

# Regional Integration: The Contribution of the Court of Justice of the East African Community

Anne Pieter van der Mei\*

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## 1. Introduction

In 2004 the Assembly of the African Union (AU) held “that the ultimate goal of the African Union is full political and economic integration leading to the United States of Africa”<sup>1</sup>. It is plain, however, that the realization of a continent-wide federal-like entity comprising more than fifty States, if feasible at all, is a long-term project that is unlikely to be completed in the near future.<sup>2</sup> The political leaders of Africa have recognized this. In 2007, at the AU summit held in Accra, Ghana, during which they engaged in ‘Grand Debate on the Union Government’,<sup>3</sup> the leaders concluded that to set the train of African integration in motion, the continental level is not the proper one to start working from. They decided that the first steps on the road to a united and integrated Africa should be taken at sub-regional level.<sup>4</sup> In other words, the political leaders left the initiative to Africa’s (sub-)

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\* Dr. jur., Lecturer, Department of International & European Law, Maastricht University, Maastricht, The Netherlands.

<sup>1</sup> Assembly/AU/Dec.90 (V).

<sup>2</sup> See further A.P. van der Mei, *The Ordeal of African Unity – Past, Present and Future*, in: A. Ott and E. Vos (eds.) *50 Years of EU Integration: Foundations and Perspectives*, The Hague 2009, forthcoming.

<sup>3</sup> See further <[www.africa-union.org/augovernment.htm](http://www.africa-union.org/augovernment.htm)>.

<sup>4</sup> In addition, the leaders decided to make an assessment of the AU’s functioning and to establish a Ministerial Committee to examine *inter alia* the competences of the AU organs, the AU’s relationship

regional communities, such as the Economic Community of West-African States (ECOWAS),<sup>5</sup> the Southern African Development Community (SADC),<sup>6</sup> the Common Market for Eastern and Southern Africa (COMESA)<sup>7</sup> and the East African Community (EAC).<sup>8</sup>

Of all the sub-regional communities<sup>9</sup>, the EAC has so far been the most active<sup>10</sup> and successful. In 1999 Kenya, Tanzania and Uganda decided to revive the 1967 EAC, which had collapsed in the late 1970s, and they set for themselves the goal to establish a “Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation”.<sup>11</sup> To pursue this ambitious agenda the three Partner States, since 2007 joined by Rwanda and Burundi, set in place an institutional structure for the EAC that seems to have been inspired by, and in many respects resembles, the supranational architecture of the European Community (EC). In less than a decade the EAC Partner States have made significant progress.

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with its Member States and the RECs, and to elaborate a road map for establishing a Union Government. See the so-called Accra Declaration, available on <[www.african-union.org](http://www.african-union.org)>.

<sup>5</sup> See further C. Gans, *Die ECOWAS: Wirtschaftsintegration in West-Afrika, Recht und Politik in Afrika*, Berlin 2006.

<sup>6</sup> See further J. Vogt, *Die regionale Integration des südlichen Afrikas: unter besonderer Betrachtung der Southern African Development Community (SADC)*, Baden-Baden 2007.

<sup>7</sup> See further R. Akombe Kwamboka, *Regional Integration and the Challenge of Economic Development: the Case of the Common Market for Eastern and Southern Africa (COMESA)*, Ann Arbor 2005.

<sup>8</sup> See further R. Ajulu, *The Making of a Region: the Revival of the East African Community*, Midrand, Institute for Global Dialogue, 2005.

<sup>9</sup> Next to ECOWAS, SADC, COMESA and the EAC, the main regional communities are the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Economic Community of Central African States (ECCAS), and the Inter-Governmental Authority on Development (IGAD). For further information on the regional communities see <[www.africa-union.org](http://www.africa-union.org)>. The basic idea is that upon successful integration at sub-regional level, the sub-regional organizations will be merged into a continent-wide entity. See further Protocol on the Relations between the AU and the RECs (ASS./AU/Dec.166(IX) juncto DOC.EX.CL/348 (XI)).

<sup>10</sup> More than a century ago already the first initiatives were taken to work towards a customs union and common market. See e.g. S. Tulya-Muhika, *Revival of the East African Co-operation and its Institutional Framework*, in: *Perspectives on Regional Integration and Cooperation in East Africa: Proceedings of the 1<sup>st</sup> Ministerial Seminar on East African Cooperation Arusha, 25-26 March 1999*, EAC Secretariat, Arusha 2000. In the early 1960s Nyerere was even willing to delay Tanganyika's independence for a year to wait for Kenya and Uganda so as to pave the way for the establishment of an East African Federation. K.P. Apuli, *Fast Tracking East African Federation: Asking the Difficult Questions*, Paper presented at a Development Network of Indigenous Voluntary Associations (DENIVA) Public Dialogue on Fast Tracking East African Federation Dialogue, Kampala, 24<sup>th</sup> November 2006, available at <[www.denica.org.ug/files/articles\\_askingthedifficultquestions.doc](http://www.denica.org.ug/files/articles_askingthedifficultquestions.doc)>. When the 1967 East African Community collapsed in 1977 no one saw this as the abandonment of the quest for East African unity. See A. Hazlewood, *The End of the East African Community: What are the Lessons for Regional Integration Schemes?*, *Journal of Common Market Studies*, 1979, 40-58. From the mid 1980s, Kenya, Tanzania and Uganda continued their cooperation and integration efforts. In 1984 they signed the East African Community Mediation Agreement, which led to the establishment in 1996 of the Tripartite Commission for East African Cooperation and subsequently to the revival of the East African Community (EAC) in 1999.

<sup>11</sup> Article 5(2) EAC Treaty.

The Customs Union is in the process of being finalized,<sup>12</sup> negotiations on a Common Market Protocol<sup>13</sup> progress significantly and initiatives have been taken to fast-track the realization of a political federation by 2013.<sup>14</sup>

While things seem to be moving in the right direction, there are also hurdles on the way to integration. One of these hurdles involves the recognition and awareness that being part of a common project and a common supranational-like entity implies a loss of sovereignty and the possibility of being bound against one's own will. Recent events demonstrate that that awareness has not fully sunk in yet among all parties involved. In November 2006 the EAC Court of Justice delivered an interim ruling in *Prof. P. Anyang' Nyong'o et al. vs Attorney General of the Republic of Kenya et al*<sup>15</sup> preventing nine Kenyan parliamentarians from being sworn in as members of the East African Legislative Assembly (EALA) on the ground that the Kenyan rules for electing members of the EALA were *prima facie* at odds with the EAC Treaty. The ruling met hostility and the Partner States responded in a manner that did not reflect great respect for the notion of an independent judiciary: they amended the EAC Treaty with a view to *inter alia* extending the grounds for removing judges from the Court of Justice! Amidst all the political turmoil, and in spite of the huge political pressure, however, the Court kept its back straight and concluded in two subsequent judgments, namely *Prof. P. Anyang' Nyong'o et al. vs Attorney General of the Republic of Kenya et al*<sup>16</sup> and *East African Law Society et al. vs The Attorney General of Kenya et al.*<sup>17</sup>, that both the Kenyan election rules and the treaty amendment infringed the EAC Treaty.

This contribution discusses the legal-political background of the judgments and analyses these. It will demonstrate that the judgments involve much more than just a power struggle between the judicial and political actors within the EAC. They also reflect a willingness of the EAC Court to firmly protect the rule of law, to guarantee individual access to justice and to review both acts of the EAC and its

<sup>12</sup> See W. Odhiambo, The East African Customs Union and its Implications, in: Ajulu, *supra* note 8, 63-75.

<sup>13</sup> For further background information and first draft protocol see East African Community Secretariat, Study on the Establishment of an East African Community Common Market – Final Report, submitted by M.A. Consulting Group, August 2007. At the latest EAC summit held in Arusha, Tanzania, the Heads of State expressed the desire to have the protocol signed in November 2009. Communiqué of the 10<sup>th</sup> Ordinary Summit of EAC Heads of State, 29<sup>th</sup> April 2009, available on <<http://www.eac.int/the-news/245-communiqué-10th-ordinary-summit-of-the-eac-heads-of-state.html>>.

<sup>14</sup> See T.N. Kibua/A. Tostensen, Fast-tracking East African Integration – Assessing the Feasibility of a Political Federation by 2010, Christel Michelsen Institute, 2005, available at <[www.cmi.no/publications](http://www.cmi.no/publications)> (discussing *inter alia* the so-called Wako-report).

<sup>15</sup> Ruling of 27 November 2006, Ref. Nr. 1 of 2006, available at <<http://www.eac.int/en/rulings.html>>.

<sup>16</sup> Judgment of 30 March 2007, Ref. Nr. 1 of 2006, available at <<http://www.eac.int/en/judgments.html>>.

<sup>17</sup> Judgment of 8 September 2008, Ref. Nr. 3 of 2007, available at <<http://www.eac.int/en/judgments.html>>.

Partner States. An autonomous East African legal order comparable to the one developed in the European Community has not yet been created. There is, however, no denying that the EAC Court of Justice draws inspiration from its European counterpart and that it views legal integration as the foundation for the overall East African integration process.

## 2. The EAC Institutional Architecture

For a proper comprehension of the two judgments and the numerous issues involved, it is useful to give a brief sketch of the institutional architecture of the EAC and the specific position occupied therein by the Court and the EALA. As noted earlier, the EAC's founding fathers have been inspired by the institutional structure of the European Community.

The EAC Treaty makes a distinction between organs and institutions. The organs are the most important and include *inter alia* the Summit, the Council, the EALA, the Court of Justice and the Secretary General.<sup>18</sup> The institutions encompass more specialized bodies such as the African Development Bank, the Lake Victoria Fisheries Organisation and the Inter-University Council of East Africa.<sup>19</sup>

The Summit, composed of the Heads of State or Government of the five Partner States, is the upper organ of the Community.<sup>20</sup> The Summit, which may be regarded as the equivalent of the European Council, is entrusted with the task of giving general directions and impetus to the development and achievement of objectives of the EAC. The Summit, which decides by consensus, may delegate the exercise of its functions to the Council or the Secretary General, to the exclusion of decisions to appoint judges to the EAC Court of Justice and the assent to bills.

The Council, which may be regarded as the cousin of the EC Council of Ministers, is composed of Ministers responsible for regional cooperation or other Ministers.<sup>21</sup> It also comprises Sectoral Councils, dealing with more specific topics. The Council, which also decides by consensus, is the policy organ of the Community and is empowered *inter alia* to make policy decisions, initiate and submit Bills to the Assembly, give directions to the Partner States and other EAC institutions/organs with the exception of the Summit, the Court and the Assembly, and to adopt (legally binding) regulations, directives and decisions.<sup>22</sup>

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<sup>18</sup> Art. 9(1) EAC.

<sup>19</sup> Art. 9(2) and (3) EAC.

<sup>20</sup> Arts 10-12 EAC.

<sup>21</sup> The members of the Council must be Ministers; the Partner States have no power to send other representatives to the Council. See the judgment of the EAC Court of Justice in *Calist Andrew Mwatela and others vs East African Community*, Application 1 of 2005, available on <<http://www.eac.int/index.php/judgments.html>>.

<sup>22</sup> The Council is assisted by the Co-ordination Committee (Arts 171-19 EAC), which may be regarded as the counterpart of the European COREPER. This Committee is composed of Permanent

The Secretariat is the executive organ of the EAC.<sup>23</sup> It is led by the Secretary General, who is appointed by the Summit, and composed of staff members who shall act independently and not seek or receive any instructions from any Partner State.<sup>24</sup> The Secretariat is responsible for initiating, receiving and submitting recommendations to the Council and forwarding Bills to the EALA, conduct research and studies, the implementation of decisions of the Summit and Council and a series of other supervisory and coordinating tasks. The Secretariat, which may be regarded as the counterpart of the European Commission, is based in Arusha, Tanzania.

The EALA is the legislative organ of the EAC.<sup>25</sup> It is composed of 27 members and a number of ex-officio members. The latter, who lack the right to vote in the EALA, are the Ministers responsible for regional cooperation of the Partner States, the Secretary General and the Counsel to the Community. EALA members hold office for a renewable term of five years and are elected by the National Assemblies.<sup>26</sup>

EAC legislation is enacted by means of Bills. Proposals for Bills can be initiated by the Council<sup>27</sup> as well as by EALA members.<sup>28</sup> Bills enter into force after having been passed by the EALA, which decides by a majority of its members, and been assented to by the Summit. The legislative procedure may thus be described as a co-decision procedure, requiring the approval of both the EALA and the Summit. Bills shall ultimately be styled as 'Acts of the Community'<sup>29</sup> and be published in the Community's *Gazette*.<sup>30</sup> The EAC Treaty seems to make a distinction between legislative measures, which take the form of a Bill or Act of the Community and are jointly adopted by the EALA and the Summit, and policy measures that take the form of regulations, directives and decisions and are adopted by the Council.

The demarcation of the powers of the EALA *vis-à-vis* those of the Council may be problematic, as became apparent in the first case ever decided by the EAC Court of Justice: *Calist Andrew Mwatela and others versus East African Community*.<sup>31</sup> In 2004 the Council, in an apparent attempt to strengthen its own position in relation to the EALA within the EAC institutional structure, decided that poli-

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Secretaries and entrusted with the task of *inter alia* implementing decisions of the Council. The Committee itself is assisted by Sectoral Committees (Arts 20-22 EAC).

<sup>23</sup> Arts. 66-73 EAC.

<sup>24</sup> Art. 72 EAC.

<sup>25</sup> Arts. 48-65 EAC. On the EALA see further P. W a n y a n d e, The Role of the East African Assembly, in: Ajulu, *supra* note 8 and A.G.R. O l o o, The EALA and the national Assemblies of Partner States: Conflict or Harmony?, in: Ajulu, *supra* note 8, 76-94.

<sup>26</sup> Art. 50 EAC.

<sup>27</sup> Art. 14(3)(b) EAC.

<sup>28</sup> Art. 59(1) EAC.

<sup>29</sup> Art. 62 EAC.

<sup>30</sup> Art. 64 EAC.

<sup>31</sup> *Calist Andrew Mwatela and others versus East African Community*, Application 1 of 2005, available on <<http://www.eac.int/index.php/judgments.html>>.

cy oriented Bills such as those having implications on the Partner States' sovereign interests and on the budgetary aspects of the Community ought to be submitted by the Council to the EALA and not by individual EALA members. The Council therefore assumed responsibility for a number of Bills and claimed that these Bills were not properly on the EALA's agenda. The Court disagreed. It observed that the Council does not have exclusive legislative initiative in the introduction of Bills in the EALA. EALA members have such initiative too and the Court opined that the Bills in question had become the "property" of the EALA and that they could only be withdrawn with permission of the EALA. Referring to Article 16 EAC, which provides in relevant part, that Council regulations, directives and decisions are binding on the other organs with the exception of *inter alia* the EALA, the Court held that the EALA is the representative organ of the Community set up to enhance a people-centred cooperation, whose independence should be preserved because the EAC Treaty has not endowed the Council with any power to interfere in the operation of the EALA.

Thus, the ruling in *Calist Andrew Mwatela and others* clearly demonstrates that the EAC is not just a classic international organization wholly controlled by the organs in which the states are represented. Rather, like the EC Treaty,<sup>32</sup> the EAC Treaty provides for an institutional structure based on separation of powers and a specific institutional balance between the various organs of the Community.

The Court itself also holds an independent position within the EAC architecture.<sup>33</sup> Composed of a maximum of six judges of "proven integrity, impartiality and independence" who are appointed and can be removed by the Summit,<sup>34</sup> the Court is entrusted with the task of ensuring the adherence to law in the interpretation and application of and compliance" with the EAC Treaty.<sup>35</sup> For this purpose, the Court holds jurisdiction in cases brought by Partner States,<sup>36</sup> the Secretary General<sup>37</sup> and legal and natural persons.<sup>38</sup> The latter may, according to Article 30 EAC Treaty,

<sup>32</sup> Case C-70/88 *European Parliament vs Council* [1990] ECRI-2041, para.26.

<sup>33</sup> On the Court see J.E. Ruhangisa, *The East African Court of Justice*, in: Ajulu, *supra* note 8, 95-110 and T.O. Ojiennda, *The East African Court of Justice in the Re-established East African Community: Institutional Structure and Function in the Integration Process*, *East African Journal of Peace & Human Rights* (2005), 220-240.

<sup>34</sup> Art. 24(1) and (4) EAC.

<sup>35</sup> Art. 23 EAC. Article 27(1) EAC provides that the Court shall "initially have jurisdiction over the interpretation and application of this Treaty". Article 27(2) opens the possibility to confer upon the Court other "original, appellate, human rights and other jurisdiction" as and when the Council so determines. In the wake of the discussion to fast-track political federation a so-called "Zero Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice" was published by the EAC Secretariat in May 2005. In this Draft Protocol the powers of the Court were extended significantly so as to confer upon the Court jurisdiction in human rights matters and to hear and determine appeals from the Partner States' courts. To the knowledge of this author, the Partner States have not yet reached agreement on the Zero Draft Protocol.

<sup>36</sup> Art. 28 EAC.

<sup>37</sup> Art. 29 EAC. This provision may be regarded as the equivalent of the infringement procedure contained in Art. 226 of the Treaty establishing the European Community. The Secretary General

“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 this treaty” (*emphasis added*).

Individuals’ access to the Court is, on the one hand, rather narrow because the acts of the Community *organs* are excluded from Article 30 EAC Treaty<sup>39</sup> and, on the other hand, broad in the sense that individuals without having to demonstrate a specific interest can directly challenge the legality of acts of the Partner States before the EAC Court of Justice.<sup>40</sup>

In addition to the Court of Justice, national courts of the Partner States are envisaged to play an important role in the East African integration process. Thus, the Treaty stipulates that, unless the Treaty provides otherwise, disputes to which the EAC is a party shall not on that ground alone be excluded from the national courts’ jurisdiction.<sup>41</sup> Furthermore, national courts *shall* in cases before them in which questions on the interpretation of application of EAC Treaty provisions or the validity of regulations, directives, decisions or actions of the Community arise request the Court of Justice to give a preliminary ruling.<sup>42</sup> Thus, a system is set in

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may, if he or she believes that a Partner State has failed to fulfill its obligation under the EAC Treaty, submit his or her findings to the Partner State concerned. That Partner must be given the possibility to respond and, in case the Secretary General still believes a Treaty infringement exists, he or she may refer the case to the Court for resolution.

<sup>38</sup> In addition, the Court holds jurisdiction in disputes between the Community and its employees (Art. 31 EAC), it is empowered to give advisory opinions (Art. 36 EAC) and it may, upon request, serve as an arbiter (Art. 32 EAC). Shortly before this contribution was finalized the EAC Court, First Division, delivered its first advisory opinion, Application No. 1, at the request of the EAC Council of Ministers. Available at <<http://www.eac.int/advisory-opinions.html>>. The Court, in brief, held that the principle of variable geometry (Art. 7 EAC Treaty), which may be compared with the EU’s provisions on Enhanced Cooperation (Art. 43 EU), is (i) in harmony with the requirement for consensus in decision-making and (ii) that consensus is not synonymous to unanimity.

<sup>39</sup> It is to be noted that this gap in protection might be partially filled. In the Draft Protocol to Operationalise Extended Jurisdiction (*supra* note 35) individuals are given the right to initiate proceedings against decisions addressed to that person, or against decisions addressed to another person or in the form of a regulation that are of direct and individual concern to him or her. (Art. 4 of the Draft Protocol) This right, however, does not seem to extend to Bills (legislative) measures adopted by the EALA and assented to by the Summit.

<sup>40</sup> In *Prof. P. Anyang’ Nyong’o et al. vs Attorney General of the Republic of Kenya et al.* the Court ruled that Article 30 EAC “confers a litigant resident in any Partner State the right of direct access to the Court for determination of the issues set out therein. We therefore, do not agree with the notion that before bringing a reference under Article 30, a litigant has to “exhaust the local remedy”. In our view there is no local remedy to exhaust”. Judgment of 30 March 2007, Ref. Nr. 1 of 2006, available at <<http://www.eac.int/en/judgments.html>>. Furthermore, in a Ruling of 12<sup>th</sup> February 2009 in *Modern Holdings (EA) Limited vs Kenya Ports Authority*, Ref. Nr.1 of 2008, in a damages case, the EAC Court denied it had jurisdiction over acts of bodies that are neither a partner State nor an institution of the EAC. Ruling available at <<http://www.eac.int/judgments.html>>.

<sup>41</sup> Art. 33(1) EAC.

<sup>42</sup> Art. 34 EAC. In the Zero Draft protocol (*supra* note 34) a distinction is made between lower courts and courts acting in last resort. The former may but the latter must refer, where necessary, a case for preliminary ruling to the Court of Justice.

place in which national courts hold jurisdiction to settle disputes concerning EAC law, but to ensure uniformity the Court, like its European counterpart, shall have the last word on the meaning to be given to EAC law.

### **3. *Prof. P. Anyang' Nyong'o et al. vs Attorney General of the Republic of Kenya et al.***

#### **3.1 Facts**

The case of *Prof. P. Anyang' Nyong'o et al. vs Attorney General of the Republic of Kenya et al.* involved the election of members of the EALA. The basic rules for these elections are laid down in Article 50 EAC Treaty, which stipulates that:

“The national Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interests groups in that Partner State, in accordance with such procedure as the national Assembly of each Partner State may determine.”

In 2001, when the first EALA was due to be constituted, the national Assembly of Kenya adopted “The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001”. These rules provided for the nomination of candidates by political parties. Nomination papers had to be submitted to the so-called House Business Committee, which considered the nominees and had to ensure that the main requirements of Article 50 EAC Treaty were met. Once satisfied that this was the case, the Committee had to table the names of the nominees before the National Assembly and such nominees were then “deemed to have been elected as members” of the EALA.

The first nine Kenyan members of the EALA were indeed elected under those rules. On 29 November 2006 their term expired and they were to be replaced by new members. The various political parties submitted lists with their nominees to the said Committee. The National Rainbow Coalition (NARC) submitted two lists of five persons each. The first was submitted by the party leader; the second by the Government Chief Whip. On 26 October 2006 the Committee resolved to consider the list by the latter, thereby impliedly rejecting the nominees suggested by the party leader. On that same day the National Assembly gave its approval to in total nine nominees, who were thus “deemed to be elected” and whose names were remitted to the EALA.

A series of individuals, among whom Prof. Anyang' Nyong'o and some of the nominees who ultimately had not been elected, decided to start legal proceedings before the EAC Court of Justice arguing that the Kenyan elections rules were at odds with Article 50 of the EAC Treaty. On 9 November 2006 they filed a reference in the Court with interlocutory application for an interim order to prevent the nine persons elected by the Kenyan Assembly from taking office as members



of the EALA on 29 November, the day at which the elected persons were planned to take oath of office.

On 27 November the Court in *Anyang' Nyong'o and others* granted the injunction reasoning that the claimants had a *prima facie* case with a probability of success and that claimants as well as the EALA and the EAC would suffer irreparable damage if it would turn out that one third of the EALA members were not legally elected.<sup>43</sup> This interim ruling, as we shall see in § 4, caused a stir in political circles. The Partner States sought to pressurize the Court by amending *inter alia* the Treaty provisions concerning the removal of EAC Court of Justice judges. The EAC Court of Justice delivered its final judgment in the case on 30 March 2007.

### 3.2 Judgment

Before the Court could address the question of whether the Kenyan rules contravened Article 50 EAC, it had to ascertain that the claimants had standing. The issue seemed rather simple since Article 30 EAC Treaty confers upon any person residing in a Partner State the right to refer a case to the Court concerning the compatibility of actions of Partner States with the EAC Treaty. Some of the respondents, however, had referred to Article 52(1) EAC Treaty, which stipulates that questions as to whether a person is an elected member of the EALA shall be determined by the national institution responsible for the elections as well as the preliminary ruling procedure of Article 34 EAC Treaty. In the respondents' view, it was thus for a national court rather than the EAC Court of Justice to answer the question on the legality of the election in question. The Court was not persuaded. It recognized that if the sole issue would concern the specific persons who were elected, it indeed had to be resolved by a national court. However, the main question *in casu* was whether the procedure adopted and followed by the Kenyan National Assembly was compatible with Article 50 EAC Treaty.<sup>44</sup>

Moving on to the compatibility of the Kenyan election rules with Article 50 EAC the Court noted a major difference between this provision and the relevant Articles of the 1967 EAC Treaty. Whereas the latter mandated the Partner States to *appoint* members of the Assembly, Article 50 of the current Treaty orders National Assemblies to *elect* such members. The Court interpreted Article 50 EAC Treaty to mean that the National Assembly of each Partner State constitutes "an electoral college" for electing representatives to the EAC Assembly and that this constitutes a "deliberate step towards establishing a legislature comprising people's representatives". As to the precise meaning of the word 'election', the Court observed that this entails more than just a choice or selection of representatives. It requires a voting procedure for choosing or selecting such representatives. In the Court's view

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<sup>43</sup> Ruling of 27 November 2006, Reference No.1 of 2006, in *Prof. Peter Anyang' Nyong'o and 10 others vs the Attorney General of the Republic of Kenya and 5 others*.

<sup>44</sup> Judgment of 30 March 2007, *supra* note 16, 14-22.

the Kenyan rules did not provide for such voting procedure. The relevant rules stipulate that a parliamentary Committee shall consider and subsequently submit the names of the nominees of the national political parties to the National Assembly. Such “nominees shall be deemed to have been elected as members of the East African Legislative Assembly in accordance with Article 50 of the Treaty”. The Court opined that the word ‘deemed’ was used in order to create the fiction that the nominees were in law elected although in reality they were not. That fiction, so the Court concluded, was created to circumvent the express requirement laid down in Article 50 EAC.<sup>45</sup>

The Court ended its judgment with a general observation concerning the need for ensuring the uniformity of EAC law:

“the lack of uniformity in the application of any Article of the Treaty is a matter for concern as it is bound to weaken the effectiveness of Community law and in turn undermine the achievement of the objectives of the Community. Under Article 126 EAC Treaty the Partner States commit themselves to take necessary steps to *inter alia* harmonize all their national laws appertaining to the Community. In our view, the case under consideration demonstrated the urgent need for such harmonization.”<sup>46</sup>

### 3.3 Comments

As noted earlier on, the holding of the EAC Court of Justice in the interim ruling of 27 November 2006 that the Kenyan election rules were *prima facie* at odds with Article 50 EAC Treaty trigger(ed) negative responses. The Court was accused of interfering in what were essentially national political matters. The Court, however, did not give to the political pressure and affirmed this conclusion in its judgment in *Prof. P. Anyang’ Nyong’o et al.* That the Court’s conclusion on this point caused commotion is not wholly incomprehensible. After all, what we have here is a relatively new international, supranational court that directly interferes in the function of national parliaments and the internal constitutional structures of the Partner States. That, however, does not imply that the responses and criticism were justified. The Court merely interpreted the EAC Treaty, which is the main task that the Partner States have entrusted upon it, and the conclusion that national Assemblies must establish procedures for the election rather than the nomination of EALA members logically follows from the text of Article 50 EAC Treaty. Thus, the Court may in fact interfere in national constitutional law, and this indeed may be something that the Partner States have to get used to. Yet, this is simply the result of the institutional structure that the Partner States themselves have put in place and of having accepted membership of a supranational organisation.

The Court’s conclusions on this point are thus in order. One must be more critical, however, as regards the Court’s final observation that there is a need to

<sup>45</sup> Judgment of 30 March 2007, *supra* note 16, 22-34.

<sup>46</sup> Judgment of 30 March 2007, *supra* note 16, 43.

harmonize the rules or procedures of the national parliaments for EALA elections. According to the Court, the lack of uniformity in the application of Treaty Articles weakens the effectiveness of Community law and undermines the achievement of the objectives of the Community. Article 126 EAC Treaty obliges the Partner States to harmonize all their national laws appertaining to the Community and the case under consideration demonstrated, according to the Court, the urgent need for such harmonization. It is hard to comprehend these observations. Firstly, Article 126 EAC does indeed impose on Partner States an obligation to “harmonize all their laws appertaining to the Community”, but this obligation is limited to legal training and certification. Election rules for EALA members do not seem to have anything to do with this. Article 126 is part of Chapter 24 of the Treaty, which is only concerned with “Legal and Judicial Affairs” and certainly cannot be understood, as the Court suggests, as a general harmonization clause aimed at achieving the Community’s objectives. Secondly, why is there at all a need to have uniform election rules in the Partner States for the EALA? Article 50 EAC Treaty merely requires national parliaments to adopt procedures for election of EALA members, but why should these be identical? In what way does such uniformity enhance the functioning of the EALA? Article 50 EAC Treaty specifically states that the national Assemblies shall determine the procedures for the elections and this suggests that they can do so in a manner they deem appropriate, provided these measures do indeed comprise elections.

#### ***4. East African Law Society and Others vs The Attorney General of Kenya and Others***

##### **4.1 Facts**

This case originated from the interim ruling of 27 November 2006 in the *Anyang’ Nyong’o* case in which the Court held that the Kenyan elections rules for the EALA were *prima facie* at odds with Article 50 EAC. As a result of this ruling, the inauguration of the second EALA had to be suspended. The ruling sparked off a flurry of hasty activity. The very next day the EAC Council of Ministers decided to recommend to the Summit to refer the matter to the Sectoral Council on Legal and Judicial Affairs to study the jurisdiction of the Court and related matters. Two days later the Summit issued a communiqué in which it directed a special Summit meeting to consider amending the EAC Treaty. On 7 December the Attorneys General of Kenya, Tanzania and Uganda considered and agreed on the amendments. The next day the Council of Ministers approved the amendments. On 9 December the EAC Secretary General submitted the proposed amendments to the Partner States, which replied positively within four days. On 14 December 2006 the Summit adopted and signed the amendments and Kenya, Uganda and Tanzania ratified the amendments in January, February and March of 2007 respectively.

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The main amendments included the following.<sup>47</sup> Firstly, the grounds for removing a judge from office would be extended to cover situations in which a judge who also holds judicial or public office in a Partner State is removed from that national office for misconduct or due to inability to perform functions for any reason or resigns from that national office following allegations of misconduct or inability to perform functions for any reason. In addition, provision was made for suspension of a judge who is under investigation for removal or is charged with such offence. These amendments quite clearly were directed at the two Kenyan judges in the EAC Court. In 2003 the two judges had been the victim of a lightning scoop on the Kenyan judiciary that saw 23 judges suspended from service on general allegations of corruption. The allegations against the judges were to be inquired into by tribunals. Subsequently, one of the two judges in the EAC Court of Justice was cleared from all allegations. The judge in question voluntarily retired from the Kenyan judiciary thereafter. The inquiry in respect to the other Kenyan judge who was on the panel of the bench in *Anyang' Nyong'o and others* had not progressed five years later. Secondly, the Court's jurisdiction was limited so as not to apply to "jurisdiction conferred by the Treaty on organs of the Partner States." Thirdly, the Court was restructured into two divisions, namely a First Instance Division and an Appellate Division. Past decisions of the Court and existing judges were deemed to be decisions and judge of the First Instance Division respectively.

The treaty amendment caused commotion and was severely criticized in legal circles. A number of law societies decided to make a reference to the EAC Court of Justice requesting it to declare that the amendments were not effectuated in accordance with Article 150 EAC Treaty, which lays down the procedure for amending the Treaty.

## 4.2 Judgment

The EAC Court of Justice delivered its judgment on 8 September 2008. Before it could address the core question of whether the amendment of the Treaty effectuated in December 2006 was lawful, the Court had to establish whether the claimants had standing or, in the Court's own words, "whether the reference was properly before it". Respondents claimed that the claimants lacked the capacity to bring the case before the Court.

Firstly, under international law the making, and thus also the amending, of treaties would be a sovereign function of states; private parties would have no role to play and no right to challenge the execution of that function. The Court was not persuaded. It simply observed that Article 150 EAC Treaty lays down a specified procedure for amending the treaty and that the Partner States lack the power to amend the treaty in any other way. The question of whether that procedure has been obeyed *in casu* is justifiable and cannot be barred on the ground of the sover-

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<sup>47</sup> As summarized in Judgment of 8 September 2008, *supra* note 17, 4-5.

eignty of the Partner States.<sup>48</sup> This conclusion was supported by Article 30 of the EAC Treaty, which confers upon “any person who is a resident in a Partner State” the right to 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 acts are unlawful. In the Court’s view, Article 30 was deliberately included to ensure that “East Africans for whose benefit the Community was established participate in protecting the integrity of the Treaty”. It would be a negation of that deliberate intent to conclude that private parties, such as the claimants *in casu*, have no capacity to bring a reference challenging a sovereign function of the Partner States. Finally, the Court held that the mere fact that Article 30 EAC Treaty does not refer to acts of organs of the Community does not imply the inadmissibility of the case. What was at issue was the totality of the amendment process, which can only be done by the Partner States acting together through the organs of the Community.<sup>49</sup>

The Court then proceeded with the question of whether the process of amendment infringed Article 150 EAC Treaty. This Article stipulates that Partner States and the Council may submit proposals for amendment of the Treaty to the Secretary General, who shall within 30 days, communicate these proposals to the Partner States (paras.2 and 3). The latter are given 90 days to comment on the proposals (para.4). After expiration of this 90 days period, the Secretary General shall submit the proposals and the received comments to the Summit through the Council (para.5). The Summit may adopt the amendment, which will enter into force when ratified by all Member States (para.6).<sup>50</sup>

The Court referred to Article 7 EAC Treaty, which stipulates that one of the principles governing the practical achievement of the EAC objectives is “people-centered and market-driven co-operation”.<sup>51</sup> The Court took notice of the fact that the proposal to fast-track political federation and the Protocol on the Customs Union had been preceded by consultations and that there are still on-going consultations on the “Zero Draft Protocol to Operationalise Extended Jurisdiction” and

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<sup>48</sup> Judgment of 8 September 2008, *supra* note 17, 12-13.

<sup>49</sup> *Ibid.*, 13-16.

<sup>50</sup> Claimants opined that the 90 days period had not been observed and submitted that this was prescribed for the purpose of allowing wide consultation on any proposed amendment so as to maintain the whole Treaty as people-centered. Respondents opposed and argued that Article 150 EAC Treaty does not provide for mandatory or any consultation. It would be absurd if the Secretary General after having received comments of all Partner States had to await the actual expiration of the 90 days period. The Court agreed with the latter interpretation of Article 150 EAC Treaty. Paragraph 5 of that Article neither expressly nor impliedly requires the Secretary General to carry out consultations, nor does it expressly or impliedly require the Secretary General to hold the proposed amendments and comments thereon received from the Member States until expiration of 90 days. The correct construction, the Court held, must be that Article 150(5) EAC Treaty directs the Secretary General to submit them to the Summit not later than the expiry of that period. *Ibid.*, 21-25.

<sup>51</sup> According to the EAC Treaty’s preamble, one of reasons why the 1967 EAC collapsed in 1977 concerned “the lack of strong participation of the private sector and civil society in the cooperation activities”. Because of this the EAC Treaty now includes the principle of “people-centered” cooperation. Art. 7(1)(a) EAC.

the Common Market Protocol. These consultations reflected, according to the Court, agreement among the Partner States that the people-centered co-operation is also applicable to the Treaty amendment process. Citing Article 31 of the Vienna Convention, which states that in the interpretation of treaties account shall be taken of *inter alia* “any subsequent practice in the application of the treaty”, the Court took 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. The Court opined that this interpretation gives full meaning to the context of the Treaty. 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.”<sup>52</sup>

The Court further considered whether the specific manner in which the treaty was amended was in violation of Articles 8(1)(c) and 38(2) of the EAC Treaty. The former provision provides that the Partner States shall abstain from any measures likely to jeopardize achievement of the objectives of the Treaty; the latter provision stipulates that where a dispute has been referred to the Court, Partner States shall refrain from any action which might be detrimental to the resolution of the dispute or aggravate it. The applicant societies had argued that the decision to amend the Treaty was a reaction to the Court’s interim order of 27 November 2006 in *Anyang’ Nyong’o* and that the proposal to extend the grounds for removal of judges from the Court was calculated to intimidate the judges and was thus likely to be detrimental to the resolution of the dispute. The Court agreed with the claimants. Referring to the specific situation of the two Kenyan judges of the Court and the fact that the amendment entitled the Summit to remove from the Court or suspend him for reasons related to his functioning or being investigated as national judge, the Court held that this amendment was designed to suit the circumstances of the two Kenyan judges. The Court considered that the amendment was capable of unduly influencing the judgment in *Anyang’ Nyong’o* and thereby detrimental to the resolution of the dispute.<sup>53</sup>

The Court thus concluded that the lack of peoples’ participation in the impugned amendment process was inconsistent with the spirit and intendment of the Treaty in general, and the amendment of the provision on the grounds for removing or suspending judges infringed Article 38(2) EAC Treaty. Notably, however, the Court refused to declare, as claimants had requested, that the entire process of amendment of the Treaty was of no legal effect. The Court saw four reasons for not invalidating the amendments in question. Firstly, as regards the requirement of people’s involvement the Court held that this infringement was not a conscious one because the text of the Treaty does not explicitly state its requirement. Second-

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<sup>52</sup> Judgment of 8 September 2008, *supra* note 17, 30.

<sup>53</sup> *Ibid.*, 31-34.

ly, the Court was inclined to the view that a similar infringement is not likely to recur. Thirdly, the Court took note of the fact that in the instant case the violation of Article 38(2) had no significant effect, if any. Lastly, in the Court's view, not all amendments are incompatible with the Treaty objectives, and those that are, are capable of rectification. In those circumstances the Court thought this was a proper case for invoking the doctrine of prospective annulment. Therefore, the Court refused to invalidate the amendments and declared that its holding on the requirement of involvement of people in the Treaty amendment process shall have prospective application.<sup>54</sup>

The Court concluded its judgment with some additional remarks. Firstly, the Court opined that the amendment limiting the Court's jurisdiction so as not to apply to "jurisdiction conferred by the Treaty on organs of Partner States" runs the risk of undermining the "overall supremacy of the Court over the interpretation and application of the Treaty". If left as amended, the provisions in question would be likely to lead to conflicting interpretations of the Treaty by the national courts of the Partner States.<sup>55</sup>

Secondly, the Court referred to Article 26 of the Treaty, which established a mechanism for the removal of judges for misconduct and inability to function. The Court opined that the Treaty aims at guaranteeing that judges of the Court are 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, might 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. The Court strongly recommended that the said amendments be revisited at the earliest opportunity of reviewing the Treaty.<sup>56</sup>

## 4.3 Comments

### 4.3.1 The Legality of the Treaty Amendment

Especially because of the reasons for the amendment and the political circumstances in which it was pushed through in December 2006 one may be sympathetic to the Court's conclusion and agree that the Treaty indeed should not be construed so as to allow "sporadic amendments at the whims of officials". Nonetheless, the Court's conclusion on this point is not beyond the reach of criticism. As the Court itself admitted, Article 150 EAC Treaty does not expressly prescribe direct involvement or consultation of citizens in the treaty amendment process. Using the principle of "people-centered cooperation" and referring to the fact that on previ-

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<sup>54</sup> Ibid., 42-44.

<sup>55</sup> Ibid., 44-45.

<sup>56</sup> Ibid., 45.

ous occasions the citizens had been consulted, however, the Court reads into Article 150 EAC Treaty a legal requirement to always involve the people in the process of amending the EAC Treaty. The Court justifies this by referring to Article 31 of the Vienna Convention, which states that in the interpretation of a treaty account shall be taken of any subsequent practice in the application of the treaty “that establishes the agreement of the parties regarding its interpretation.” Yet, does the mere fact that the protocols on the customs union and fast-tracking political federation were preceded by consultations reflect an agreement among the Partner States that they are *legally obliged* to *always* do so? Or does this merely reflect agreement that the Partner States should consult the people as a matter of *courtesy* or wise policy? The latter is more likely to be true. The Partner States also held consultations on the EAC Treaty itself, but the omission of any reference to consultations in Article 150 EAC Treaty suggests that they saw peoples’ involvement primarily as a matter of sound policy aimed at increasing the legitimacy of the treaty adoption process rather than as a legally binding duty. Further, there are no other indications that the decisions to ask the opinion of the people and civil society on subsequent protocols were taken because the Treaty so required.

In essence, what the Court did was to transform a policy rule into a constitutional one. The Court acted as a judicial activist, which read into the EAC Treaty a legal duty that was not there before. In fact, by legally prescribing citizens’ involvement the Court itself amended the treaty amendment procedure. It is submitted that there was no need for such a questionable constitutional move. The core problem in *East African Law Society and others* concerned the reasons why the Partner States decided to amend the treaty and the manner in which they, in this specific case, made use of the procedure laid down in Article 150 EAC Treaty. The problem did not lay in the procedure itself. Because of this it would have been better if the Court had based its legal condemnation of the December 2006 amendment solely on Article 38 EAC Treaty, which orders the Partner States to refrain from any action that might be detrimental to the resolution of cases pending before the Court. There was no need to include Article 150 EAC Treaty to resolve the case in question and to alter the amendment procedure. By nonetheless doing so and rather creatively using the principle of people-centered cooperation, the Court reached the limits of its own interpretative powers.

#### 4.3.2 Prospective Annulment

From a political perspective the Court’s application of the doctrine of prospective annulment was not entirely incomprehensible. If it had annulled the entire amendment with retroactive effect, and thus forced the Partner States to commence the amendment procedure all over again, the Court might have triggered much antagonism and thereby would probably have undermined its own legitimacy.

From a legal perspective, however, some question-marks can be placed behind the Court’s refusal. The doctrine of prospective annulment basically means that the



Court's ruling shall not have retrospective effect. The Court first applied this doctrine in *Calist Mwatela and others vs East African Community*, to which the Court expressly refers in *East African Law Society and others*. In *Calist Mwatela* the Court held that the decision of the Council of Ministers in 2001 to establish a Sectoral Council on Legal and Judicial Affairs violated the EAC Treaty on the ground that the Council was not exclusively composed of Ministers, as the Treaty prescribes.<sup>57</sup> The establishment of the Sectoral Council was thus inconsistent with the EAC Treaty, but the Court refused to annul the decision with retroactive effect. In support of this holding the Court in *Calist Mwatela* referred to various rulings of other courts, among which one of the EC Court of Justice: *Defrenne*.<sup>58</sup> Judgments of the latter court in principle have retroactive effect, but the European Court has reserved for itself to limit the effects of judgments in time if retroactive application would be at odds with the principle of legal certainty.<sup>59</sup> Retroactive annulment of the decision to establish the Sectoral Council in *Calist Mwatela* indeed would have caused legal uncertainty because, as the Court observed, that Sectoral Council had since its establishment adopted a series of decisions, which, if retroactively deprived of legal effect, would have caused legal confusion. One could question, however, whether an annulment of the treaty amendment with retroactive effect in *East African Law Society and others* would cause much uncertainty. Annulment of the division of the Court itself in two divisions would not have caused such confusion and the same holds true for the amendment of the rules on removing judges of the Court.

In fact, the decision of the Court in *East African Law Society and others* to apply the doctrine of prospective annulment, and thus not to declare void the Treaty amendment of December 2006, is likely to cause legal uncertainty. Consider the following: Article 150 EAC Treaty provides that any amendment of the Treaty shall enter into force when ratified by all the Partner States. The last Partner State that ratified the amendment in question, namely Tanzania, did so on 19 March 2007. This would seem to imply that the amendment entered into force on that date, which is 11 days before the Court delivered its ruling in *Anyang' Nyong'o and others*. The amendments entail *inter alia* the division of the Court in a First Instance Division and an Appellate Division. Thus, on the date of the ruling in *Anyang' Nyong'o* the Court was acting as the First Instance Division, even though the Court nowhere states so. The ruling can thus be appealed before the Appellate Division. If an appeal indeed would be lodged, this is deemed to be successful. Another amendment, which thus still holds legal effect, concerns the limitation of the Court's jurisdiction so as not to apply to "jurisdiction conferred by the Treaty on organs of Partners State". In adopting its elections rules, the Kenyan National Assembly was, as the Court literally stated in *Anyang' Nyong'o and others*, exercising "a discretionary power conferred on it by the Treaty". In other words, on the date

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<sup>57</sup> Art. 14(3)(i) EAC.

<sup>58</sup> Case 43/75 *Defrenne* [1976] ECR 455.

<sup>59</sup> See e.g. Case 24/86 *Blaizot* [1988] ECR 379 and Case C-209/03 *Bidar* [2005] ECR I-2119.

this judgment was delivered the Court lacked jurisdiction to rule upon the legality of the Kenyan election rules. The Appellate Division, if asked to do so, thus would seem to have no other choice than to overrule the ruling of 30 March 2007 on the ground of lack of competence. In other words, as a result of the Court's refusal to annul the Treaty amendment (retroactively) the entire ruling in *Anyang' Nyong'o and others* might turn out to be an empty legal shell.

## 5. The Relationship between EAC Law and National Law: Towards an Autonomous East African Legal Order?

### 5.1 *Anyang' Nyong'o and others* and the Relationship between EAC Law and National Law

In addition to the points discussed in the previous two sections, the EAC Court of Justice addressed some more general legal issues concerning the effect of EAC law. In doing so the Court drew inspiration from the case law of the European Court of Justice. Illustrative is the following closing observation of the EAC Court in *Anyang' Nyong'o and others*:

“When the Partner States entered into the treaty, they embarked on the proverbial journey of thousands of miles which of necessity starts with one step. To reach the desired destination they have to ensure that every subsequent step is directed towards that destination and not backwards or away from that destination. There are bound to be hurdles on the way. One such hurdle is balancing individual state sovereignty with integration. While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs in limited areas to enable them to play their role”.

EU lawyers will be quick to notice the resemblance with the European Court's famous observation in *Van Gend and Loos* that

“the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.”<sup>60</sup>

That the EAC Court indeed seeks guidance from its European counterpart became clear when it addressed in *Anyang' Nyong'o and others* the relationship between EAC law and national law and, more specifically, the question of what the legal implications were of the conclusion that the Kenyan rules breached Article 50 EAC. In the proceedings before the Court it was argued that this conclusion rendered the Kenyan election rules null and void. The Court struggled with the issue.

It first referred to Article 33(2) EAC, which provides that decisions of the Court shall have precedence over decisions of national courts. The Court observed, however, that this treaty provision merely governs the hierarchical relationship be-

<sup>60</sup> Case 21/63 *Gend en Loos* [1963] ECR 1.

tween its own judgments and those of national courts and that the Treaty does not contain a comparable clear-cut solution for the more general situation where a Treaty provision or Community rule conflicts with a national rule.<sup>61</sup> The Court then cited as authorities on this subject the rulings of the European Court in the cases of *van Gend en Loos*,<sup>62</sup> *Costa*<sup>63</sup> and *Simmenthal*<sup>64</sup>, to make the point that where there is a conflict between Community law and national law, the former is given primacy in order for it to be applied uniformly and effectively. For purposes of illustration, the Court also referred to the rulings of the European Court in the *Factortame* cases,<sup>65</sup> in which this Court held that a UK rule, according to which courts could not issue an injunction against the Crown, undermined the full effectiveness of Community law and thus had to be disapplied.

One, or at least EU lawyers, might perhaps have expected that the reference to the European judgments would have incited the Court in *Anyang' Nyong'o and others* to make some general statements about the relationship between EAC law and national law and the specific legal implications for national rules that breach EAC law.<sup>66</sup> This, however, the Court did not do. Rather disappointingly, all the above merely led the Court to affirm the substantive conclusion that the Kenyan elections rules infringed Article 50 EAC.<sup>67</sup> Thus, while the Court clearly drew inspiration from its European counterpart, it did not go as far as to actually lay the foundations for an autonomous East African legal order or to formally declare the primacy of EAC law over the law of the Partner States. The conclusion that the Kenyan rules infringed Article 50 EAC read in conjunction with the above cited general observations concerning the ceding of sovereignty do suggest the supremacy of EAC law, but the Court did not expressly state so.

Whatever the precise view of the Court on the general issue of the relationship between EAC law and national law is, the judgment does not leave room for any interpretation other than that the Kenyan rules reviewed *in casu* cannot be applied. This is already a step forward. The EAC Partner States, or at least the three origi-

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<sup>61</sup> Judgment of 30 March 2007, *supra* note 16, 41.

<sup>62</sup> Case 21/63 [1963] ECR 1.

<sup>63</sup> Case 6/64 [1964] ECR 585.

<sup>64</sup> Case 106/77 [1978] ECR 629.

<sup>65</sup> Case C-213/89 [1990] ECR I-2433.

<sup>66</sup> The Court also sought the possible solution in the basic principle of international law, embodied in Article 27 of the Vienna Convention on the Law of Treaties, which stipulates that a "State party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". This reference to Article 27 was unpersuasive. That provision merely implies that national internal rules cannot save a breach of international treaty. Article 27 lays down a rule for determining whether or not there is a breach, but it does not say anything about the manner in which a state has to repair that breach. More in general, international treaty law merely requires states to obey treaty obligations but leaves it up to them how they wish to do so or, in case of a breach, how to rectify the illegality. Thus, international treaty law does not prescribe how states should regulate application of international norms in their national legal orders or how national courts should handle cases involving conflicts with international law. Judgment of 30 March 2007, *supra* note 16, 41-42.

<sup>67</sup> Judgment of 30 March 2007, *supra* note 16, 43.

nal ones, have inherited from the UK the doctrine of parliamentary supremacy, which implies that Acts of Parliament are unchallengeable in court and are upheld even if they contravene national constitutions.<sup>68</sup> The ruling in *Anyang' Nyong'o and others* would seem to imply a limitation of this doctrine. Albeit merely for “purpose of illustration”, the Court did rely on *Factortame* in which the European Court held that British principle of parliamentary sovereignty that did not allow for interim orders against the Crown had to be abandoned in so far as this was necessary to ensure the full effectiveness of EC law. So, whatever the precise implications of *Anyang' Nyong'o* may be, the judgment does suggest that EAC law may have quite far-reaching implications for national legal orders of the EAC Partner States and the position of the organs acting therein.

## 5.2 Towards an Autonomous East African Legal Order?

The question that arises is whether the EAC Court of Justice in future cases will continue to be inspired by EC law and whether it will move in a similar direction. On the one hand, much can be said for this. The driving force behind the European Court's reasoning concerned the conviction that successful market integration requires enforcement of rights conferred upon traders, companies and individuals. For such enforcement to be effective, it cannot be left only to the Member States or the European Commission, who might be unwilling or incapable to ensure full compliance with Community law in all cases. To ensure the effectiveness of the common market rules and rights, the holders of these rights themselves ought to have the right of enforcement. That logic extends to the EAC and thus, from a legal-substantive perspective, much can be said for it that the EAC Court of Justice would adopt a reasoning similar to the one of the EC Court of Justice.

One cannot be certain though. The EAC Partner States have set in place a court that qua institutional design and powers may mimic the European Court, but this is not to say that the EAC Court of Justice will operate in a similar manner. And even if the EAC Court indeed were to think of delivering East African equivalents of *Van Gend en Loos* and *Costa* there is no guarantee that the autonomy and primacy of EAC law will reach as far as or work as effectively as in the EC. The experiences of the Andean Tribunal of Justice (ATJ) are illustrative. This Court too constitutes an institutional clone of the EC Court and it has emulated ECJ doctrines, rendering Andean law directly effective and supreme to national law.<sup>69</sup> It has, however, limited the reach of these doctrines to the field of intellectual prop-

<sup>68</sup> Ojienda, *supra* note 33, at 232-233.

<sup>69</sup> K. Alter/L. Helfer, Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice, available on <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1424423](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424423)>, at p. 17. For a more general comparison between the integration processes in the EC and the Andean Community see A. Malamud/P. Schmitter, The Experience of European Integration and the Potential for Integration in South America, Working Paper available on <<http://ssrn.com/abstract=965798>>.

erty and refused to be comparably expansionist in other fields.<sup>70</sup> More in general, research on the functioning of international courts suggests that not all such courts are expansionist lawmakers that wish to expand their own authority and act as a motor of regional integration. Whether or not they will be willing and/or be able to assume such a role, and to take a firm stance *vis-à-vis* political institutions and Member States, depends on a variety of factors including composition and institutional design, legal traditions (monism versus dualism, civil law versus common law), access of private litigants and compulsory jurisdiction,<sup>71</sup> judicial independence,<sup>72</sup> political stability, the possibility of international courts being corrected or overruled by political institutions or Member States<sup>73</sup> and the degree to which international courts are supported by national actors among which in particular national courts.<sup>74</sup> The impact of these various factors may vary from region to region, from time to time and thus from court to court, thus making concrete predictions as to how a given court will act and rule particularly difficult, if not virtually impossible.

Thus, the East African Court may have the potential of evolving into a legally and politically powerful body, but there is no certainty that it will follow the footsteps of the European Court and be able to successfully shape an autonomous East African legal order. A regional court may say that the law it interprets has direct effect and is the supreme law of the region, but it has no control over the actual implementation of such doctrines. That is a task first and foremost of national courts. While the issue has proved far from uncontroversial or easy,<sup>75</sup> national courts in the EC have generally been willing to effectuate the direct effect and supremacy of EC law. This may be explained, at least partly, by the fact that in doing so they were backed by actors like the European Commission, academics and political activists as well as the fact that national courts occupied a *de iure* and *de facto* independent position in their national constitutional structures, as a result of

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<sup>70</sup> It has even been suggested that the Andean Tribunal's reluctance to rule against Member States has contributed to the stagnation of the Andean integration process. O. Saldias, *Supranational Courts as Engines of Disintegration – The Case of the Andean Community*, Berlin Working Paper on European Integration No.5, available at <<http://ssrn.com/abstract=1092797>>.

<sup>71</sup> K. Alter, *Private Litigants and the New International Courts*, 35 *Comparative Political Studies* (2006), 33-63.

<sup>72</sup> E. Posner/J. Yoo, *Judicial Independence in International Tribunals*, 93 *California Law Review* (2005), 1-74.

<sup>73</sup> G. Garret et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 *International Organization* (1998), 149-176.

<sup>74</sup> See further Alter/Helfer, *supra* note 69 and K. Alter, *The European Court's Political Power*, Oxford 2009, in particular Chapter 13.

<sup>75</sup> The European experiences show that most national courts are willing to follow the European Court in practice, but that they have not accepted the normative foundation for their subordination. National supreme courts, or their equivalents, continue to read the acceptance of the supremacy of EC law into their national constitutions rather than the EC Treaty, reserving for themselves the constitutional right not to follow the European Court in case this court would oblige them to apply European rules or national rules adopted in furtherance of EC obligations that contradict their national constitutions. See further D. Chalmers, *European Union Law*, Cambridge 2006, 196-209.

which ruling against governments was not an unusual thing for them to do.<sup>76</sup> Thus, the European Court could plant the seeds of direct effect and supremacy in quite fertile ground making their unique flourishing possible. Does such fertile ground exist in the EAC Partner States? Law societies and the like may encourage national courts to adhere to and implement the doctrine under consideration, but there are no strong indications that the EC Secretariat and national courts are equally supportive. As the 2003 lighting scoop on the Kenyan judiciary suggests, national courts in EAC Partner States have to operate in a rather unstable political setting. Often they are not free from political pressure, discouraging them from ruling against governments. Thus, much less than the European Court, the EAC Court can be sure that national courts will actually implement its judgments and holdings. Moreover, as the responses to the November 2006 interim ruling in *Anyang' Nyong'o and others* demonstrate, the EAC Court itself faces the problem that the Partner States and perhaps the political EAC institutions like the Summit and the Council, do not hesitate to take measures to reverse, correct or minimize its judgments or rulings. The two judgments described in this contribution may show that the EAC intends to secure its own independent position with the EAC architecture, but it is plain that the bold political responses to the said interim ruling might act as a brake on the Court's willingness to deliver in forthcoming years expansionist ruling advancing the integration process. One factor that seems to have enabled the European Court to develop a progressive jurisprudence imposing sometimes far-reaching limitations on the Member States powers consists of the fact that the EC political institutions and Member States were institutionally unable to reverse the Court's judgments by either adopting legislative measures or amending the Treaty.<sup>77</sup> Because of the divergent interests and views of the Member States the unanimity or consensus required for effectuating measures correcting ECJ judgments often could not be reached. The same requirement applies in the EAC, but, as described, this is much less a hurdle for adopting such measures than in the EC.

All in all, the EAC Court does possess the legal tools to make an active contribution to the East African integration process and, as this contribution has shown, the Court is willing to use these so as to ensure that process proceeds within the limits of the rule of law. Yet, there are reasons to doubt as to whether judicial integration and an own autonomous East African legal order can be materialized in an equally successful manner as in the EC.

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<sup>76</sup> In fact, the European doctrines of direct effect and supremacy seemed to have served the interests of national courts as they enabled them to further strengthen their own position. See J. Weiler, *A Quiet Revolution – The European Court of Justice and its Interlocutors*, 26(4) *Comparative Political Studies* (1994), 510-534.

<sup>77</sup> K. Alter, *Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 *International Organization* (1998), 121-147, at 135-140; G. Garret et al., *supra* note 73 and F. Scharf, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, 66 *Public Administration* (1988), 239-278.

## 6. Conclusion

Upon reading the two judgments discussed in this contribution, any lawyer or person valuing the rule of law must respect the political-constitutional stance taken by the EAC Court of Justice. When the EAC Partner States decided to revive the EAC, they included many provisions in the Treaty reflecting a willingness to respect and adhere to the rule of law, the need for peoples' involvement in the functioning of the newly established organization and to opt for a peaceful, judicial resolution of conflicts that may arise within the framework of the Treaty. Even though the great role of the EAC Summit in appointing and removing judges of the EAC Court of Justice already suggested some hesitation to fully accept the rule of law and the independent role of the Court, there is no denying that the Partner States did accept judicial review of, or restraints on, the exercise of legislative or political power. The Partner States did recognize that for the EAC integration process to be successful the rule of law ought to prevail over power politics. The events described in § 4.1, however, demonstrate that commitments accepted on treaty paper do not necessarily imply a willingness to transform such commitment into practical reality. The hostile response to the interim order of the Court of 27 November 2006 and the speed with which the Partner States agreed to amend the Treaty revealed an apparent conviction that the last word on East African integration should not be for courts but for politics. The events of December 2006 constituted disrespect for the previously accepted commitment to the rule of law. Therefore, anyone valuing the rule of law must welcome the courage of the EAC Court of Justice and willingness to protect the rule of law. Furthermore, the rulings in *Anyang' Nyong'o and others* and *East African Law Society and others* demonstrate that the EAC Court of Justice is inspired by the revolutionary case law of the EC Court of Justice. The rulings suggest that the EAC Court recognizes the potential advantages of the European notions of the autonomy and primacy of Community law. Whether it will actually follow the footsteps of the European Court remains to be seen. Much can be said for this, but as the events described in this contribution have shown, the road to supranationalism is likely to be a bumpy one covered with numerous legal, political and other hurdles to overcome.

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