

THE FAST-TRACKING OF FEDERATION AND CONSTITUTIONALISM IN EAST AFRICA

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Introduction

I am happy to be invited to give this paper on this occasion' which honours Sir Udo Udoma the first African Chief Justice of Uganda before whom I enjoyed practising law as a young practising lawyer and advocate in Kampala and Mbale in the 1960ss and early 1970s. Sir Udo in one of his famous judgements put an African stamp on the interpretation of African customary practices concerning marriage when he over-turned a long standing judgement of a British judge which had defined African traditional marriage as "wife purchase!" Since then, the application of African traditional conceptions of law and justice has become handled in a more sensitive manner by the courts, although a long journey still remains to be travelled in this direction.

The best cases I remember doing before Sir Udo Udoma immediately after my release from political detention in 1971 concerned the right of passage of a community in a mining area owned by a Goan industrialist near Mbarara and the other was a traffic case involving a third party claim against the insurance company for a fatal accident caused by a taxi driver who, it was claimed, had driven the taxi at his own (frolic!) without the owner's consent. The first claim was that the miner owner had no power to close the passage that went through the mine but which the community had used for many years without creating a substitute passage for them. Sir Udo Udoma ruled in the community's favour by asserting the collective rights of the community to the passage and awarded them costs.

In the traffic insurance case in which the insurance company had denied responsibility on the ground that the driver was not insured since he drove without the owner's consent, Sir Udo Udoma ruled that the right of the passengers were not affected by the status of the driver since the insurance policy covered all passengers who could not have known whether the driver was driving the taxi with the owner's consent or not. These were cases of their first kind and were reported in the Uganda reports and/or East African Law Report of time since they seemed to set a precedent. Therefore, Sir Udo Udoma was quite instrumental in setting the pace and the tenor for the Africanisation of law in Uganda. Thus when Justice Patrick Tabaro many years later grappled with the issue of witchcraft, he was doing so on a tradition of legal interpretation that had been laid.

The Origin of the Idea of Federation

In this context, we can also begin to see how to view the future of East African integration and unity. The fundamental question here will be whether we shall define the idea of federation from the dominant Eurocentric understanding of the nation-state, or whether we can trace positive African experiences of state-formation that have an African conception of democratic governance that can be the basis of such a new development.

There are two main trends in the evolution of the concept of ‘federation’ since the European colonisation of East Africa. The first is a colonial concept and the other is a Pan-African concept. The first was advanced for the sake of domination and the other was advanced as a tool of resistance against exploitation and domination, crafted as a response to the European ‘balkanisation’ of Africa.

A. The colonial concept of federation

From the colonialist standpoint, Lord Durham first crafted the idea of federation in a report of 1839 in which he proposed a separation between British interests and those of the colonies in order to prepare them for ‘responsible government.’ These were of course at the time, English-speaking colonies then found mainly in North America. Even at this stage, British imperialism was confronted with ‘the era of colonial nationalism’ in which the colonised white settlements asserted their “Rights of an Englishman” and wanted then recognised. Because of this pressure, the British colonisers crafted the idea of an imperial ‘federation’ as a response. It was decided by British imperialism to ‘grant’ these territories ‘responsible government’ in order to contain their nationalist sentiments. At this point, these British ‘possessions’ that were granted ‘responsible government’ were Nova Scotia in 1848 and British Columbia in 1871 in Canada. In the next struggles that followed, Britain was not able to contain this ‘nationalism’ and despite its endeavours, it lost full control of its American colonies in 1776 that, in their own endeavour, set up their own federation in the form of the United States of America.

Be that it may, the idea of federation for the British cropped up again and was refurbished by Neville Chamberlain in order to contain this growing ‘colonial nationalism’ in the newer white colonies. This was also the period for a ‘new economic policy of national development’ for each colony out of their resources. It was also the time of ‘great international tensions’ and ‘great continental armaments’ for British imperialism and its competitors which resulted in the first world war and the ‘new policy’ was intended to force the colonies to ‘share the cost of the British Navy’ by paying for the own development. The policy was also intended to hold the colonies within the British Empire and contain their ‘nationalism,’ given the experience of having lost their colonies in America. The British Federal League had been formed in 1884, which opened the way for colonial autonomy for colonies such as New Zealand, Australia and South Africa. Indeed, the success in the application of this policy earned Chamberlain, then the prime minister of Britain, the fame of being ‘the enlarger of the British empire.’

The idea of federation became a workable hypothesis for British colonialism in Africa when it was advanced as a political vehicle for transition from direct colonial rule to neo-colonialism. In the case of Central and East African the idea came under these circumstances after the Second World War in which the spread of ‘colonial nationalism,’ had reached Africa. The then British Colonial Secretary, Lennox-Boyd in mid-1950s called for the creation of a Central African federation in which all the ‘races’ would share power in a political federation. In Central Africa, where the White population was just over 200,000 against an African population of 3.5 million, this attempt was seen as a new effort to entrench white settler colonialism on a majority of Africans and hence the idea was vehemently resisted. The resistance was strongest in Nyasaland, whose population was predominantly African as against Northern and Southern Rhodesia where, especially in the south, had a bigger White population.

In East Africa, the crunch came when the then Secretary of State for the Colonies, Oliver Lyttelton (later Lord Chandos) at a meeting of the East African Diner Club in Nairobi, made a speech, which was reported in the *East African Standard* of 3rd July, 1953 in which he spoke of the possibility of a future federation of the East African territories. Paulo Kavuma, then the Katikiro of Buganda, later told the story of how he heard this news at “a tea party’ welcoming a representative of the British Bible Society who had flown in from Britain through Nairobi. His reaction was typical of the Buganda political elite of the time:

“I was shocked by the suggestion that federation, which we in Buganda had strongly resisted, was still under consideration although we had not been consulted. The Kabaka was in England, but I decided that something must be done at once. ...”¹

The Buganda Lukiiko was called and put up a resistance by passing a resolution denouncing the idea of federation in which Buganda would be part and called on Britain to recognise its treaty obligations with Buganda. The British reacted with the typical imperialist authoritarianism and called on the Kabaka of Buganda, Edward Mutesa, to advice the Lukiiko to withdraw their resolution. When he refused to do so, he was deported to Britain in 1955 where he was held until 1958 [Ibid]. The federal idea that was opposed by Buganda was called “*Ekintabuli*” or ‘multiracialism,’ which the federal idea implied and which the Baganda, like their counterparts in Central Africa, had seen as an attempt to maintain colonial rule through white domination.

Indeed, this rejection of federation by Buganda Lukiiko under these very different political circumstances has continued to bedevil all Uganda’s discussions about an East African Federation whenever it has emerged and it may indeed affect the way implementation of the fast tracked federation might proceed. This is because the leadership in Buganda does not see much difference between the way the British colonisers had proposed the idea of federation and the way the current African political elite that inherited the colonial system have pursued it in disregard of the general feelings of the people of Buganda and the African people in East Africa in general.

The reason behind these continuing suspicions and the way the project is pursued is because the idea is not advanced as a political project of the people of East Africa in which they are involved right from the beginning in discussions and meetings at local levels. It has been pursued as an economic integration project in which the interests of the dominant groups and classes are taken to be the basis of the discussions. This also they way the idea of an East African customs union as a colonial project had emerged. It arose as project intended to create wider markets for British companies operating in the region. It was also intended to reduce the costs of production for the settler farmers in Kenya since their production was too costly comparative to African peasant production costs in Uganda. The idea of a customs union was therefore a mechanism for African coffee and cotton growers in Uganda to cross-subsidise settler agriculture through railway freight rates. The construction of what was called the Uganda Railway, which formed the

¹Kavuma, P [1979]: *Crisis in Buganda: The Story of the Exile and Return of the Kabaka, Mutesa II*, Rex Collings, London, pp. 19-20.

bedrock of the system, was to move the crops to the British market at a cheap price and it worked very well for the colonial government as well as the colonial settlers.²

B. The Pan-African Concept of federation

On the side of the East African nationalists, the idea of federation proposed by the colonialists at this time was a rejected by them as a British attempt to deny Africans genuine independence by placing it under settler domination. Theirs was a Pan-African conviction of uniting the continent against the colonial ‘balkanisation’³ The political leaders who led the people of East African to independence were part of this wider Pan-African movement that was expressed in the formation of the Pan-African Freedom Movement for East Africa and Central-PAFMECA and the broader Movement that included Southern Africa-PAFMESCA. The decision to form these Pan-African political movements was a reflection of a clear commitment by the leaders of these countries to move to a greater unity of their countries. The people in those countries supported this commitment⁴. The Pan-African Manifesto of 1957 had warned against the idea of *Eur-Africa* in the context of the European Common Market that was being formed by the Europeans after the war as a ‘last chance for survival of Europeans’ and ‘cause the African race to disappear.’ It added that ‘unity was our last chance of survival’ [Ibid: 190-2].

But the movement did not flower because African leaders negotiated political independence on the basis of their colonial borders. The acceptance of the colonial borders as the basis of Africa’s independence was a backward step that arose out of the differences between mainly the former French speaking countries and the others, which led to the division of these leaders between the Monrovia and the Casablanca political blocks. This division was reflected in the compromises that characterised the formation of the Organisation of African Unity-OAU, which accepted the continuance of colonial borders as a compromise between radical Pan-Africanism and the more conservative territorially, based nationalism⁵.

The dissolution of this body with the birth of the African Union is a reminder to us that that model of ‘unity’ was doomed to failure. The formation of the African Union is, according to the Sirte Declaration, a step towards the formation of the United States of Africa, which should be pursued vigorously and expeditiously. This political union is supposed to be achieved on the basis of the existing regional integration arrangements that should be used as the “building blocks” of a United States of Africa⁶. It follows that for the United States of Africa to be realised, there is need for the “building blocks” to come into place as quickly as possible, and hence the importance of the need to *politically* fast track the East African Federation project.

C. The Neo-colonial Concept of federation

These weaknesses in continental organisation were reflected in the problems of regional integration. By then it was becoming clear that neo-colonialism was a reality we

² Nabudere, D. W [1982]: *Imperialism in East Africa: Imperialism and Integration*, Vol. 2, Zed Press, London.

³ Thompson, V B[1969]: *African Unity: The Evolution of Pan-Africanism*, Longman, London.

⁴ Hughes, A. J [1963]: *East Africa: The Search for Unity: Kenya, Tanganyika, Uganda and Zanzibar*, Penguin African Library, London.

⁵ Thompson, Vincent B [1969]: *Africa and Unity: The Evolution of Pan-Africanism*, Longman, London.

⁶ Maloka, Eddy [2001]: *A United States of Africa?* Africa Institute of South Africa, Pretoria, South Africa.

had to grapple with. One lesson that we must learn from the failure of the old East African Community [1967-1977] is that the leaders put *economic* integration ahead of the realisation of the *political* unification. It was not the differences between Nyerere and Amin that were responsible for the break-up of the Community, as has been suggested by many politicians, observers and scholars. Nor was it the ideological differences between Kenya and Tanzania. In fact these differences were themselves the manifestation of political differences brought about by the acceptance of the geographical divisions of East Africa according to the colonial boundaries and the acceptance of multinational corporations as the basis of African economic liberation. In their *Declaration of Federation by the Governments of East Africa* issued in Nairobi on 5th June 1963, the leaders (Kenyatta, Nyerere and Obote) were clear on the need for the urgency to federate to avoid these narrow differences:

“We the leaders of the people and governments of East Africa assembled in Nairobi on 5th June 1963, pledge ourselves to the political Federation of East Africa. Our meeting today is motivated by the spirit of Pan-Africanism and not by mere regional interests. We are nationalists and reject tribalism, racialism, or inward looking policies. We believe that the day of decision has come, and to all our people we say there is no more room for slogans and words. This is our day of action in the cause of the ideals that we believe in and the unity and freedom for which we have suffered and sacrificed so much⁷.”

This declaration was an expression of the burning Pan-African desire to bring the people of Africa together into an African unity. The leaders went further to declare that they believed that the East African Federation could be “a practical step towards the goal of Pan-African unity.” They referred to the declaration made at the Addis Ababa conference of Heads of States and governments and added: “practical steps should be taken wherever possible to accelerate the achievements of our common goal.” The leaders recognised that certain “territorial factors” existed and that these had to be taken into account because they believed that “some of *these territorial problems can be solved in the context of such an East African Federation.*”

Indeed, just like the current leaders who “resolved to expedite the process of integration so that the ultimate goal of a Political Federation is achieved” through a Fast Track Committee, the political leaders in 1963 also decided to set up a “Working party” that was supposed to “prepare a framework of a draft constitution for the Federation of East African.” Again, just like the current Fast Track Committee, the 1963 Working party was required to report back in the third week of August of that year to the full Conference of East African governments “to consider the proposals of the Working party.”

But this never happened because in the meantime, the more pressing *economic* issues emanating from the management of the “territorial economy” and the “territorial factors” and “problems” that arose began to overwhelm the Work of the Party. As a result the leaders abandoned the political initiative for a political federation. These “territorial problems” and pressures had emerged within the workings of the *East African Common Services Organisation* (EACSO) that had replaced the colonial East African High

⁷ “Appendix: Declaration of Federation by the Governments of East Africa” in Hughes, A. J [1963]: *East Africa: The Search for Unity: Kenya, Tanganyika, Uganda and Zanzibar*, Penguin African Library, London.

Commission to take care of the interests of an independent Tanganyika before the independence of Uganda and Kenya⁸.

In other words, the African leaders became embroiled in the colonial problems they had inherited in their different territories, which they now called ‘nations,’ and forgot about the noble objective of declaring a political union of the three countries into an African nation of East Africans within which they could have collectively addressed the inherited “territorial problems.” By doing this they surrendered to the neo-colonial project, which the colonisers were perfecting under the colonial idea of “nation-building” by making the African leaders manage their former ‘territories’ for them as the new governors. Even the unilateral offer that Julius Nyerere had made to delay Tanganyika’s political independence until the other two countries were ready to federate was abandoned.

So while the idea of pan-Africanism continued in the minds of East Africans, the economic problems emanating from EACSO became the new reality on which immediate focus was placed. The management of the economic problems that the British had left in this new organisation took precedence over any talk about a *political* East African Federation that was envisaged by the *Nairobi Declaration*. Hence the political federation of Africa never materialised for these leaders. The differences between Nyerere and Amin had their roots in this failure of the leaders to go beyond “territorial factors” and problems in the interest of the unity of the people of East Africa and to respect the principles of democracy, which were denied the people of Uganda. Thus, although the Working party met in Kampala on 30th May 1964 to produce a constitution for a Pan African Federation for East Africa, this working party, according to Franck, “did little but wind up the books” on a pan-African federation in East Africa⁹.

Indeed a conference of the three leaders, which took place in Arusha soon after to sign the Constitution, was aborted at the last moment as disputes about *structural economic imbalances* mounted among the bureaucrats and the political leaders. The leaders had a minimal understanding of political economy not to realise that *uneven development was the basic law of colonial capitalism*. Blind to this law, they embarked on an impossible task of creating *economic equality* before uniting instead of the other way round: creating unity in order to remove the colonial uneven development of East African economies. They forgot that even among the developed capitalist countries, the economies are never equal in development nor are they equitable in the distribution of ‘benefits’ to all their citizens. But to be able to understand this law as an oppressive law that led to the struggle for independence would have undermined their *class interests* as a *petty bourgeois* (small capitalist) class, whose interests lay with the interests of the big capitalist class that created avenues for their employment. To struggle for real equality in this sense through unity would have meant fighting for the removal of those bases of uneven development for all East Africans, which would have undermined the privileges they now claimed under neo-colonialism.

Instead of directing their minds to the larger issue of political unity, the three leaders instead signed the *Kampala/Mbale Agreement* in 1964/5 under which the three “Partner States” reverted to the colonial project of “business as usual” to “balancing

⁸ Nabudere, D. W [191982]: *Imperialism in East Africa*, Volume II: *Imperialism and Integration*, Onyx Press, London

⁹ Franck, T. M [1964]: *East African Unity through Law* (New Haven, Yale University Press), p. 1963.

trade” between the three countries under the agreement by “distributing industries,” which they did not *even* own or control as states. Five short-term technocratic methods to deal with imbalances in industrial development and trade relations were agreed, which were supposed to deal with the “imbalances.” Under the Kampala agreement of 1964, the partner states engaged in a set of interviews with the different multinational companies about the prospects of them being ‘allocated’ to the different countries. In Mbale the disagreements that emanated from the Kampala exercise were ‘adjusted’ so that agreement could be signed. This was done leading to the revised Mbale Agreement of 1965. Even then Kenya did not ratify it and what followed was that Tanzania then decided to impose selective quotas against certain Kenyan products and so begun the journey to the East African Community of 1967. Now each country got back to the business of running its own affairs in their ‘territories’ now called ‘independent states’ only interfaced by EACSO.

It was at this stage that the three countries appointed the Philip Commission, under the chairmanship of Kjeld Philip from Denmark, to review the operations of EASCO and find the best ways of continuing some kind of economic cooperation with or without a political federation. The Philip Commission recommended the creation of a Common Market, but even they also warned that this could not function unless there was some kind “political binding force”, short of a political union:

“We cannot expect the Common Market to function so long as there is no common political power to make decisions. Not to have a political power in this field would only be possible provided all three countries were following the principles of 19th century liberalism. As all three countries are practising economic planning and all three wish to interfere in the economic development, it is necessary that there exist a responsible political body to govern the Common Market. As modifications would have to be introduced in the Common Market, and as a machinery will have to be established, it is necessary to make a Treaty concerning the Common Market between the three countries ... this machinery should have three levels, namely, political, official and a tribunal to solve disputes.”

Thus began the process for the establishment of the *East African Community without a political federation*, which increasingly receded in the background. Two American scholars writing at the time, warned about the economic consequences of balkanisation. In their book: *Unity or Poverty: The Economics of Pan-Africanism*, Reginald H. Green and Ann Seidman, argued that efforts by each African state to achieve a more balanced economic development will be impeded by the division of resources and markets of the separated territories. As a result, their industrialisation programmes will be limited to small-scale factories producing relatively high-cost consumer goods behind tariff barriers, which they would have created:

“This kind of ‘industrialisation’ cannot lead to the rapid economic development needed to achieve economic independence and higher living standards for all. ... What is essential is to create an irreversible dynamic towards continental economic unity within the framework of political union; to make the welfare of the African people - not of foreign interests or a limited African elite – truly dominant in economic policy and structure; and to create the coordinated national and continental planning mechanisms technically essential to rapid, socially desirable economic reconstruction and development¹⁰.”

¹⁰ Reginald H. Green and Ann Seidman [1968]: *Unity or Poverty: The Economics of Pan-Africanism*, Penguin African Library, London.

This advice was not heeded and instead, operating on the compromised *Charter of the Organisation of African Unity-OAU*, which sanctified the then existing colonial borders that balkanised Africa, they adopted the ‘strategy’ of separate ‘national’ territorial development and *regional economic integration* to coordinate that ‘development.’ Neo-colonial ‘economics’ took over from committed Pan-African politics and the way was opened for more divisions to emerge based on narrow ‘nationalistic’ and ‘territorial’ considerations in which the interests of the multinational corporations and those of the individual East African economic and political elites began to dominate the decisions of the states. Neo-colonialism had succeeded in merging the interests of the multinational corporations with those of a section of the African elite (a petty bourgeois class) that increasingly became *compradorised* and *technocratised* to serve those interests through their states.

This was in the context of the emerging pattern of global economic organisation in the post-war world, but in the case of East Africa, this new regional integration was tailored to the rules of multilateral imperialism, which had been established under US hegemony under the General Agreement on Trade and Tariffs under which the East African Community was to operate. The problems that emerged after the post-colonial East African Community in 1967 are traceable to the contradictions within this system based on the Bretton Woods institutions and what happened with the leaders getting embroiled in the economic problems was a process through which their territories got fixed in this new neo-colonial Bretton Woods system, with the World Bank and the International Monetary Fund as the other anchors of the multilateral imperialist system.

In the research I undertook as to why the East African Community in its first phase had failed, I challenged the prevalent explanations about ideological differences between Nyerere and Kenyatta, the *coup d’etat* in Uganda in 1971 and the alleged Kenyan benefiting at the expense of the other partner states. My conclusion was that the collapse of the Community had come about as the result of the economic crisis, which all the three countries faced in the form of a ‘balance of payments’ crisis that affected all the countries. The research pointed out that although there was an overflow of financial resources from Uganda and Tanzania to Kenya, these were dividends and transfer payments that had been generated by the multinational corporations in these two countries. Their transfer to Kenya was because Nairobi was the regional headquarters of those corporations and that these earnings in Uganda and Tanzania were added to the earnings in Kenya and later siphoned off to the metropolitan centres where the headquarters of the corporations were based. This was why, I explained, Kenya had faced the same ‘balance of payments crisis’ in 1971 at the very time when Uganda and Tanzania were undergoing the same crisis. The research had added:

“This type of (multinational) investment activity and trade patterns must lead to a great siphoning off of resources to external sources of capital and commercial supplies. Once this is added to the super-profits earned by the (multinational) monopolies on the export account (which is siphoned off), as reflected in the balance of payments deficits, the result is catastrophic, as demonstrated in another study by the Common Market | Secretariat. This study pointed to the ‘openness’ of the economies of the region to international pressures and their ‘dependency relationship’ with the developed economies. It pointed out that with the regional gross domestic product at factor cost of shs. 25, 889 million, and an external imports and external exports standing at shs. 12, 329

million- a ratio of foreign trade to regional GDO of 1: 0.47, that is nearly half of the regional economy- the dependency relationship is almost total.”¹¹

My research went on to demonstrate how the financial transfers from Uganda and Tanzania had reflected this dominant pattern of the multinational corporations and how Kenya’s transfers to the metropolises had revealed a ‘net outflow of funds overall’ from the region as a whole, so that what the leaders had been quarrelling about in talking about Kenya being a ‘man eat man society’ and Tanzania being a ‘man eat nothing society’ were petty bourgeois wrangling for the crumbs that had remained on the table. Instead of understanding this process and organising the people of East Africa to organise and consolidate their political independence through unity, these leaders had placed their individual interests above those of the East African *wanainchi*, who were all exploited by the multinational corporations, being ignored. The research concluded:

“Thus we come to the conclusion that the dominant (economic and social) forces that brought down the (EA) Common Market were the forces of international monopolistic competition, which were stronger than the (national) forces struggling for a national economy. Vacillating and outmanoeuvred, the national forces could only compete for the remains left by the multinational corporations, and had no conception of a consistent struggle against the economic exploitation (of their people).¹²

There is no evidence that this dependency of the East African economies has lessened. On the contrary, the economic ‘reforms’ that have been carried out in the region since the mid-1980s under ‘structural adjustment programmes’ of the World Bank and the ‘financial stabilisation’ policies of the International Monetary Fund under which East African governments were forced to ‘liberalise’ and ‘privatise,’ have created a culture of corruption that has become the cornerstone of late post-colonial crisis of the state. The criminalisation of politics and the fragmentation of the people with politics of tribalism by the leaders have undermined any Pan-African spirit of the first generation of leaders. In this context, it cannot be seen how any effort at either ‘reviving’ of the East African Community’ or the ‘Fast Tracking of the East African Federation’ can bring about the integration of East African economies, at a time when economic globalisation is driving these countries in the opposite direction by being integrated into the global economy through other structures.

The Revival of the East African Community

The decision to ‘revive’ the East African Community goes back to 1984 when, under the Mediation Agreement of May 1984 under which the assets and liabilities of the old Community were shared out, it was agreed under article 14.01 of the said Agreement that the three countries would explore and identify areas for future cooperation and make arrangements for such cooperation. Accordingly, on the 30th November 1993 **Agreement for the Establishment of a Permanent Commission for Cooperation** was signed by the three states (hereinafter referred to as the “Tripartite Commission”). This Commission was to be responsible for the coordination of economic, social, cultural, security and political issues among these countries and a Declaration was also made by the Heads of

¹¹ Nabudere, D. W [191982]: *Imperialism in East Africa*, Volume II: *Imperialism and Integration*, Onyx Press, London.

¹² Ibid: p. 157.

State calling for a closer East African Cooperation. On the 26th November 1994 a **Protocol on the Establishment of a Secretariat of the Permanent Tripartite Commission for Cooperation** between the three states was signed.

On the 29th April 1997 at Arusha, Tanzania, the Heads of States of the three countries reviewed the progress which had been made by the Tripartite Commission in the development of closer cooperation in the fiscal, monetary, immigration, infrastructure and service fields. They approved a plan called the *East African Cooperation Development Strategy 1997-2000* and directed the Commission to embark on negotiations for the *upgrading* of the Agreement establishing the Tripartite Commission *into a Treaty*.

The commission worked on the drafting of a new Treaty for the establishment (not re-establishment) of the East African Community. The “Partner States” in the Preamble of the Draft Treaty resolved to act in concert to realise a fast and balanced regional development. They also resolved to create an enabling environment in all the Partner States in order to attract foreign investments and allow the private sector and civil society to play a leading role in the socio-economic development activities through the development of sound macro-economic and sectoral policies and their efficient management. They also took cognisance of the developments in the world economy and particularly the provisions of the WTO Agreement 1994 to which they tried to comply. In short, like the experience of the earlier attempt to federate, while they were talking of integrating regionally, they were in fact already being manipulated by the new global order to which they were responding favourably without considering their interests first.

These commitments were in many respects a recitation of the earlier pledges, which were contained in the old treaty, except that this time even more emphasis was being placed on the role of foreign investment, the private sector and ‘civil society’ in the development process. However, the preamble also revealed that the three states were unable to recognise the problems emanating from the globalisation of the world economy particularly the role the WTO was playing in subjecting countries of the South to the demands of the interests of the multinational corporations which the Uruguayan Round of the GATT had achieved for them and which had resulted in the formation of the WTO. The emergence of the WTO had weakened the position of the countries of the South in the world economy.

It was for this reason that many of the provisions of the draft of the EAC treaty sounded rather hollow because commitments contained in these provisions seemed not to amount to much. The draft treaty declared that it was establishing the East African Community comprising of a common market, which would “subsequently lead to a Monetary Union” and “eventually (to) a Political Federation”. In fact, as we have seen, this was a reversal of the earlier Pan-African process, which had begun with a commitment to establish a *political federation* as a precondition to the creation of the economic *Community*. Now it was economics first, a customs union, a common market, a Monetary Union, a common currency and then “eventually a Political Federation,” a confirmation of the route that had failed as we have seen above.

Emphasis was formalistically placed “adherence to universally acceptable principles in democracy, the rule of law, observance of human rights and social justice” as pre-conditions for entry of any new members. These were mere declarations without content. In fact they were being ignored as the declarations were being made since

undemocratic practises were the dominant practices in the running of their countries. The objective of *the community* (as the principal organs) was declared to be “the development of policies and programmes aimed at widening and deepening cooperation among the partner states in various fields such as political, economic, social, cultural, defence, security and legal and judicial affairs for their mutual benefit,” which were in fact unachievable under these conditions (Articles 2,4).

Again, the reversal of terminologies and order of words is interesting to note. Whereas in the 1967 Treaty, the East African Community was established for the “continuation of common services and the harmonization of monetary, balance of payments, fiscal, and economic planning policies”, now the partner states committed themselves to “develop the policies and programmes” for their achievement. In the earlier treaty the word “develop” was used in relation to actual *on-going economic activities of transformation*. Now the word was used in relation to “policies and programmes”! Later the concept ‘governance’ was to play the same role for democracy, since ‘good governance’ was no longer about the people’s rights to govern themselves, but the ‘good management’ of the macroeconomic ‘programmes and policies.’

The fundamental principles reflected a concern for “mutual” trust, political will, *equitable distribution of benefits*, peaceful settlement of disputes, peaceful co-existence and good neighbourliness. This also was impossible in conditions where pastoral communities across borders raided each other for cattle and where the state officials themselves played a role in these raids and the proliferation of small arms and light weapons inside their own countries in ‘illicit’ channels. The operational principles were said to be a “*people-centred and market-driven cooperation*.” In fact this was also a populist diversion of the situation since the implication here was that for the community to be “people-centred”, it must be “market-driven” and it was in this role that the role of ‘civil society’ was being considered. Indeed, this was a direct acceptance of the neo-liberal agenda of the “Washington Consensus”. The reality was that the new Community, just like the old one, was a Community of the people of East Africa, but that of the “partner States” and hence the Heads of States of East Africa. It was to a Club of the leaders.

The “*principle of subsidiarity*” borrowed from the European Union practice is said to lie in the emphasis on “multi-level participation and the involvement of a wide range of stakeholders in the process of integration”. These ‘stakeholders’ did not in fact include the people, but multinational corporations and corporate interests. It was now realised that the achievement of the objectives of the treaty might be more difficult and hence the need for variability in approach. With this approach, another new principle called “*variable geometry*” was also adopted to allow for “progression among groups within the community for wider integration schemes in various fields and at different speeds.” The principle of “*complementarity*” was also asserted as one of the operating principles. How all these principles were to operate has to await the actual experiences in implementation of this new compact, now that the whole ultimate idea of a political federation was being ‘fast tracked.’

In terms of the actual operations of the Community, the cooperation in trade liberalization and development was to be achieved on the basis of a *Common Market* and *Customs Union* as an integral part of the process. The liberalization in trade through the Customs Union involved the elimination of customs duties and “other charges of

equivalent effect”. Non-tariff barriers, which included quotas and administrative barriers, were to be removed. A common external tariff had instead to be put into effect in respect of goods imported from third countries. However, the establishment of the Customs Union was to be “progressive” in the course of a transitional period of five years from the entry into force of the Treaty after which there would be a *zero tariff* regime at the end of the transitional period. In fact the process was to prove more difficult as we shall see below. In the meantime, the Partner States agreed to reduce “and ultimately eliminate by the year 2000” all internal tariff rates and other charges of equivalent effect imposed on or in connection with the importation of goods which were eligible for community tariff treatment. The partner states were not in the meantime to impose any new duties and taxes or increase existing ones in respect of products traded within the community.

Measures to address “*imbalances*” arising from the application of the provisions for the establishment of a Common Market and Customs union were provided for in article 83 of the Treaty. These involved the conclusion within six months of a protocol to address the imbalances! Under these conditions, the achievement of ‘tangible benefits’ for each ‘Partner State’ before the achievement of the political federation was going to be a never-ending chase of the sun under the treaty. And in order to ensure that the chase would never end, a provision was made for each ‘Partner State’ to take “safeguard measures” in the event of ‘serious disturbances’ occurring in its economy to rectify the situation after informing the Council of Ministers of the Community and such ‘measures’ could last up to one year with possible extension.

These provisions reveal that despite the ‘commitments’ on the part of the leaders in the Treaty, the most important decisions regarding the implementation of the Treaty were left for further negotiations whose results were to be contained in new Protocols. This means that the signing of the Treaty and its ratification was a process of a ‘variable approach’ that was to continue in line with ‘variable geometry’ in protracted negotiations and renegotiations, which could end with no Community at all. Instead, the prolonged negotiations could in reality be another form of being integrated into the global economy via variable geometry through other integration arrangements such as COMESA and SADC as well as the EU-EPA. For instance, the customs union protocol took many years to conclude, but even then after being ‘fast tracked’ to accord with the ‘vision’ of one of the presidents who wanted to create a political federation in order to extend his now unlimited power to the rest of the region in order to ‘industrialise’ it with the help of multinational corporation. This is the leader who had been called the ‘beacon of light’ by US imperialism, to become another Mobutu in the region.

In short, the top-down approach of the process regional integrations was reflected in the lack of detail on how the people of East Africa were to be “at the centre” of the East African Cooperation in order to arrive at the political federation. Instead we saw the centring of the bureaucrats in the process who continued to make their livelihoods on perpetual ‘negotiations’ while the real integration in the global economy was proceeding regardless. In the meantime, the people of East Africa were being increasingly marginalised and socially excluded in their homeland. There was no concern about the strategies, policies, plans, programmes and attendant institutions which were to be put in place to ensure that the community was a “people-centred and private-sector driven” outside the neo-liberal strategies of the IMF/World Banks/WTO, which all operated on the whims of the United States.

Indeed, where a detailed plan was indicated to proceed to integrate the region such as harmonization and convergence of social, political and especially economic policies; free movement of goods and services; free movement of capital; free movement of labour; and the provisions and ownership of land across the region were all in the interests of the corporations. Provision and ownership of land in effect meant dispossessing the people of their land in order to ‘attract foreign direct investments.’ All these details entailed a *market integration and development* of the region in which the global corporate interests were to be ‘attracted.’ It also implied the consequent *loss of sovereignty* of the people of East Africa over their resources and political rights if we are indeed to move towards a Political Federation that is being ‘fast tracked.’ There is no indication that the leaders understand the implications of such changes and that they have thought over these matters carefully? In these circumstances, they cannot expect the people of East Africa to continue playing their games of deceptions.

In fact, the situation on the ground shows that with increasing marginalisation of the people and the prevalent high levels of poverty in the entire region tend to undermine the processes of regional market enlargement and expansion. These developments in fact prove what is actually going on in the global economy while the leaders are engaged an endless and meaningless signing of treaties. The increasing poverty is a reflection of the increasing exploitation of the resources, including labour resources of the poor countries. This means the minimal resources left a ‘national’ and ‘regional’ level when ‘pooled’ become matters of contention in the manner of how they are to be distributed ‘among the dogs.’ We all know when such a situation arises!

These contentions, as experience has shown in the earlier East African experiences, lead to “strains and stresses” in which some ‘partners states’ claim to be the *net losers* and others being accused of being *net gainers*. This leads to break-ups of whatever we want to achieve. To repeat these mistakes is to make the people of East Africa to move in vicious circles. There is no indication that this has been done and the slow pace of the negotiation of the customs union protocol, although ‘fast tracked’ at the end in 2004, will yield any long-standing solution. Instead, the ‘fast-tracking’ will worsen the contradictions between the ‘partner states,’ which are bound to blow up into a lot of confusion that could easily lead to conflict.

Fast Tracking of East African Federation

It was under these circumstances that the East African leaders decided to “Fast Track” the establishment of the East African Federation on the urging of the president of Uganda, Yoweri Kaguta Museveni, who had according to himself, developed a vision, which included the expediting of the federation and industrialisation of the region before he retired! On several occasions after the decision to set up a Fast Tracking Committee to expedite the modalities, he made public pronouncements to the effect that two of his burning visions was the ‘industrialisation’ of the Uganda economy and the ‘integration’ of the East African region because Africa needed larger markets in order to ‘industrialise.’ He, like the earlier leaders, had a minimal understanding of political economy not to realise that one could not ‘fast track’ the emergence of a customs union, a common market and monetary union, on the current economic relationships, without deep and long period of concerted programmes, in which all the countries were united.

To expect to federate after ‘negotiating’ the above stages laid down under article 5(1) of the East African Community Treaty was to engage in a lot of wishful thinking.

Nevertheless, following this vision of a single-individual who proposed the idea to fast track, it was decided by the three Heads of States to set up a Committee on Fast Tracking East African Federation during their Special Summit held in Nairobi on 27-29 August 2004. The Heads of State charged the Committee with the task of examining ways and means “to expedite the process of integration so that the ultimate goal of a political federation is achieved through a fast track mechanism”. According to its Terms of Reference, the Committee was to propose ways and means of *expediting, accelerating and compressing the process of integration of the East African Community with the aim of achieving a political federation in the shortest time possible*. They were to report to the Summit within three months.

The Members of the Committee appointed by the Heads of State and their assistants were the Kenya Attorney General, Amos Wako (Kenya), Chairman of the Committee; Prof. Haidari Amani (Tanzania), Vice Chairman; and Dr Ezra Suruma, (Uganda), Secretary to the Committee. Associate Members of the Committee were Ms Margaret Chemengich (Kenya), Prof. Sam Tulya-Muhika (Uganda), and Mr. Mohamed Fakh Mohamed (Tanzania). The Committee started its work on 21st September 2004 involving wide consultation with the people of East Africa during the period up to 16 October 2004 in Tanzania, Kenya and Uganda.

The Committee held consultations throughout East Africa and many views expressed by the public cautioned the Committee not to repeat the mistakes that were made when the first Community was formed. I submitted a memorandum to the Committee in which I called upon the Committee to understand these historical factors, instead of rushing to expedite and accelerate the process of integration based on the same false premises adopted in 1963-1966 period. Without going into a deep and clear analysis of why the first East African Community had failed, it would be foolhardy to proceed along the lines proposed.

We argued that from the experience we have had since 1963 when the then Heads of States called for an early federation, it was clear that placing economic considerations a head of political unity as a basis for an eventual federation will not lead to any success. At that time, not only was a federation not formed and the process of constitution making abandoned, two neighbouring countries-Tanzania and Uganda went to war in 1978-79. This experience suggests that a decision to federate must not be an economic one but a *political decision*, which can lead to economic consequences later.

In our memorandum, we therefore suggested that the three Heads of States, having decided to expedite the mechanisms to fast track the creation of the federation, should have gone headlong to make a **bold political decision** and recommend to their Parliaments to pass **binding and irrevocable resolutions abolishing the existing boundaries** that exist between the three countries and then ask the people of East Africa to reconstitute themselves in new cultural-linguistic states that would be the basis of a political federation. The Committee acknowledged the receipt of the memorandum but did not consider them nor even acknowledge its having been presented.

The Committee submitted their findings and report to the Heads of States on 23rd November 2004. In their report, the Committee recommended that the federation should come in existence in the year 2010 and that the period between 2010 and 2012 would be

used as a “consolidation phase” in which the presidency of the federation would be rotated on, what was later called by President Kikwete of Tanzania ‘a triangulate” basis between the three presidents before East Africans could elect their first president directly in the year 2013. President Mwai Kibaki of Kenya was quoted by Uganda’s *New Vision* newspaper to have been ‘excited’ about the prospects of a federation calling the report “wonderful” and expressing the hope that East African Federation can be realised “in my life time.” He also said that the leaders were determined to bring about a federation “at the risk of losing the current sovereignty.”

President Mkapa of Tanzania argued East Africans not be “egoistic” in the region’s quest for unity and asked them to work steadily towards its achievement. President Museveni was later quoted as saying that he was determined to be around until 2013 when the first president of East Africa was elected. Since he was the one who had moved the other leaders at the Summit in Nairobi in August 2004 to ‘fast track’ the establishment of the federation, as we have noted above, and since he continued to claim that he was the only individual who had a ‘vision’ for Uganda and the region, it was clear that this proposal to fast track the federation was linked to his aspirations to become a life president in Uganda, and then later a president of East Africa by manipulating the other leaders and the East African population the same way he had done in Uganda.

This is because prior to this declaration, he had manipulated Parliament, including the paying of Ushs. 5 million to his parties MPs to ‘facilitate’ them to pass an amendment to the Uganda constitution to remove presidential term limits so he could perpetually stand for election, unlike his counterparts in Kenya and Tanzania whose terms of office were limited to two five year terms. During the 2006 presidential elections Uganda, Museveni manipulated the electoral by prevailing on the Electoral Commission to ignore the electoral law that enabled him to be elected for a fifth time as president of Uganda.

When the main presidential candidate Col. Dr. Kiiza Besigye petitioned the Supreme Court about these irregularities and asked the court to order a re-run of the election, the Supreme Court in its ruling unanimously came to the conclusion that the Electoral Commission had not followed the electoral law and as a consequence the election it conducted was ‘not free and fair,’ and yet allowed the election of president Museveni on the ground that the irregularities had not been “not substantial!” This clearly demonstrates the determination of president Museveni to hang on to power until 2013 when he would have a chance to stand for the East African presidency using Uganda as his base, which would give him a leverage as an ‘elder statesman.’

In a press statement issued at the end of the Summit, which was held in Arusha three months later to receive the Fast Tracking Committee report, the three presidents were reported to have regarded the findings of the Wako Committee as “a realistic plan of implementation.” They decided to meet again in March 2005 to discuss the report and “give direction on the way forward.” This would have been followed by a “programme of wide sensitisation and mobilisation” of the East African people on the “processes, achievements and benefits of the political federation.” But this did not happen and although the leaders met Dar es Salaam in November 2005 they just decided to continue along with the negotiations, but none of them had developed a “programme for the wide sensitisation and mobilisation” of their people.

Therefore, when the leaders met again in Arusha on the tenth-anniversary of the commencement of the East African Community on 26-27th March 2006, they still

directed that the negotiations on the common market should commence with effect from 1st July 2006 with time frames of December 2008 as target date for concluding and signing the common market protocol and June 2009 as the new target date for ratification of the protocol. After that it was directed that January 2010 would be the target date for commencement of the common market. The Heads of State also noted that Tanzania and Kenya had already appointed ministers solely responsible for East African Community affairs and Uganda will appoint the minister in may 2006 to be responsible for the political ‘fast-tracking.’

The Communiqué also noted that the Heads of State had reiterated support for the road map proposed in the 2004 report of the committee on fast tracking east African federation and directed that national consultations and sensitisation of the people of East Africa on the political federation “commence immediately.” They directed that the consultations should take place at the national levels and be co-ordinated at regional level by the newly established EAC Department of Fast Tracking East African Federation. It added that the report of the outcome of the national consultations would be presented to the Heads of State at the next ordinary summit of the community in November 2006 for consideration. Thus the people of East Africa were given only six months at most to get on with the discussion and produce a report for the leaders. There was no indication whether these mobilisation and sensitisation activities were to take place in the rural communities and in what form. Is it the governments or ruling political parties or all the parties that are to conduct such mobilisation and ‘sensitisations? These questions are important because they will determine the extent to which this consultation process is to be regarded as legitimate.

The reason these questions are being raised is whether the leaders are taking the issue seriously or whether they are manipulating the process. Our analysis above has shown that on the basis of the past experience from which the leaders seem not to have learnt anything, the leaders are adopting hasty ‘road maps’ that are not going to lead to the result the people of East Africa expect and end up being manipulated into accepting a dictatorship at the end of the day. This is because if the leaders are serious on their ‘road map’ why is it that all of them, despite their ‘commitment’ to fast tracking East Africa integration, still maintain links to other customs union arrangements? Tanzania, for instance, pulled out of COMESA but instead joined SADC region, while Kenya and Uganda still retain their membership of COMESA, which also seeks to set up their own customs union, just like the SADC members.

Moreover, all the three countries are members of the European Union-African Caribbean and Pacific States free trade area called the *Cotonou Agreement*, in which the African, Caribbean and Pacific Island countries-ACP, now operate on the basis of reciprocity with the European Union-EU. Under the new WTO rules, African countries are expected to offer reciprocal advantages to the EU; unlike the past when under the Lome Conventions (1-4), the ACP countries could be receive certain advantages without reciprocity to the EU. The Cotonou membership complicates further the operations of the regional arrangements in inter-African trade since instead of operationalising horizontal relationships; the continent is overwhelmed by vertical integrative mechanisms propelled by the globalisation process emanating from the North at all levels.

There are problems to be foreseen as regards the harmonisation of policies under the Treaty that are supposed to lead to the convergence in social, political and economic

arenas for the region. Politically, this is becoming unattainable since Uganda, which had pursued a “no-party movement political system” which barred political party activity, has now entered the phase of ‘One-Man Rule’ after the rigging of the 2006 general elections and after the silencing of the judiciary, which endorsed the election of president Museveni even when the elections were declared not to have been free and fair by the Uganda Supreme Court. Yet Article 46 dealing with election of members of the Assembly requires that representation should, “as much as possible”, reflect the various political parties and shades of opinion in each partner state. This will not happen in any substantial way to reflect the differences of political opinions in the region since the votes do not reflect the actual representation.

It is now generally accepted, and experience from the earlier community arrangements show that economies will converge towards or diverge from one another depending on the level of dependence of each of the economies on each other or on the outside world as well as the policies and institutional choices each country is able to make. If policies and institutional differences become too large, or the dependence on the outside world, which globalisation implies, widen this gap, countries cannot achieve significant regional economic and political integration. This is worsened by the law of uneven development to which re referred above as having affected the development of the region under colonialism.

Federation and Constitutionalism

It can be seen that the constitutional arrangements being ‘fast tracked’ by the Heads of States, are not ‘pro-people.’ The people of East Africa have been ‘side tracked’ in the process of ‘fast tracking’ of the integration process. The public debate could have helped to determine the conditions and terms under which the ‘fast tracking should have taken place. Just like the 1963 experience, the leaders are putting the cart before the horse, and here since the people are the horses it is clear they will not pull the cart if they do not understand the direction in which they must pull.. No wonder that the renowned African scientist, historian and also a Pan-African activist, Prof Cheick Anta Diop, described the leaders in these early attempts at regional arrangements as “giants with feet of clay engaged in trying to square the circle.” In that assessment, Diop observed that to achieve meaningful economic unity without political union, was an impossibility since no one of the leaders was prepared to engage its population so that they could accept a renunciation of their ‘national sovereignty’ in order to achieve political unity. He pointed out that all hope to gain the benefits of economic integration without sacrificing the selfish interests of their governing groups on the alter of African unity were impossible: “That is the fundamental contradiction lying at the base of all these ephemeral constructions and unions”¹³

There was no indication that the self-interests of these political and economic groups had been abandoned. On the contrary, they appeared to have narrowed to the egoistic needs for personal rule of one of the leaders who seemed to be the driving force behind the new attempt. It is also to be noted that it is the representative of this leader (of Uganda) who has been given the responsibility for ‘coordinating’ the debates and ‘mobilisation’ about the fast tracking of federation at ‘national levels.’ Despite the fact

¹³ Diop, C. A [1974]: *Black Africa: The Economic and Cultural Basis for a Federated State*, Lawrence Hill & Company, Westport, Connecticut and Africa World Press, Trenton, New Jersey.

that the Wako Committee argued that the process should be ‘owned’ by the people of East Africa, no comprehensive plan has so far emerged to involve the political parties of the region into the process. It is the ruling groups and their parties that are running the show in deciding the terms of such a ‘debate.’ In the absence of such a broad involvement of the other political layers, the dialogue will in fact be a monologue between the ruling parties and the governments, which they run.

The Committee also passed over many delicate matters because of the pressure coming from the visionaries. To be sure, the problem of creating a constitutional framework for an East African Federation was now complicated by two factors. The first was the problem of constitutional development in each ‘partner state’; and the second was the very process of negotiating a constitution for the region as a whole, which was being undertaken in the ‘fast tracking’ exercise without a democratic involvement. These two processes are inter-linked, but it is important to understand the specific difficulties in each case, because they contradict the very process of creating an East African political union.

A. The Problem of Constitutionalism in the Partner States

In the case of the first complicating factor, it was emerging that the constitutional developments in Uganda were aimed at perpetuating the incumbent, Yoweri Museveni in power, through amending the constitution, which removed presidential term limits so that the incumbent would be free to continue in power any number of times. This contradicted the Kenyan and Tanzanian constitution, which limited presidential terms to two terms (a maximum of ten years in power). The incumbent Museveni had in the process of entrenching himself in power also arranged for his wife, Janet Museveni, to become a Member of Parliament, in an apparent preparation for her to take over from him as president in order to continue the family dynasty, while she also prepares the way for her son, Muhozi, now one of the commanders of the Presidential Protection Brigade, to take over from her.

This manipulation was in fact achieved when the president organised the 2006 elections in such a way that he would win them regardless of what the electorate decided. He began by arresting the leading opposition leader just as the election campaign was beginning and charged him with a series of criminal charges, including rape, treason and illegal possession of arms. He subjected him to concurrent trial before the civilian courts and a military court martial, when he himself was busy campaigning in the field. Even after being granted bail by the civilian High Court, the opponent was rearrested by the military police after the High Court had been surrounded by the ‘Black Mamba’ section of the Military Police, an action that was described by the Principal Judge and Chief Justice of Uganda as a ‘raping of the temple of justice.’

Although the elections were highly contested even with all the irregularities, the opposition leaders, Col. Dr. Kiiza Besigye, was poised to win and when radio broadcasts of the results seemed to indicate a victory for him, the government ordered a closure of one of the radio stations and banned it from broadcasting the results so that the results were henceforth to be announced by the incumbent appointed and controlled Electoral Commission. Following this high handed and undemocratic measure, the Commission began announcing results on the basis of returns filed by polling stations by mobile telephones instead of the filing of the tallying sheets as provided for under the electoral

laws and the constitution. With this kind of prearranged procedure, the incumbent was declared by the Commission to have ‘won’ the elections by 59% of the votes cast as against 37% for the opposition leader.

Even when the later tried to petition the courts against these fundamental irregularities in what man believed to be a strong case, the Supreme Court ruled that the malpractices did not “substantially” affect the results of the incumbent winner although the seven justices of the court unanimously concluded that the Electoral Commission had conducted the election without following the law and that therefore the election had not been free and fair! Despite these conclusions the court dismissed Dr. Kiiza’s petition and upheld the election of the incumbent. In these circumstances, many East Africans were asking the question: How is the East African Federation to operate with this kind of leadership that manipulates itself to power? How can people’s democratic rights be placed under this kind of leadership?

In Kenya, the struggles for power among the political and economic elites, had moved the country to a near standstill. The struggle was over a new constitution draft, which had been altered to give more power to the presidency as opposed to the popular demand for a constitutional arrangement where some of the presidential powers would be in the hands of the prime minister, thus creating a hybrid system where there would be a sharing of power between the president and the prime minister. Although the matter was put before the population in a referendum and the government was split in the middle with one group (‘the oranges’) opposing the draft and the president’s faction (‘the bananas’) supporting it, the impasse continued even after the population had voted overwhelmingly against the bananas. Moreover these political factions were fighting out their battles mainly along tribal lines.

In the aftermath of this stalemate, the president (Mai Kibaki) dismissed the entire cabinet and only brought back his supporters with a sprinkling with ‘the oranges’ who immediately rejected the offers. The president pretended to have gone over the crisis even when the other faction was calling on him to resign and to set a date for a new election. This was rejected and currently the government is trying to force its favoured draft, slightly modified before a manipulated parliament. There are fears that the president will try to go election in 2007 under the old constitution, although his NARC government had promised the population when they were elected that they would implement the new draft constitution within 100 days of taking power. This did not happen and instead what we have seen are manipulations by the incumbent to try to remain in power at any cost by playing on tribal sentiments. Again here, it can be asked: How can these kinds of leadership pretend that they represent their people in the decision to fast track the federation? Can such a federation be truly democratic and representative?

While the situation in Tanzania is not as bad as that described for Kenya and Uganda, there are those who have observed that the situation between the Mainland Tanzania and the Island of Zanzibar leaves much to be desired. The opposition has insisted that there should be no federation talks when the government of Jakaya Kikwete is not representative of the whole country. They claim that the 2005 elections to have been saddled by extensive violence against the opposition on the Island, especially, on the Island of Pemba. Since the political union between mainland Tanganyika and Zanzibar is in balance, there is fear that this negative political experience may make it

impossible to negotiate any future political unions in the region. This is also a situation to observe as we engage in the so-called fast tracking of the East African Federation.

B. The Problem of Constitution-Making for the Federation

The Wako Fast Tracking Committee in presenting their work plan towards determining the timing of the fulfilment of the macroeconomic and other ‘convergence criteria’ and especially the timing of the Monetary Union as well as the writing a constitution for the federation, the Committee pointed out that this would depend on whether the partner States wanted to take “‘a conservative’ ‘sequence approach’” or “‘the faster ‘shock approach.’” Following what the Committee called ‘expert opinion’ in the region; the Committee recommended that the States should take the ‘shock approach,’ “subject to certain conditions, especially free mobility of labour and capital alongside the macroeconomic and financial criteria that have already been achieved and which of course must be maintained.” They did not go along with the more ‘conservative view’ that argued that “the minimum requirements for the Monetary Union entails close convergence of the productive structures and fiscal policies as well as free movement of labour and capital¹⁴.”

While it is clear that the ‘conservative view’ would seem to accord with reality, this also ignored the role of the external economic forces that were in turn determined by the globalising forces. The activities of these global multinational corporations, which do not act in accordance with local ‘productive structures’ ultimately determine the course the East African economies take. As the 1971-77 experience had demonstrated, the activities of the multinational corporations tended to undermine those ‘productive structures’ through exploitation with the consequence that their needs could never ‘converge’ with the activities at a ‘national level.’ They just dominated those local activities. So any pinning of hopes that the regional structures would converge and that as a result there would be free labour movement was wishful thinking.

In any case, since capital movement was free for all the three countries vis-à-vis the multinational corporations, it could be understood why it should be a problem between the three countries, except that every free movement of capital tended to undermine the free movement of labour. That is why the reliance on the economic integration under these conditions was bound to lead to a dark alley for the political federation. This is because as each country tried to ‘attract foreign direct investments,’ each tended to offer attractive terms to the corporations, which at times undermined the structures in the neighbouring countries.

But equipped with these false hopes, the Committee nevertheless felt bold enough to advance its proposal to ‘fast track’ the federation through the ‘shock approach.’ In arriving at the ‘shock approach,’ the Committee had assessed ‘three options’ for the fast tracking the process of economic integration, so that the ultimate objective of establishing a Political Federation is achieved within the shortest possible time. The first option, according to the Committee, was “the now familiar integration sequence laid down in article 5 (2) of the East African Treaty which lays down that in order to come to the political federation, it is necessary to achieve the following: customs union, common market, monetary union and then finally political federation. This option, they observed,

¹⁴ EAC [2004]: *Report of the Committee on Fast Tracking East African Federation submitted to the Sixth Summit of Heads of State of the East African Community*, Arusha, Tanzania, 26th November, 2004.

called for a ‘stage-by-stage implementation’ of the treaty. However, they also observed that according to the timetable set by the leaders in 2004, there was no any timeframe set for implementation of the other stages except the customs union and others had been left open. The leaders, as we noted above, fixed these time frames, in May 2006.

The Committee noted that the “main advantage’ of the first ‘option’ was that it would ‘conform to the current step by step approach,” while the advantage of the second ‘option’ was that “by compressing all the four stages, the political federation stage would be achieved sooner.” They warned, however, that “the danger is that the shorter the timeframe for each stage, the more difficult it will be to achieve across the board tangible benefits.” Thus this ‘option’ seemed to be undermined by the economic approach of demonstrating that the federation as ‘fast tracked’ would achieve ‘across the board tangible benefits,’ since this could not be achieved in a fast tracked manner. They also added that such benefits would have to translate to the ‘general public and interest groups, as well as ‘the driving force for the integration” namely the politicians and bureaucrats. These were contradictory objectives, which could not in fact materialise.

The second option advanced by the Committee was an ‘overlapping’ approach whereby ‘parallel activities’ of the different stages could be undertaken. With such approach, it would be the benefits realised and how they were ‘shared’ among Partner States that would determine the speed of integration and bring about political support to the process. If this were to be realised the four phases or stages laid down in article 5(1) of the Treaty, could be ‘allowed to intertwine and overlap.’ This, they observed, was already happening but in a manner that was ‘unplanned and segmented.’ To reinforce their argument on this point, they quoted from a Memorandum of Understanding on Foreign Affairs and Defence, which stated:

“The notable issue is that a lot has been achieved in the EAC integration process. Unfortunately the milestones that have been achieved are not in a consolidated document and are done by various Sectoral Committees to the extent that some are unknown to the general public. Hence, while the four phases of the EAC integration process are distinct they are and can be further be intertwined with overlapping processes” [EAC, 2004: 67].

The Committee however reverted to its dilemma by observing that while the case for the fast tracking of the federation was made and that such a development could give the people “hope for a better future,” they nevertheless pointed out that it might not guarantee their “future tangible benefits.” That is why they advised that therefore “focusing on economic integration first will enable the people to see tangible benefits and build support for deeper integration, including support for political federation.” But the Committee knew this could not arise in real life and so they argued that for a sound foundation to be established there should be “public mobilisation pressure” rather than the leaders doing so “by executive decision” and hence the need for a referendum:

“A public referendum in the three Partner States would appear the most natural policy choice. The referendum process is desirable, *since large numbers of the people of East Africa stated very clearly that they want not only to understand what federation is, but also own it and participate in its formation*” [emphasis added: Ibid: 69].

That is why the Committee had recommended for the urgency of an economic integration that would show the ‘tangible benefits’ to them: “It can only be facilitated by achievements in economic integration but can also be delayed if the benefits are projected but not realised. Another component of such a foundation to address is to redress economic and social disparities currently existing among the Partner States.” But the Committee should have seen that this is along shot. How can you fast track the federation and still insist that the disparities between the three states must be addressed in such a short time, especially when these disparities cannot even be cured within the countries themselves?

These disparities, caused by continuing uneven development, are part and parcel of the political wrangles that go on all the time within each of the states themselves. In this connection, the Committee was quick to refer to the constitutional problems in each of the partner States, but contented themselves with the observation that “these are political issues which the Committee can only raise” but not address! This is then putting the cart before the horse, as we have already argued. The Committee merely complicated matters by referring to the “contextual parameters” that must be addressed by the politicians, namely that for a federation to come into place, there must be: *a shared political vision; the need for the mobilisation broad public support for it; and the need to marshal “the political will to negotiate all the issues involved in the establishment of a federal system of government.”* By so concluding, it was not clear whether it was the “political will of the leaders to negotiate” or the will of the people of East Africa and their involvement and ownership of the process that was at issue.

With this confusion left hanging, the Committee recommended for the ‘overlap and parallel approach’ to be adopted. With this approach, they stipulated the ‘guiding principle’ to be: that “the political federation should not wait for all expectations of the EAC integration to be realised.” Rather they recommended that preparatory and transitional stages should focus only on “those areas considered to be necessary and sufficient for establishing the federation.” These preparatory and transitional stages were to include a *consolidation phase*, which would lead to a fully-fledged federation with its own institutions. The preparatory phase was therefore to consider these institutional frameworks beginning with the customs union, the common market, and the monetary union.

As a way forward, the Committee proposed a road-map that begun with the customs union coming in place by January 2005. This is to be followed with a series of ‘negotiations’ to achieve the other overlapped phases. In terms of constitutional development, the Committee recommended:

- That the period between 2005 to 2010 be utilised to develop the following constitutional institutions:
- The creation of the East African Federation Advisory Council (EAFAC) to be chaired by a prominent East African statesman, which will advise the Summit on issues related to the implementation process leading to federation;
- The delinking of the East African Legislative Assembly and the EA Court structurally from the Secretariat and strengthening them as self-accounting departments of the EAC;

- Creating clusters of departments to be designated as ‘Ministries responsible for regional cooperation’ in each partner states and the Deputy Secretary General to be assigned to each Ministry as the Permanent Secretary;
- A Constitution Commission to work on the Constitution for the Federation and pass it on to the EA Legislative Assembly and the national Parliaments of each partner states for adoption;
- Holding of a referendum to approve the Constitution;
- Setting up of specialised Task Forces to fast track identified strategic interventions in a manner that builds on the ongoing processes ‘but with a more focused agenda;
- Forming the “Triangulate” of the Heads of State that would be composed of the three presidents to rotate between 2010 until 2013;
- Hold elections in 2013 to elect president of EA Federation as well as the East African Parliaments according the EA Constitution.

The road-map above looks implementable except that it is dependent on the overlapping negotiations that must take place as part of these processes. But it should be noted that problems are already arising that can put out of gear the whole ‘fast tracking’ exercise. According to the *East African* (April 10-16, 2006), the negotiating process over the Common Market is beginning to create difficulties. This has arisen because a new strategic plan for the Community worked out by the Secretariat has recommended to create a new tax to be called “assessed contributions’ that will impose an added burden on Kenya. Under the new tax, Kenya has to raise 3 percent of its GDP for the EAC budget. This tax applies to the other countries reflecting their economic performance. While the other partner states are also paying this tax, it is however being commented that since the Kenyan economy is about half of the total economies of Uganda and Tanzania, its burden will be much higher and might lead Kenya to insist on a higher voice in the matters of the Community,

The other area, which is already creating ‘tensions’, is the negotiation on the movement of labour across the borders. The East African reports that the states are becoming even more restrictive in terms of granting immigration work permits to the non-nationals. A negotiated position on the issue is, according to the paper, being ‘resisted’ by the respective immigration departments indicating that ‘divided loyalties between national and regional demands’ were ‘beginning to manifest even more clearly.’ Even the customs union implementation is creating problem on the ‘rules of origin’ as well as the fact that unlike the old Community, each state under the new arrangements is responsible for the management of the customs union implementation.

The problem of ‘multiple memberships’ by partner states in different regional economic arrangements is also becoming a real hindrance to the management of the customs union. While all these nascent problems may be papered over in the haste to establish the federation, it is clear that any fast tracked federal structure will crumble in view of the fact that despite the creation of the federation, the existing borders will still remain so that any of the states can ‘pull-out’ should its ‘tangible benefits’ not be realised. This is why the Partner States are reluctant to abandon membership in the other regional arrangements. Thus, even before the ‘negotiations’ on detailed but important

areas of economic relationships, cracks are already appearing that could undermine the spirit that prevailed in Nairobi in August 2004.

The Way Forward

That is why we conclude that if the people of East Africa are denied the fundamental democratic right to discuss how the political federation is to be negotiated and make it their own project, such a neglect of the rights of the people will be tantamount to surrendering their sovereignties to the Heads of State. It will place the interests of these leaders above those of the people and give them leeway to manipulate the federation to their advantages that they call ‘tangible benefits.’ The ‘overlapping’ approach merely means the hastening the four- stage approach laid down in Article 5(1) of the Treaty, which historically has proved unsustainable. The ‘fast track’ approach should not just involve bureaucratic and elite ‘negotiations’ about ‘tangible benefits,’ but should be a change of direction from the earlier approaches to East African unity.

The unity being created is a *political* unity of the people and not an economic project *per se* to be negotiated between the leaders. As such what is required is for the leaders of East Africa to put a single question to the people of East Africa in the opening of the debates, which are to be held between now and November 2006: **Do you want the borders between the three countries removed and East Africa to become one federated State?** Dissolving the current borders will be the only way the ‘sovereignties’ of the three countries can be abandoned. If it is true that the people of East Africa have clearly expressed their desire to unite, as the leaders keep on repeating, then it is clear that the answer in the referendum will be: **YES.**

Following such a response, the leaders should then put a resolution to their respective parliaments to implement the peoples’ decision by resolving to *irrevocably to dissolve* the existing colonial borders and *constitute one single federated state with inviolable East African borders with the prospect of them only expanding to include the rest of Africa through stages.* The decision will be a momentous one because for the first time, the people of East Africa would have expressed *their sovereign will* to constitute a state of their own in accordance with the modern reality. Some of the issues to be discussed in the referendum should revolve around the new reality if borders are dissolved. These realities will be that the new borders cannot at any cost be undermined except through expansion to include other African communities. As Prof Cheick Anta Diop emphasized:

“The permanency of the federal structures must be inviolable. This principle should be upheld whether the case be national federation like Nigeria, a regional federation, or a continental federation. Once a federal structure is set up it should become irreversible. Once federal structures are elaborated, confirmed and consolidated, succession of any kind must be prevented. ... However, its counterpart must be the granting of cultural freedom and autonomy of the various communities. Africa must be protected against anarchy. ... While Africa must be protected from, we cannot (also) condone the other extreme, which leads to the stifling of the cultural freedom and autonomy of the various communities inhabiting the continent. Each community must be able to enjoy to the fullest a freedom compatible with its desire to fulfil itself culturally and linguistically¹⁵.

¹⁵ Sertima, I V [1986]: *Great African Thinkers: Cheick Anta Diop*, Transaction Books, New Brunswick, USA & Oxford, UK.

Thus with the surrender of their sovereignty to the federal state, the communities will have the right to regroup across former colonial boundaries and to determine whether they want to constitute cultural-linguistic states of their own, which can enable them to enjoy self-determination and autonomy within their own state as members of the federal state, where they will all be citizens. This right to reconstitute their own states fits with the reversal of the colonial injustice that saw to the fragmentation and dismemberment of their communities along ‘tribal’ lines into which they were fixed in the colonial states. This will create greater cultural and linguistic unities across former colonial borders.

The people of East Africa should not be seduced by bureaucratic approaches that favour ‘tangible benefits’ when there are greater political issues involved in the political unification of the people of East Africa. I think this is what president Mkapa referred to when he condemned the egos of those people who would say: “*what is in for me.*” This is why we call on the Heads of States not to think in terms of the “risk of losing the current sovereignty” of their individual countries. Rather, they should remember that these ‘current sovereignties’ are a colonial creations that continues to divide the people of Africa. They should remember that the only sovereign power in East Africa is that of the people of East Africa and not the sovereignty of the Heads of State, which they inherited from the Queen of England through the neo-colonial constitutions. What we want is the creation of a federation that combines the sovereignty of the people of East Africa into a single state.

The issue of sovereignty is important to consider in the context of what the ordinary people of East Africa really want. You cannot convince a Maasai of Laikipia in Kenya and a Maasai in Ngorongoro Crater in Tanzania that removing the boundaries between Tanzania and Kenya is a “risk” to them, when in fact they ignore it on a daily basis as they cross the borders even without carrying ‘national identity cards’ or passports!. So unless we are thinking of other human beings than those that exist on the ground in East Africa, doing a way with the existing colonial state sovereignties and borders cannot be considered to be a “risk” not worth taking!

It follows that the issue to be debated in the communities is not about “sensitisation” or “mobilisation” of the communities about the “benefits of the political federation.” The issue should be about the leaders taking bold and irrevocable decision to dissolve the existing colonial borders that separate the peoples of East Africa. The issue should be about calling on the communities to decide how the new states based on cultural-linguistic identities, among other considerations, should be formed. This will be an empowering process that will, for the first time give an opportunity to the people of East Africa to decide their fate. Having done that, the leaders will then engage experts to draft an East African constitution that will devolve powers to local state levels as well as defining those at a federal level after the people have decided the political question. Such The state constitutions of the different states will also be written to incorporate the wishes of the respective communities, which need not be the same.

The ‘ultra-nationalist’ claiming to be ‘modern’ will argue that these steps will “taking us back” to “tribalism.” In fact these ultra-nationalists are the very ones that practice tribalism even in their political parties to entrench themselves in power. Removing borders will reunite colonially created tribes and reinstate cultural-linguistic communities that are a feature of all modern nations, including those of Europe that we so much imitate. African post-colonial states because of the colonial character are the

only exception in this regard. Thus the Interim Constitution that will come in force for the short period while new states are being formed will provide for the following short-term institutions and measures, which will replace the former 'national institutions' without letup for any anarchy:

- (i) **Presidential Council of State** that will recognise the existing political Heads of States who are currently in position of leadership at the time of the declaration who will act **in rotation for a year each** until constitutional and legal mechanisms have been put in place for the election of the Head of State of the Federation of East Africa on a popular basis in 2010 or such date as will be decided by the Council of State.
- (ii) **Traditional Leaders and Elders Council**, which will have the functions of **advising the Presidential Council of State and the East African Federation Parliament**, especially on matters of state formation having regard to the cultural and linguistic heritages of the people of East Africa and other matters of importance to the people of East Africa.
- (iii) **An East African Interim Federal Parliament** out of the existing territorial Parliaments by each Parliament turning itself in an Electoral College to elect 100 of their members (on equal gender representation) to join the existing East African Legislative Assembly to constitute a 327-Member East African Federal Parliament-MEAP **to legislate on matters submitted to them by new institutions** that will emerge as a transition to the emergence of new constituent states;
- (iv) **An East African Constituent Assembly** drawn from all the nationalities and base communities identified by the Traditional Leaders and Elders Council in consultation with the Presidential Council of State as well as some of the members of the existing parliaments who do not find their way into the East African Parliament **to discuss a new Federal Constitution** based on the new state formations;
- (v) **An East African Armed and Security Forces** under one command structure from the existing three armies and security agencies. One third of each of the three armies will be posted to the other three existing states. These forces will **ensure the security of the new federal sate** as the communities set about recreating new constituent states under a new constitutional arrangement as well as ensuring a peaceful transition;
- (vi) Merging existing Central Banks into one **East African Central Bank** with the responsibility to **manage the three currencies**, which will continue to relate **through the market** until one of the currencies emerges as the strongest able to serve the communities in the new Federation. The issue of a **Monetary Union** would have been confronted directly through the market and the **Common Market** would also have arisen out of the existence of one market created by

the fusion of the states into one **Customs Union** with the Common External Tariff, which is currently being worked on, protecting the whole East African Market externally and not internally. No single industry inside East African Federation will be protected, but will operate on a competitive basis. Only those enterprises that are able to provide goods and services cheaply will get the entire market. This will be the only way to prevent smuggling, which criminalizes economic linkages at lower prices to the consumers. Those industries which are eliminated by the competition will find new forms of investment anywhere in East Africa and the most successful companies will be able to invest in new productive units in any part of East Africa to reduce costs of transportation, thus spreading the benefits of integration instead of rewarding inefficient producers simply because they happen to be in Uganda, Kenya or Tanzania.

- (vii) Consolidating the **Common Services** and **national civil services** such as the Airlines, Railways, Harbours, Post Offices, Telecommunications, Customs Collection, Tax Collections, Transport over of internal lakes and rivers so that these services are managed by the relevant existing institutions and enterprises, which will now be integrated under single management on East African basis.

The fast tracking and formation of the political federation and union would have thus solved the Customs Union problem at a stroke instead of ‘fast tracking.’ It will also have done a way with the bureaucratic recommendations made by the Wako Committee in their report. This is because the Committee recommends that in order to effectively implement the fast tracking of the federation; each country should appoint a “specific minister for East African federation to be resident in Arusha, the *defacto* capital.” They also recommend that each of the three states: “directly remit a percentage of its national revenue to an account for East African federation to meet increased expenses of the fast tracking the union.” It is not clear exactly what the ministers will do, apart from adding new bureaucracies to the structures. In our view instead of this undefined new structures that may complicate the issues, our above focused new institutions will add value to the political decision to abolish the borders at once and set in motion the process of the re-empowerment of the East African people through federation based on their linguistic-cultural identities¹⁶.

¹⁶ Nabudere, D. W[2005]: “The East African Community and NEPAD: Prospects for Collaboration” in Rok Ajulu: *The Making of A Region: Revival of the East African Community*, Institute for Global Dialogue, Midrand, South Africa.