IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA

CORAM: MULENGA V.P., KASANGA MULWA and ARACH AMOKO JJ.

REFERENCE NO. 3 OF 2007

BETWEEN

THE EAST AFRICAN LAW SOCIETY…….1ST APPLICANT

THE LAW SOCIETY OF KENYA……2ND APPLICANT

THE TANGANYIKA LAW SOCIETY…….3RDAPPLICANT

THE UGANDA LAW SOCIETY……4TH APPLICANT

THE ZANZIBAR LAW SOCIETY…….5TH APPLICANT

AND

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA...……..1ST RESPONDENT

THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA…….2ND RESPONDENT

THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA……..3RD RESPONDENT

THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY……..4TH RESPONDENT

JUDGMENT OF THE COURT.

On 14th December 2006, the Summit of the Heads of State of the then three Partner States in the East African Community ("the Summit") considered and adopted amendments to several Articles of the Treaty for the

Establishment of the East African Community ("the Treaty"). On subsequent diverse dates, the three Partner States severally ratified the said amendments to the Treaty and deposited their respective instruments of ratification with the Secretary General of the East African Community. The last of the instruments of ratification was so deposited on 19th March 2007. Meanwhile, on 16th March 2007, the said amendments were published in the East African Community Gazette.

In this reference, the five applicants jointly challenge the legality of the said amendments to the Treaty and seek declarations that the amendment process infringed provisions of the Treaty and norms of international law and was of no legal effect. They also seek diverse consequential orders.

Background

The facts leading to the reference are generally not in dispute. On 27th November 2006, this Court delivered a ruling granting an interim order in the case of ***Prof. Peter Anyang' Nyong'o & 10 others vs. The Attorney General of Kenya & 5 others*** Reference No. 1 of 2006, restraining the Clerk to the East African Legislative Assembly and the Secretary General of the East African Community from recognizing 9 persons named in the order as duly elected by the National Assembly of Kenya to the East African Legislative Assembly (EALA) or permitting them to participate in any function of the EALA until the final determination of the reference. In that reference, the applicants challenged the legality of nomination of the 9 persons to the EALA on the ground that the National Assembly of the Republic of Kenya did not elect them in accordance with Article 50 of the

Treaty. In apparent reaction to the Court's ruling, the Council of Ministers of the East African Community ("the Council"), at its meeting on 28th November 2006, considered the implications of the interim order and decided to recommend to the Summit that the matter be referred to the Sectoral Council on Legal and Judicial Affairs to study the jurisdiction of this Court and other related matters and advise on the way forward.

In a communiqué issued at the conclusion of its meeting at Arusha, on 30th November 2006, the Summit –

> ***"Endorsed the recommendation of the Council of Ministers to reconstitute the East African Court of Justice by establishing two divisions, a court of First Instance with jurisdiction as per present Article 23 of the Treaty and an Appellate Division with appellate powers over the Court of First Instance.***
>
> ***Directed that the procedure for the removal of Judges from office provided in the Treaty be reviewed with a view to including all possible reasons for removal other than those provided in the Treaty.***
>
> ***Directed that a special Summit be convened very soon to consider and to pronounce itself on the proposed amendments of the Treaty in this regard."***

This sparked off a flurry of activity, the highlights of which are –

- An extraordinary meeting of the three Attorneys General of Kenya, Tanzania and Uganda held on 7th December 2006, which considered draft amendments to the Treaty in line with the said communiqué and recommended to the Council that the same be approved and submitted to the Summit pursuant to Article 150 for consideration and adoption;
- A meeting of the Council held at Arusha on 8th December 2006, during which the draft amendments to the Treaty approved by the

meeting of the Attorneys General of the Partner States was considered and approved;

- Submission of the proposed amendments to the Partner States by the Secretary General of the East African Community ("the Secretary General") on 9th December 2006 and the respective replies dated 11th, 12th and 13th December 2006;
- The adoption of the amendments and signing of the Instrument of Adoption by the Summit on 14th December 2006;
- The deposit with the Secretary General of the instruments of ratification of the amendments by the Governments of Kenya on 8th January 2007, of Uganda on 26th February 2007 and of Tanzania on 19th March 2007.

The Amendments

Although this reference does not relate to the substance of the amendments, it is useful to note at least their import, which is –

- To restructure the Court into two divisions, i.e. a First Instance Division and an Appellate Division; (Article 24);
- To include, among the grounds for removing a judge of the Court from office, the following –
    - ***"in the case of a judge who also holds judicial office or other public office in a Partner State,*** [if the judge] **–**
        - ***is removed from that office for misconduct or due to inability to perform the functions of the office for any reason; or***
        - ***resigns from that office following allegation of misconduct or of inability to perform the functions of the office for any reason;***

if the judge is adjudged bankrupt or convicted of an offence involving dishonesty or fraud or moral turpitude under any law in force in a Partner State."

and to provide for suspension of a judge who is under investigation for removal or is charged with such offence; (Article 26);

- To limit the Court's jurisdiction so as not to apply to "***jurisdiction conferred by the Treaty on organs of Partner States";*** (Art. 27 & 30)
- To provide time limit within which a reference by legal and natural persons may be instituted, (Article 30);
- To provide grounds on which appeal may be made (Article 35A); and
- To deem past decisions of the Court and existing judges to be decisions and judges of the First Instance Division respectively. (Article 140 A).

Subject matter of the Reference

The substance of the reference as pleaded by the applicants in paragraph 17 of the reference reads –

"17. In the premises, the subject matter of this reference is that –

a) The purported declaration of the Summit, contained in the Communiqué of 30th November 2006, was not encapsulated in an East African Gazette Notice, as expressly stipulated by Article 11 of the Treaty, and therefore the decision has no legal effect.

b) The explicit time-lines, as well as the elaborate procedures, for treaty amendment, expressly stipulated in Article 150 of the Treaty, were and continue to be infringed, and the said amendments therefore have no legal effect. In particular –

1) There was no written proposal from either a Partner

State or the Council of Ministers as provided in Article 150(2) and (3);

2) The Secretary General of the Community did not communicate the amendments in writing to the Partner States as provided in Article 150(3);

3) Further the 30-day notice period prescribed in Article 150(3) was not observed;

4) The mandatory 90-day period for Partner States' comments prescribed under Article 150(4) and (5) was not observed;

5) There were no written comments from the Partner States as stipulated in Article 150(5);

c) The purported ratification of the amendments by the Republic of Kenya, the Republic of Uganda and the United Republic of Tanzania by their respective Cabinets are an infringement of Article 150(6); further they are unconstitutional, illegal and therefore of no legal effect;

d) In attempting or purporting to amend the Treaty while the Court was still seized of Treaty (sic) ***Reference Application Number 1 of 2006, the Partner States and the Secretariat of the Community infringed Articles 8(1)(c) and 38(2) of the Treaty. As a consequence the entire purported process of treaty amendment is vitiated and of no legal effect;***

e) The Summit, Council of Ministers, Office of the Secretary General and the 3 Partner States' Attorneys General excluded all the other organs of the Community, the Partner States governments and more importantly, the people and registered interest groups of East Africa in the irregular and rushed Treaty amendment process. This infringes both the Preamble and Articles 1, 5, 6, 7, 8, 9, 11, 38 and 150 of the Treaty."

We should observe at the outset that although the aforesaid pleading was not amended and none of the averments therein was otherwise withdrawn, learned counsel for the applicants addressed the Court only on the averments

in paragraphs 17 (b) 4) and 17(e) in the submissions under issue no.2, and on those in paragraph 17(d) in the submissions under issue no.3. No evidence was adduced in support of, and learned counsel did not canvass the averments in paragraph 17(a), 17(b) 1), 2), 3) and 5) and 17(c) obviously because they were inconsistent with the available evidence, and no counter evidence to support them was adduced. We shall therefore regard those particular averments as abandoned.

Although the reference is stated to be made under twelve articles of the Treaty, the only article under which any legal or natural person may bring such a reference is article 30 of the Treaty. The five applicants are legal persons. The 1st applicant is a Company limited by Guarantee, and registered in Tanzania as such and in Kenya and Uganda as a Foreign Company. Its membership consists of individual lawyers as well as five national associations of lawyers of Kenya, Tanzania, Uganda, Rwanda and Zanzibar. The 2nd, 3rd and 4th applicants are corporate entities established by national statutes of Kenya, Tanzania and Uganda respectively; and the 5th applicant is a registered society under Zanzibar legislation.

The four respondents are cited in the reference in their respective representative capacities, representing the Republic of Kenya, the United Republic of Tanzania, the Republic of Uganda and the East African Community, respectively.

The reference was filed in the Court Registry on 18th May 2007 and was followed by separate responses from all the respondents. Upon conclusion of the pleadings and in pursuance of rule 52 of the Rules of Procedure, the

Court held a scheduling conference on 2nd November 2007 during which the parties *inter alia* framed the following issues for determination by the Court, namely –

1. Whether the reference is properly before the Court;
2. Whether the process of amending the Treaty was proper and lawful;
3. Whether the said amendments were carried out in good faith;
4. Whether the amendments as carried out can be stopped; and
5. Whether the amendments will strengthen the Community.

Hearing did not proceed promptly due to several adjournments initially with a view to settlement and subsequently because of post-elections problems in Kenya. Hearing finally commenced on 7th May 2008 with oral submissions of counsel, the evidence relied on by all the parties being by affidavits filed along with the pleadings.

Prof. Fredrick Ssempebwa the learned lead counsel for the applicants made submissions on all the framed issues. He was assisted by Mr. Alex Mgongolwa and Mr. Donald Deya who shared the submissions in reply to submissions for the respondents. Learned counsel for the respondents shared the framed issues among themselves. Mr. Wilbert Kaahwa, learned Counsel to the Community who appeared for the 4th respondent argued issues no, 1 and no. 5 on behalf of all the respondents. Mr. Anthony Ombwayo, learned counsel for the 1st respondent, Mr. Henry Oluka, learned counsel for the 3rd respondent, and Mr. Joseph Ndunguru counsel for the 2nd respondent, did likewise respectively on issues no. 2, no. 3, and no. 4.

Submissions on Issue No.1

The first framed issue, namely ***"Whether the reference is properly before the Court"*** could have been taken as a preliminary objection, but the parties argued it along with the rest of the issues. Primarily, it arose from the responses of the 1st and 3rd respondents. The former pleaded that the subject matter of the reference, being the result of a decision of one organ of the Community, was not subject to review by this Court under Article 30. The latter pleaded that the reference was incompetent and misconceived because there was no dispute amongst the parties to the Treaty. Additionally, the 2nd and 4th respondents pleaded that under international law, the applicants were not competent to challenge the sovereign right of the Partner States to amend the Treaty to which they were parties.

Learned counsel for the respondents explained that the contention that the reference was not properly before the Court was not in respect of the Court's jurisdiction or competence to determine the reference, but rather it was in respect of the applicants' lack of capacity to bring the reference to court. On the one hand he submitted that it is a trite principle under international law, that the making of treaties, as well as the amendment thereof, is a sovereign function and a preserve of states as the contracting parties. The individual subjects of the contracting states have neither a role to play in the function nor a right to challenge the execution of the function by the contracting states. In the instant case the right to amend the Treaty by agreement of all the Partner States was reiterated under Article 150. He maintained that the applicants had no capacity to challenge the Partner States in the exercise of that right.

Secondly, learned counsel submitted that the reference was not properly before this Court because it lacked one of the essential elements of a reference under Article 30 of the Treaty. According to learned counsel, a reference is properly before this Court under that article only if –

- the applicant is a resident of a Partner State;
- the subject matter of the reference is ***"an Act, regulation, directive, decision or action <u>of a Partner State or of an institution of the Community</u>"***; and
- the ground of the reference is that the challenged subject matter is an infringement of a provision of the Treaty or is otherwise unlawful.

He maintained that what is envisaged under the second requirement is not something done or made by the Partner States together as contracting parties or by an organ of the Community. According to learned counsel, what is envisaged is what is done or made by a single Partner State or an institution of the Community, which is unlawful or an infringement of the Treaty. Learned counsel submitted that in the instant case, the second requirement was not satisfied, in as much as the subject matter of the reference was not an Act, regulation, directive, decision or action of a single Partner State or of an institution of the Community.

Learned counsel urged us to interpret the provisions of Article 30 of the Treaty strictly, and not to construe them as impugned on the sovereignty of the Partner States; emphasizing that under that article, only an Act, regulation, directive, decision or action of a single Partner State or an institution of the Community may be challenged; but not that of an organ of the Community. He argued that to the extent that in this reference the applicants challenge the legality of the decision of the Summit to amend the

Treaty, the reference does not fall within the ambit of Article 30 and is therefore not properly before this Court. He submitted that the decision of this Court in **Callist *Mwatela and others vs. Secretary General of the EAC,*** Reference No.1 of 2005, which the applicants rely on, is not a proper authority because the pertinent question, *whether a directive, decision or action of an organ of the Community is justitiable under Article 30* was not raised and this Court did not pronounce itself on it.

While conceding that the making of a treaty, as well as the amendment thereof, is a sovereign function of state, learned counsel for the applicants, submitted that each treaty must be interpreted in the context of its objectives. He stressed that the main objective of the Treaty in the instant case is the phased integration of the Partner States into a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation. He invited the Court to take into consideration the historical context of the Treaty when interpreting its provisions. In that regard he recalled that the past failed East African Community was not people centered and noted that, in contrast, the Treaty provides in Article 7(1) (a), that the operational principles for achieving its objectives shall include ***"people centered and market driven co-operation"***. Counsel submitted that in furtherance of that principle, the Treaty confers rights on the people of East Africa and permits them to enforce those rights through this Court. In so doing and in binding themselves under Article 150 as to the procedure for amending the Treaty, the Partner States surrendered some degree of sovereignty.

With regard to the scope of Article 30, learned counsel recalled the Court's duty under Article 23, to ensure adherence to law in the interpretation and

application of the Treaty, and the empowerment of natural and legal persons in East Africa under Article 30, to challenge any illegality in the application of the Treaty by a Partner State or institution of the Community, and submitted that Article 30 cannot be construed as excluding from such challenge, illegality by an organ of the Community. He invited the Court to apply the purposeful approach in interpreting the article and to hold that any Act, regulation, directive, decision or action by an organ of the Community is within the ambit of Article 30 and may be challenged under it. Learned counsel cited as authority for that proposition, the decision of this Court in ***Callist Mwatela and others vs. Secretary General of the EAC,*** **(supra),** where the decisions/directives of the Council of Ministers, an organ of the Community, were successfully challenged under Article 30.

In reply to the submissions by the respondents' counsel, learned counsel for the applicants further pointed out that the two main arguments in support of the respondents' contention contradicted each other. Whereas on the one hand the respondents argued that the reference was incompetent for purporting to challenge the sovereign function of the Partner States, on the other hand they argued that it was incompetent for purporting to challenge the decision and action of an organ of the Community. Learned counsel maintained that the reference was brought in respect of decisions and actions of the Partner States and were therefore properly before the court as envisaged under Article 30.

Conclusion onIssue No.1

In this reference, the applicants do not challenge the sovereign right of the Partner States to amend the Treaty. They only contend that under Article 150 of the Treaty the Partner States bound themselves to follow a prescribed procedure in exercising that right and that a deviation from that procedure constitutes an infringement of the Treaty. They argue that in effecting the amendments in issue in the instant case, the prescribed procedure was not complied with, and that consequently the amendments amounted to an infringement of the Treaty. We agree in as much as the Partner States bound themselves to abide by a specified procedure in the process of amending the Treaty, they cannot amend the Treaty in any other way. To that extent the Partner States agreed to cede a degree of their respective sovereignty. In our view, therefore, the question whether the amendment process in issue in this reference amounts to an infringement of the Treaty is justitiable and cannot be barred on the ground of sovereignty of the Partner States.

Secondly, the applicants do not claim to have any inherent right to make this reference questioning the manner in which the Partner States exercised their sovereign right to amend the Treaty. They, as residents of the Partner States, rely on the right the Treaty vests in them under Article 30, which reads –

> ***“ Reference by Legal and Natural Persons***
> ***Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty.”*** (Emphasis is added)

Ordinarily at international law, a treaty between or among states, like any contract, protects interests of or creates rights for the parties thereto and imposes duties and obligations on the parties to it. Neither another state that is not a party, nor a legal or natural person, may directly claim any interest or right under it, notwithstanding that that other state or person derives benefit from implementation and operation of the treaty. However, nothing prevents the state parties to a treaty to vest in any person or other state an enforceable right.

It is clear from the provision of Article 30 that the residents of the Partner States are vested with the right to access this Court for the purpose of challenging any form of infringement of provisions of the Treaty. Several provisions in the Treaty lend weight to the view that this was a deliberate provision to ensure that East Africans for whose benefit the Community was established participate in protecting the integrity of the Treaty. The following excerpts from the Treaty in particular, stand out to illustrate that deliberate intent. First, in the Preamble to the Treaty, the fourth recital recalls and highlights that one of ***"the main reasons that contributed to the collapse of the*** (previous) ***East African Community"*** in 1977, was ***"lack of strong participation of the private sector and civil society in the co-operation activities";*** and the eleventh recital records that the parties to the Treaty ***"are resolved to create an enabling environment in all the Partner States in order to attract investments and allow the private sector and civil society to play a leading role in the socio-economic development activities"***

Secondly, Article 7 provides –

"1. The principles that shall govern the practical achievement of the objectives of the Community shall include:
(a) people-centered and market-driven co-operation;"

In our view, therefore, it would be a negation of that deliberate intent to bar the reference on the ground that the applicants had no capacity to bring a reference challenging a sovereign function of the Partner States.

Lastly, we are not persuaded by the respondents' urging that we give to Article 30, a narrow interpretation that excludes from the application of the Article, infringement of the Treaty by an organ of the Community. With due respect to learned counsel, it seems to us that such a restrictive interpretation is not based on a sound ground. It is only based on the fact that no mention of infringement of the Treaty by an organ of the Community is made in Article 30. It is noteworthy that the Treaty provides for two other similar references to this Court. Article 28 authorises a Partner State to make a similar reference in respect of a failure to fulfill an obligation under the Treaty or of an infringement of a provision thereof on the part not only of another Partner State or an institution of the Community but also of an organ of the Community. On the other hand, Article 29 empowers the Secretary General, subject to direction by the Council, to make a similar reference to the Court in respect of such a failure or infringement by a Partner State only. We note the disparity in the three articles depending on who is responsible for the alleged failure or infringement, but having regard to the purpose of the provisions, namely to ensure compliance with provisions of the Treaty and to provide for empowerment of *inter alia* any resident to seek judicial adjudication where there is allegation of non-compliance, we are inclined to the view that a restrictive interpretation would defeat that purpose.

We agree that in ***Callist Mwatela and others vs. Secretary General of the EAC,*** **(supra)** the subject matters of the reference were decisions and actions of organs of the Community, but no one raised the point of their justitiability. In our view, however, that is not a substantial point. Legally the organs are not corporate entities, but are components of the Community, which is the corporate body. Ordinarily, an act of an organ in discharging its functions is an act of the corporate Community. However, in areas where a function of the Partner States has not been ceded to the Community, an organ may discharge the function in the context of *"the Partner States acting together."*

In the instant reference, the alleged infringement is in essence not the diverse individual decisions, directives or actions of the Summit or other organs of the Community set out in the reference. The alleged infringement is the totality of the process of the Treaty amendment, which amendment was, and can only be made by the parties to the Treaty, namely the Partner States, acting together through the organs of the Community. It follows that if in the amendment process the Treaty was infringed, it was infringed by the Partner States. The reference therefore cannot be barred on the ground that its subject matter are decisions and actions of organs of the Community.

For the reasons we have set out, we find and hold that the reference is properly before this Court. Accordingly we answer issue no.1 in the affirmative.

Submissions on Issue No.2

The second issue revolves around the construction of Article 150 which reads –

> ***“ <u>Amendment of the Treaty</u>***
>
> ***1. The Treaty may be amended at any time by agreement of all the Partner States.***
>
> ***2. Any Partner State or the Council may submit proposals for the amendment of this Treaty.***
>
> ***3. Any proposals for the amendment of this Treaty shall be submitted to the Secretary General in writing who shall, within thirty days (30) of its receipt, communicate the proposed amendment to the Partner States.***
>
> ***4. The Partner States which wish to comment on the proposals <u>shall do so within ninety days (90)</u> from the date of the dispatch of the proposal by the Secretary General.***
>
> ***5. <u>After the expiration of the period prescribed under paragraph 4</u> of this Article, the Secretary General shall submit the proposals and any comments thereon received from the Partner States to the Summit through the Council.***
>
> ***6. Any amendment to this Treaty shall be adopted by the Summit and shall enter into force when ratified by all the Partner States.”*** (Emphasis is added)

As noted earlier in this judgment, issue no.2 is: ***“Whether the process of amending the Treaty was proper and lawful”.*** The thrust of the submissions by learned counsel for the applicants on this issue is that the amendment process was flawed in two respects, namely failure to abide by the mandatory time-frame prescribed under Article 150(4) and (5), and absence of adequate or any consultation of “the people” on the proposals for amendment, as envisaged under the Treaty.

Learned counsel contended that whether the proposal is by all the Partner States together or by any one of them or the Council, it must be processed through the stages set out in Article 150 under paragraphs (2) to (6) because they are all mandatory. He stressed in particular that the period of 90 days from the time the Secretary General communicates the proposal to the Partner States must expire before the proposal with the comments from the Partner States is submitted to the Summit through Council, even if the Secretary General receives the comments well before expiry of that period, as happened in the instant case. According to counsel, the 90 days period must not be abridged because it was prescribed for the purpose of allowing wide consultation on any proposed amendment, in order to maintain the whole Treaty as people-centered. In this regard, he invited the Court to take judicial notice of the extensive consultation that was carried out on the proposal to "Fast-track Political Federation", and the on-going wide consultation on extension of the Court's jurisdiction.

On the basis of his analysis of Article 150, learned counsel argued that although in the communication to the Partner States and in the submission to the Summit the Secretary General purported to do so in accordance with Article 150(4) and (5) respectively, the submission of the proposed amendments to the Summit before expiry of the prescribed 90 days was an infringement of Article 150(5). He argued further that the undisputed fact that the amendment process from initiation to conclusion took only a few days, is sufficient proof that the consultations envisaged under the Treaty, were not carried out, and the Treaty was thereby infringed.

Learned counsel for the respondents submitted that the Treaty may be amended in one of two different ways. To put it in his own words, he said –

> ***"It is trite law that a treaty can be amended in two modes. The first mode of amending a treaty is by agreement. This is an agreement by the Partner States to amend the provisions of the treaty. The second mode of amendment is as provided for under Article 150(2) to (5) of the Treaty…… that is a set out procedure for amendment of the Treaty where there is no agreement.***

He submitted that the first mode was recognized at international law and was embodied in Article 39 of the Vienna Convention on the Law of Treaties, ("the Vienna Convention") and was reiterated in Article 150(1) of the Treaty. Initially, learned counsel contended that in the instant case the Partner States amended the Treaty by agreement, applying the first mode of amendment, when in the communiqué at the Summit meeting of 30th November 2006, the Heads of State endorsed the recommendations of the Council and issued conclusive directives –

- to reconstitute the East African Court of Justice into two divisions;
- to review the procedure for removal of judges from office; and
- to convene a special Summit to consider the amendments.

In the course of his submissions, however, without conceding that the communiqué did not constitute an effective amendment of the Treaty, learned counsel accepted that in addition to the agreement of the Partner States to amend the Treaty that is evidenced by the communiqué, there was compliance with the procedure set out in paragraphs (2) to (5) of Article 150 and in particular stressed that paragraphs (4) and (5) were not infringed.

The substance of learned counsel's argument in regard to the timeframe set out in paragraphs (4) and (5) of Article 150 may be paraphrased thus: Where

one act is required to be done within a set period and a second act is required to be done after expiry of the said set period, for purposes of doing the second act, the set period is deemed to expire when the first act is done. Learned counsel maintained that in the instant case, when the Partner States submitted their comments on the proposed amendments within the set period of 90 days, for purposes of the next step of submitting the proposed amendments with the comments to the Summit, the 90 days period was deemed to lapse upon the Secretary General receiving the last of the comments from the Partner States. Consequently, according to learned counsel, the submission of the proposed amendments with the comments well before the actual expiry of 90 days did not constitute an infringement of Article 150(5) of the Treaty. In support of his argument, learned counsel referred to the cases of ***Alida Singh vs. Vanel Singh*** (1956) RD-SC 83; ***Jaramogi Oginga Odinga and others vs. Zacherus Chesoni*** Application No.602 of 1992 (K) and ***David Wakairu Murathe vs. Samuel Macharia*** Civil Appeal No.171 of 1998 (K), which we did not find helpful.

Furthermore, learned counsel opposed the applicants' proposition that the Secretary General has to await the actual expiration of 90 days before the submission to the Summit even after all the comments are received. In his view such interpretation renders the provision absurd. Article 150 does not provide for mandatory or any consultation and therefore requiring the Secretary General after receiving all the comments to postpone submission of the same for further action would be pointless and absurd.

Consideration and conclusion of Issue No.2

There are two components in issue no.2, which in the interest of clarity we shall consider separately. We shall first consider whether the amendment process infringed the Treaty by reason of noncompliance with Article 150, and then consider if it infringed the Treaty in any other way.

We should mention at the outset that we do not agree with the submission by counsel for the respondents that Article 150 provides for two modes of amending the Treaty. In our view the provision in Article 150(1) is a general provision reiterating the position at international law as reflected in Articles 39 and 40 of the Vienna Convention on the Law of Treaties (Vienna Convention). Article 39 substantially provides that a treaty may be amended by agreement between the parties to it. That indicates the capacity to amend not the procedure for amending. Article 40 makes that quite clear by providing that unless otherwise provided in the treaty –

> ***"Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:***
>
> ***a) the decision as to the action to be taken in regard to that proposal***
>
> ***b) the negotiation and conclusion of any agreement for the amendment of the treaty."***

In the instant case, the Treaty does not provide otherwise. Rather in paragraphs (2) to (6) of Article 150 it makes provisions for the parties to it, i.e. the Partner States, to participate in the amendment process. As we noted earlier in this judgment, the bone of contention is whether the provisions in those paragraphs were complied with in making the impugned amendments.

In view of the abandoned pleadings we alluded to earlier in this judgment, we need focus only on the provisions in two of the paragraphs, namely paragraphs (4) and (5) of Article 150.

Paragraph (4) provides that the Partner States wishing to comment on proposed amendments shall do so within 90 days from the date the proposals were dispatched to them. Paragraph (5) provides that after expiration of that period (90 days), the Secretary General shall submit the proposed amendments, with any comments thereon, to the Summit through the Council.

It is not in dispute that the Secretary General submitted the proposed amendments to the Summit long before expiry of the period of 90 days from the day he communicated them to the Partner States. It is indeed recorded in the Report of the 4th Extraordinary Meeting of the Summit held on 14th December 2006 that pursuant to Article 150 of the Treaty, the Summit received the proposed amendments with the comments, not through the Council, but directly from the Secretary General at that meeting. That was only 5 days after his communication to the Partner States, and therefore well before expiration of 90 days' period.

We have given anxious consideration to the opposing arguments on the interpretation to be placed on the expression ***"After the expiration of the period prescribed under paragraph 4 of this Article"*** appearing in paragraph (5) of Article 150. Counsel for the applicants urged that we must give it its plain ordinary meaning that translates to: "*after expiration of 90 days*", which is the period prescribed under paragraph 4. However, we

cannot overlook the force of the argument by counsel for the respondents that to construe the paragraph as requiring the Secretary General, in mandatory terms, to await the expiry of 90 days, could lead to unreasonable if not absurd result, where the Secretary General has received the comments from all the Partner States well ahead of the expiry of that period, as happened in the instant case.

The Vienna Convention sets out international rules of interpretation of treaties. Article 31 that comprises the General Rule of Interpretation reads –

> ***"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty <u>in their context and in the light of its object and purpose.</u>***
> ***2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:***
> ***(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;***
> ***(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.***
> ***3. <u>There shall be taken into account, together with the context:</u>***
> ***(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;***
> ***(b) <u>any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;</u>***
> ***(c) any relevant rules of international law applicable in the relations between the parties.***
> ***4. A special meaning shall be given to a term if it is established that the parties so intended."*** (Emphasis added)

Article 32 then provides that where, in interpreting a treaty, the application of Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, recourse may be had to

supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion.

Taking into account the said general principle of interpretation enunciated in Article 31 of the Vienna Convention we think that we have to interpret the terms of the Treaty not only in accordance with their ordinary meaning but also in their context and in light of their objective and purpose. Primarily we have to take objective of the Treaty as a whole, but without losing sight of the objective or purpose of a particular provision. In that context, in our view, the objective and purpose of Article 150 is to stress that the Treaty, as a contract binding on all the Partner States, may be amended only if all the Partner States agree; and to regulate the procedure for processing the amendments up to conclusion.

With due respect to learned counsel for the applicants, we are not persuaded by his argument that the purpose of prescribing the period of 90 days in paragraph (4) is to provide for the period that every Partner State must spend undertaking unspecified consultations. When the Court sought from him clarification, he asserted that the expression *"After the expiration of the period prescribed in paragraph 4"* was put there for a purpose and he went on to say –

> ***"It is in the context of the whole Treaty which is people-centered … So, our contention is that this is the period that is allowed for consultation. In actual fact, the consultation may not take place, but this was the purpose."*** (Emphasis is added)

That answer exposes how the interpretation he urged for could lead to absurd results. In our view, the purpose of paragraph (4), as stated in the

paragraph itself, is to limit the time for commenting on proposed amendments by any Partner State wishing to do so. In construing paragraph (5) therefore, it cannot be correct to transform that purpose into one of prescribing a mandatory period for unspecified consultations.

The clear core objective and purpose of paragraph (5) on the other hand is to direct that the Secretary General shall submit the proposed amendments with the comments from the Partner States, if any, to the Summit. It appears to us that the cross reference to the period prescribed under the preceding paragraph was made upon a presupposition of the Partner States taking the whole period of 90 days to comment. In our view it does not cover the scenario where the Partner States take a shorter period to comment. We think it is more reasonable to conclude, as we hereby do, that paragraph (5) does not expressly or impliedly require the Partner States to carry out any consultations, nor does it expressly or impliedly require the Secretary General to hold the proposed amendments and comments thereon received from Partner States until expiration of the 90 days. The correct construction must be that the provision directs the Secretary General to submit them to the Summit not later than the expiry of that period.

Accordingly, we find that the submission of the proposed amendments to the Summit by the Secretary General within 5 days after his communication to the Partner States was not an infringement of paragraph (5) of Article 150 of the Treaty specifically.

We now turn to consider if by reason of failure to carry out wide consultations on the proposals for the amendments, the process constituted

an infringement of the Treaty in any other way. It is useful at this point to recall the sequence of the critical events in the process.

Pursuant to the Summit communiqué of 30th November 2006, an Extraordinary Meeting of the Attorneys General held on 7th December considered and concluded the draft amendments, which it recommended the Council to approve and submit to the Summit. On 8th December, the Council met and approved the draft, following which the Secretary General addressed a letter dated 9th December 2006 to the Ministers responsible for the East African Community Affairs in the three Partner States in which he wrote -

> ***"Re: <u>Proposals for the Amendment of the Treaty for the Establishment of the East African Community.</u>***
>
> ***I have the honour to inform you that I have received proposals from the Council of Ministers for the amendment of the Treaty for the establishment of the East African Community.***
> ***The proposals are shown in Part 2 of the Report of the 12th Extraordinary Meeting (Ref EAC/CM/EX/12/2006) which is enclosed herewith. In accordance with Article 150(3) of the Treaty, <u>I request you to facilitate your Partner State's consideration of these proposals. Given the urgency on this matter, please submit the comments to me by Monday, 11th December 2006.</u> This will enable me submit the proposals to the Summit of Heads of State for consideration and adoption."*** (Emphasis is added)

The responses were prompt. Uganda's First Deputy Prime Minister/Minister of East African Affairs replied on 11th December, intimating simply that Uganda had no objection to the proposed amendments to the Treaty. The Kenya Minister of East African Community replied on 13th December also intimating that Kenya concurred with the proposed amendments.

Only the Permanent Secretary of the Tanzania Ministry of East African Cooperation, who replied on 12th December, alluded to any consultation on the proposals. He wrote in part –

> ***"We have reviewed the Report of the 12th Extraordinary Meeting… (Ref. No. EAC/CM/EX/12/2006) dated 8th December 2006 and Tanzania is in agreement with the proposals therein. Given the urgency of the matter and the professionalism shown by the Partner States Attorney Generals*** (sic) ***and the Council of Ministers, the proposals can now be submitted to the Higher Authorities for consideration.***
> ***Please note that December 9th 2006 was Tanzania's 45th Independence Day celebrations and 10th December 2006 was a Sunday, hence consultations could not have been done effectively during these days."*** (Emphasis is added)

These were the only comments from the Partner States on the proposed amendments. For the purposes of paragraph (4) of Article 150, therefore, the Partner States through their responsible officials made the comments within the prescribed period of 90 days after the Secretary General's communication. The earliest was 2 days, and the latest was 4 days after the communication.

It is evident from the aforesaid correspondence that no serious widespread consultations on the amendments within the Partner States were intended let alone carried out. It is noteworthy that according to the record of the meeting of the Attorneys General, even communication to the Partner States under paragraph (4) was not contemplated since the recommendation was that Council should approve the draft and submit it to the Summit for consideration and adoption. It is also noteworthy that apparently the persons whose initial recommendation to make the amendments was endorsed by the

Summit in its communiqué and who later approved the Attorneys General's draft amendments to be communicated to the Partner States, are virtually the very persons who received and considered the amendment proposals in the name of the Partner States. The Kenya Minister made no pretensions about consultations when in his reply to the Secretary General he said –

> ***"I have studied the report and the proposals therein and Kenya concurs with the proposed amendments."***

Even in the case of Tanzania where the Permanent Secretary's reply appears to imply that after the public holiday on Independence Day and Sunday there was some consultation on Monday the 11th December, there cannot have been wide or much consultation on the drafted amendments before he sent the reply on 12th December. Needless to say that the way the matter was handled ridicules the provision for forwarding the proposed amendments to the Partner States.

As we observed earlier in this judgment, under Article 7 the people's participation in cooperation activities set out in, and envisaged under the Treaty, is ranked high among the operational principles of the Community. The best illustration in the text of the Treaty is Article 30 where specifically, every resident of a Partner State is empowered to access this Court for the purpose of participating in ensuring compliance with the Treaty.

However, neither Article 150 nor any other provision of the Treaty specifies the modality and extent of people's participation in cooperation activities in general and in the amendment of the Treaty in particular. Ideally, it would have been easier for this Court to uphold and apply the proposition that every amendment of the Treaty must involve prior consultation of the people, if the draftsman had provided the measure for determining such

involvement or participation, as is done for example, in integration treaties that provide for consulting the people through referenda. Undoubtedly other forms of involving and consulting the people are also possible.

In this regard, we agree with learned counsel for the applicants that we should take judicial notice of two major activities subsequent to the Treaty coming into force, which were preceded by extensive consultations. We do take judicial notice of the fact that consultation on the "Zero Draft Protocol to Operationalise Extended Jurisdiction" of this Court is still on-going. We also take judicial notice of the fact that the proposal by the Summit to fast-track political federation of the Partner States was subjected to extensive consultations of diverse categories of the people in the Partner States, and ended in a determination that there was no consensus among the people to alter the sequence of stages set out in Article 5(2) of the Treaty for the gradual phasing of the integration process towards the ultimate stage of political federation. Although the two sets of consultations were not conducted uniformly, they undoubtedly reflect agreement among the Partner States that the principle of people-centered cooperation is also applicable to the Treaty amendment process.

In addition to these two examples mentioned by counsel for the applicants, we also take judicial notice of the consultations that preceded the conclusion of the Protocol on the Customs Union and the on-going consultations on the Common Market, which is the next stage in the integration process.

As we noted earlier in this judgment, the Vienna Convention provides in Article 31 that the context of a treaty includes the text as well as its preamble

and annexes, and that for the purpose of interpretation, there shall be taken into consideration *inter alia* –

> ***"any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."***

In accordance with this rule, we take into consideration the said series of consultations as having established agreement among the parties to the Treaty that in seeking to apply or alter provisions of the Treaty, the people shall be consulted. As to the extent of such consultations, we think that until more elaborate modalities are evolved as the Community continues to grow, the resolve to allow participation of the private sector and civil society recited in the preamble, and the objective to enhance and strengthen partnerships with the private sector and civil society enunciated in Article 5(3) (g), provide adequate guidelines.

We think this is the interpretation that gives full meaning to the context of the Treaty. It is common knowledge that the private sector and civil society participated in the negotiations that led to the conclusion of the Treaty among the Partner States and, as we have just observed, that they continue to participate in the making of Protocols thereto. Furthermore, as we noted earlier in this judgment, Article 30 entrenches the people's right to participate in protecting the integrity of the Treaty. We think that construing the Treaty as if it permits sporadic amendments at the whims of officials without any form of consultation with stakeholders would be a recipe for regression to the situation lamented in the preamble of *"lack of strong participation of the private sector and civil society"* that led to the collapse of the previous Community.

In conclusion we find that failure to carry out consultation outside the Summit, Council and the Secretariat was inconsistent with a principle of the Treaty and therefore constituted an infringement of the Treaty within the meaning of Article 30. Accordingly, we answer issue no.2 in the negative.

Submissions on Issue No.3

The argument of learned counsel for the applicants on issue no.3 may also be sub-divided in two distinct aspects. The first aspect is the particular argument that because the impugned amendments were made in reaction to the interim order of the Court in ***Anyang' Nyong'o Case*** (supra), the undertaking of the amendments was an infringement of Articles 8(1) (c) and 38(2) and was *ipso facto* done in bad faith. The second aspect is the general argument that inference of bad faith ought to be drawn from the manner in which the amendments were conceived and processed and from the content of the amendments.

The first aspect was pleaded in paragraph 17(d) of the reference as part of the subject matter of the reference. In the pleading, however, what was referred to the Court was the assertion that "***attempting or purporting to amend the Treaty while the Court was still seized of Application No.1 of 2006"*** infringed the Treaty and consequently vitiated the entire amendment process rendering it of no legal effect. It could as well have been argued under issue no.2. The second aspect was not part of the subject matter of the reference. It appears to have arisen from the averment in the response of the 4th respondent who pleaded in paragraph 7 that the process of amendment of

the Treaty ***"was undertaken in utmost good faith in accordance with the Treaty..."***, which begs the question whether that aspect of the issue was properly referred to the Court under Article 30. We shall dispose of the two aspects separately.

Article 8(1) (c) is an undertaking by the Partner States to abstain from any measures likely to jeopadise achievement of objectives of the Treaty or the implementation of its provisions. Article 38 is concerned with the principle of acceptance of the Court's decisions and in paragraph (2) it provides –

> ***"Where a dispute has been referred to the Council or the Court, the Partner States shall refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute."***

The contention for the applicants is that the impugned amendments were undertaken with a view to threaten and cow down the Court. Learned counsel for the applicants premised his argument on a remark appearing in the record of the meeting of the Council held on 28th November 2006, during the deliberations on the implications of the Court's interim order, to the effect that ***"there is need for the organs of the Community to appreciate and support each other in the discharge of the Community functions."*** He invited the Court to infer from this remark that the Council was unhappy and even angry with the Court order, hence the inclusion in the recommended amendments the expansion of grounds for removal of judges of the Court.

Much of learned counsel's argument was geared to showing bad faith. However, when asked by the Court to explain how the reaction of the Council which was ultimately endorsed by the Summit in the communiqué

was likely to be detrimental to the resolution of the dispute or to aggravate it, the thrust of learned counsel's response was as follows: The decision to amend the Treaty was a reaction to the Court's interim order in ***Anyang' Nyong' o case.*** Both the Council and the Summit were aware that the resolution of the dispute in that case was still pending in the Court. The proposal to extend the grounds for removal of judges from the Court was calculated to intimidate the judges and consequently was likely to be detrimental to the resolution of the dispute. In his lengthy reply on issue no.3, learned counsel for the respondents did not address this aspect. In our view there is substance in the arguments of learned counsel for the applicants, particularly in the context of the surrounding circumstances, whose summary below gives a clear understanding of this conclusion.

It is common knowledge that at all the material times the two members of the Court from the Republic of Kenya had been victim of a lightening scoop on the Kenya Judiciary in 2003 that saw 23 judges suspended from service on general allegations of corruption. The allegations against them were to be inquired into by tribunals. Subsequently, one of the two judges of this Court was cleared of the allegations against him without their being inquired into by the tribunal. He voluntarily retired from the Kenya judiciary thereafter. The inquiry in respect of the other judge has not progressed up to the present day, 5 years down the road. Both judges were on the panel of the bench that was seized of the ***Anyang' Nyong'o case*** (supra)**.**

The pertinent amendment extending the grounds for removal of a judge is that under Article 26(1) (b) the Summit may remove from office –

"(b) …a Judge who also holds judicial office or other public office in a Partner State [if that judge] –

(i) is removed from that office for misconduct or due to inability to perform the functions of the office for any reason; and

(ii) resigns from that office following allegation of misconduct or of inability to perform the functions of the office for any reason;

2. Where –

(a) …

(b) a Judge is subject to investigation by a tribunal or other relevant authority of a Partner State with a view to his or her removal from an office referred to in paragraph 1(b); or

(c) …

the Summit may, subject to paragraph 2B, suspend the Judge from the exercise of the functions of his or her office."

The only reasonable and irresistible inference from these provisions is that, while they may be of general application, they were designed to suit the circumstances of the two Kenya judges on this Court. The test to apply in determining if that move infringed Article 38(2) is not whether or not it intimidated or was calculated to intimidate the two judges or any other judge of the Court. The obligation under the Article is not to refrain from an act that is detrimental but from one that might be detrimental. In our considered view, given the circumstances we have just summarized, the move was capable of unduly influencing the pending judgment in ***Anyang' Nyong'o case*** (supra) and thereby be detrimental to the just resolution of the dispute**.** The fact that it did not have that effect is credit to the sense of independence on the part of the two judges together with the other judges on the panel, and to their resolve to uphold the principles of judicial integrity and judicial independence. We therefore hold that that part of the amendments constituted an infringement of Article 38(2) of the Treaty.

Turning to the second aspect of issue no.3, we reiterate what we have just observed that it is not part of the subject matter referred for determination under Article 30 of the Treaty. The reference was not for determination whether the amendments were made in bad faith, but rather whether the amendment process did not comply with specified provisions of the Treaty, and therefore infringed them. As submitted by learned counsel for the respondents, while in the 4th respondent's response and in three of the affidavits supporting the respondents' pleadings it was positively asserted that the amendments were made in good faith, the applicants were not assertive in their pleadings that the amendments were made in bad faith, save that in the affidavit supporting the reference there was an oblique or implicit mention of the deponent's belief that "amendments (to the Treaty) should be made in good faith". The emphasis in the reference and the supporting affidavit is that the amendment process was illegal for infringing provisions of the Treaty. Strictly therefore, the pleading in the 4th respondents' response that the amendments were made in good faith is more in the nature of "a cross-reference", which is not provided for or envisaged under Article 30. We are therefore constrained to observe for future guidance, that upon further reflection we think that we should not have allowed the framing of this issue as it was framed. However, having allowed not only the framing of the issue but also full arguments on it, we consider it prudent to make our views on it known.

In submitting that the impugned amendments were not carried out in good faith, learned counsel for the applicants relied on the following grounds, namely that –

- in recommending the amendments Council was motivated by an apparent perception that the Court was not cooperating with other organs of the Community;
- the amendments were carried out in extraordinary haste;
- the substance of the amendments, namely restructuring the Court into two divisions and increasing grounds for removal of judges, had no relationship with the problem or mischief the Council purported to address, namely delays of Community activities due to suspension of EALA functioning resulting from the Court's interim order;
- the way to avert the problem posed by the interim order in good faith, would have been for the Partner State concerned to concede and cause a fresh election of its representatives to EALA, without waiting for the final judgment.

Learned counsel for the respondents submitted that there was no straight simple definition of the expression "good faith", but that it connotes fairness and reasonableness. He stressed that at international law, states are assumed to act in good faith and consequently the courts are reluctant to impute bad faith on the part of a state unless it is well established by very clear evidence. In support of this proposition he quoted a passage in the arbitral award in the ***Tacna-Arica Question, In the Matter of Arbitration between the Republic of Chile and the Republic of Peru*** (UN Reports of International Arbitral Awards, 2006, Vol. II 921-958).

He argued that in the instant case, the impugned amendment process was undertaken by three Partner States acting together in the Council and the Summit, which makes it more difficult to impute bad faith on the part of

three States. He contended that even if it is assumed that one Partner State was irked by, and over reacted to the interim order that questioned the legitimacy of its choice of representatives to the EALA, the other two who were not party to the ***Anyang' Nyong'o case*** (supra) could not have been similarly affected by the interim order. He opined that apart from that order, there must have been other matters taken into consideration in deciding to amend the Treaty. He further contended that the Partner States were within their rights to consider the implications of the interim order on the functioning of the Community, so long as they abided by the Court decision as they did.

Furthermore, learned counsel submitted that neither infringement of a treaty provision *per se* nor the expeditious processing of the amendments in the instant case should be construed as acting in bad faith or as evidence thereof.

The reference in the ***Anyang' Nyong'o case*** (supra) arose from a highly politicised dispute over the determination of Kenya's nine new Members of the EALA. It is apparent that although technically the reference raised a legal issue of interpretation of the Treaty, the contesting parties viewed it in light of the political dispute and any Court decision in it, whether interim or final, was taken as a matter of victory or defeat in their political dispute. What is more, the timing of the interim order, though unavoidable, was unfortunate. It issued when the aura of that dispute was still dominant. It was literally on the eve of inauguration of the 2nd EALA when all concerned had converged on Arusha for that important event in the calendar of the Community. The order had the immediate effect of suspending the event and

thereby the functioning of the EALA. That it met hostile reception from some quarters in that environment was inevitable and not surprising.

We agree with learned counsel for the respondents that the Council was entitled and indeed under duty to consider the implications of the interim order on the activities and functioning of the Community as a whole. The inexplicable matter, however, is that after identifying the problems resulting from the suspension of EALA activities, the Council did not come up with solutions to those problems. Instead, it recommended the restructuring of the Court, as if the Court was the problem, which recommendation had no bearing on the solution of the identified problems. It is on this dichotomy that the applicant's contention that the amendments were not made in good faith, is anchored. However, though we accept that the recommendation thus appears to be without rationale that alone cannot be sufficient proof that the amendments were not made in good faith let alone that they were made in bad faith. What constitutes bad faith?

The holding by the Supreme Court of the Philippines in ***Benito Ang vs. Judge R.G. Quilala and others:*** [A.M. No. MTJ-03-1476 February 4, 2003] [http://www.supremecourt.gov.ph/jurisprudence/2003/feb2003/am_mtj_03_1476.htm] appears to be pertinent and to provide a comprehensive answer to this not so simple a question. Judge Ynars-Santiago, with whom all the other judges on the panel concurred, said –

> ***"Bad faith does not simply connote bad judgment or negligence; it imputes a dishonest purpose or some moral obliquity and conscious doing of a wrong; a breach of a sworn duty through some motive or intent or ill-will; it partakes of the nature of fraud. It contemplates a state of mind affirmatively operating***

with furtive design or some motive of self-interest or ill-will for ulterior purposes"

With regard to the difficulty of imputing bad faith on a State, we agree with the view expressed in the passage referred to us by learned counsel for the respondents from the arbitral award in the ***Tacna-Arica Question*** (supra). At p.930 of the report, the arbitrator says –

> ***"While there should be no hesitation in finding such intent or bad faith, if established, and in holding the party guilty thereof to the consequences of its action, it is plain that such a purpose should not be lightly imputed. Undoubtedly the required proof may be supplied by circumstantial evidence, but the onus probandi of such a charge should not be lighter where the honour of a Nation is involved than in a case where the reputation of an individual is concerned. A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion."*** (Emphasis is added)

In ***Barcelona Traction, Light and Power Company Limited (Belgium vs. Spain) 2nd Phase*** (1970) I.C.J. Reports, Judge Tanaka (in a Separate Opinion) at p.159 says –

> ***"Although the Belgian Government insists on the existence of bad faith on the part of the Spanish judiciary and puts forward some evidence concerning the personal relationship of Mr. Juan March and his group with some government personalities etc … we remain unconvinced of the existence of bad faith on the part of the Spanish administrative and judicial authorities. What the Belgian Government alleges for the purpose of evidencing bad faith of the Spanish judges concerned does not go very much beyond surrounding circumstances; it does not rely on objective facts constituting collusion, corruption, flagrant abuse of judicial procedure by the Spanish judiciary. ….***
> ***It is not an easy matter to prove the existence of bad faith because it is concerned with a matter belonging to the inner***

psychological process, particularly in a case concerning a decision by a State organ. Bad faith cannot be presumed."

We think the same must be said of the evidence, such as there was, in the instant case. It fell short of proving conclusively either the contention of the respondents that the impugned amendments were made in good faith or that of the applicants that the impugned amendments were made in bad faith. However, the former contention is helped by the presumption of fact that a State does not act in bad faith.

In order to rebut the presumption it was not sufficient to show that the amendments were initiated as a result of the interim order which irked officials of one Partner State, and that they were irrational because they did not address the mischief caused by the interim order. It was necessary to adduce cogent evidence leading to a compelling conclusion that all three Partner States colluded to make the amendments from such ill-motives as to intimidate or spite the Court or its judges. From the evidence as it stands, the Court has no insight on what transpired during the deliberations that led to each proposal for amendment. It is noteworthy that the only affidavit evidence adduced was from deponents who did not even claim to have had personal knowledge as participants in the deliberations that resulted into the impugned amendments. Even if the issue had been properly within the reference, therefore, the evidence would not have been sufficient to base a holding on.

Issues No.4 and No. 5

The last two framed issues were also not part of the subject matter of the reference for the Court's determination under Article 30, and we allude to them briefly only because we allowed argument on them.

The fourth issue is ***"Whether the amendments as carried out can be stopped".*** In his submission under this issue, learned counsel for the respondents, relying heavily on the decision of the High Court of Kenya in the case of ***Anyang' Nyong'o and 10 others vs. Attorney General and another,*** High Court Case No. 49 of 2007, maintained that upon the amendments being ratified by the Partner States in accordance with paragraph 6 of Article 150, they took effect and therefore became part of the Treaty. He argued that as such, they were no longer amendments and could not be reversed. According to learned counsel, the position would have been different if the reference was made prior to the ratification when the amendments had not taken effect.

With due respect, we do not find merit in this argument. The scope of Article 30 is not limited to anticipatory infringement of the Treaty. The Article envisages this Court determining the legality of an Act that has been enacted and come into force, a regulation that has been made, a directive that has been given, a decision that has been taken and an action that has been done and concluded. If upon reference of any of these the Court finds that it is an infringement of the Treaty or otherwise unlawful it has to so hold and, depending on the nature of the infringement or unlawfulness, may grant the

discretionary remedy of a declaratory judgment annulling such Act, regulation, directive, decision or action, as the case may be.

We reiterate that the last framed issue, namely ***"Whether the amendments will strengthen the Community"***, is also not part of the reference on the legality of the impugned amendments. Indeed, as it turned out during submissions by counsel, there was disagreement as to whose pleadings raised it, with counsel on either side seeking to disown it because it was not material to his case. Be that as it may, it was not seriously canvassed that the impugned amendments were unlawful or infringed the Treaty because they did not strengthen the Community or vice versa. Besides, with all due respect to learned counsel, neither party was able to show definitively to what measure and in what way the amendments strengthened or weakened the Community. In essence their submissions were in the nature of speculation. In the circumstances, we make no findings on this issue.

Conclusion

In the result, we hold that the lack of people's participation in the impugned amendment process was inconsistent with the spirit and intendment of the Treaty in general, and that in particular, it constituted infringement of principles and provisions in Articles 5(3) (g), and 7(1) (a). We also hold that the purpose for which Article 26 was amended constituted infringement of Article 38(2) of the Treaty.

Under paragraph 19 of the Reference, the applicants prayed for four separate declarations. Our said holding covers the declarations sought under sub-paragraphs (a) and (b). Under sub-paragraphs (c) and (d) they pray for –

> ***"(c) DECLARATION that the entire process of amendment of the Treaty to date is unlawful and of no legal effect;***
>
> ***(d) DECLARATION that the purported ratification processes for the said Treaty amendments employed by the*** [Partner States] ***are illegal, unconstitutional and of no legal effect".***

Earlier in this judgment, we indicated that we would disregard as abandoned, the averment in paragraph 17(c) of the reference alleging that the ratifications of the amendments were unconstitutional, illegal and of no legal effect since at the trial it was not canvassed. Accordingly we also disregard the corresponding prayer (d) as abandoned.

With regard to the prayer in (c), we have considered circumstances which appear to militate against the grant of that declaration, notwithstanding our holding. First, the text of the Treaty is not explicit on the requirement of people's involvement in its amendment. We have had to consider several provisions of the Treaty in order to come to the conclusion that the failure to involve the people in the amendment constituted an infringement of the Treaty. In view of that we deduce that the infringement was not a conscious one. Secondly, we are inclined to the view that after this clarification of the law on the matter the infringement is not likely to recur. Thirdly, while we are mindful of the gravity of infringement of Article 38(2) of the Treaty, we take note of the fact that in the instant case it had no significant effect, if any. Lastly in our view, not all the resultant amendments are incompatible

with the Treaty objectives, and those that are, which we shall revert to presently, are capable of rectification.

In the circumstances we think this is a proper case where we should invoke the doctrine of prospective annulment. As we observed in ***Callist Mwatela Case*****, (supra),** the doctrine is good law and practice. We should add that it is particularly beneficial for our stage of developing integration and the emerging Community jurisprudence. In the result we decline to invalidate the amendments and declare that our holding on the requirement of involvement of people in the Treaty amendment process shall have prospective application.

Two other specific prayers remain. We consider that in view of our findings the order prayed for in paragraph (e) is superfluous. Lastly, on costs we order that the respondents shall jointly and severally bear the applicants' costs.

Before taking leave of the reference, we are constrained to draw attention of those responsible for initiating rectification of anomalies in the Treaty, to two of the amendments whose implications may have been lost in the haste.

1. By the provisions under Articles 23, 33(2) and 34, the Treaty established the principle of overall supremacy of the Court over the interpretation and application of the Treaty, to ensure harmony and certainty. The new

(a) ***proviso to Article 27***; and

(b) ***paragraph (3) of Article 30***,

have the effect of compromising that principle and/or of contradicting the main provision. It should be appreciated that the question of what "the Treaty reserves for an institution of a Partner State" is a provision of the Treaty and a matter that ought to be determined harmoniously and with certainty. If left as amended the provisions are likely to lead to conflicting interpretations of the Treaty by the national courts of the Partner States.

2. Article 26 of the Treaty established a mechanism for the removal of judges for misconduct and inability to function as determined by an independent tribunal appointed by the Summit, obviously applying uniform standards. When read together with Article 43(2) it becomes apparent that the objective of the Treaty is for the judges of the Court to be independent of the Partner States they originate from. The introduction of automatic removal and suspension on grounds raised or established in the home State, and applicable to only those in judicial or public office, makes possibilities of applying un-uniform standards to judges of the same court endanger the integrity of the Court as a regional court. Under the original mechanism such grounds could be submitted for consideration at the Community level.

We strongly recommend that the said amendments be revisited at the earliest opportunity of reviewing the Treaty.

Lastly, we wish to commend the applicants for the vigilance they have demonstrated in trying to ensure the protection of the objectives of the Treaty. We also wish to thank all the counsel for all the parties in this reference for their industry in assisting us to come to a just decision.

DATED at Arusha this day of 2008

J. N. Mulenga
Vice – President (as I then was)

Kasanga – Mulwa
Judge (as I then was)

M.S. Arach – Amoko
Judge