IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION AT ARUSHA

(Coram: Emmanuel Ugirashebuja, P; Liboire Nkurunziza, VP; Edward Rutakangwa, Aaron Ringera and Geoffrey Kiryabwire, JJ.A.)

APPEAL NO. 4 OF 2016

BETWEEN

THE EAST AFICAN CIVIL SOCIETY ORGANIZATIONS' FORUM (EACSOF) ..... APPELLANT

AND

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

COMMISSION ELECTORALE NATIONALE INDEPENDANTE..... 2ND RESPONDENT

THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY (EAC).....3RD RESPONDENT

[Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica Mugenyi (Principal Judge), Hon. Isaac Lenaola (Deputy Principal Judge) and Hon. Justice Fakihi A. Jundu (Judge) dated 29th September, 2016 in Reference Number 2 of 2015]

JUDGMENT

INTRODUCTION

1. This is an Appeal against the Judgment of the First Instance Division of this Court (hereinafter referred to as "the Trial Court") dated 29th September, 2016 arising out of Reference No. 2 of 2015, by which 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 sued the first Respondent, the Attorney General of Burundi, in his capacity as the legal representative of The Republic of Burundi (hereinafter referred to as "Burundi"); the second Respondent, The Commission Electorale Nationale Independate of the Republic of Burundi (hereinafter referred to as "CENI"); and the third Respondent The Secretary General of The East African Community (hereinafter referred to as the "SG-EAC") before the Trial Court in respect of a Decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5th May 2015 (hereinafter referred to as the "impugned Decision").
3. It is the case of the Appellant that the impugned Decision violated the letter and spirit of the Arusha Peace 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. Furthermore by reason of the aforesaid breach of the Arusha Accord and the Burundi Constitution the impugned Decision also equally violated Articles 5 (3) (f), 6 (d), 7 (2), 8 (1) (a) and (c) and 8 (5) of the Treaty for the for the Establishment

of The East African Community (hereinafter referred to as the "EAC TREATY").

4. The Appellant was represented by Mr Donald Omondi Deya, Advocate; the First Respondent by Mr. Nestor Kayobera, Principal State Counsel; and the third Respondent by Mr. Stephen Agaba, Advocate.

BACKGROUND

5. The facts from which this Appeal arises are as follows. On 28th April, 2015, fourteen Senators of the Burundi Senate filed a motion dated 17th April, 2015 in the Constitutional Court of Burundi seeking an interpretation of Articles 96 and 302 as to whether the President, Mr Pierre Nkurunziza, who had twice previously been elected President of The Republic of Burundi, was eligible to run in the forthcoming elections in The Republic of Burundi. A day before the Constitutional Court of Burundi delivered its Decision the Vice President of the Constitutional Court fled the Country (alleging intimidation). That notwithstanding, the Constitutional Court of Burundi on the 5th May, 2015 rendered its Decision and held that Mr Pierre Nkurunziza was eligible to run for the Presidency of Burundi.
6. On the 8th June, 2015, the Chairman of the second Respondent, CENI, announced new dates for the general elections but on the 9th June, 2015, Mr Pierre Nkurunziza announced different dates for the said elections. Thereafter public demonstrations started in Burundi and many leaders and other Burundians fled the country while others were killed during the violent and chaotic demonstrations.

7. It is the eligibility or otherwise of Mr Pierre Nkurunziza to run for the third time for the Presidency of Burundi following the impugned Decision of the Constitutional Court of Burundi; the conduct of the CENI in connection with the holding of the said elections in 2015 and the alleged failure of the third Respondent SG-EAC to properly advise the Heads of State to take decisive steps against the alleged violation of the Arusha Accord and the EAC Treaty that led to the filing of Reference No 2 of 2015 in the Trial Court.
8. At the Trial Court, the Appellant, as the Applicant in the said Reference sought the following Declarations and Orders to be granted against the Respondents:

(a) A Declaration that the Decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5 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) By reason of the aforesaid breach of the Arusha Accord and the Burundi Constitution, a Declaration that the Decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5 May 2015 equally violated several Articles of the Treaty for the Establishment of the East African Community (the EAC Treaty);

(c) A Declaration that the decision of the CNDD-FDD political party to nominate or put forward President Pierre Nkurunziza as a candidate for election to the Office of the President of the

Republic of Burundi in 2015 violated the Arusha Accord aforesaid and is unlawful; and

(d) An order directing the Secretary-General of the EAC to constitute and give immediate effect to the said judgment 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 for the Establishment of the East African Community.

9. In its Decision the Trial Court held that while it had jurisdiction to interpret the Constitution of Burundi and the Arusha Agreement and determine whether any action taken in furtherance of the said Constitution and Agreement are amount to an infringement or violation of the Treaty it further held that:

   (a) Its mandate did not extend to the interrogation of decisions of other courts in a judicial manner such as is being asked in the present reference;

   (b) The second Respondent was improperly enjoined to the Reference and is struck out of the proceedings; and

   (c) There was no plausible reason why the Third Respondent was enjoined to the proceedings.

   For the above reasons the Reference was dismissed and each party was ordered to bear its own costs (as the Reference was filed in the public interest); hence this appeal.

THE APPEAL

10. The Appellant has raised six grounds of Appeal namely:

(a) That the Honourable Learned Judges of the First Instance Division of the Court erred in law by disavowing themselves of jurisdiction expressly bestowed upon them by the Treaty for the Establishment of the East African Community (the Treaty), to wit jurisdiction to review any Decision of any Court (or indeed of any organ or institution) of a Partner State on the basis that it is unlawful or a violation of the Treaty, in keeping with the theory of state unity and undifferentiated attribution.

(b) That the Honourable Learned Judges of the First Instance Division of the Court erred in law and committed a procedural irregularity by incorrectly reframing the Appellant's Application for the said Court to revise , review or quash the impugned decision of the Constitutional Court of Burundi in Case Number RCCB 303 delivered on 5th May 2015, which Application was premised on the basis that the impugned decision was, inter alia, unlawful or a violation of the Treaty, as if the Applicant had merely appealed or applied for review on the sole basis of the municipal law of the 1st respondent.

(c) That the Honourable Learned Judges of the First Instance Division of the Court erred in law and committed a procedural irregularity by failing to interpret and/or apply Rules 24 (1) and (3) of the Court's Rules of procedure, which the appellant had expressly relied upon and which the Court had acknowledged.

(d)That the Honourable Learned Judges of the First Instance Division of the Court erred in law by failing to follow the precedent that this Honourable Court had set in Reference No. 7 of 2013; Burundi Journalist' Union versus Attorney General of Burundi and Another, or in the alternative, that the Honourable Learned Judges of the First Instance Division of the Court erred in law by failing to sufficiently distinguish the latter case (Reference No. 7 of 2013) from the instant case (Reference No. 2 of 2015).

(e)That the Honourable Learned Judges of the First Instance Division of the Court erred in law by failing to acknowledge that there were compelling reasons which motivated the Appellant to seek to enjoin the 3rd Respondent [The Secretary General of the East African Community] as a party to the proceedings in his own right.

(f) That the Honourable Learned Judges of the First Instance Division of the Court erred in law and committed a procedural irregularity by declaring that there was no cause of action against the 3rd Respondent [The Secretary General of the East African Community].

11. The Appellant further prayed that the Court grants the following orders:

(a) The Appellate Division of the East African Court of Justice (EACJ) reverses the above mentioned parts of the Decision of the First Instance Division of the Court;

(b) The Appellate Division of the East African Court of Justice (EACJ) reverts the above mentioned parts of the decision to the First Instance Division of the Court for a Decision on the merits;

In the alternative, the Appellate Division of the East African Court of Justice (EACJ) to make the following Declarations and Orders against the Respondents:

(i) **A DECLARATION that the Decision of the Constitutional Court of the Republic of Burundi in case Number 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;**

(ii) **A DECLARATION that, by reason of the aforesaid breach of the Arusha Accord and the Constitution of Burundi, the decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5th May 2015 equally 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 (the EAC Treaty);**

(iii) **A DECLARATION that any decrees, decisions or orders of the 2nd Respondent (The CENI) of the Republic of Burundi**

for the purposes of organizing or supervising Presidential elections in 2015 in which Mr. Pierre Nkurunziza was a candidate for the Office of the President of Burundi were, are and shall be considered incompatible with the Arusha Accord and the Constitution of Burundi and therefore , unlawful and a violation of the EAC TREATY;

(iv) AN ORDER to annul, quash or set aside the decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5th May 2015;

(v) AN ORDER directing the 3rd Respondent (the EAC Secretary General) to constitute and give immediate effect to the Judgment of the First Instance Division of this Court Honourable Court in Reference No. 1 of 2014 (East African Law Society versus the Attorney General of Burundi and the Secretary General of the East African Community (EAC) on whether the Republic of Burundi should be sanctioned, suspended or expelled from the East African Community under Articles 29, 67, 71, 143, 146, and 147 of the EAC Treaty;

(vi) AN ORDER directing the 1st and 3rd Respondents to appear and file before this Honourable Court not later than 14 days from the date of any decisions or orders that this Court may make, a progress report on the remedial mechanisms and steps taken towards the implementation of the Orders issued by this Honorable Court; and

(vii) AN ORDER that the costs of and incidental to this Reference (sic) be met by the Respondents

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

12. At the Scheduling Conference of the Appeal held on the 15th February 2017, the six grounds of appeal were consolidated into three substantive issues namely:

(a) Whether or not the Honourable Learned Judges of the 1st Instance Division of the Court erred in law by disavowing themselves of Jurisdiction to review and/ or quash the Judgment of the Constitutional Court of Burundi?

(b) Whether or not the Honourable Learned Judges of the 1st Instance Division of the Court erred in law and committed a procedural irregularity by declaring that there was no cause of action against the 3rd Respondent?

(c) Whether or not the Appellant is entitled to the Orders that it seeks?

MANDATE OF THIS COURT.

13. As correctly submitted by all the Parties to this Appeal, the jurisdiction of the Appellate Division to hear appeals proffered from the Trial Court is provided for under Article 35A of the EAC Treaty. Such an appeal shall be on *"...points of law, grounds of lack of jurisdiction; or procedural irregularity..."*. In the case of **Simon Peter Ochieng and Another Vs The Attorney General of The Republic of Uganda Appeal No. 4 of 2015,** we made it clear that the right of

appeal to this Division is restricted to the scope provided for under the said Article 35A of the EAC Treaty. Furthermore, the burden of proof falls on the party alleging the error who must advance arguments in support of the contention and explain how the error invalidates the decision. The parties must ever bear in mind that this Court does not undertake a hearing *de novo* of the questions of fact and law examined by the Trial Court.

THE PARTIES' SUBMISSIONS

ISSUE No. 1. Whether or not the Honourable Learned Judges of the 1st Instance Division of the Court erred in law by disavowing themselves of Jurisdiction to review and/ or quash the Judgment of the Constitutional Court of Burundi?

APPELLANT'S SUBMISSIONS

14. Counsel for the Appellant submitted that the crux of their Appeal was based on just 3 paragraphs of the Judgment of the First Instance Division, namely paragraphs 46, 47 and 48. Those paragraphs are reproduced here for ease of reference:

"...As we have stated elsewhere above, this Court has primacy in the interpretation of the Treaty but that mandate in our considered view does not extend to the interrogation of decisions of other Courts in a Judicial manner such as is being asked of us in the present Reference. An interrogation of the reasons, ration decidendi and

contents of such decisions would necessarily require that we exercise an appellate Jurisdiction over the said decisions which jurisdiction we certainly do not have. The independence of the Courts of Partner States is a paramount principle of the Rule of Law as envisaged in Articles 6(d) and 7(2) of the Treaty and we cannot in upholding those principles, interfere willy nilly with that independence.

What of the Jurisdiction to interpret the aforesaid decision of that Court in the context of the Treaty and whether it was made in violation of the said Treaty? The Applicant has submitted in that regard that we should assume jurisdiction to do so in the context of Article 30(1) of the Treaty. Try as we have, we are unable to see any Jurisdiction to reopen decisions of Courts of Partner States and decide whether such decisions are or are not in line with either the Constitution of Burundi or the Agreement or even the Treaty. See ***East African Law Society vs. Attorney General of Burundi & Secretary General of the EAC Ref. No.1 of 2014****.*

In doing so, we reiterate that what is before us is not any question regarding due process before the Constitutional Court of Burundi but the correctness of its decision in the context of the interpretation(sic) of the Republic of Burundi and the Arusha Agreement. Only by undertaking an interrogation of that decision as to its correctness can we revise, review and quash it. Such remedies are available only upon a review or appeal against the said decision and not whether it was made in violation of the principles of the Rule of Law as was the approach taken by this Court in determining the issues raised in the ***Burundian Journalists*** *case (supra).*

For the above reasons, we can only determine Issue No. 3 in the negative..."

15. It is the case for the Appellant in its written submissions, that the Trial Court in those paragraphs sought to find that:

" a. The East African Court of Justice (EACJ) has primacy in interpreting the EAC Treaty;

*b. The EACJ Treaty Interpretation mandate does **not** extend to interrogation of decisions of other Courts **in a judicial manner;***

*c. Inquiring into the reasons, ratio decidendi and contents of decisions of other Courts would make EACJ exercise an **appellate jurisdiction** over the said decisions which (appellate) jurisdiction (sic) EACJ says it does **not** have;*

*d. Exercising an appellate jurisdiction would interfere with the **judicial independence** of these other Courts, and thereby violate a paramount principle of the rule of law;*

*e. EACJ **lacks jurisdiction** to reopen decisions of Partner States' Courts to decide whether or not such decisions are in line with: -*

- ***i. The EAC Treaty!***
- *ii. The Constitution of Burundi*
- *iii. The Arusha Accord*

*f. EACJ tries to **distinguish** that: -*

- *i. Had the Applicant questioned whether there was **due process** before the Burundi Constitutional*

Court, the EACJ would have assumed jurisdiction to inquire into that (due process);

ii. *But as the Applicant has challenged the* ***correctness of the decision*** *made by the Burundi Constitutional Court, the EACJ would have to interrogate the said Constitutional Court Decision, which is ONLY available upon a review or appeal, which jurisdiction the 1st Instance Division states that it does not have;*

iii. *In attempting to distinguish from its decision in the* ***Burundi Journalists' Union (BJU)*** *Case, the 1st Instance Division states that: -*

1. *In the BJU case, the 1st Instance Division examined whether the (then) decision of the very same Burundi Constitutional Court was* ***made in violation of the principles of the rule of law*** *(a procedural question);*
2. *In the instant case (EACSOF case), the Applicant challenged the* ***correctness of the decision*** *of the same Burundi Constitutional Court (a substantive question)…"*

16. Counsel raises five areas of law in which the Trial Court erred and/or misdirected itself in holding as it did above. Some of the areas are incidental to this issue but still do arise from the grounds of appeal.

17. The first area is that the Trial Court erred in law by disavowing itself of the existing jurisdiction in international law to review and/or quash the judgment of the Constitutional Court of Burundi.

18. He argued that this Court, being an international court which is responsible for interpreting and applying international legal instruments, such as the EAC Treaty and other relevant conventions, has jurisdiction to determine whether a decision and/or an omission of any judicial organ of a Partner State is a violation of the said international legal instrument, i.e. the EAC Treaty and EAC law generally.

19. Counsel for the Appellant submitted that Articles 23 (Role of the Court) and 27 (Jurisdiction of the Court) of the EAC Treaty bestow upon this Court the Jurisdiction to review any decision of any court of a Partner State on the grounds that it is unlawful or is a violation of the Treaty. This mandate of the Court is in keeping with the theory in international law of state unity and undifferentiated attribution. He further pointed out that there is no exception under international law (both case and customary law), for decisions made by the judicial organs of a state party. He argued that if this was so, then it would mean that a state party would be allowed to infringe on its international obligations through its judicial decisions which would be unacceptable. Therefore according to the general principles of international law all wrongful decisions including judicial decisions are attributable to a State.

20. Counsel further argued that this Court in a number of its decisions has consistently upheld the principle of state responsibility for judicial decisions that violate the EAC Treaty. He in particular

referred us to the **Burundi Journalists Union (BJU) Vs Attorney General of Burundi, EACJ Application No. 007 of 2013**. In that case the First instance Division of this Court held (Para 40-41):

"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 Articles 6(d) and 7(2) of the Treaty.

(...)

The above jurisdiction differs from that conferred by Article 27(1) which provides that this Court shall "initially have jurisdiction over the interpretation of the Treaty." The proviso thereof is irrelevant for purposes of this Reference, but suffice it to say that interpretation of the question whether Articles 6(d) and 7(2) of the Treaty were violated in the enactment of the Press Law is a matter squarely within the ambit of this Court's jurisdiction".

21. Counsel also referred us to the case of **Baranzira Raphael and Another Vs Attorney General of Burundi, EACJ Reference No. 015 of 2014** where again the First Instance Division of this Court held (in a matter where the Constitutional Court of Burundi had already previously rendered a judgment):

"In the instant case, although the constitutionality of the Bill that preceded Act No 1/26 was tested and sanctified by the Constitutional Court of Burundi, it is the Applicant's contention that the Act

nonetheless contravenes Articles 6(d) and 7(2) of the Treaty in so far as it offends the principles of rule of law and good governance. ***Clearly, the decision of the Constitutional Court of Burundi notwithstanding, there are matters of Treaty interpretation presented by the Reference that beg the Court's interrogation. To that extent, therefore, we are satisfied that this Court does have jurisdiction to entertain the Reference.*** *We so hold".*

22. Counsel for the Appellant also referred us to other related decisions of courts and tribunals at the international and African regional level. He cited the **Salvador Commercial Company Case UNRIAA, Vol. XV,** [p. 455 at p. 477 (1902)] where the Arbitration Tribunal found:

> *"..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..."*

Counsel further referred us to the International Court of Justice (ICJ) Advisory Opinion while referring to decisions of state courts in the matter of **Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, ICJ Reports 1999 [p. 87 para 62]** where the Court ruled that:

"According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule ... is of a customary character".

23. Counsel for the Appellant submitted that based on those consistent findings by international Courts, the **United Nations International Law Commission** [ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001] has codified the rule in the following terms:

"Article 4: Conduct of organs of a State

*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 or of a territorial unit of the State.*

An organ includes any person or entity which has that status in accordance with the internal law of the State". (Emphasis added)

In the Commentary which is related to this Article, the ILC Commentary states as follows:

"Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including

*those at provincial or even local level. No distinction is made for this purpose between legislative, executive or **judicial** organs..."*

24. At the African regional level, Counsel referred us to several decisions of The African Court on Human and Peoples Rights, where the Court held that decisions made by national Courts are attributable to the State concerned and such decisions may engage its international responsibility. He in particular referred us to the decision in the case of **Lohe Issa Konate Vs Burkina Faso, Application No. 004 of 2011**. In that case it was held that:

*"Since the conduct of the **Burkinabe courts** fall squarely on the Respondent State [in footnote, reference is made to Article 4 of the ILC Draft Articles], the Court is of the view that the latter failed in its obligation to comply with the provisions of Article 9 of the Charter [and some other international human rights instruments], with regard to the Applicant..."*

Other decisions of the African Court cited on this point included:

- **Norbert Zongo and Others Vs Burkina Faso, Application No. 013 of 2011;**
- **Wilfred Onyango Nganyi and Others Vs United Republic of Tanzania, Application No. 006 of 2013; and**
- **Mohammed Abubakari Vs United Republic of Tanzania, Application No. 007 of 2013.**

25. The second area under the first issue to be resolved that Counsel for Appellant submitted on, is in relation to errors and omissions in the Judgment of the Trial Court. Here Counsel argues three points.

26. First, Counsel submitted that the Trial Court, erred when it misdirected itself and resolved a different issue from that which was placed before it. The Trial Court he argues, was preoccupied with determining whether it had appellate jurisdiction over the decision of a national court. That particular question was never an issue he urged. What the Reference had placed before the Trial Court was whether this [Honourable] Court has jurisdiction to fulfill certain functions specifically provided for in the EAC Treaty and the Court's own Rules.

27. He submitted that the Trial Court inaccurately found (para. 48), that the Applicant had only challenged the *"correctness of the (Burundi Constitutional Court's) decision in the context of the interpretation of the* ***Constitution of the Republic of Burundi*** *and the* ***Arusha Agreement***". Counsel argued that this finding left out the very important element that the Applicant had also challenged the decision of the Constitutional Court of Burundi, as being a violation of the EAC Treaty. It is the case of the Appellant that this Court can challenge a decision of a Partner State and its organs to establish whether the said decisions are in line with the EAC Treaty.

28. Counsel submitted that It is trite law that when this Court considers whether the Respondent State, through the decisions of its judicial organs, has conformed or not with the Treaty or any other

relevant international legal instrument, it does not act as an appellate court.

29. Secondly, Counsel submitted that the Trial Court failed to interpret and/or apply Rules 24 (1) and (3) of the Court's Rules of Procedure. Rule 24(1) provides the manner by which a litigant should institute a Reference at the Court. This includes legal or natural persons, as provided for in Article 30 of the Treaty. Rule 24(3) gives a hint of the kind of Orders that litigants who commence litigation under Rule 24(1) could seek. It specifically provides for:

*"... **annulment** of an Act, regulation, directive, **decision** or **action** ..."*

Counsel emphasised that annulment was just one of several orders that the Court could make taking into account all the circumstances of the case.

30. Counsel argued that Rule 24 of the Rules of this Court, makes no distinction on the types of decisions or actions that can be annulled. He further argued that if this Court could annul decisions of 'Executive' or 'legislative' arms of government, but that they could not annul decisions of judicial arms of governments of Partner States that are not in conformity with the Treaty then this would be an absurdity. Therefore where necessary this Court could call for *"the annulment of any Act, directive, decision or action of a Partner State."*

31. Thirdly, Counsel submitted that the Trial Court failed to properly follow the precedent of the Court in the **Burundi Journalists' Union (Supra)**. In that case, the Respondents had argued that this Court had no jurisdiction because the Constitutional

Court of Burundi had previously adjudicated on the same matter. However, this Court rejected that argument and adjudicated on the matter and even arrived at a different conclusion from the Constitutional Court of Burundi and proceeded to make other orders of Court. In this case however, the Trial Court erroneously found that it lacked jurisdiction to adjudicate on a matter previously decided upon by the Constitutional Court of Burundi.

32. The third and last area under the first issue to be resolved that Counsel for Appellant submitted on, is whether or not the second Respondent (CENI) has legal personality to be sued before the East African Court of Justice, under Article 30 (1) of the EAC Treaty. He pointed out that CENI had been added to the Reference for purposes of injunctive orders sought against it and also to give it an opportunity to be heard.

Counsel in principle accepted the finding of the Trial Court, that an institution of a Partner State like CENI cannot be sued directly in this Court.

33. Finally, Counsel for the Appellant prayed that this Court on the first issue find in favour of the Appellant on the basis that the Trial Court:

"...

a. *Made assertions and findings that are **not** backed by the EAC Treaty;*
b. *Made assertions and findings that are **not** backed by international law;*

c. *Attempts to disavow itself of jurisdiction that it has, and which it has exercised previously;*

d. *Tries to make a distinction between its handling of this case, and handling of the* ***Burundi Journalists' Union (BJU)*** *case, which was largely in pari materia, which purported distinction is* ***not*** *sustainable..."*

FIRST RESPONDENT'S ARGUMENTS

34. Counsel for the First Respondent in response submitted that this Appeal is bad in law as it does not meet the standard required under Article 35A of the EAC Treaty and its well established jurisprudence. He stated that Article 35A provides:

"... an appeal from the judgment or any order of the First Instance Division of the Court shall lie to the Appellate Division on:-

(a) points of law;

(b) grounds of lack of jurisdiction; or

(c) procedural irregularity..."

35. He referred the Court to its Decision in **Angella Amudo Vs The Secretary General of the East African Community, Appeal No.4 of 2014,** (paragraph 65 on page 28 of the Judgment of the Court) where this Court set out the conditions required under Article 35 A of the EAC Treaty to show that the Trial Court had committed an error of law or procedural errors or irregularities; namely:

"...

(a) Misapprehends the nature, quality and substance of the evidence;

(b) Draws wrong inferences from the proven facts; or

(c) Acts irregularly in the conduct of a proceeding or hearing leading to a denial or failure of due process (i.e. fairness)..."

He further argued that this same test had also been applied in the case of **Simon Peter Ochieng case** (supra) where it was further held that

"...to meet the standard required by Article 35A of the Treaty, the Counsel for the Appellant had for example to demonstrate in his submissions that the Trial Court committed errors of law or procedural irregularities of (sic) (or) lacked jurisdiction ...".

Counsel submitted that the Appellant had not shown how the Trial Court had committed errors of law or procedural irregularities or lack of jurisdiction.

36. Counsel submitted that the role of this Court as found under Articles 23 and 27 of The EAC Treaty is to ensure adherence to law in the interpretation and application of and compliance of the EAC Treaty. In this regard Counsel argued that the Trial Court did not willingly abdicate its duty, when it denied itself jurisdiction on the question of whether the decision of the Constitutional Court of Burundi complies with the EAC Treaty.

37. Counsel argued that the Appellant appeared not to understand the correct reasoning made by the Trial Court in its Judgment, that the power to review, revise and/or quash the decision of the Constitutional Court of Burundi is only available to a Court clothed with appellate and/or review jurisdiction which jurisdiction is not provided for under Article 23 and 27 of the EAC Treaty referred to by the Appellant.

38. Counsel further argued that had the Learned Judges of the Trial Court attributed to themselves the appellate jurisdiction to review and/or set aside the impugned Judgment, which jurisdiction is not conferred to them under the EAC Treaty, then their Judgment would be a nullity as in the **Angella Amudo Appeal case** (supra), where it was held that:

"All said and done, we hold without any demur that the entire proceedings in the Trial Court were a nullity on account of want of jurisdiction. We, accordingly, quash and set them aside. If authority for this is needed, we shall quickly refer to our decision given in Appeal No.4 of 2012 between Legal Brains Trust and The Attorney General of the Republic of Uganda, where we nullified the proceedings in the First Instance Division which had been determined on merit when the Trial Court had no jurisdiction to entertain the matter."

This would then mean that the entire proceedings of the Trial Court would have been a nullity for want of jurisdiction.

39. Counsel then prayed that this Court answers the first issue in the negative.

ARGUMENTS OF THE THIRD RESPONDENT

40. Counsel for the Third Respondent, largely agreed with and adopted the arguments of the First Respondent. He submitted that the Appellant did not comprehend the reasoning of the Trial Court in its judgment. He referred us to paragraph 48 of the Judgment of the Trial Court, where it found that what the Reference sought was not

determining a question regarding the due process before the Constitutional Court of Burundi but rather to determine the correctness of its decision. He further submitted that the Trial Court correctly held that such remedies as to revise, review and quash the decision of another Court are only available upon appeal or review of the said decision to an appellate court and not as a result of an interrogation by this Court as to whether the said decision was made in violation of the principles of the Rule of Law under The EAC Treaty.

41. Counsel submitted that the only route available to establish the correctness of a court decision is by way of Appeal or review. Therefore, since the East African Court of Justice's jurisdiction is established under Article 23(1) and 27 of the EAC Treaty to ensure the adherence to law in the interpretation and application of and compliance with the EAC Treaty, the Learned Judges of the Trial Court were in order to disavow themselves of jurisdiction to review and/or quash the Judgment of the Constitutional Court of Burundi. He added that none of the legal authorities cited by the Appellant held that this Court could exercise appellate jurisdiction it did not have to revise, review or quash the decision of a domestic court of a Partner State.

42. Counsel prayed that the first issue be answered in the negative.

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COURT'S DETERMINATION

43. We have carefully read and considered the pleadings and submissions together with the supporting legal authorities cited by the opposing parties for which we are grateful. We now resolve Issue number one as hereunder.

44. In this issue it is the case for the Appellant, that the Trial Court disavowed itself of jurisdiction to review and/or quash the Judgment of the Constitutional Court of Burundi in Case Number RCCB 303 delivered on the 5th May 2015, on the grounds that it violated the letter and spirit of the Arusha Accord and also Articles 5 (3) (f), 6 (d), 7 (2), 8 (1) (a) and (c) and 8 (5) of the EAC Treaty.

45. Indeed in the case of **Alcon International Vs Standard Chartered Bank of Uganda & 2 Others Appeal No 3 of 2013** (para. 58), we found that this Court is an international Court and exercises jurisdiction like any other international court in accordance with international law. In this case the issue of jurisdiction revolves around whether the Court had jurisdiction *ratione materiae* to annul and/or review the decision of the Constitutional Court of Burundi within the meaning of The EAC Treaty and 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.

46. Pursuant to The EAC Treaty, Partner States have undertaken to abide by and carry out the obligations as provided for 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

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under Article 23 (1) of the EAC Treaty to *"...ensure the adherence to law in the interpretation and application and compliance with this Treaty..."*. To this end it is the case for the Appellant, that the Partner State of Burundi by reason of the impugned Decision of the Constitutional Court of Burundi 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 all parties accept 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.

47. The Trial Court in hearing the original Reference to it from which this appeal arises however found (para. 48 of its Judgment) that:

> *"...what is before us is not any question regarding due process before the Constitutional Court of Burundi but the correctness of its decision in the context of the interpretation of the Republic (sic) of Burundi and the Arusha Agreement. Only by undertaking an interrogation of that decision as to its correctness can we revise, review and quash it. Such remedies are available only upon a review or appeal against the said decision and not whether it was made in violation of the principles of the Rule of Law as was the approach taken by this Court in determining the issues raised in the* ***Burundian Journalists*** *case (supra)..."*

The First and Third Respondents agree with this position of the Trial Court and generally argued that this Court does not under the EAC Treaty have appellate jurisdiction over the Constitutional Court of Burundi to interrogate the correctness of its decision.

48. This case raises the question of what is the responsibility of States for internationally wrongful acts committed by its judicial organ, as is alleged by the Appellants, to have occurred in the impugned decision. The International Law Commission (ILC) commentary **on The Responsibility of States for internationally wrongful acts** (November 2001 hereinafter referred to as the "ILC Commentary") in Article 1 provides that:

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

The State therefore takes international responsibility for any wrongful act of that State. This is the principle of State responsibility.

49. Furthermore the **ILC Commentary** in Article 4 when dealing with the conduct of an organ of a State provides:

"...1. 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 or of a territory unit of the State..."

It follows therefore, that a State under international law, assumes international responsibility for the wrongful acts of the judicial organ of that State.

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50. In the book **International Law** 4th Edition (edited by Malcolm D Evans Oxford University Press) at page 452 the authors set out what the elements of State responsibility are. They write:

"...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..."*

51. The position in the European Community law as outlined in the book by Anthony Arnull **"The European Union and its Court of Justice"** 2nd Edition Oxford Publishers (p.313) is that:

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

It follows therefore that State liability for domestic courts at international law is quite wide as it covers both acts and omissions.

52. 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] ECR 585** where it was held that:

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"...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..."

53. Indeed, the European Court of Justice in the case of **Gerhard Kobler Vs Republik Osterreich [2003] ECR I-10239** held that the principle of state liability would also apply to violations of EU law by national courts of final appeal. In so making the said finding, the ECJ dismissed arguments against the said application by reason of state liability to the conduct of 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).

We find these authorities of the ECJ to be persuasive in our situation under The EAC Treaty. So like EU Member States in terms of the EEC Treaty, EAC Partner States are bound to follow the law created by the EAC Treaty and have it applied by their courts.

54. As held at the Trial Court in their Judgment in this matter (para.42 & 43), this Court has not been shy in the context of the EAC Treaty to interpret domestic laws and constitutions. This was done in the case of **Kyarimpa Vs Attorney General of Uganda, EACJ Appeal No. 6 of 2014** where we held:

> *"...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 the internal laws of the Partner State and apply its own appreciation thereof to the provisions of the*

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Treaty. The Court does not and should not abide the determination of the import of such internal law by the National Courts..."

The same logic therefore should apply to court decisions within the context of The EAC Treaty.

55. Furthermore even where a superior court of a Partner State has made a final determination as to the constitutionality of a domestic law, which is not appealable to a higher court, the Trial Court rightly held before in the case of **Burundi Journalist Union** (supra para. 40 and 41 supra) that such a determination would not stop this Court from still interrogating whether that domestic law was in violation of the EAC Treaty and reach a different conclusion from that of the superior domestic court. The Trial Court held:

"...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 Articles 6 (d) and 7(2) of the Treaty... suffice it to say that interpretation of the question whether Articles 6(d) and 7(2) of the Treaty were violated in the enactment of the Press Law is a matter squarely within the ambit of this Court's jurisdiction..."

This was also the position taken in the **Baranzira Raphael case** (supra). So clearly this Court has jurisdiction to interrogate matters of Treaty interpretation notwithstanding a previous decision of a superior court of a Partner State.

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56. We agree with the submissions of Counsel for the Appellant that even at the African Court on Human and Peoples Rights, the position is no different from that at the EACJ and the ECJ. The African Court while interpreting and applying the **African Charter on Human and Peoples Rights** in the cases of **Lohe Issa Konate** (supra), **Norbert Zongo** (supra), **Wilfred Onyango Nganyi** (supra) and **Mohammed Abubakari** (supra) found that decisions made by the national courts are attributable to the State concerned and may engage its international responsibility.

57. In this case it is not in 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. 1/017 of 1st December, 2000. The Arusha Accord therefore had the status of both an international agreement and a municipal law. On the 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. It was therefore fitting that any dispute arising from the Arusha Accord be settled in the Burundian Courts to ensure that both Burundi's international and municipal law obligations are upheld. Indeed this is what led to the impugned decision and the allegations by the Appellant that the the Constitutional Court of Burundi fell short of its international obligations.

58. The Appellants at the Trial Court in Reference No. 2 of 2015 sought declarations that the impugned decision:

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(a) A declaration that the Decision of the Constitutional Court of the Republic of Burundi in Case number RCCB 303 delivered on 5 May 2015 violates the letters 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 number RCCB 303 delivered on 5 May, 2015 equally violates Articles 5(3)(f), 6(d), 7(2),8(1)(a) & (c), 8(5) of the Treaty for the Establishment of the East African Community (the EAC Treaty);

(c) A declaration that the decision of the CNDD-FDD to nominate or put forward the President of Burundi as a candidate for election to the office of the Presidency in the Republic of Burundi violates the Arusha Accord aforesaid and is unlawful;

(d) A declaration that any decrees, decision or orders of the 2nd Respondent or the CENI of the Republic of Burundi for the purpose of organizing or supervising Presidential elections in which the 2nd Respondent is or 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;

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(e) An order setting to quash and set aside the decision of the Constitutional Court of the Republic of Burundi in case number RCCB 303 delivered on 5 May, 2015;

(f) An order directing the 3rd 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 for the Establishment of the East African Community;

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

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

59. It is clear from the declarations and remedies sought at the Trial Court, that the Appellant sought to highlight three violations by the Constitutional Court of Burundi in their impugned Judgment namely:

a) The Arusha Accord [in particular Article 7 (3) of Protocol II];

b) The Constitution of Burundi; and

c) Articles 5 (3) (f), 6 (d), 7 (2), 8 (1) (a) and (c) and 8 (5) of the EAC Treaty.

60. The Trial Court held (para. 43) that it had:

"....jurisdiction to interpret the Constitution of Burundi or the Arusha Agreement and if any action purportedly undertaken in furtherance of the said Constitution and Agreement are in anyway found to amount to an infringement of violation of the Treaty, this Court has Jurisdiction to determine such an issue and we so find...".

On this holding we agree with the Trial Court. The Trial Court then surprisingly went on to further hold (para. 48 and 49):

"... we reiterate that what is before us is not any question regarding due process before the Constitutional Court of Burundi but the correctness of its decision in the context of the interpretation of the Constitution of the Republic of Burundi and the Arusha Agreement. Only by undertaking an interrogation of that decision as to its correctness can we revise, review and quash it. Such remedies are available only upon a review or appeal against the said decision and not whether it was made in violation of the principles of the Rule of Law as was the approach taken by this Court in determining the issues raised in the ***Burundian Journalists*** *case (supra) For the above reasons, we can only determine Issue No. 3 in the negative ..."*.

On this second holding we respectfully disagree.

61. We disagree with this second holding for the following clear reasons:

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i) The reference before the Trial Court was not 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.

ii) 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 or omission it may make.

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. In so exercising its duty, 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 it 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

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rather makes declarations as to the decision's compliance with the EAC Treaty.

62. In finding as we have above, we have in substance covered all five areas of law in which the Appellant under Issue Number one alleges that the Trial Court erred and/or misdirected itself in holding as it did in the impugned Judgment.

63. We accordingly answer Issue Number one in the affirmative.

ISSUE No. 2 Whether or not the Honourable Learned Judges of the 1st Instance Division of the Court erred in law and committed a procedural irregularity by declaring that there was no cause of action against the 3rd Respondent?

ARGUMENTS OF THE APPELLANT

64. Counsel for the Appellant submitted that the Trial Court erred in law by failing to acknowledge that there were compelling reasons which motivated the Appellant to seek to enjoin the SG-EAC [3rd Respondent The Secretary General of the East African Community] as a party to the proceedings in his own right.

65. The Trial Court in its Judgment (paras. 59, 60 and 61) held that there was no plausible reason why the SG-EAC was enjoined to the Reference. The Trial Court held, that whereas in the past they had found the SG-EAC accountable for his actions in cases that called for accountability there were no circumstances that called for accountability in this case. They found that there was no evidence to show that the SG-EAC had breached any of his duties as provided for

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under Articles 67 and 68 of the EAC Treaty. Lastly, the Trial Court found that even the nature of the prayers in the Reference, showed that the SG-EAC had no role to play in the matter. This is because the only prayer sought against the SG-EAC was for an Order to implement any Orders issued by the Trial Court should the Reference have been successful.

66. Counsel for the Appellant argued that at the Trial Court, very profound Orders had been sought against the Government of the Republic of Burundi including the stay of national elections and the SG-EAC. This was against the back drop of a political crisis in Burundi at the time. He further argued that, such profound Orders against a Partner State would have to be urgently brought to the attention of the apex organs of the EAC (and of the African Union), by none other than the SG-EAC. Furthermore their implementation would necessarily involve the SG-EAC in a pivotal position, and therefore he had a right to be heard before the Court Orders are formulated.

67. Counsel also argued that once joined to the Reference, the SG-EAC through his counsel still nonetheless actively participated in all stages of the proceedings and made submissions on matters that went beyond his joinder to the Reference.

68. He also argued that it would best serve the interests of justice, if the SG-EAC was enjoined in the case, and had actively participated in it. Thereafter, should the Secretary General have defaulted in implementing any of the orders directed at him, the Applicant would have sought to enforce these orders by follow-up proceedings in case

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of default. In this light, it would be better if the Secretary General was already a party to the case.

ARGUMENTS OF THE THIRD RESPONDENT.

69. Counsel for the Third Respondent, submitted that the Trial Court did not err in law and/or commit any procedural irregularity by declaring that there was no cause of action against the 3rd Respondent because the Appellant did not at all prove any act, regulation, directive, decision or action that is unlawful or is an infringement of the provisions of the Treaty attributable to the 3rd Respondent whether before the trial court or even on appeal. He prayed that this issue be dismissed.

ARGUMENTS OF THE FIRST RESPONDENT.

70. Counsel for the First Respondent also submitted that the Trial Court did not commit any error in law and/or did not commit any procedural irregularity by declaring that there was no cause of action against the 3rd Respondent for failure by the Appellant to prove any provisions of the EAC Treaty that had been violated by the Secretary General of the East African Community, be it in the Trial Court or in the Appellate Division of this [Honourable] Court. He also prayed that this Issue be dismissed.

COURT'S DETERMINATION

71. We have carefully read and considered the pleadings and submissions together with the supporting legal authorities cited by the

opposing parties for which we are grateful. We now resolve Issue number two as hereunder.

72. We agree with the findings of the Trial Court that the SG-EAC can and should be found accountable for failures to discharge any part of his duties under The EAC Treaty as was held in the cases of **Sitenda Sebalu Vs Secretary General of the East African Community & Anor. Reference No.1 of 2010** and the **East African Law Society Vs Attorney General of Burundi & Another, Reference No. 1 of 2014**; however in this case there was no evidence of failure to discharge his duties.

73. All that the Appellant submitted in substance under this issue, is that it would be good and in the interests of justice to have the SG-EAC as a party so that should the appeal be successful, then the SG-EAC could be made to enforce the resultant orders of this Court. That reasoning in our understanding is totally misconceived as it does not *ipso facto* make the SG-EAC a party in this dispute and in any case does not amount to a cause of action. Where the SG-EAC is not a party to a dispute but wishes to be enjoined in a case he can only do so under Articles 37 (2) of the EAC Treaty where Counsel to the Community can appear before the Court where any of the EAC institutions is a party or where he thinks that such an appearance would be desirable and Article 40 (Intervention) of the EAC Treaty with the leave of the Court.

74. This being our finding we answer the second issue in the negative.

REMEDIES

75. The Appellant made prayers for alternative Orders in this appeal as detailed earlier in this Judgement. The Orders can generally be divided into three namely:

a) Reverse parts of the decision of the Trial Court that are in favour of the Appellant and then revert them to the Trial Court for a decision on the merits.

[Or in the alternative]:

b) Make Declarations against the Respondents that:

i. The Constitutional Court of Burundi by reason of its impugned Decision violated the letter and spirit of the Arusha Accord and the Constitution of Burundi; and

ii. The Constitutional Court of Burundi by reason of its impugned Decision violated Articles 5 (3) (f), 6 (d), 7 (2), 8 (1) (a) and (c) and 8 (5) of The EAC Treaty.

c) Make Orders against the Respondents:

i) To annul, quash or set aside the said Decision of the Constitutional Court of Burundi;

ii) For the SG-EAC to give immediate effect to the Judgment of this Court and then advise the Summit of Heads of Government of the EAC on measures to be taken against the Republic of Burundi.

76. We have answered Issue number one in the affirmative meaning, that the Trial Court erred in not proceeding to hear the

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Reference on its merits. In the case of **Henry Kyarimpa Vs Attorney General of Uganda Appeal No. 06 of 2014** this Court held:

"...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..."

We are mindful of the passage of time in this case considering that the act complained about took place in 2015 (three years ago) and that many things on the ground may have changed in The Republic of Burundi. In the **Henry Kyarimpa** case we also established the principle that remedies are only to be given to the extent possible. This is in line with the ILC Commentary Article 35 which provides:

"... 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..."

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 remedy. The Appellant seeks 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 to be an appropriate remedy and make such orders as may be necessary for the ends of justice.

As it is, Article 35A of the EAC Treaty does not grant this Court the power to hear the merits of the Reference No. 2 of 2015.

77. The other alternative is to revert this case to the Trial Court to be heard on its merits with the view of establishing whether or not there was a Treaty violation as alleged. The passage of time notwithstanding, with the above guidance, we find that this is only logical path that we can direct.

CONCLUSION

78. We find and hold that this Appeal succeeds in part and is therefore allowed in part.

79. The Judgment of the Trial Court is set aside with the following Orders:

a) Having found that the Trial Court erred in not proceeding to hear the Reference on its merits we hereby Order that this matter be reverted to the Trial Court to be heard on its merits and 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.

b) Having further found that there is no cause of action against the Secretary General of the East African Community (as third Respondent), we strike out him out as a party to this case.

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c) As to costs, we agree with the finding of the Trial Court that this case was brought in the public interest and so each party should bear its own cost.

We so Order.

Dated and Delivered at Arusha this 24th day of May 2018

.....
Emmanuel Ugirashebuja
PRESIDENT

.....
Liboire Nkurunziza
VICE PRESIDENT

.....
Edward Rutakangwa
JUSTICE OF APPEAL

.....
Aaron Ringera
JUSTICE OF APPEAL

.....
Geoffrey Kiryabwire
JUSTICE OF APPEAL