating to its relationships with RECs. Article 6(2) of the AU Constitutive Act provides that the Assembly of Heads of State and Government shall serve as the supreme organ of the AU. Article 4 outlines the principles of the AU by which member states are bound. They include *inter alia*: sovereignty and interdependence of members, good governance and observance of the rule of law, and the right of the Union to interfere in a member state in grave instances such as crimes against humanity and genocide. The principles of the AU sought to remedy the shortcomings of the OAU.

However, despite the existence of supranational characteristics within the AU Constitutive Act, the organisation largely operates as an intergovernmental body.<sup>139</sup> I concur with Babatunde Fagbayibo that the organisation has consistently exhibited little political will to evolve into a supranational entity.<sup>140</sup> This reiterates my point that RECs and their member states generally avoid supranational control. For example, despite the existence of the Pan-African Parliament (PAP), member states of the AU have not granted it any legislative powers, either fully or partially.<sup>141</sup> Additionally, although the AU's Constitutive Act establishes a Court of Justice of the Union, member states have not taken steps to operationalise it. Most notably, there has been a failure to create a regulatory framework aimed at harmonising the RECs.<sup>142</sup>

After the Abuja Treaty and the AU Constitutive Act, there have been efforts to come up with a regulatory framework exclusively for the relationship between RECs and the AU. These have chiefly been through the 2008 Protocol on Relations between the RECs and the AU (the Protocol on Relations) and the Memorandum of Understanding on Cooperation in the Area of Peace and Security between the AU, RECs

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<sup>139</sup> Fagbayibo, 'Looking back, thinking forward', 414.

<sup>140</sup> Fagbayibo, 'Looking back, thinking forward', 414.

<sup>141</sup> Fagbayibo, 'Looking back, thinking forward', 414; Constitutive Act of the African Union, Article 17.

<sup>142</sup> Fagbayibo, 'Looking back, thinking forward', 414. Constitutive Act of the African Union, Article 18.

and the Regional Standby of Brigades of Eastern and Northern Africa (the MoU on Cooperation).<sup>143</sup>

## 2008 Protocol on AU-RECs Relations

Before the 2008 Protocol on AU-RECs Relations came into effect, there was the 1998 Protocol on Relations.<sup>144</sup> However, for purposes of this paper, I will only discuss the 2008 Protocol on Relations as it is currently in force and its impact is readily assessable. The Protocol on Relations came into force on 10 November 2021 after being signed by the Chairperson of the AU Commission and the Chief Executives of three RECs.<sup>145</sup> At present, four RECs are signatories to the Protocol on Relations: the Economic Community of Central African States (ECCAS), the Community of Sahel-Saharan States (CENSAD), SADC, and the Common Market for Eastern and Southern Africa (COMESA).<sup>146</sup>

As has been a recurring theme in my paper, African RECs tend to avoid a formal regulatory framework, binding them to a supranational body such as the AU. Only four RECs from the eight recognised by the Abuja Treaty are party to the Protocol on Relations in about 17 years of its existence, with the latest, COMESA, signing on 4 February 2022.<sup>147</sup> The Protocol on Relations defines a REC as a regional grouping of African states, established by treaty to achieve social and economic integration.<sup>148</sup> This definition supersedes the eight recognised by the

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<sup>143</sup> Gerhard Erasmus and Trudi Hartzenberg, 'How relevant is the Protocol on Relations between RECs and the AU?' *Tralac Blog*, 2022.

<sup>144</sup> Centre of Conflict Resolution 'The AU and Africa's Regional Economic Communities', 1 August 2016.

<sup>145</sup> Protocol under Treaty Establishing the African Economic Community on Relations between the African Union (AU) and the Regional Economic Community (RECs), 27 January 2008, Article 33.

<sup>146</sup> Protocol on Relations between the African Union (AU) and the Regional Economic Community (RECs), Article 33.

<sup>147</sup> Muzinge Chibomba 'COMESA signs the AU Protocol to consolidate relations' 6 February 2022.

<sup>148</sup> Protocol on Relations between the African Union (AU) and the Regional Economic Community (RECs), Article 1.

Abuja Treaty, meaning out of the 19 RECs in Africa that are arguably eligible to become signatories to the Protocol on Relations, only four are signatories.<sup>149</sup>

Given that it seems to be the norm for African RECs to resist subjecting themselves to supranational bodies such as the AU, it seems unlikely to envision direct control of RECs by the AU. Rather, the solution rests in a regulatory framework flexible enough to accommodate the individual interests of RECs and concrete enough to define the nature of the relationship between RECs and the AU. That subsidiarity, instead of direct control, is the solution to a successful regulatory framework between RECs and the AU is not the question. Rather, how best can this framework be adopted to make it most effective? The answer lies in the African Continental Free Trade Area (AfCFTA).

### **The AfCFTA Agreement as a blueprint for a legal framework establishing the relationship between the AU and RECs**

So far, I have shown that RECs tend to resist direct control by the AU in favour of a more intergovernmental relationship based on subsidiarity and complementarity. My argument in favour of intergovernmentalism has been premised on the fact that the trajectory of African regional development has evolved along the lines of intergovernmentalism and not supranationalism. This is to preserve their decision-making autonomy and allow them to tailor the regional integration and/or cooperation process to their region-specific needs.

As such, any legal framework that seeks to articulate a relationship between the AU and RECs must be cognisant of this reality. I now move to illustrate why the AfCFTA Agreement serves as the blueprint for a conscious agreement that appreciates the nuances behind why RECs prefer a relationship based on subsidiarity and complementarity as opposed to being subjected to direct control.

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<sup>149</sup> Centre of Conflict Resolution 'The AU and Africa's Regional Economic Communities', 1 August 2016.

I will first provide a brief background of the AfCFTA Agreement. It primarily establishes the AfCFTA.<sup>150</sup> It seeks to promote, among others, intra-African trade through the elimination of tariffs and non-tariff barriers, progressively liberalise trade in services, and cooperation in all trade-related matters amongst its membership.<sup>151</sup> Nagu views the AfCFTA Agreement as intrinsically linked to the Abuja Treaty.<sup>152</sup> He opines that establishing a continental free trade area corresponds to establishing an AEC.<sup>153</sup> Although the Abuja Treaty does not mention the creation of a continental FTA, it can be implied from the linear steps of economic integration it employs that an FTA comes first before a CU.<sup>154</sup> This conclusion leads Shumba to assert that the AfCFTA Agreement is an initiative of the AU that pursues the principles of the Abuja Treaty.<sup>155</sup>

I draw the reader's attention to the point I made earlier that the Abuja Treaty is successful to the extent it is intergovernmental and fails to the extent it is supranational. The AfCFTA Agreement illustrates how, as an initiative of the AU in pursuit of the principles of the Abuja Treaty,<sup>156</sup> it continues to follow this trajectory of intergovernmentalism characterised by subsidiarity instead of direct control.<sup>157</sup> This will be further expanded on below.

Part III of the AfCFTA Agreement contemplates a subsidiary relationship between the AfCFTA and the AU, similar to the relationship between the AEC and the AU. Under Article 10 of the AfCFTA Agreement, the Assembly of Heads of State and Government of the African Union (the AU Assembly) has oversight and is tasked with giving strategic guidance to the AfCFTA. In line with the principle of subsidiarity,

<sup>150</sup> Agreement Establishing the African Continental Free Trade Area, 21 March 2018, Articles 2 and 3.

<sup>151</sup> Agreement Establishing the African Continental Free Trade Area, Article 4.

<sup>152</sup> Nagu, 'Implementing the African Continental Free Trade Area Agreement', 68.

<sup>153</sup> Nagu, 'Implementing the African Continental Free Trade Area Agreement', 68. Abuja Treaty, Article 4(2)(d).

<sup>154</sup> Shumba, 'Towards an African Economic Community', 22.

<sup>155</sup> Shumba, 'Towards an African Economic Community', 22.

<sup>156</sup> Shumba, 'Towards an African Economic Community', 22.

<sup>157</sup> Tralac, 'African Continental Free Trade Area Agreement (AfCFTA) legal texts and policy documents', *Tralac Blog*.

it is the Council of Ministers, although reporting to the AU Assembly, that is tasked with making decisions per the AfCFTA Agreement.<sup>158</sup>

Such decisions are binding on state parties. Article 13 of the AfCFTA Agreement, unlike the Abuja Treaty, provides that the AfCFTA Secretariat shall function independently of the AU. This indicates a deeper devolution of powers from the AU to the AfCFTA and supports the argument that, unlike the AEC, the AfCFTA functions far more independently than it would have under the Abuja Treaty. As will be demonstrated below, the subsidiary relationship between the AU and AfCFTA trickles down to RECs.

The speed at which the AfCFTA Agreement was negotiated, adopted, and entered into force is indicative of the presence of sheer political will in the creation of a continental FTA in Africa. Following a series of deliberations, the AU Assembly, in 2012, moved to implement measures to boost intra-African trade and map out a plan for the establishment of a continental FTA.<sup>159</sup> The 25th Ordinary Session of the Assembly of Heads of State and Government commenced discussions around achieving concrete advances towards the establishment of an AEC in line with the Abuja Treaty.<sup>160</sup>

This paved the way for the commencement of negotiations for the establishment of the AfCFTA. On 21 March 2018, the AfCFTA Agreement was adopted and signed by 44 AU member states.<sup>161</sup> As of August 2024, all 55 AU member states except Eritrea had signed into the AfCF-

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<sup>158</sup> Agreement Establishing the African Continental Free Trade Area, Article 11(3)(a).

<sup>159</sup> AU Assembly of Heads of State and Government Eighteenth Ordinary Session, 'Decisions and declarations of the Assembly: Decision on boosting intra-African trade and fast tracking the continental free trade area', Assembly/AU/Dec.394(XVIII), AU Doc EX.CL/700(XX), 2012, para 1-9.

<sup>160</sup> AU Assembly of Heads of State and Government Twenty-Fifth Ordinary Session, 'Decisions and declarations of the Assembly: Decision on the launch of continental free trade area negotiations', Assembly/AU/Dec.569(XXV), AU Doc Assembly/AU/11(XXV), 2015, para 1-8.

<sup>161</sup> Vera Songwe, Jamie Alexander Macleod and Stephen Karingi, 'The African Continental Free Trade Area: A historical moment for development in Africa', 8(2) *Journal of African Trade* (2021) 12.

TA Agreement, 48 of which had ratified it.<sup>162</sup> The AfCFTA Agreement came into force on 30 May 2019.<sup>163</sup>

Given that the central argument of this section is that the AfCFTA Agreement provides a blueprint for a robust framework outlining the relationship between RECs and the AU, the question then becomes, what makes the AfCFTA Agreement different from its predecessors?

Firstly, the AfCFTA follows a strong intergovernmental framework. Gerhard Erasmus and Trudi Hartzenberg note that it is a member-driven organisation and does not contemplate supranational authority over its members.<sup>164</sup> This makes the AfCFTA Agreement more compatible with RECs and member states' tendencies to resist supranational control and is reflected in the eminence support the AfCFTA Agreement has received.

Moreover, the Abuja Treaty, in contrast to the AfCFTA Agreement, was too ambitious in its objectives.<sup>165</sup> The Abuja Treaty advocated for deep integration at a pace that Africa was and arguably still is not prepared for. This is evidenced by how the latter three stages of the Abuja Treaty have not been implemented. The establishment of a CU, Common Market, and a single currency require a deep level of integration that African states and RECs are not prepared for. As previously stated, African states are seldom willing to sacrifice their sovereignty, and RECs tend to resist supranational control. As such, any legal framework seeking to outline a relationship between the RECs and AU must account for this resistance. The AfCFTA serves as a blueprint for such an agreement by establishing a free trade area based on its member states' abilities.<sup>166</sup>

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<sup>162</sup> Tralac 'African Continental Free Trade Area Agreement (AfCFTA) legal texts and policy documents'. As of 2025, the status of signing and ratification has not changed.

<sup>163</sup> Shumba, 'Towards an African Economic Community, 20-21.

<sup>164</sup> Erasmus and Hartzenberg, 'How relevant is the Protocol on Relations between RECs and the AU?'

<sup>165</sup> Erasmus and Hartzenberg, 'How relevant is the Protocol on Relations between RECs and the AU?'

<sup>166</sup> Katrin Kuhlmann and Akinyi Lisa Agutu, 'The African Continental Free Trade Area: Toward a new legal model for trade and development', 51(4) *Georgetown Journal of International Law* (2020) 758.

Another advantage that the AfCFTA has over its predecessors is its timing. It came at a time when there was almost a consensus amongst African countries that an African free trade area was needed. Mold and Mukwanya note that at the Tripartite Free Trade Area (TPFTA) Kampala Summit of 2008, SADC, the EAC, and the Common Market for Eastern and Southern Africa began negotiations towards building a grand free trade area on the continent.<sup>167</sup> By June 2015, the three RECs established the TPFTA, the largest free trade area at the time, making up about 54% of the continent's gross domestic product and over 58% of the continent's population.<sup>168</sup>

Together with the evidence of immense political will from African states, it is not a coincidence that three years later, an African continental free trade area was established. Songwe, Macleod, and Karingi take the view that the establishment of the AfCFTA was long overdue.<sup>169</sup> To them, discussions for a possible continental free trade area can be traced as far as the 1963 Summit Conference of Independent African States, where the idea was first discussed. Citing the first consignment of goods traded under the AfCFTA, containers of cosmetics and drinks from Ghana to South Africa, on 5 January 2021, there appears to be undoubted support for the AfCFTA.<sup>170</sup> I argue that the conditions seem to have been ripe for the formation of an African free trade area. This contrasts with the implementation and success of its predecessors. For instance, the Abuja Treaty advocated for deep integration without accounting for whether African countries were ready for such a commitment.

Furthermore, as Katrin Kuhlmann and Akinyi Lisa Agutu argue, by design, the AfCFTA Agreement adopts an incremental approach that prioritises the tailored needs of its negotiating members.<sup>171</sup> Through

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<sup>167</sup> Andrew Mold and Rodgers Mukwanya, 'Modelling the economic impact of the Tripartite Free Trade Area: Its implications for the economic geography of Southern, Eastern and Northern Africa', 3(1) *Journal of African Trade* (2016) 57.

<sup>168</sup> Mold and Mukwanya, 'Modelling the economic impact of the Tripartite Free Trade Area', 57.

<sup>169</sup> Songwe, Macleod, and Karingi, 'The African Continental Free Trade Area', 12.

<sup>170</sup> Songwe, Macleod and Karingi, 'The African Continental Free Trade Area', 12.

<sup>171</sup> Kuhlmann and Agutu, 'The African Continental Free Trade Area: Toward a new legal model for trade and development', 758.

flexible and variable geometry,<sup>172</sup> the AfCFTA Agreement allows incremental implementation based on a country's needs and capabilities, periodic review of the Agreement every 5 years,<sup>173</sup> and flexibility to negotiate additional instruments to form an integral part of the Agreement.<sup>174</sup>

Kuhlmann and Agutu point out that the flexible nature of the AfCFTA Agreement draws parallels to the flexible nature of African RTAs.<sup>175</sup> This further buttresses the point that RECs best respond where their interests are best catered for and their decision-making power is preserved. Not only does this make the AfCFTA somewhat more compatible with RECs, but it also indicates a more intimate relationship between itself and RECs absent from its counterparts.

In doing so, the AfCFTA Agreement identifies RECs as its building blocks.<sup>176</sup> It places itself as a facilitator of investment initiatives and development within state parties and RECs.<sup>177</sup> Where the AfCFTA provides a Committee of Senior Trade officials tasked with, *inter alia*, the implementation of the Council of Ministers' decisions, RECs shall be represented within the Committee, albeit in an advisory capacity.<sup>178</sup> This, in part, remedies the reality that RECs respond to matters within their region-specific interests. As such, a platform for REC interests in the implementation of the AfCFTA Agreement is provided. The AfCFTA Agreement's Protocol on Trade in Goods further provides that in the implementation of the Protocol, the Secretariat shall work with state parties and RECs.<sup>179</sup>

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<sup>172</sup> These principles are recognised and used within some of the RECs, for example, Treaty for the Establishment of the East African Community, Articles 1 and 7(1)(e).

<sup>173</sup> Agreement Establishing the African Continental Free Trade Area, Article 28.

<sup>174</sup> Agreement Establishing the African Continental Free Trade Area, Article 8.

<sup>175</sup> Kuhlmann and Agutu, 'The African Continental Free Trade Area', 758. See, Gathii, 'African regional trade agreements as flexible legal regimes', 572-573.

<sup>176</sup> Agreement Establishing the African Continental Free Trade Area, Article 5(b).

<sup>177</sup> Agreement Establishing the African Continental Free Trade Area, Article 3(c).

<sup>178</sup> Agreement Establishing the African Continental Free Trade Area, Article 12(5).

<sup>179</sup> Protocol on Trade in Goods under the Agreement Establishing the African Continental Free Trade Area, 21 March 2018, Article 29(1).

The AfCFTA Agreement, although acknowledging that RECs are the building blocks of the AfCFTA, is conscious of the potential conflict of laws and inconsistencies arising from RTAs. It provides that where a conflict arises between an RTA and the AfCFTA Agreement, it takes precedence to the extent of that inconsistency.<sup>180</sup> The AfCFTA Agreement goes a step further by acknowledging that some RECs have attained higher levels of integration than others; through the *acquis* principle,<sup>181</sup> it maintains that in such circumstances, these higher levels of integration are to be maintained.<sup>182</sup> This demonstrates a very intimate relationship between RECs and the AfCFTA and, by extension, the AU, that is built on subsidiarity. Although not perfect, the degree of political will that has led to the Agreement's adoption serves as a testament to its favourability amongst African countries and RECs.

## Conclusion

This paper contends that a subsidiary relationship between RECs and the AU is preferable to direct oversight of the former by the latter. Through a historico-legal investigation, the study has demonstrated that the OAU functioned through an intergovernmental framework to which supranational control over its membership was never envisaged. Even after it was succeeded by the AU, member states have pushed back against its supranational institutions, in favour of a more intergovernmental-leaning framework. This behaviour has also manifested in RECs who have demonstrated a preference for a subsidiary relationship with the AU as opposed to being subjected to its direct oversight.

The paper has established that RECs were developed independently to address region-specific challenges. An analysis of the 2008 Pro-

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<sup>180</sup> Agreement Establishing the African Continental Free Trade Area, Article 19(1).

<sup>181</sup> The term *acquis* is derived from French meaning 'that which has been agreed'. In the context of regional integration, the principle holds that agreements must not start from afresh but rather build on what already exists. See, Gerhard Erasmus, 'AfCFTA parallelism and *acquis*', *Tralac Blog*, 10 February, 2021.

<sup>182</sup> Agreement Establishing the African Continental Free Trade Area, Article 19(2).

protocol on AU-RECs Relations highlighted the reluctance of RECs to engage, indicating their resistance to supranational authority. Only four out of the eight RECs recognised by the AU have signed this protocol. Furthermore, a review of the Abuja Treaty revealed that while it envisions a subsidiary relationship between RECs and the AU, the treaty's final three stages, encompassing a customs union, common market, and monetary union, necessitate a level of supranational control over RECs and their member states. This requirement contrasts with the actual behaviour of RECs and their member states, as they rarely concede to supranational oversight.

The AfCFTA Agreement has been presented as a blueprint for defining the relationship between RECs and the AU. As a subsidiary of the AU, the AfCFTA positions RECs as foundational elements beneath it. This framework emphasises its nature as an intergovernmental organisation rather than a supranational one, which accounts for the tendency of RECs and their member states to resist any form of supranational oversight.

Additionally, the Agreement addresses a significant concern for RECs: the establishment of a continental free trade area, a goal that RECs and their member states were keen to achieve. With the Tripartite Free Trade Area having been formed in 2015 by the EAC, SADC and COMESA, the creation of the AfCFTA in 2018 was a natural progression. The AfCFTA Agreement also recognises the diverse economic capacities of its member states, incorporating a principle of variable geometry to facilitate their integration into the Agreement based on their individual capabilities.

I do not seek to argue that the AfCFTA is perfect, rather, I argue that, evidenced by the immense political support it has gained, lessons can be drawn from it as a template for developing a robust legal framework outlining the relationship between the AU and RECs. One that is based on subsidiarity.

