IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION AT BUJUMBURA

(Coram: Geoffrey Kiryabwire, VP; Sauda Mjasiri and Anita Mugeni, JJA.)

APPEAL NO. 01 OF 2O2O

BETWEEN

THE EAST AFRICAN CIVIL SOCIETY ORGANIZATIONS' FORUM

(EACSOF)...................................... ....APPELLANT

AND

THE ATTORNEY GENERAL OF THE REPUBLIC BURUNDI...1st RESPONDENT

COMMISSION ELECTORALE NATIONALE

INDEPENDANTE...... .... 2nd RESPONDENT

THE SECRETARY GENERAL OF THE EAST AFRICAN

COMMUNITY...3rd RESPONDENT

(Appeal from the Judgement of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica K. Mugenyi (Principal Judge), Hon. Dr Faustin Ntezilyayo (Deputy Principal Judge), Hon. Justice Fakihi A. R. Jundu (Judge), Hon. Justice Dr. Charles Nyawello (Judge) and Hon. Justice Charles Nyachae (Judge) dated 3rd December 2019 in Reference No. 2 of 2015).

JUDGMENT OF THE COURT

INTRODUCTION

1. This is an Appeal from the decision of the First Instance Division of this Court (hereinafter referred to as the "Trial Court") arising out of Reference No. 2 of 2019 dated 3rd December, 2020. The Trial Court dismissed the Reference and held that each party bear its own costs.

2. The Appellant, the East African Civil Society Organizations' Forum filed a Reference against the Attorney General of the Republic of Burundi in his capacity as the legal representative of the Republic of Burundi; the second Respondent, the *Commission Electorale Nationale Independante* of the Republic of Burundi and the third Respondent, the Secretary General of the East African Community, before the Trial Court following the decision of the Constitutional Court of the Republic of Burundi (hereinafter the Constitutional Court") in Case No RCCB 303 on 5th May, 2015 (hereinafter referred to as the "RCCB 303").

3. The Appellant filed Reference No. 2 of 2015 in the Trial Court on 6th July, 2015. The Reference was dismissed by the Trial Court on 29th September 2016. The Appellant then filed Appeal No. 4 of 2016, **the East African Civil Society Organizations' Forum vs the Attorney General of Burundi and Two Others,** to the Appellate Division (this Court). The Appeal was allowed on 24th May, 2018, and this Court made an order for Reference No. 2 of 2015 to be remitted to the Trial Court in order for the Reference to be heard on merits. The Trial Court

dismissed the Reference (now on merits) on 3rd December, 2019, hence the appeal to this Court. As this Court did not object to the striking out of the second Respondent as a party and ruled that the third Respondent was improperly joined in the Reference, the appeal proceeded against the first Respondent only.

4. It is the Appellant's case that the impugned decision of the Constitutional Court violated the letter and spirit of the Arusha Peace Accord and Reconciliation Agreement for Burundi 2000 (hereinafter referred to as "the Arusha Accord") and in particular Article 7(3) of Protocol II to the Arusha Accord and the Constitution of Burundi. By reason of the aforesaid breach of the Arusha Accord and the Burundi Constitution the impugned decision also violated Articles 5(3) (f), 6(d), 7(2), 8(1) (a) and (c) and 8(5) of the Treaty for the Establishment of the East African Community (hereinafter referred to as the "EAC Treaty").

5. The Appellant was represented by Mr. Donald Omondi Deya, Mr. Nelson Ndeki and Ms Esther Muigai Mnaro, Advocates and the Respondent was represented by Mr. Diomede Vyzigiro, State Counsel.

BACKGROUND

6. On 28th April, 2015, fourteen Senators of the Burundi Senate filed a Motion dated 17th April, 2015 in the Constitutional Court seeking interpretation of Articles 96 and 302 of the Arusha Accord as to whether the President of Burundi, Mr. Pierre Nkurunziza who had been been previously elected President of the Republic of Burundi twice, was

eligible to run in the forthcoming elections in the Republic of Burundi. On 5th May, 2015, the Constitutional Court held that Mr. Pierre Nkurunziza was eligible to run for Presidency for the third term.

7. At the Trial Court the Appellant sought the following Declarations and Orders:-

(a) A Declaration that the Decision of the Constitutional Court of the Republic of Burundi in case No. RCCB 303 delivered on 5th May 2015 violated the letter and spirit of the Arusha Peace and Reconciliation Agreement for Burundi 2000 (the Arusha Accord) and in particular Article 7(3) of Protocol II to the Arusha Accord and the Constitution of Burundi;

(b) A Declaration that by reason of the aforesaid breach of the Arusha Accord, the Decision of the Constitutional Court of the Republic of Burundi in case No. RCCB 303 delivered on 5th May 2015 equally violates Articles 5(3) (f), 6(d), 7(2), 8 (1) (a) and (c) and 8(5) of the Treaty;

(c) A Declaration that the decision of the CNDD-FDD political party to nominate and put forward the incumbent President of Burundi as a candidate for election to the Office of the Presidency in the Republic of Burundi in 2015 violates the Arusha Accord aforesaid and is unlawful; A Declaration that any decrees, decision or orders of 2nd Respondent or the CENI of the Republic of Burundi for the purpose of organizing or supervising Presidential elections in which the above named may be considered a candidate for the office of the President of Burundi are and shall be considered incompatible with the Arusha Accord and the Constitution of Burundi and therefore, unlawful.

(d) An Order to quash and set aside the decision of the Constitutional Court of the Republic of Burundi in Case No RCCB 303 delivered on 5th May, 2015;

(e) An order directing the Secretary General of the EAC (third Respondent) to constitute and give immediate effect to the judgment of this Honourable Court in Reference No. 1 of 2014 and to advise the Summit of Heads of State and Government of the East African Community (EAC) on whether the Republic of Burundi should be suspended or expelled from the East African Community under Articles 29, 67, 71, 143, 146 and 147 of the Treaty.

(f) An order directing the 1st and 3rd Respondents to appear and file before this Court not later than 14 days from the date of the present decision a progress report on remedial mechanisms and steps taken towards the implementation of the Orders issued by this Honourable Court; and

(g) An order that the costs of and incidental to this Reference be met by the Respondents.

FINDINGS BY THE TRIAL COURT

8. Two issues were considered by the Trial Court. These were similar issues which were agreed upon by the parties and approved by the Court in this appeal that is :-

1. *Whether the First Instance Division erred in law in finding that the impugned decision of the Constitutional Court of Burundi was not in violation of Articles 5(3)(f); 6(d); 7(2); 8(1) (a) and (c) and 8 (5) of the East African Community Treaty.*

2. *Whether the parties are entitled to remedies sought.*

9. The Trial Court found the First issue in the negative. According to the judgment no plausible reason was found to fault the decision, the judicial reasoning of the Constitutional Court of the Republic of Burundi or the result. According to the Trial Court, the Constitutional Court clearly applied its mind to the background of the Constitution's promulgation, duly acknowledged and tested the Arusha Accord against related foundational laws such as the Electoral Code and took due cognizance of the political situation that prevailed in Burundi at the time. The impugned decision would not invoke State Responsibility given that the decision of the Constitutional Court was neither an outrageous judicial act nor did it warrant the intervention of the Respondent State to address a non-existent judicial outrage. The Court's international judicial review mandate was improperly invoked and the Court declined the invitation to improperly exercise that mandate. The principle in **B. E. Chattin (USA) vs United Mexican State** (1927), UNRIAA VOL 1V 282 at p 288. The Trial Court was of the view that due cognizance of the fundamental role of apex domestic courts in the development of municipal jurisprudence, cannot and should not be usurped by an international court or tribunal. Its mandate did not extend to the interrogation of decisions of other Courts in a judicial manner such as being prayed for in **Reference No. 2** (supra). The Trial Court also struck out the second Respondent from the proceedings. The Court also held that there was no plausible reason why the third Respondent was enjoined in the proceedings.

10. In relation to issue No. 2 on the remedies sought, the First Instance Division held that the remedies were untenable given that this Reference was improperly before the Court and was accordingly dismissed. The First Instance Division was of the view that even though under Rule 111(1) costs follow the event, as the Reference raised issues of public interest, it was ordered that each party bear its own costs.

11. This decision resulted in Appeal No. 4 of 2016, **The East African Civil Society Organization's Forum** (supra) where this Court ordered the same to be remitted to the Trial Court to hear the Appeal on merit.

THE APPEAL

12. The Appellant raised five (5) Grounds of Appeal in its Memorandum of Appeal namely:-

1. *That the Honourable learned judges of the First Instance Division of the Court erred in law by partially stripping themselves of jurisdiction and limiting its jurisdiction to a supervisory role.*

2. *That the Honourable learned Judges of the First Instance Division of the Court erred in law in finding that that the impugned decision of the Constitutional Court of Burundi in case No. RCCB 303 delivered on 5th May 2015 was not in violation of Articles 5(3) (f) , 6(d) , 8(1) (a) and (c) and 8(5) of the Treaty.*

3. *That the Honourable learned Judges of the First Instance Division of the Court erred in law and procedure by excusing the acts of the impugned decision by holding that it was passed with the proper application of the Constitution and the Arusha Accord.*

4. *That the Honourable learned Judges of the First Instance Division of the Court erred in law and in fact in finding that the impugned decision did not fall within the ambits of the conditions set in* ***B.E. Chattin (USA) v United Mexican State****, 1927, UNRIAA, IV, P. 282 at page 288.*

5. *That the Honourable learned Judges of the First Instance Division of the Court erred in law by holding that the International judicial review mandate is improperly invoked in the Reference.*

13. The Appellant also prayed that the Court grant the following orders:-

1. *The Appellate Division of the East African Court of Justice (EACJ) reverses the whole decision made on 3rd December, 2019.*

2. *That the Orders as prayed for in the Reference be granted.*

3. *That this Appeal be allowed with costs in favour of the Appellant in the Appellate Division and in the First Instance Division.*

4. *An Order that the costs of and incidental to the Appeal be met by the Respondents.*

5. *That this Honourable Court may be pleased to make such further or other orders as may be just, necessary or expedient in the circumstances.*

ISSUES FOR DETERMINATION

14. The following issues were agreed upon by the parties and approved by the Court during the scheduling conference which was held on 12th October, 2020.

1. ***Whether the First Instance Division erred in law in finding that the impugned decision of the Constitutional Court of Burundi was not in violation of Articles 5(3)(f); 6(d); 7(2); 8(1) (a) and (c) and 8 (5) of the East African Community Treaty.***
2. ***Whether the parties are entitled to remedies sought.***

PARTIES' SUBMISSIONS AND ARGUMENTS

ISSUE NO. 1 WHETHER THE FIRST INSTANCE DIVISION ERRED IN LAW IN FINDING THAT THE IMPUGNED DECISION OF THE CONSTITUTIONAL COURT OF BURUNDI WAS NOT IN VIOLATION OF ARTICLES 5(3)(F); 6(D); 7(2); 8(1) (A) AND (C) AND 8 (5) OF THE EAST AFRICAN COMMUNITY TREATY

APPELLANT'S SUBMISSIONS AND ARGUMENTS

15. In relation to issue No.1 the Appellant submitted that the Trial Court erred in law in finding that the impugned decision of th Constitutional Court of Burundi was not in violation of Articles 5(3)(f); 6(d); 7(2); 8(1)(a) and (c) and 8(5) of the East African Community Treaty (the Treaty).

16. It was further argued that the Trial Court also erred in law in finding that the impugned decision of the Constitutional Court of Burundi was not a violation of a proper application of the Constitution and the Arusha Accord.

17. According to the Appellant the fact that the Arusha Accord was domesticated gave it further legitimacy and legality but did not change its status as an International Agreement.

18. Counsel argued that in Paragraph 45 of the Judgment of the Trial Court, it was held that an international court is restricted to an interrogation of a domestic decision's adherence to domestic law only to the extent that such compliance would underscore the domestic court's compliance with the responsible state's international law obligations. However, Counsel for the Appellant stated that this Court has primacy in interpreting the Treaty. According to Counsel the jurisprudence of this Court is that any violation of national laws by any of the organs of the Partner States amount to the violation of the Rule of law principles in terms of Articles 6(d) and 7(2) of the EAC Treaty. The same applies to the violation of any provision of the EAC Treaty or other Community legal instruments.

19. The Appellant made reference to the case of **Manariyo Desire v The Attorney General of Burundi,** Appeal No. 1 of 2017, where the Court defined the principle of the Rule of Law as follows:-

> *"The principle of governance [according to which] all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well measures to ensure adherence to the principles of supremacy of the law, accountability to the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.*

20. According to the Appellant the Respondent by violating its own laws through the impugned decision of the Constitutional Court violated the principle of the Rule of Law and at least one of its aspects, the principle of the supremacy of the law, as understood by this Court.

21. Article 96 of the Burundi Constitution provides as follows:-

> *"The President of the Republic shall be elected by direct universal suffrage for a term of five years renewable once."*

Article 302 of the Constitution provides as follows:-

"Exceptionally, the first President for post-transition period shall be elected by the National Assembly and the Senate sitting in Congress, with a majority of two-thirds of the members.

If this majority is not obtained on the first two ballots, it ***immediately proceeds with other ballots until a candidate obtains votes of two-thirds of the members of Parliament.***

In the case of vacancy of the first President of the Republic of the post-transition period, his successor is elected according to the *same modalities specified in the preceding paragraph.*

The President elected for the first post-transition period may not dissolve Parliament."

22. Counsel for the Appellant submitted that while he is in agreement with the Constitutional Court that Article 96 is very clear and does not raise any issues of interpretation, it deals with two issues namely, the term of the President (Head of State) and the mode of election of the President. However he disagrees with the Constitutional Court's findings as far as Article 302 is concerned. According to him the expression **"exceptionally"** used in Article 302 is not ambiguous on the intention of the framers of the Constitution. The findings of the Constitutional Court is wrong. The intention of the framers of the Constitution is to be found in the legal instruments that

inspired the drafting of the Constitution and the Arusha Accord is the right legal instrument.

23. Counsel for the Appellant argued that this legal position is clearly acknowledged by the Constitutional Court which stated thus:-

> *"In order to understand the spirit of the Constitution, it is useful to first, understand the document which mostly inspired the drafters of the 2005 Constitution, and that it would give special attention to the Agreement as a genuine, unavoidable and indispensable document from which the inspiration was drawn by the Burundian Constitutional drafters".*

24. Counsel submitted that the Constitutional Court acknowledged that the Arusha Accord was the *"Constitution's bedrock"* and that whoever violated the main constitutional principles of the Arusha Accord could not claim to respect the Burundian Constitution. However, the Constitutional Court then failed to apply the right intention of the negotiators of the Arusha Accord.

25. It was further argued that, the Constitutional Court stated that the vagueness of the word "exceptionally" under Article 302 appears to be independent of Article 96 of the same Constitution thereby creating a completely exceptional and special mandate which is unrelated to Article 96.

26. It is contended for the Appellant that the Constitutional Court, in its ruling, concluded that Article 302 should be understood as limiting the number of terms of office of the President to those where he / she is elected by direct universal suffrage, thereby **creating an exceptional and special term of office different from that** provided for in Article 96.

27. According to the Appellant, the Constitutional Court failed to apply the right intention of the negotiators of the Arusha Accord to the interpretation of the Constitution contrary to the requirements set out under the case of **Unity Dow v Attorney General**, 1992 Court of Appeal of Botswana. It was held as follows:-

> *"The first task of a Court when called upon to construe any of the provisions of the Constitution is to have a sober objective appraisal of the general canvass upon which the details of the constitutional picture are painted. It will be doing violence of the Constitution to take a particular provision and interpret it in a way which will destroy or mutilate the whole basis of the Constitution when by a different construction the beauty, cohesion, integrity and healthy development of the State through the Constitution will be maintained".*

28. The Appellant also relied on the case of **Economic Freedom Fighters vs**

Speaker of the National Assembly and Others; Democratic Alliance vs

Speaker of the National Assembly and Others [2016] ZACC 11, where it
was held that:-

> *"Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried conscientiously, we have a recipe for constitutional crisis of great magnitude. In a state predicated on a desire to maintain the rule of law, it is imperative that that one and all should be driven by moral obligation to ensure that continued survival of our democracy.*

29. It is the position of the Appellant, that The Honourable Judges of the Trial Court erred in law by finding that that the impugned decision of the Burundi Constitutional Court does not fall within the ambit of the conditions laid down in **B.E. Chattin (USA) vs United Mexican State** (1927), UNRIAA VOL 1V 282 at 288. According to the Trial Court, State parties can only be held responsible for the most outrageous judicial acts that depict outrage, bad faith, wilful dereliction of judicial duty and manifestly insufficient government action. However, the Appellant submitted that the impugned decision was an outrageous judicial decision depicting willful dereliction of judicial duty.

30. The Appellant contended that the Trial Court's conclusion that the decision of the Constitutional Court of Burundi was not in violation

of the Treaty was reached by partially stripping the First Instance Court of jurisdiction and limiting its jurisdiction to a supervisory role. However according to Article 23 of the Treaty read together with Article 27 of the Treaty, the Court is vested with the jurisdiction to interpret acts and decisions of a partner state in order to make a determination as to whether or not they are in line with the Treaty.

31. The Appellant argued that an International Court that has been recognized by State Parties by ratification of the enabling treaties, has jurisdiction to determine whether or not the decisions and acts of a State Party including judicial decisions are in line with the international obligations as provided for in the treaties. The Appellant made reference to Article 1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts which provides that *"internationally wrongful act of a State entails the international responsibility of that State".* The Appellant stated further that Article 4 of the Draft Articles of the Responsibility of States for Internationally Wrongful Acts further provides that, *"conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever the position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State".*

32. According to the Counsel for the Appellant this principle was explored further in the case of **Salvador Commercial Company,** UNRIAA Vol. XV p. 455 at page 477 where the Tribunal held that:-

"A State is responsible for the acts of its rulers, whether they belong to the legislative, executive or judicial department of the Government, so far as the acts are done in their official capacity".

It is therefore a well-established Rule of International law that the conduct of an organ of the State is regarded as the act of the State.

33. The Appellant also relied on the case of **Nobert Zongo and Others v Burkina Faso**, Application No. 013 of 2011, the African Court on Human and Peoples' Rights (the African Court) found the Respondent had violated Article 7 of **the African Charter on Human and Peoples' Rights because the police and judicial authorities at the national level had not acted with due diligence in seeking out, prosecuting and placing on trial those responsible for the** murder of **Norbert Zongo** and his three companions.

34. The Appellant also made reference to the case of **Wilfred Onyango Nganyi and Others v the United Republic of Tanzania,** Application No 6 of 2013 where the African Court found the Respondent State in violation of Article 7(1)(d) of the African Charter which guaranteed the right to be tried within a reasonable time relying on the case of **Cuscani v United Kingdom** (Application No. 32771/96 ECtHR, where it was held that the trial judge is the ultimate guardian of fairness and a more proactive attitude is expected of him.

Counsel also made reference to the case of **Henry Kyarimpa v Attorney General of Uganda,** Appeal No. 6 of 2014 EACJ, where it was held that,

> *"...In short, in adjudging an impugned state action as being internationally wrongful, this Court ask itself the question whether it is in conformity with the Treaty. Where the complaint is that the action was inconsistent with international law and on that basis a breach of a Partner State's obligation under the Treaty to observe the Principle of the Rule of Law, it is the Courts inescapable duty to consider the internal law of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty".*

35. In **Henry Kyarimpa** (supra) the Court also made reference to the decision in ICJ case of **Electronnica Sicula S.P.A. (Elsi)** ICJ Reports 1989 p.15 where it was held that:-

> *"Compliance with Municipal Law and compliance with provisions of the Treaty are different questions. A breach of Treaty may be lawful in the Municipal Law and what is lawful under the Municipal Law may be a wholly innocent violation of the Treaty".*

36. Counsel for the Appellant also relied on the case of **Baranzira Raphael and Another v Attorney General of Burundi**, Reference No. 15 of 2018 where the First Instance Division held that, the decision of the Constitutional court of Burundi notwithstanding, where there are matters of Treaty interpretation the First Instance Division had

jurisdiction to entertain the Reference. The Court has jurisdiction to determine whether a decision and/or omission of any judicial organ is a violation of an International legal instrument such as the EAC Treaty. The Court has done so in a number of occasions.

RESPONDENT'S SUBMISSIONS AND ARGUMENTS

37. According to Counsel for the Respondent the appeal is a pure abuse of the process of the Court.

38. In relation to issue No. 1 the Respondent submitted that there is no evidence provided indicating how the Trial Court erred in law by finding that the impugned decision of the Constitutional Court of Burundi was not in violation of Articles 5(3) (f); 6(d); 7(2); 8(1) (a) and (c) and 8(5) of the East African Community Treaty.

39. According to the Counsel for the Respondent **RCCB Case No. 303** (supra) was decided by a Court having jurisdiction under Article 228 of Constitution of Burundi which gives powers to the Constitutional Court to interpret the Constitution on the request of the President of the National Assembly or on the request of the President of the Senate, or on the request of one quarter of the Members of the National Assembly or on the request of one quarter of the Members of the Senate.

40. In relation to the **RCCB Case No. 303** (supra), Counsel for the Respondent submitted that the Constitutional Court had been moved

by a request made by fourteen (14) Members of the Senate that is composed by less than thirty (30) Members to provide an appropriate interpretation of Articles 96 and 302 of the Constitution in order to determine whether or not the late President Pierre Nkurunziza was eligible for another term of five (5) years taking into consideration that in 2005 he was not elected through direct universal suffrage as was done in 2010.

41. Counsel for the Respondent stated that the Constitutional Court of Burundi had jurisdiction to interpret Articles 96 and 302 of the Constitution without breaching any national law. The said Court established that the Arusha Accord had been integrated in the 2005 Burundian Constitution and Article 96 of the Constitution complied with point 1(a) and 3 of the 2nd Protocol of the Arusha Accord, point 1 (a) being the establishment of the principle for democratic elections.

42. Counsel argued that, Articles 7(1)(a) and 3 of the 2nd Protocol of the Arusha Accord and Article 96 of the 2005 Burundian Constitution provide for direct universal suffrage for a term of five (5) years renewable once.

43. He further argued that, Article 302 of the 2005 Burundi Constitution on its part provides for an exceptional and special term for a President who is not elected through a direct universal suffrage but who is elected by the National Assembly and the Senate sitting in Congress with a majority of two thirds of the Members. This exceptional term created by the legislators differs from the terms

provided under Article 7 (1) and 3 of the 2nd Protocol of the Arusha Accord and cannot in any way be confounded.

44. Counsel for the Respondent submitted that the intention of the legislators is provided under the Burundian Constitution and not otherwise.

45. According to the Respondent, had the legislators intended to include the term created under Article 302 of the 2005 Burundian Constitution to the terms created under Article 96, they would have created a second part to Article 96 that is related to Executive powers under Part V of the Constitution.

46. It was further argued that, the legislators placed Article 302 under Part XV which is related to an exceptional and special term that followed immediately after the post transition period. This differs with what is provided under Article 96 of the Constitution.

47. Counsel for the Respondent stated further that the democratic principle is covered under point 1 (a) of Article 7. However, point 1(c) relates to election of the post transition.

48. In response to the Appellant's written submissions contained in paragraphs 1-24 of the Appellants submissions, the Respondent states that the intention of the legislature is as provided under the 2005 Burundian Constitution which creates an exceptional and special term of the President of the Republic who has not been elected through

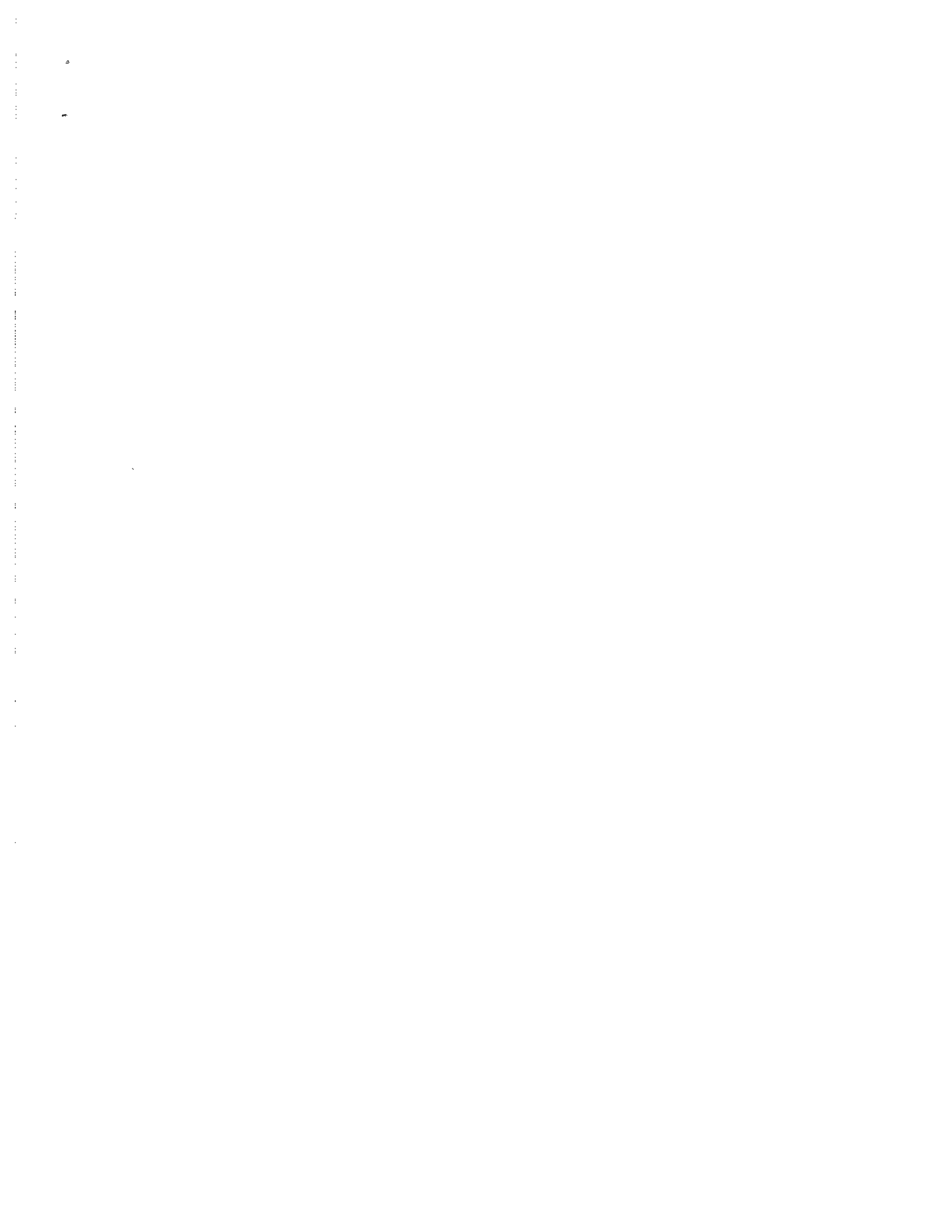
universal suffrage as provided under Article 7 (1) (a) of the Arusha Agreement for peace and reconciliation by referring to Article 20 related to the transitional arrangements.

49. In relation to the Appellant's arguments in paragraphs 25-30 of the Appellants written submissions, Counsel for the Respondent stated that no evidence was tendered before the First Instance Division nor the Appellate Division to fault the decision of the Constitutional Court of Burundi.

50. Counsel further stated that the Constitutional Court of Burundi in **RCCB Case No. 303** (supra) gave the right interpretation of the Burundian Constitution in the light of the Arusha Agreement. According to the said Court the Arusha Agreement for peace and negotiation is the bedrock of the 2005 Burundian Constitution.

51. It was argued before us that, special arrangements were made under Chapter II of the 2nd Protocol of the Arusha Agreement for Peace and Reconciliation during the transition period. The negotiators included as an exceptional term the election of the President by the National Assembly and the Senate. Two terms of the President were limited to the election of the President through direct universal suffrage.

52. It was further argued that, according to the Respondent the Arusha Agreement for Peace and Reconcilation had five Protocols:- (i) The nature of the Conflict; (ii) Democracy and Good governance (Constitutional and Transitional arrangements); (iii) Questions of



Peace and Security (Defence and Security Force Reform and Permanent ceasefire); (iv) Reconstruction and Development (Economic Matters); (v) Guarantees on implementation of the Agreement.

53. Counsel submitted that the 2nd Protocol on Democracy and Good Governance had two main chapters, Constitutional Principles of the post transition Constitution (Chapter 1) and the Transitional arrangements (Chapter II). The negotiators put all the Constitutional Principles of the post transitional Constitution including matters relating to the election of the President of the Republic in Chapter 1.

54. He further submitted that the interpretation of the Burundi Constitution should take into account the whole structure of the Arusha Agreement and not one Article read out of context. The Appellant's intention is to isolate point 3 of the second Protocol out of context of the negotiators who specifically created an exceptional and special term of a President not elected in a direct universal suffrage in the post transitional arrangements.

55. Counsel for the Respondent strongly submitted that, the decision of the Constitutional Court of Burundi was not an outrageous decision.

56. He further argued that the Trial Court did not err in law in finding that the impugned decision did not fall within the ambits of **B. E Chattin USA v United Mexican State** (supra).

ISSUE NO. 2 WHETHER THE PARTIES ARE ENTITLED TO THE REMEDIES SOUGHT

SUBMISSIONS BY THE APPELLANT

57. Counsel for the Appellant submitted that, under Rule 120 of the Court Rules 2019 the Court can do the following:-

> *"The Court may in dealing with any appeal confirm, reverse or vary the judgment of the First Instance Division or remit the proceedings to it with such directions as may be appropriate or order a new trial where it is manifest that a miscarriage of justice has occurred and to make any incidental or consequential orders including orders as to costs".*

58. He further argued that, guided by the maxim of *pacta sunt servanda* under Article 26 of the Vienna Convention on the Law of Treaties 1980 that all Treaties are binding and should be performed in good faith the Respondent ought to have complied with the EAC Treaty.

59. Counsel for the Appellant submitted that under International law an International Court has jurisdiction to determine whether or not a decision of any organ of a State Party, including a judicial decision is in accordance with that State's international obligations as set out in the various Treaties that the State in question has verified. No exception is provided in international law (both case law as well as customary law).

60. The Appellant seeks the following orders from the Appellate Division of the East African Court of Justice:-

(a) The whole decision of the First Instance Division be reversed.

(b) The orders as prayed for in the Reference be granted.

(c) That the Appeal be allowed with costs in favour of the Appellant in
the Appellate Division and the First Instance Division.

(d) An Order that the costs of and incidental to this Reference be met
by the Respondent.

SUBMISSIONS BY THE RESPONDENT

61. Counsel for the Respondent submitted that, the Appellant is not entitled to any remedies prayed for in the Reference as all the remedies sought are unfounded and cannot be granted. That the Appellant has also demonstrated many times that there are sufficient reasons to regard their appeal as an abuse of the process of the Court.

62. It was further argued that, the Appellant is not entitled to any costs as this appeal brought by the Appellant is an abuse of the process of the court. Furthermore, the Appellant's appeal is brought under no specific ground or on any ground under Rule 86 of the EACJ Court Rules, 2019. The Appellant has therefore engaged unnecessary procedures which caused the Respondent to incur unnecessary costs.

63. Counsel submitted that in view of the provisions of Rule 127(1) of the Court Rules it is well established that costs follow the event unless the Court for good reasons otherwise order. However, in this matter no good reasons have been established by the Appellant.

64. The Respondent therefore prayed that the Appeal should be dismissed with costs to the Respondent.

COURT'S DETERMINATION

65. In relation to issue No. 1, ***Whether the First Instance Division erred in law in finding that the impugned decision of the Constitutional Court of Burundi was not in violation of Articles 5(3)(f); 6(d); 7(2); 8(1) (a) and (c) and 8 (5) of the East African Community Treaty*** the Court considered the rival submissions of the parties, authorities cited and the law.

66. In the case of **Alcon International vs Standard Chartered Bank of Uganda and 2 Others,** Appeal No. 3 of 2013, the Court held that:-

> *"this Court is an international Court and exercises jurisdiction like any other international Court in accordance with international law. The issue of jurisdiction revolves as to whether the Court had jurisdiction ratione materiae to annul and/ or review the decision of the Constitutional Court of Burundi within the meaning of Rule 24(3) of the Rules of this Court. Jurisdiction ratione materiae is concerned with the power of the Court to*

entertain and decide on the subject matter of the complaint before it".

64. In the case of **East African Civil Society Organisations' Forum** (supra) this Court considered at length its role as an International Court when considering the violation of the provisions of the EAC Community Treaty. The Court held thus:-

> *"Pursuant to the EAC Treaty, Partner States have undertaken to abide by and carry out the obligations as provided therein. This at international law creates state responsibility to each and every Partner State that is attributable to them. It is the duty of this Court under Article 23(1) of the EAC Treaty to "ensure the adherence to law in the interpretation and application and compliance with this Treaty."*

65. It is the Appellant's case that the Partner State of Burundi by reason

of the impugned decision of the Constitutional Court is in violation of Articles 5(3) (f), 6(d), 7(2), 8(1) (a) and (c) and 8(5) of the EAC Treaty and the Arusha Accord (which is an international agreement which has been domesticated under Burundian law (No. 1/07 of 1st December, 2000) and that this violation should be attributable to the said Partner State by this Court through its mandate to ensure adherence to the law through the interpretation and application of the EAC Treaty.

66. This case raised the question as to what is the responsibility of the States for internationally wrongful acts committed by its judicial organs, as alleged by the Appellant, to have occurred in the impugned decision.

What is the role and status of this Court in the East African Community?

67. In the case of **Attorney General vs African Network for Animal Welfare** [EACJ Appeal No. 3 of 2011] it was held as follows:-

> *"The Partner States have freely and voluntarily bound themselves in the Treaty to observe a variety of express undertakings and obligations based on common objectives and principles. The Treaty therefore is an international agreement. In furtherance of this agreement by the Partner States, Article 23 (1) establishes the Court and provides that it shall be a judicial body which shall ensure the adherence to the law in the interpretation and application of and compliance with the Treaty."*

68. Appellant was not only challenging the impugned Supreme Court Judgement's inconsistency with the internal laws and the Constitution of Burundi *per se,* but rather, faulted the Respondent State for non-compliance with its international obligations under the Treaty.

69. The Rule of Law principle is enshrined in Articles 6(d) and 7(2) of the Treaty. The definition of the Rule of Law principle is encapsulated in a **Report of the (UN) Secretary General on the Rule of Law and Transitional Justice in conflict and post conflict**

societies [UN Docs/2004/616 92004] and was rendered in the following words:-

> *"It refers to the principle of governance to which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of the supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency".*

70. We entirely agree with the above formulation of the concept and principles of the rule of law.

71. In the **Henry Kyarimpa** case (supra) this Court held that the law of state responsibility is well articulated in the **International Law Commission 's (ILC) Draft Articles on responsibility of States, 2001** which was held to be a codification of customary international law. Draft Article 2 provides as follows:-

> *"There is an internationally wrongful act of a State when a conduct consisting of an action or omission constitutes a breach of an international law obligation of the State."*

72. It is very clear from this provision that International Law does not differentiate between wrongful acts of different organs or institutions of the State.

73. The governing principle is that of **undifferentiated attribution of State**

Action. It matters not whether it is executive, legislative, or judicial act or omission which is complained of.

74. The act or omission need only be wrongful to engender international responsibility of the State. **There is no general requirement that it should be shown to have been outrageous, done in bad faith or with wilful neglect, or to be a blatant miscarriage of justice.** What was required to engender international responsibility of the State was a finding that the impugned decision was inconsistent with Burundi's International Obligation under Articles 6(d) and 7(2) as read with the Protocol.

75. The International Law Commission (ILC) commentary on **the Responsibility of States for Internationally Wrongful Acts** (November 2001 hereinafter referred to as the "ILC Commentary") provides as follows:-

Article 1

"Every internationally wrongful act of a State entails the international responsibility of that State".

76. The principle of State Responsibility entails that the State takes responsibility for any wrongful act of that State.

The **ILC Commentary** when dealing with the conduct of an organ of a State provides as follows in Article 4.

> *"The conduct of any State* organ *shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government territory unit of the State".*

77. It follows as the night follows day that a State under International law, assumes international responsibility for the wrongful acts of the judicial organ of that State.

78. This Court in the case of **East African Civil Society Forum** (supra) made reference to various publications on International law on the elements of State Responsibility. For example, the book on **International Law,** 4th Edition (edited by Malcom D. Evans Oxford University Press) at page 452 the elements of State Responsibility are set out as under:-

> *"An internationally wrongful act presupposes that there is conduct consisting of an action or omission, that:-*

(a) Is attributable to a State under international law; and

(b) Constitutes a breach of the international obligations of the State.

In principle, the fulfilment of these conditions is a sufficient basis for international responsibility, as has been consistently affirmed by international courts and tribunals".

79. In the book **The European Union and its Court of Justice** by Anthony Arnull 2nd Edition, Oxford Publishers (p. 313) it is stated that:-

> *"the principle of State liability for the acts and omissions of supreme courts can be acknowledged as a general principle of Community law".*

80. Therefore, State liability for domestic courts at international law is quite wide as it covers both acts and omissions.

81. In the case of **East African Civil Society Forum** (supra) this Court found as follows on page 30 of the Judgment:-

> *"European Community Law in many ways is similar to the position in the East African Community, as the EAC Treaty has been domesticated in all Partner States. The effect of this type of domestication in the EU was discussed in the European Court of Justice (hereinafter referred to as the "ECJ) case of* ***Flaminio Costa vs Enel*** *6/64 [1964] where it was held that:-*
>
> *"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which on entry into force of the Treaty became an integral part of the legal systems of Member States and which their courts are bound to apply".*

82. **In the case of Gerhard Kobler v Republik Osterreich** [2003] ECR 1-10239 the European Court of Justice held that the principle of

State liability would also apply to violations of EU law by national courts of final appeal. In making the said finding the ECJ dismissed arguments against the said application by reason of state liability to the conduct of the courts of last instance based on principles like legal certainty, *res judicata,* the independence and authority of the judiciary (see the book **EU LAW** Text, Cases and Materials 5th edition (Paul Craig, Oxford Publishers p. 245).

83. This Court has taken a similar position in interpreting domestic laws and constitutions. In the case of **Henry Kyarimpa vs Attorney General of Uganda, EACJ** Appeal No. 6 of 2014 it was held as follows:-

> *"When the Court has to consider whether particular actions of a Partner State are unlawful and contravene the Principle of the Rule of Law under the Treaty, the Court has jurisdiction, and, indeed a duty to consider internal laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty. The Court does not and should not abide the determination of the import of such internal law by the National Courts".*

84. The Court stated further that:-

> *"A declaration of violation, or infringement of, or inconsistency of any action of a Member State with a Treaty violation is not a discretionary remedy. It is a command of the Treaty".*

85. See also the case of **Burundi Journalists Union** (supra) where the Trial Court held that:-

"With tremendous respect to the Respondent, what is before this Court is not a question whether the Press Law meets the constitutional muster under the Constitution of the Republic of Burundi but whether it meets the expectations of Article 6(d) and 7(2) of the Treaty and whether they were violated in the enactment of the Press Law is a matter squarely within the ambit of the Court's jurisdiction".

86. A similar position was taken in the **Baranzira Raphael** case (supra). Therefore, in the light of the above mentioned decisions, it is evident that the Court has jurisdiction to interrogate matters of Treaty interpretation notwithstanding domestic law. Therefore, the legal position taken by the EACJ is similar to that of ECJ.

87. The African Court in applying the **African Charter on Human and Peoples** Rights has also held that the decisions made by the national Courts are attributable to the State concerned and may engage its international responsibility. See for instance **Lohe Issa Konate** and **Nobert Zongo** (supra).

88. In looking at this case, it is not disputed that the Arusha Accord which inter alia was guaranteed by all EAC Partner States was an international agreement which was later domesticated under Burundian law No. 01/17of 1st December 2000. The Arusha Accord therefore had the status of both an international agreement and a municipal law. On 1st March 2005, the people of Burundi adopted a

new constitution and in the Preamble thereto they confirmed their faith in the said Arusha Accord.

89. The Trial Court found that where an action complained of is alleged to be inconsistent with municipal law and, to that extent, a breach of a Partner State's Treaty obligation to observe the rule of law, it is the Court's inescapable duty to consider the internal law of such a Partner States in its determination as to whether the action complained of amounts to a Treaty violation. The Trial Court made reference to the decision of the Appellate Court in the case of the **East African Civil Society Organisations' Forum** (supra) and **Henry Kyarimpa vs Attorney General of Uganda** (supra)

90. While the Trial Court appreciated the position as propagated in the **East African Civil Society Organisations' Forum** (supra) to interrogate the decision of the Constitutional Court of Burundi to determine the Partner State's international responsibility as well as to evaluate every act and omission made in respect of that decision so as to deduce its compliance with EAC Treaty (or lack of it) the Trial Court decided to turn to other international decisions for direction as to the burden and standard of proof applicable. The Trial Court relied on the principle advanced in the case of **B. E. Chattin** (supra) where State responsibility for wrongful judicial acts was limited to *'**judicial acts** showing outrage, bad faith, wilful neglect of duty, or manifestly insufficient governmental action'*, and **Ida Robinson Smith Putnam** *'where only a clear and notorious injustice, visible to put thus at a mere glance'* could allow setting aside a national decision.

91. The Trial Court held as follows in paragraph 43 of its judgment:-

> *"that a judicial decision of a domestic court would only give rise to a cause of action, first where it is established on the face of the record as depicting outrage, bad faith and wilful dereliction of judicial duty; and secondly, where no or manifestly insufficient action has been taken by an appropriate judicial disciplinary body to redress such judicial outrage. We so hold."*

92. We find that the decisions in **B. E. Chattin and Ida Robinson** are no longer expressive of modern international law.

93. In the case of **East African Civil Society Organisations' Forum** (supra) this Court held thus:-

> *"...The Trial Court is not expected to review the impugned decision as is the case under Article 35(3) and Rule 72(2) of the Rules of this Court looking for new evidence or some mistake, fraud or error apparent on the face of the record. The Trial Court will however have to sift through the impugned decision and evaluate critically with a view of testing its compliance with the EAC Treaty and then make a determination. In so making the said determination, the Trial Court does not quash the impugned decision as if it were a court exercising judicial review powers as known in the municipal laws of the Partner States, but rather makes declarations as to the decision's compliance with the EAC Treaty".*

94. The Reference before the Trial Court therefore was not and should not be seen to have been a further appeal from the decision of the Constitutional Court of Burundi. It was a Reference on the Republic of Burundi's international responsibility under international law and the EAC Treaty attributable to it by reason of an action of one of its organs namely the Constitutional Court of Burundi. The Trial Court had a duty to determine this international responsibility and in so doing, it had a further duty to consider the internal laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty.

95. The interrogation of a decision of a State Organ, like a domestic Court to determine the international Responsibility of a State, goes beyond having regard to the due process before that said domestic court and extends to every act and omission it may make.

96. In not carrying out this duty, we find that the Trial Court disavowed itself of the jurisdiction to determine whether or not the impugned decision of the Constitutional Court of Burundi was in violation of Articles 5(3) (f), 6(d), 7(2), 8(1) (a) and (c) and 8(5) of the EAC Treaty.

97. After a careful consideration of the rival submissions of the parties we are of the considered view that the decision of the Constitutional Court of Burundi was in violation of the above mentioned Articles of the East African Community. We therefore answer issue No. 1 in the affirmative.

ISSUE NO. 2 REMEDIES

98. A case pending before a court may at some point in the litigation process lose an element of justiciability and become "*moot*". Mootness may occur when a controversy initially existing at the time the law suit was filed is no longer "live" and or current due to a change in the law or the status of the parties involved or due to an act of the parties that dissolve the dispute. In the instant case the President of the Republic of Burundi served his first term from 2005 to 2010; the second term from July 2010 to June, 2015. Dissent came with the public announcement that President would serve for a third term scheduled for June, 2015. This move appeared contrary to the term limits established by the Arusha Accord.

99. The Constitutional Court Ruled on 5th May 2015 that the projected third term was legal. Elections took place in July 2015 and President Nkurunziza was elected for a third term. Constitutional Reforms were advocated and approved which would allow longer Presidential terms in a Referendum held in May 2018. The passage of Burundi's May 2018 Referendum revised a great deal the 2005 Constitution and thus changing the state of the law of Burundi *"ante"* and therefore affecting the application as law the Protocols of the Arusha Accord. In June 2018 the President announced that he would not be standing for a fourth term and that he would step down in 2020. The President's party CNDD – FDD nominated another Presidential candidate. Elections took place in May 2020. President Nkurunziza

was to remain a *"prominent person"* in public life in the post of Supreme Guide of Patriotism.

100. President Nkurunziza died on 8th June 2020. His death occurred after the 2020 elections. He was due to step down in August 2020. All of these events have taken place before we have been able to render this Judgment.

101. Taking the above observations into consideration, we take judicial notice that following the Referendum in 2018 changes had taken place in the legal dispensation in Burundi that have caused this matter to have been overtaken by events. Furthermore, the death of President Nkurunziza has also caused the complaint raised by the Appellant to become moot.

102. In the case of **Alcon International Limited and Standard Chartered Bank of Uganda and Two Others**, Appeal No. 3 of 2013, this Court held thus:-

> *"The doctrine of mootness or academic adventure by the Court of Justice is well known. The reason d'etre of Courts of Justice is to give binding decisions on live disputes submitted to them by the parties or, where applicable, to render advisory opinions in limited cases where their constitutive opinions, Constitutions, Statutes or Treaties so provide, if there is no live dispute for resolution (and there can be none in the absence of the parties) or the Court is not exercising any advisory opinion, jurisdiction it*

may have, a Court would be wasting public resources of time, personnel and money by engaging in a futile and vain exposition of the law. The exposition of the law in the abstract in the province of academics and not the Court of Justice. It is for this that the appellation "academic" is used to characterize such an endeavour".

103. This Court in the **Alcon** case (supra) relied on the case of **Borowski vs The Attorney General of Canada,** 1989 S.C. R 342 where the Supreme Court of Canada held as follows:-

"The doctrine of mootness is an aspect of general policy practice that a Court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the Court which affects or may affect the rights of the parties. If the decision of the Court will not have any practical effect on such rights, the Court declines to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time the Court is called upon to reach a decision.

Accordingly, if subsequent to the initiation of the action or proceeding, events occur which affect the rights of the parties, the case is said to be moot. The general policy or practice is enforced in most cases unless the Court exercises its discretion to depart from its policy and practice".

104. In relation to the Remedies sought by the Appellant and given the development and the change of the status quo in the Republic of

Burundi, we are of the firm view that the remedies sought would not serve any purpose.

105. We entirely agree with the observations made by this Court in the **Alcon** case (supra). The postulation of the doctrine is totally apposite to the case at hand. It therefore follows that issue No. 2 is answered in the negative.

106. We arrive at this conclusion taking into consideration that the act complained of took place in 2015 (six years ago) and that many things on the ground have changed in the Republic of Burundi.

107. In the **Henry Kyarimpa** case (supra) it was established in principle that remedies are to be given only to the extent possible. This is in line with the ILC Commentary Article 35 which provides that:-

> *"A State Responsible for an internationally wrongful act shall take the form of restitution, that is to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:*
>
> *(a) Is not materially impossible;*
>
> *(b) Does not involve burden out of all proportion to the benefit deriving from restitution instead of compensation".*

108. This Court in the case **East African Civil Society Organizations' Forum** (supra) held thus:-

"This Court must therefore while not shying away from pronouncing itself on an alleged violation of the EAC Treaty take into account all the circumstances of the case when pronouncing itself on the remedies. The Appellant seek orders to annul, quash or set aside the decision of the Constitutional Court of Burundi. The Court has a wide discretion in granting what it considers appropriate".

Costs

109. In relation to costs we have carefully considered the rival submissions of the parties, and we have taken the following view on the matter.

According to Rule 127 (1) of the East African Court of Justice Rules of the Court, 2019:-

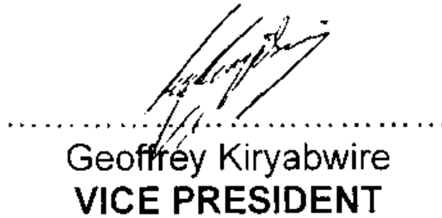
"costs in any proceedings follow the event unless the Court shall for good reason otherwise order".

110. The question to ask ourselves in this matter is whether or not we should exercise our judicial discretion in awarding costs. We entirely agree with the observations made by the Trial Court that this is a public interest litigation, hence each party should bear its own costs.

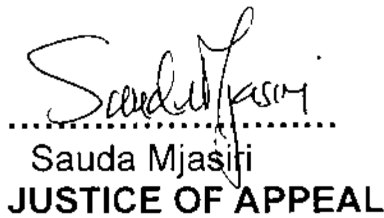
CONCLUSION

In view of our findings hereinabove, this Appeal partially succeeds. Each party is to bear its own costs. Order accordingly.

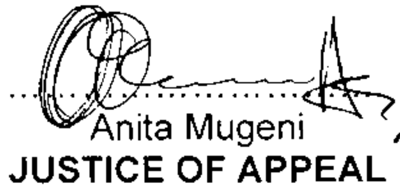
DATED, DELIVERED AND SIGNED at **BUJUMBURA** this 25th day of November, 2021.



Geoffrey Kiryabwire
VICE PRESIDENT



Sauda Mjasiri
JUSTICE OF APPEAL



Anita Mugeni
JUSTICE OF APPEAL