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'Fast-Tracking' East African Integration and Treaty Law: *Pacta Sunt Servanda*, Betrayed?

Khoti C. Kamanga*

Introduction

The East African Community (EAC)[1] as we know it today, is a creature of the "Treaty Establishing the East African Community" (the EAC Treaty), as signed by Presidents Benjamin William Mkapa (for Tanzania), Daniel arap Toroitich Moi (for Kenya), and Yoweri Kaguta Museveni (for Uganda), on November 30, 1999. This being the case, the EAC Treaty is indubitably governed by the Vienna Convention on the Law of Treaties (VCLOT) of 1969. The fundamental implication of the foregoing is the applicability of the *pacta sunt servanda* rule.[2] According to this basic principle of both civil law and international law, having signed and ratified the EAC Treaty, these founding Partner States[3] are duty bound to fulfil their respective obligations in good faith.

This mundane but critical detail, does not seem to be taken into account often enough, especially in those instances where at stake, are sensitive and fundamental alterations to the integration architecture. Most notably, this was the case as East Africans debated on the question of *'fast-tracking'* the EAC,[4] and more recently, as we engaged on the matter of transition to a *'Common Market'*.[5]

Likewise, there are reservations whether there is sufficient appreciation and all are mindful of the factors which conspired and drove Kenya, Tanzania and Uganda into such acrimony that disbanding

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1 For a chronological background to the EAC see K. Kamanga, "Constitutional Dimensions of East African Cooperation" in O. Onyango (ed.), Kituo cha Katiba Studies Series 3, 2003, 118-146.

2 Arts. 26, 27, and 31, are particularly relevant.

3 These three States must be distinguished from Burundi and Rwanda who joined the EAC subsequent to 1999, in July 2007.

4 EAC, "Report of the Committee on Fast-Tracking East African Federation," Arusha, 26 November 2004.

5 The EAC Protocol on the Establishment of the Common Market, entered into force on 1 July 2010.

the erstwhile East African Community, in 1977, became the only acceptable way to retain civility in our mutual relations.[6]

This being the case, it may serve us well to recall at least three factors: the nature of the instrument we chose in creating the EAC, existing global 'best practices' in respect of strengthening integration, and the factors responsible for the demise of the 'Community' in 1977. It need be recalled that the 1999 Treaty is not the first attempt at integration between Kenya, Tanzania and Uganda. In 1967, the three neighbouring States adopted a similarly worded treaty and organisation, and which came crashing down, barely a decade into its existence. For convenience's sake, this paper will focus on the first two. This approach not only directs our attention to that branch of international law, governing treaties, but also to the experience of the European Union (or, as it was previously known, the European Economic Community, the EEC), as well.

Let us take it up from the tail end, that is to say, begin by considering the situation in Europe, which although totally distinct from the one found in East Africa, never the less, offers certain lessons of general applicability.

1. Lessons from Europe

Several specific developments seem to stand out for their relevance. Today's European Union (EU) comprises an impressive 27 strong family of nations,[7] with astounding heterogeneity in a variety of fundamental ways.[8] However, it is also true that in terms of scope of membership size, its beginnings were far more modest. The Rome Treaty of 1957, establishing the EEC, brought together a humbling six nations - France,

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6 Among the works which capture the details of this sordid period are V.H. Umbricht, *Multilateral Mediation: Practical Experiences and Lessons*, Martinus Nijhoff Publishers, 1988; S. Tulya-Muhika, *Lessons from the Rise and Fall of the East African Community*, Friedrich Ebert Foundation, 1995.

7 These are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovania, Slovakia, Spain, Sweden, UK, while Croatia, Macedonia and Turkey are candidates for membership.

8 While France, Germany, Italy and the UK are among the world's richest industrialised nations (the G-8), countries such as Bulgaria, Malta and Slovania post a modest GDP.

Germany, Italy and the Benelux States (Belgium, Luxembourg and Netherlands).

Without this historical throwback, one may be forgiven for imagining that the EU has always been the juggernaut we know today. Such a proposition would amount to ignoring the modest number of EEC founding nations, and which was no more than one fifth of the present scope of membership.

Parallel with the 'numbers' issue, is yet another striking feature - *Gradualism* accompanied by *Pragmatism*. From its inception, the EEC's trajectory has distinguished itself with an incremental membership enlargement as opposed to a transmogrification. Equally, so too has been the expansion of the scope of integration at any given time. Pragmatism has manifested itself first and foremost in the overall cautious pace of integration, refraining all along to appear hurtling along like a headless chicken.

It wasn't until January 1973, that the original six were joined by Denmark, Ireland and the UK, bringing the number to nine, following 16 years of zero growth. A whole eight years would lapse before the doors would be opened again to let in a new member – Greece, in 1981. A 'third enlargement' would take place in 1986 with the accession of Spain and Portugal, with the 'fourth enlargement' following in 1995 as a result of the accession of Austria, Finland, Sweden and Norway. Today, the EU is 27 strong and includes countries that were part of the defunct USSR.[9] Today's EU is large and impressively variegated. However, this shouldn't obscure us from the plain truth, which is that, membership expansion was attained incrementally, bit by small bit.

The *gradualism* is also aptly captured by the Rome Treaty of 1957. The grand goal of the EEC, the Treaty declared, was the establishment of "a common market" and, importantly, "progressive approximation of the economic policies of Member States... continuous and balanced expansion..."[10] Incidentally, in sharp contrast, the comparable provision of the EAC Treaty of 1999 is far more grandiloquent and in my view, agreeably[11] so, reads as follows:

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9 The latest accession to the membership of the EU (the so called "Second Eastern Enlargement") occurred in 2007, when the doors were opened to let in Bulgaria and Romania.

10 Art. 2

11 Some may find the articulation of the EAC's objectives and purposes as comparatively overambitious. But it is precisely this detailed content, which one day might prove invaluable to a court of law tasked with ascertaining the intentions of the 'founding fathers' of the EAC.

> "...Partner States undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared"[12]

The EU *gradualism* is also evident in the 'legislative pathway' the enlargement took.

The EEC Treaty of 1957, was followed by the Luxembourg Accords of January 1966.[13] In 1986, that is, two decades later, another landmark treaty, the Single European Act (SEA), which was to introduce fundamental changes to the 1957 Treaty, came into being.[14] According to some observers, the "Single European Act confounded expectations and brought about the most radical change in the history of the European Communities' fortunes."[15]

Another dramatic development came in February 1992, that is 35 years down the road with the signing of the *Maastricht Treaty*, or the Treaty on European Union (TEU). Having attained a *common market*, Europe was now determined to climb a notch up on the integration ladder. It would now aim for an *"economic and monetary union"*, implement a common foreign and security policy, and ultimately, a common defence policy.[16] Since then, we have witnessed the adoption of at least three more major treaties – the Treaty of Amsterdam, of Niece, and that of Lisbon in 2009.[17] To summarise, it is clear that *Gradualism*, manifested itself in quite a consistent manner. It is visible in membership expansion, and in defining the goals of the integration process. Finally, and no less importantly, in the legislative pathway

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12 Art. 5 (2)

13 For details see D. Chalmers, *et al., European Union Law: Texts and Materials*, Cambridge University Press, 2006, 13 -14.

14 For a critical commentary on the SEA, see P. Pescatore, Some Critical Remarks on the Single European Act, 24 *CMLRev* 9, (1987), 14.

15 *Ibid.*, 20

16 For more details see, among others, J. Weiler, The Transformation of Europe, 100 *Yale Law Journal*, (1991), 2476 – 2477.

17 See Chalmers *supra*, note 13, 40 – 43.

taken, that is to say, the negotiation and adoption of a fresh legal instrument, a treaty, to be precise, with each significant step taken.

This *gradualism* hardly exhausts the hallmarks of the European experience. Europeans were not only galvanised by a visionary, passionate leadership: Jean Monnet, Robert Schuman, Altiero Spinelli, Henri-Paul Spaak, Jacques Delor, to name but a few.[18] Underpinning the integration project was a shared fear of the consequences from frustrating the pace of integration.

As one goes through annals of history trying to capture developments of the 1950s, one gets the impression that for the European elite class, integration was approached with passion and probably viewed as a matter of life and death, an absolute necessity for which no sacrifice was too high.

1.1 Shared Fear and Common Interests

One informed observer, puts it this way:

> "The origins of the European Union lie in a crisis provoked by the establishment of the Federal Republic of Germany in 1949. The Ruhr, which was then under the administration of the International High Commission, was due to be handed back to the Federal Republic, along with the Saar. French fears of emerging German industrial might were compounded by Germany's increasing share of European steel production."[19]

As a consequence of this "fear" the French Finance Minister put out a proposal on 9 May 1950. A pertinent passage in the Schuman Declaration read:

> "Franco-German production of coal and steel be placed under a common High Authority...open to the participation of the other countries in Europe. The pooling of coal and steel production... will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most

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18 P. Craig, *et al.*, *EC Law: Text, Cases and Materials*, Oxford University Press, 1996, 2-12. The significance of this observation lies in the fact that the idea of European integration had its detractors as well, the most notable of which, is General Charles de Gaulle, former French President.

19 This is an argument shared by Paul Craig *et al* as well as Damian Chalmers.

> constant victims. The solidarity in production thus established will make it plain that war between France and Germany becomes not merely unthinkable, but materially impossible"[20]

A second observer puts it in far more graphic terms. The French plan was:

> "not only economically inspired, but it also represented an attempt to restabilise relations between France and Germany after [World War II], to *allay fears* about any *military threat* which the defeated German State might represent, and to bind them within a limited framework of peaceful cooperation in order to *avert emerging rivalry* over the coal-producing regions of the Ruhr and the Saar".[21]

1.2 Judicial Activism

Beyond a visionary, passionate leadership, gradualism, and shared fundamental concerns, there is a fourth distinguishing characteristic: The unsuspecting and unique role played by the European Court of Justice (ECJ).[22] In a series of judgements, and most notably, *Van Gend en Loos* v *Nederlandse Administratie der Belastingen*,[23] and *Costa* v *ENEL*,[24] the ECJ gave what are sometimes referred to as "integrationist judgements."[25] In *Van Gend*, a judgment variously described as "the Court's single most important judgment to date", "ground-breaking judgment" "one of two most significant judgments"[26] the ECJ held that the EEC was a sovereign legal order, which gave rise to rights that could be invoked before national courts and that in cases of conflict, EEC law took precedence over national law.

The pertinent parts of the judgment read as follows:

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20 Quoted in Chalmers *supra*, note 13, 9.

21 M. Holland, *European Integration From Community to Union*, Pinter Publishers, 1993, as quoted in Craig, *supra*, note 18, 4.

22 Originally established under the terms of the European Coal and Steel Community Treaty of 1951.

23 ECJ Case No 26/62.

24 This is acknowledged by both Craig, *supra*, note 18, 153 and Chalmers *supra*, note 13, 14.

25 Chalmers, *ibid.*, 14.

26 Chalmers, *ibid.*, 47.

> "To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.
>
> The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States."

The court offered three grounds in justifying such an interpretation of the overall import of the EEC Treaty: the preamble; nature of EEC organs; and imposition of duties on individuals. From this the Court held:

> "The conclusion to be drawn from this is that the [EEC] **constitutes a new legal order** of international law for the benefit of which the States have **limited their sovereign rights**, albeit within limited fields, and the **subjects of which** comprise not only Member States but also their **nationals**. Independent of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to **confer upon them rights** which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also **by reason of obligations** which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."[27] (emphasis mine)

2. Implications for the EAC

If *integrationist judgements*, *gradualism*, pragmatism, and an objectively (as opposed to a subjectively) shared, mutually complementing needs and fears, are the cement that has held the European integration architecture together, what are the corresponding determinants of East African cooperation? How does the EAC compare

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27 As quoted in Craig, *supra*, note 18, 152 -153.

with the EU?[28] The answers are both troubling, and a source of optimism. It is due to the following reasons.

It is quite obvious that the implicit comparison between East Africa and Europe may sound pretentious and therefore unwarranted. But I proceed to do so, nevertheless,[29] on the understanding that there is no escaping from the wisdom of taking an "accomplished athlete" as the most suitable yardstick against which to measure the EAC.[30] I do agree, that there are other economic integration systems such as CARICOM[31] and ECOWAS,[32] but what better 'world *athlete*', than the European Union (EU)?

In our observation of the European Union experience, as described earlier, the following stand out: *gradualism* and pragmatism; passionate and visionary leadership; adoption of a treaty with each major upscale of integration (incremental legislative pathway); a supportive judiciary (*integrationist judgements*); and, no less important the existence of shared fears and aspirations.[33]

Where does East Africa stand, in respect of these factors? Plainly speaking, until we began talking about *fast-tracking* the integration process,[34] we were on course, in the sense that, there was a comparatively higher fidelity to the *pacta sunt servanda* doctrine.

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28 According to the CIA World Fact Book, the "EU stands as an unprecedented phenomenon in the annals of history" For details see www.cia.gov/library/publications/the-world-factbook/geos/ee.html, (accessed 8 July 2010).

29 I am not alone in this. See for example W. Odhiambo, "Equity Issues in Regional Trade Arrangements: The Case of the EAC", paper presented to a regional conference on regional integration, Great Rift Valley Lodge, Naivasha, Kenya, September 2004.

30 An observation purportedly made by Tanzania's founding father, Mwalimu Julius Nyerere, on the wisdom of assessing Least Developed Countries against achievements of the Developed Nations to the North.

31 The Carribean Community (CARICOM) brings together into a Single Market and Economy, 15 Member States dedicated to establishing, according to the 'Chaguaramas Treaty' of July 4, 1973 a "Common Market".

32 Established under the terms of the ECOWAS Treaty of 1975, the 15 Member States have pledged (Article 3) to create a Common Market and ultimately, a Monetary Union.

33 It is also fair to mention the massive and generous financial handout from the US Government of the day, under the European Recovery Programme, or the 'Marshall Plan', an intervention valued at $ 13 billion and which proved critical to rebuilding and creating a stronger economic foundation for Europe.

34 See *supra*, note 2.

Incidentally, in the course of 1998 and early 1999, when invited by EAC Secretariat to comment on the then Draft EAC Treaty, I began, as I am doing today, by drawing attention to this mundane, but critical fact.[35]

2.1 Pay Heed to Law of Treaties

It is simply unwise to lose sight of the fact that the EAC is a creature of the EAC Treaty, which in turn is governed by the Law of Treaties, more specifically, by the Vienna Convention on the Law of Treaties (VCLOT) of 1969.[36] The VCLOT in turn, contains the rule according to which, treaties are binding and must at all times be fulfilled in good faith, the *pacta sunt servanda* rule.[37] The EAC Treaty is remarkably explicit (as compared to the Rome Treaty of 1957, establishing the EEC) with regards to the integration pathway. It reads:

> "Partner States undertake to establish... a Customs Union, a Common Market, **subsequently** a Monetary Union and **ultimately** a Political Federation...."[38] (emphasis mine)

Clearly, therefore, the Treaty envisages a step by step progression – beginning with the rudimentary, to the most sophisticated. Beginning with a Customs Union, and ultimately, arriving at Political Federation: in other words, by way of *Gradualism*. Beyond this particular provision are several others, all of which articulate a *gradualist* approach.[39] Two provisions can serve as illustrations. Article 75 (2) states:

> "The establishment of the Customs Union **shall be progressive** in the course of a transitional period as shall be determined by the Council." (emphasis mine)

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35 See K. Kamanga,"East Africa Treaty: Marry in Haste, Repent at Leisure?", *The East African*, 14-20 June 1999, 26.

36 Reproduced in I. Brownlie (ed.), *Basic Documents in International Law*, Oxford University Press, 1991, 349-384. Authored by the UN International Law Commission, the VCLOT not only codifies existing rules and practices. It also engages in the 'progressive development of the law.'

37 According to Art. 26.

38 Art. 5 (2).

39 Incidentally, a gradualist approach is also encountered in the ECOWAS Treaty where the words "in stages" are used to prescribe the integration trajectory.

Article 76 (2) is couched in similar blunt fashion. It reads:

> "The establishment of the Common Market **shall be progressive** and in accordance with schedules approved by the Council." (emphasis mine)

The treaty could not be more explicit and consistent. The Treaty is also explicit on another critical issue. Each of those integration leaps shall be articulated through a "Protocol"[40] which is just another way of saying a "treaty", which, as we have seen, has precisely been the European experience. That is, first came the 1957 Treaty of Rome. It was followed in measured steps, by the SEA, TEU and ultimately the more recent Treaty of Lisbon of 2009. With every major progression, the EAC Treaty demands, we pause and pop a champagne bottle, in other words, adopt, a Protocol.

2.2 Fast-Tracking and Gradualism

The fundamental question is, to what extent is *'fast tracking'*, consistent with the *gradualism* explicitly set out in the EAC Treaty?[41]

Ignoring the implications of the law of treaties, such as *pacta sunt servanda*, in particular, on the EAC Treaty, is the last thing a legal mind would want to be seen doing. As we have tried to show, fundamental to the EAC architecture and law (but also supported by practice elsewhere), is gradualism and pragmatism. It is these basic tenets, which fast-tracking, for all intents and purposes, seeks to challenge and revise. To my mind, the most appropriate way of proceeding was to begin with an acknowledgement of the major revision to the original trajectory which fast-tracking entails. Secondly, a realisation that given these implications, a legally sound approach requires an amendment of the provisions of the EAC Treaty laying down its fundamental structure and trajectory.

As I read the 'Report of the Committee on Fast-Tracking East African Federation'[42] I was hoping to find among its recommendations,

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40 See for example, Art. 75 (1) and Art. 76 (1).

41 Note the lack of uniformity on opinions as regards 'fast-tracking' as captured by the consultative study titled 'Report on the East Africa Political Federation Consultative Process for the East Africa Diaspora in the USA' and jointly submitted to the EAC Secretariat, by the East Africa America Business Council and the East Africa Cooperation Forum Diaspora, USA, June 30, 2007.

42 *Supra,* note 4.

one addressing itself to the issue of amending the EAC Treaty, Articles 2 and 5, in particular.[43] No such recommendation appears under the section dealing with 'Preparatory Phase for the Transition Period', neither under the rubric 'A Road Map of Action for an East African Federation.' To be fair, and consistent with the EAC Treaty, a Protocol on the Common Market has been adopted and went into force as on 1 July 2010.

However, the 'Transitional Phase to Federation' is evasive about the adoption (as required by the EAC Treaty) of a Protocol on the Monetary Union, confining itself instead, to a "Protocol on Double Taxation and Prevention of Fiscal Tax Evasion."[44] Quite illuminating also is the fact that the Report envisages a transition to a 'political federation' by way of a 'Constitution of the Federation of East Africa'[45] whereas, the EAC Treaty is explicit – by way of a "Protocol."[46] On this score, the opinion of the regional Bar Association, the East African Law Society (EALS) is quite instructive. In a Memorandum to the EAC Committee entrusted with advising on 'fast-tracking', the EALS opined:

> "We do not support the adoption of a "top-down" approach whereby the political leadership would declare a Federation on the basis of an interim Federation Constitution..."[47]

Incidentally, besides the transition from one integration model to another, there are several other transformative matters for which the EAC Treaty also prescribes a "Protocol." An envisaged extension of the jurisdiction of the EAC Court of Justice is also to be executed with the aid of "a Protocol."[48]

Again, it is worth pointing out the position of the East African Law Society (EALS), the regional Bar Association, on the matter of fast-tracking. Not only did the EALS express doubts whether there existed, a shared interpretation of the terms 'fast-tracking' or 'fast-tracking

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43 Together, they set out the broad, key phases and *modus operandi* for effecting progression of the integration process.

44 *Supra,* note 4, 220.

45 *Ibid.*, 222.

46 As implied in Article 123 (2) of the EAC Treaty. See also *supra,* note 35.

47 EALS, Memorandum of the EALS to the Committee Appointed by the EAC Summit Towards Fast-Tracking East African Regional Integration, Arusha, Tanzania, 21 October 2004, para. 48.

48 See Art. 27 (2).

mechanism.' The EALS was emphatic in calling for adherence to the basic integration framework in respect of 3 areas: 'Objectives of the Community'; 'Fundamental Principles of the Community' and 'Operational Principles of the Community' (that is, Articles 5, 6, 7, respectively).[49]

So much for 'fast-tracking' and its unsettling implications for *gradualism* about which, incidentally, the EAC Treaty is unambiguous and consistent. *Gradualism* in Europe was accompanied by robust *integrationist judgements*. A judicial activism,[50] so to say, which contributed immeasurably to integration largely through the Court's interpretation of the role of Community Law *vis a vis* national law (and its institutions), and in challenging barriers to the integration process, particularly in respect of free movement and equality. What has been the corresponding role of the East African Court of Justice? Have there been any missed opportunities?

As I did point out elsewhere, the EAC Draft Treaty had a number of shortcomings. Some of them continue to soil the existing version. One such matter which invites unkind attention is the manner in which 'EAC Law' and the national law of Partner States interface. A corresponding problem within the EU was resolved in the most unsuspecting way, in *integrationist judgements* such as *Van Gend en Loos* in 1962. Does a similar problem, or potential for dispute, exist within the EAC Treaty?

3. The Intersection Between EAC Law and National Law

In my humble opinion, it surely does. Primarily, on account of the fact that the prevailing legal tradition and doctrine in at least three of the five EAC Partner States,[51] draws a rigid distinction between treaty law,

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49 EALS, *supra*, note 47, para 9.

50 In Tanzania, the judge consistently associated with the global judicial activism scion, is the late James L. Mwalusanya. For example, in *Mwanza Restaurant and Catering Association* v *Mwanza Municipal Director*, Misc Civil Cause No 3 of 1987 he openly questioned the ritualism promoted by Declaratory Theory adherents, whose anachronistic approach, he was prepared to "give a decent burial" and on whose grave, Mwalusanya J was inviting fellow judges "to lay wreaths." For further details, see the book by H. Kijo-Bisimba & C.M. Peter, *Justice and Rule of Law in Tanzania: Selected Judgements and Writings of Justice James L. Mwalusanya and Commentaries*, Legal and Human Rights Centre, 2005.

51 In particular Kenya, Tanzania and Uganda all of which belong to the Anglo-Saxon legal tradition as opposed to Burundi and Rwanda whose national legal systems are fashioned around the civil law system.

on the one hand, and national law, on the other,[52] with the result that, in the event of conflict, precedence is given to national law. Two cases probably echo this classical approach within jurisdictions with an Anglo-Saxon legal tradition: *Okunda et al v. Republic*[53] and *EAC v. Republic*.[54]

In the former case, the bone of contention was whether statutes enacted by the Parliament of Kenya in giving the force of law of the East African Community Treaty of 1967 represent what the Constitution termed "other laws", and whether therefore, such laws are caught by the absolute requirement of being in conformity with the Constitution. The Attorney General took the view that the statute in question, an enabling legislation of the 1967 EAC Treaty, the Official Secrets Act, 1968, was enacted by Parliament, which in turn is a creation of the Constitution. That being the case, any conflict between EAC law and the Constitution should render the former a nullity in view of the principle of constitutional supremacy.

Counsel for the EAC to the contrary, argued, that the 'conflict' be resolved in favour of EAC Law:

> "because the Community's power to legislate springs from the Treaty for East African Cooperation which was freely entered into by the three East African countries."[55]

Mwendwa CJ, rendering judgement on behalf of his colleagues, Chanan Singh J and Simpson J, acknowledged the existence of a conflict between statutory law on the one hand and Treaty Law on the other. He went on to state:

> "If we did have to decide a question involving a conflict between Kenya law on the one hand and principles or usages of international law on the other... and we found it impossible to reconcile the two, we, as a municipal court, would be bound to say that Kenya law prevailed"[56]

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52 Further details can be found in T. Maluwa, *International Law in Post-Colonial Africa*, Kluwer Law International, 1999, especially the section 'Situating International Law in Municipal Legal Systems in Africa,' 31-57.

53 *Okunda and Another* v *Republic*, *EALR* [1970] 453.

54 *East African Community* v *Republic*, *EALR* [1970] 457.

55 *Ibid.*, 455.

56 *Ibid.*, 456.

With even greater emphasis the court held that:

> "if any other law is inconsistent with [the Kenyan Constitution], the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."[57]

We encounter a similar deference to municipal law, in the latter case, which in fact was in exercise, unsuccessful, at that, of the right to appeal from *Okunda et al.*

The Presiding Justice of Appeal, Sir Charles Newbold (on behalf of his remaining two members of the bench, Duffus and Spry) made the following remarks in his *obiter*. Firstly, he reasserted the paramouncy of the Constitution. Secondly, he reaffirmed the constitutional duty of courts of law to uphold the provisions of the Constitution as interpreted by the courts. And finally, the fundamental tenet of dualist legal systems, according to which, "provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by law of Kenya" but even following domestication, if such treaty provisions are found to be in conflict with the Constitution, "then to the extent of such conflict such provisions are void."[58]

This *dualist* approach (of regarding international law, as distinct from the corpus of applicable national laws) is also the foundation of the constitutional requirement for ratification and, especially, 'domestication' of treaties.[59]

It would appear that the issue of the relationship between treaty law and national law is of such importance that a number of Constitutions, the world over, including Germany, Malawi, Namibia, Russia, South Africa, have given it prime time. In the case of the South African Constitution of 1996,[60] an entire 3 articles, that is, Articles 231, 232, and 233.

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57 *Ibid.*, 457. Incidentally, this position has been reproduced almost verbatim in the recently promulgated Constitution of Kenya of 2010, in the provision articulating the "Supremacy of the Constitution."

58 *EAC* v *Republic*, 460.

59 As regards the specific operation of this constitutional prescription, see K. Kamanga "International Human Rights Law as Reflected in Tanzania's Treaty and Court Practice" in W. Binchy & C. Finnegan (eds.), *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives*, Clarus Press, 2006, 53–70; B.T. Mapunda Treaty Making and Incorporation in Tanzania, 28-30 *Eastern Africa Law Review*, (2003), 156 - 170.

60 Act No. 108 of 1996 (as amended).

Article 233 deserves to be quoted, and it reads:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

This provision and the preceding two articles[61] of the South African Constitution stand out for the welcome guidance they provide, in ascertaining the relationship in which statutory law, and international law, stand. There is the additional value of indicating the role and place of treaty law on the hierarchy of national laws. To fully appreciate the value of constitutional guidance on the question of the general interface between international law and municipal law, one may wish to consider the Malawi Supreme Court case of the adoption of Chifundo James.[62]

In this case, the Court was called upon to consider, *inter alia,* the role of international human rights law treaties in adjudicating over a dispute arising from the interpretation and application of a Malawi statute, the Adoption of Children Act.[63] In its *obiter*, the Court entered a number of pertinent observations. Firstly, the "Constitution of Malawi is the supreme law of the land which sets the standards to which all statutes must conform" with a collateral responsibility on judicial officers to at all times "interpret, protect and enforce the Constitution and all laws in accordance with the Constitution."[64] Having stated the 'constitutional supremacy' principle the Court then proceeded to articulate the correlation with Malawi's treaty obligations in the arena of the rights of the child. And, the Court declared, that where it is applicable, "when interpreting the Constitution courts must have regard to current norms of public international law and comparative foreign case law."[65] Finally, the Court noted that the provisions in both the Convention on the Rights of the Child, 1989 and those found on the African Charter on the Rights and Welfare of the Child,[66] in respect of the principle of the 'best interest of the child' do "compliment and amplify the [Malawi statute on

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61 That is, Arts. 231, 232.

62 In the Matter of the Adoption of Children Act (Cap 26:01), MCSA Adoption Appeal No. 28 of 2009

63 Cap. 26:01.

64 *Supra,* note 62, 5.

65 *Ibid.*, 6.

66 Adopted in Addis Abeba on 11 July 1990 and entered into force on 29 November 1999.

adoption]. On that ground, the Court is convinced that" courts may take judicial notice of [the CRC and African Charter referred to above], "when considering an application [for adoption]."[67]

It is probably true that such an interest in international human rights law would never have arisen, if the Constitution, unlike that of Tanzania, contained no explicit guidance as to the relationship between international and municipal law. To the contrary, there is an entire provision addressing itself to this very issue.[68]

The EU doctrine and approach on the issue, was first set out in the *Van Gend* case.[69] Put simply, deference goes to EU Law. Secondly, national courts of law (and other authorities) are obliged to give EU Law '*direct effect*,'[70] that is to say, without the agency of an enabling legislation (or 'domestication'), as is the case, here in East Africa.

The EAC Treaty does come close to addressing this problem in a number of provisions.[71] However, the day has not arrived where this matter is tested, as has been the case within the EU, before the EAC Court of Justice. The EAC Treaty for instance, states that:

> "regulations, directives and decisions of the Council taken or given in pursuance of the provisions of [the EAC] Treaty shall be binding on the Partner States..."[72]

At the other extreme, the Treaty directs that: "[EAC] organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of [the EAC] Treaty."[73] Finally, the Treaty confers the right of superior honour to the EAC Court of Justice. It reads:

> "Decisions of the [EACJ] on the interpretation and application of [the EAC] Treaty shall have precedence over decisions of national courts on a similar matter".[74]

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67 *Supra,* note 62, 11.

68 For details see Article 211 of the Constitution of Malawi.

69 *Supra,* note 20.

70 Craig, *supra,* note 18, 151–199.

71 In particular, Arts. 8 (4), 16 and 33 (2).

72 Art. 16.

73 Art. 18.

74 Art. 8 (4).

This comes close enough to the '*direct effect*' doctrine of the EU but two fundamental questions arise. Firstly, given the prevailing common law tradition on the matter, may an aggrieved East African, petition a national court of law directly relying primarily and solely on the EAC Treaty? Secondly, and would such a court of law, feel obliged to entertain such a complainant?

4. Integrationist Judgements by the EACJ?[75]

In none of the cases which have so far come before the EACJ have such matters been tested. Neither have fundamental rights and basic freedoms been associated with the Customs Union or Common Market. As the integrationist judgements of the EU, such as *Van Gend* and *ENEL* demonstrate, it is grievances in respect of barriers to integration which provided an opportunity for the exercise of 'judicial activism'.

Given the pace of our integration process, it is quiet likely that the day is not far, when East Africans will begin approaching their national courts, and ultimately, the EACJ, seeking remedies, relying primarily and solely on the EAC Treaty. The probability of this happening is grounded in the EAC Treaty as well as the Protocols regarding the Customs Union and the Common Market, both of which confer a number of substantive rights on among others, individuals directly, thereby laying the ground for petitioning the EACJ. It need be borne in mind that the EAC Treaty ascribes to the EACJ the task of ensuring "the adherence to law in the interpretation and application of and compliance with [the EAC] Treaty"[76]

In respect of the EAC Customs Union Protocol, and if the experience of the European Court of Justice is anything to go by, we are likely to see petitions around Non-Tariff Barriers and the principle of 'National Treatment.'[77] In similar fashion, one of the bones of contentions with regard to the implementation of the Protocol on the Common Market,

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75 One of the earliest observers to acknowledge this potential of the EACJ is John Ruhangisa, current Registrar of the EACJ, in September 2004: J. Ruhangisa, "The EACJ *vis a vis* African Courts of Justice and Other New Initiatives," Workshop Paper, Workshop on the East African Community, September 2004, Naivasha, Kenya. Also, T. Ojienda, "The EACJ: Institutional Structure and Function in the Integration Process," Conference on 'Reaping the Fruits of the EAC' organised by the East African Law Society, Dar es Salaam, 21 February 2003.

76 Art. 23.

77 Arts. 13 and 15 respectively.

for an example, is likely to arise in the obligation, requiring Member States to "guarantee the free movement of persons who are citizens of the other Partner States, within their territories."[78] And it is only at that stage when one will be in a position to ascertain the existence or otherwise, of *integrationist judgements*. Any definitive remark at this point would amount, therefore, to no more than conjecture.

Nevertheless, available evidence, however anecdotal, seems to suggest that, aspects of EAC Law are gradually and already finding their way into the jurisprudence of national courts of law. In Uganda, in what essentially is a purely local matter, the Commercial Division of the High Court had to take judicial notice of the EAC Treaty.[79]

In a germane part of the judgement, the Court declared:

> "Article 104 of the [EAC Treaty] provides for the free movement of persons, labour, services, and the right of establishment and residence. The Partner States are under **obligation to ensure the enjoyment of these rights** by their citizens within the Community. In this regard, Court is mindful of the fact that the Treaty has **the force of law** in each Partner State; and that this **Treaty law has precedence** over national law"[80] (emphasis mine)

Another prominent hallmark of the European experience with integration (besides *gradualism* and *integrationist judgements*), has been the 'shared fear', the collective motive for integration. Fear of German militarism and war is widely acknowledged as a determinant of considerable significance.[81] Along with this 'fear factor' was an appreciation of the stupendous rewards from integration for all concerned, particularly in terms of peace, stability and prosperity. This pattern of thinking is evident in the integration pathway chosen in those early years. Rather than embarking on an integration encompassing, in one fell swoop, all aspects of human life (as does the EAC Treaty), the Europeans began with a carefully chosen handful, in fact with those, with the greatest dividends in combating militarism and laying the foundations for industrialisation. First, came the Treaty of Paris, establishing the European Coal and Steel Community in 1951 and a

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78 Art. 7 (1).

79 *Deepak Shah and Others* v *Manurama Ltd and Others*, Miscellaneous Application No 361 of 2001 (Reported).

80 *Ibid.*, 5.

81 See *supra*, notes 17 and 18.

short-lived European Defence Community in 1952. This was followed, by the European Atomic Energy Community in 1956, all predecessors of the EEC.

5. Aren't We Popping the Champagne Bottles a Little Bit Too Hastily?

So, it wasn't simply *gradualism* (along with the adoption of a new treaty for each major integration step taken), but Europe coalesced around a modest number of shared fears and aspirations. Viewed from this perspective, one would be permitted to ask whether the EAC Treaty of 1999 wasn't overly ambitious. As anyone familiar with the Treaty would confirm there hardly is an aspect of human endeavour which the Treaty does not seek to regulate. Perhaps this expansive remit was unavoidable given the fact that the Treaty seeks to cover not only a Customs Union and Common Market but the eventuality of a Monetary (and Economic) Union, and the penultimate 'Political Federation.' No surprisingly every conceivable facet of national life comes under some sort of regulation.

The range is indeed impressive. It extends from investment meteorology, agriculture and food security, tourism, health (along with the social and cultural) all the way to the role of women in business peace and security, and civil society.[82]

Now, precisely because of the phenomenal scope of the EAC Treaty one is hard pressed at putting their finger on the priorities. Given the prevailing general economic standing in the region,[83] prioritization might have proved more than useful. However, to arrive at a consensus on priorities there probably ought to be clarity over which are the greatest shared fears and aspirations.

Which, drawing from the European experience, makes one ask: what is the shared 'fear factor' which glues us together? I want to argue, i

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82 As set out, for example, in Arts. 81-129.

83 The UN High Representative for the Least Developed Countries, Landlocked Developed Countries and Small Island Developed Countries lists Burundi, Rwanda Tanzania and Uganda as LDCs, with Burundi and Rwanda also belonging Landlocked LDCs. At the other extreme, the Kenya Human Development Report while acknowledging that Kenya's Human Development Index has "increased marginally in recent years" also notes that "a majority of Kenyans are still trapped deepening poverty www.hdr.undp.org/en/reports/nationalreports/africa/kenya/kenya2006, (accessed 8 July 2010).

this regard, and by way of illustration, that had there been a compelling fear factor, our leadership would have found it difficult to disband the EAC in 1977. At least there would have been such public outcry for a search for alternative dispute settlement.

Conclusion

The Heads of State Summit of August 2004 showed concern at the tardiness in the integration process and in its wisdom, took the decision to:

> "expedite and compress the integration process so that the ultimate goal of a Political Federation is achieved through a fast-track mechanism."[84]

These are undoubtedly laudable intentions but the EAC is a creation of the EAC Treaty and by the same token, regulated by the Law of Treaties. A cardinal principle of the latter is the rule requiring States Party to treaties to unfailingly show fidelity to the *pacta sunt servanda* rule: in other words, the duty to fulfil one's treaty obligations in good faith. In the context of the EAC, a major, fundamental undertaking is adherence to the *gradualism* and *pragmatism* explicitly, repeatedly and consistently set out in the EAC Treaty. Fast Tracking, whatever its intentions, in my considered opinion, amounts to a substantive revision of the fundamental tenets on which the EAC architecture and trajectory rest.[85]

This assessment emerges not only from considering developments in East Africa, but vindicated by, among other regions, the European experience with integration. Five lessons emerge from the European experience.

Firstly, Europe took the *gradual* approach. Membership began with a humble six States, and expansion came in measured doses over a period stretching nearly four decades.

Secondly, gradualism also finds reflection in the legislative approach to the integration trajectory. No major transformation leap was ever

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84 *Supra,* note 4, 1-2.

85 For other broader challenges (as well as prospects) confronting the EAC integration see the Society for International Development (SID) publications forming part of the 'The State of East Africa Annual Reports' and especially the intriguingly titled 2007 edition, 'Searching for the Soul of East Africa.'

undertaken, without full scale negotiations, consensus and adoption of a fresh treaty. There was absolutely no haste, in popping champagne bottles.

Thirdly, through its *integrationist judgements* such as *Van Gend en Loos,* and *Costa,* the European Court of Justice, contributed in an invaluable manner in shaping the direction and dictating the pace of integration.

Fourthly, a major driving force and determinant to the integration process and subsequent prosperity was the existence of an identifiable and shared fear and core interests, which not only made integration attractive, but an absolute necessity.

Fifthly, was the presence of a passionate, dedicated ruling elite, especially in the early years of the EEC across the founding States.

The EAC Treaty of 1999 is fairly explicit and consistent with respect to the notion of *gradualism.* Recent practice, and in particular, the attempt at 'fast tracking' the integration process (however laudable this exercise is), seems inconsistent with the spirit and the letter of the EAC Treaty. It would appear necessary to have the EAC Treaty amended if 'fast-tracking' has to enjoy a sound, indisputable legal basis. Put differently, the otherwise, justifiable passion for accelerating the integration process should not be allowed to serve as an excuse for betraying the vows of fidelity our Heads of States gave on signing the EAC Treaty, nor as the *casus belli* for attacking the established wisdom of respecting *gradualism* and *pragmatism.* But above all else, there is the *pacta sunt servanda* rule, to contend with.