IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, DPJ; Fakihi A. Jundu, Charles Nyawello & Charles Nyachae, JJ)

REFERENCE NO.2 OF 2015

THE EAST AFRICAN CIVIL SOCIETY
ORGANISATIONS FORUM (EACSOF) .... APPLICANT

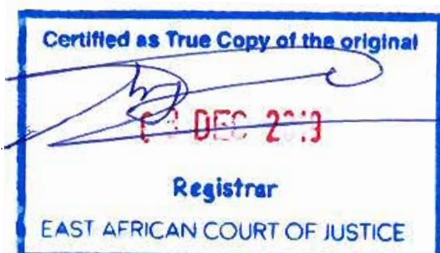
VERSUS

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

COMMISSION ELECTORALE NATIONALE INDEPENDANTE (CENI) .... 2ND RESPONDENT

SECRETARY GENERAL, EAC .... 3RD RESPONDENT

3RD DECEMBER 2019



JUDGMENT OF THE COURT

A. INTRODUCTION

1. This Reference was brought under Articles 5(3)(f), 6(d), 7(2), 8(1)(a), 8(5), 27(1), 29, 30, 38, 124(1), 143, 146 and 147 of the Treaty for the Establishment of the East African Community ('the Treaty'), and Rules 1 and 24 of the East African Court of Justice Rules of Procedure, 2013 ('the Rules'). It sought to challenge the decision of the Constitutional Court of the Republic of Burundi in *Case No. RCCB 303* in so far as it endorsed the legality of Mr. Pierre Nkurunziza's participation as a candidate in that Partner State's 2015 presidential election.

2. The East African Civil Society Organisations Forum ('the Applicant'), a platform for civil society organisations in East Africa, faulted the impugned decision for purportedly violating the Arusha Peace and Reconciliation Agreement for Burundi, 2000 ('the Arusha Accord'), as well as the Constitution of the Republic of Burundi and, consequently, the Treaty.

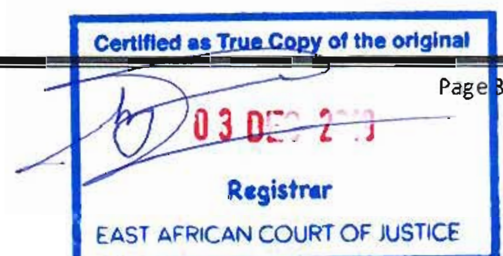
3. The First and Third Respondents are self-defining offices that were sued in a representative capacity on behalf of the Republic of Burundi and the East African Community respectively. On the other hand, the Second Respondent, Commission Electorale Nationale Independante (CENI), is the body that is responsible for conducting national elections in the Republic of Burundi and was sued for its role in the presidential election under scrutiny herein.

4. At the hearing, the Applicant was represented by Mr. Nelson Ndeki, while Messrs Nestor Kayobera and Diomede Vizikiyo appeared for the First Respondent.

B. FACTUAL BACKGROUND

5. On 28th August 2000, the Government of the Republic of Burundi voluntarily endorsed the Arusha Accord, Article 7(3) of Protocol II of which restricts the President of Burundi to election for a term of five (5) years that is renewable only once, and explicitly prohibits more than two (2) presidential terms. The Arusha Peace Accord was subsequently domesticated into Burundi national law vide *Law No. 1/07* of 1st December 2000. On 18th March 2005, Burundi promulgated a new Constitution, the Preamble to which re-affirms the ideals of peace, reconciliation and national unity as spelt out in the Arusha Peace Accord while Article 96 re-echoes the provision for the President to be eligible for election for a 5-year mandate that is renewable only once.

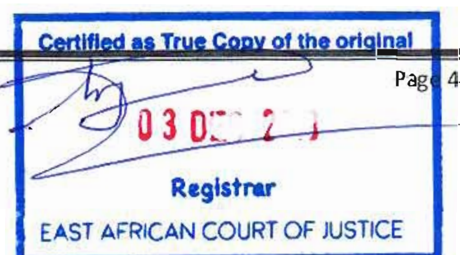
6. On 22nd March 2014, the Parliament of Burundi rejected an amendment to the Constitution that would have made President Nkurunziza eligible to run for another presidential term. Nonetheless, President Nkurunziza was subsequently nominated as a presidential candidate whereupon 14 Senators of the Burundi Senate filed *Case No. RCCB_303* in the Constitutional Court of Burundi seeking the interpretation of Articles 96 and 302 of the Burundi Constitution. On 5th May 2014, the said Court delivered its decision in that matter, validating President Nkurunziza's nomination for the presidential election and thereby sanctioning his inclusion by the Second Respondent on the list of presidential candidates, whereupon the Applicant filed this Reference. As it transpired, Mr. Nkurunziza did participate in the now concluded 2015 Burundi presidential election and was subsequently declared the successful candidate.



7. This Court did render its judgment on the matter, acknowledging that it did have jurisdiction to determine the legality of any action taken under the Arusha Peace Accord and Burundi Constitution viz the Treaty but that jurisdiction did not extend to the judicial interrogation of decisions from Partner States' (domestic) courts, such as the impugned decision in **Case No. RCCB 303**. The Court did also strike out the Second and Third Respondents from the proceedings. On Appeal, however, the Appellate Division of this Court held a contrary view with regard to the question of jurisdiction and re-directed the Reference back to this Division for determination on its merits. On the other hand, the decision to strike out the Second Respondent was not challenged therefore CENI is no longer a party to the Reference. In the same vein, the Appellate Division having upheld the decision to strike out the Third Respondent, the EAC Secretary General is no longer a party in this matter. On that premise, it is to the merits of the Reference that we now revert.

C. APPLICANT'S CASE

8. The gravamen of this Reference is that the nomination and participation of Mr. Nkurunziza in the 2015 Burundi presidential election, despite his having been twice elected as the President of that Partner State, contravened the Arusha Accord, the Burundi Constitution and, in turn, the Treaty. The Applicant faulted the decision of the Burundi Constitutional Court that endorsed Mr. Nkurunziza's candidacy in that election for violating Burundi domestic law, as well as the Treaty. This position was re-echoed in an affidavit deposed by Dieudone Bashirahishize that essentially reiterates the illegality of Mr. Nkurunziza's participation in the then impending



presidential election viz the Arusha Acc(rd, Burundi Constitution and EAC Treaty.

9. The Applicant sought the following Declarations and Orders:

   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, 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;**

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

d. 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;

e. 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 EAC 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.

D. FIRST RESPONDENT'S CASE

10. The First Respondent did not contest the factual basis of this Reference; rather, its case hinges on two (2) points of law. First, it is the contention that the Burundi ruling party (CNDD-FDD) having nominated Mr. Nkurunziza as its candidate for the 2015 presidential election, the Reference should have been filed within 2 months thereafter in order to comply with the 2-month limitation period prescribed by Article 30(2) of the Treaty. It is the First Respondent's case that to the extent that the Reference was filed well over that 2-month period, it was filed out of time. Secondly, it was propounded by the same Party that the finality of a decision of the Constitutional Court of Burundi ousted the jurisdiction of this Court, which is neither

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adorned with jurisdiction to interpret the Arusha Accord nor the mandate to revise, review or quash a decision of the said Constitutional Court. These legal questions were re-echoed in a supporting affidavit deposed by Sylvestre Nyandwi, the Permanent Secretary of Burundi's Ministry of Justice. The first Respondent thus seeks to have the Reference dismissed with costs.

E. ISSUES FOR DETERMINATION

11. At a Scheduling Conference held on 7th March 2016, the following issues were framed for determination:

    a. **Whether or not the Reference is time-barred.**
    b. **Whether or not this Honourable Court has jurisdiction over the interpretation and application of the Constitution of the Republic of Burundi and the Arusha Peace and Reconciliation Agreement on Burundi, 2000.**
    c. **Whether or not this Honourable Court has jurisdiction to revise, review or quash the decision of the Constitutional Court of Burundi in Case Number RCCB 303 delivered on 5th May 2015.**
    d. **Whether or not the 2nd Respondent has legal personality to be sued before the East African Court of Justice under Article 30(1) of the EAC Treaty.**
    e. **Whether or not the Reference discloses any cause of action against the 3rd Respondent.**
    f. **Whether the Applicant is entitled to the remedies sought.**

12. It would suffice to note that the question of limitation was conclusively determined by this Court, was never in issue on appeal and is therefore settled. In the same vein, the Second and Third

Respondents were conclusively adjudged (by this Division and the Appellate Division respectively) to have been improperly enjoined as parties to this Reference and are, to that extent, no longer in issue before us. However, it having been held on Appeal that this Court does have jurisdiction over the issues raised therein, the Reference was directed back to this Division for determination on its merits on the question as to '**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 Treaty**.' Needless to say, the remedies sought do also remain in contention.

13. Consequently, the only subsisting issues for determination presently are:

    I. **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 Treaty, and**

    II. **Whether the Applicant is entitled to the remedies sought.**

F. COURT'S DETERMINATION

ISSUE NO.1: **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 Treaty**

14. In submissions, it was argued for the Applicant that any violation of national laws by an organ of EAC Partner States, as well as the contravention of the EAC Treaty or other Community Law by such organ, would amount to a violation of the *rule of law* principle enshrined in Articles 6(d) and 7(2) of the Treaty. Citing a definition of

rule of law by the office of the United Nations Secretary General, it was the Applicant's contention that by violating its own laws through the impugned decision of the Burundi Constitutional Court, the Respondent State had violated the principle of supremacy of the law that is inherent in the notion of rule of law. The rule of law was defined as follows therein:

> **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, equality before the law, accountability to the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.** *(See Report of the (UN) Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies)*[1]

15. To underscore his emphasis on the supremacy of the law, learned Counsel for the Applicant did also refer us to the decision in **James Katabazi & 21 Others vs. The Secretary General of the East African Community & Another, EACJ Ref. No. 1 of 2007** where the rule of law was defined in its most basic form as '**the principle that no one is above the law.**'

[1] UN Doc S/2004/616 (2004), para. 6

16. Mr. Deya cited the Constitutional Court's allegedly erroneous interpretation of Articles 96 and 302 of the Burundi Constitution to buttress his contention that the resultant decision was flawed and violated the domestic laws of Burundi, as well as that Partner State's international obligations. He opined that whereas Article 96 of the Burundi Constitution was clear and unambiguous on the election of the President for a term of five (5) years renewable once, the Burundi Constitutional Court had interpreted the term 'exceptionally' in Article 302 of the Constitution to erroneously denote ambiguity as to the actual intention of the framers of the Constitution in that regard.

17. It was his submission that the Constitutional Court's interpretation offended general rules of constitutional interpretation which advocate for a plain reading of a Constitution with regard to precise and unambiguous text;[2] the interpretation of a constitution as a whole where all the provisions have a bearing on the subject matter, and the application of the rule of harmony such that constitutional provisions would not be viewed in contrast but rather as sustaining each other, such interpretation directed at enhancing the application of the constitution rather than defeating its very purpose. Mr. Deya further advanced the view that a constitution must be considered as a living, organic entity and construed in a manner that caters for the social and political changes in the environment.[3] He argued that the Burundi Constitutional Court had correctly acknowledged that the intention of the framers of the Constitution was to be discerned from legal instruments that inspired its promulgation, specifically citing the Arusha Accord as the bedrock to the Burundi Constitution, the intention of which (the Accord) was to limit the number of presidential

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[2] PLO Lumumba & Louis G. Franchesci, The Constitution of Kenya 2010: An Introductory Commentary, p.70

[3] Alexander Ssensikombi, The rules followed in Constitutional Interpretation: A Case of Uganda, p.2

terms to 2 terms. He faulted that court for ignoring the intention of the Arusha Accord in its interpretation of the Constitution, its acknowledgment of its critical role notwithstanding, thus arriving at what in his view was a wrong conclusion.

18. On its part, in very brief submissions, the Respondent State underscored the fine distinction between the appellate jurisdiction prescribed in Article 35(3) of the Treaty and Rule 72(2) of the EACJ Rules of Procedure, on the one hand; and the duty upon this Court to test the impugned decision's compliance with Treaty, on the other hand. Learned Counsel for the First Respondent sought to remind his counterpart for the opposite party that this Court is not at liberty to revise, review and quash the decision of the Constitutional Court of Burundi as would typically ensue under an appeal. He maintained that the impugned decision neither violated the Burundi Constitution nor the Treaty.

19. We carefully listened to the Parties in this Reference. We do also respectfully acknowledge that the question as to the Court's jurisdiction to entertain this matter was quite conclusively settled in the decision giving rise to the present retrial, **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of Burundi & Others, EACJ Appeal No.4 of 2016**. In that case, it was held:

> **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.

20. The above decision does resonate with Article 4(1) of the *International Law Commission (ILC) Articles on State Responsibility*, which provides for the attribution of judicial organs' internationally wrongful actions to their respective states. Article 4(1) reads:

> **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.**

21. Article 4(1) of the foregoing Articles was reinforced by the legal advisory opinion advanced by the International Court of Justice (ICJ) in **Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999, p.62 at pp. 87-88, paras. 62, 63**, where it was held:

> **According to a well-established rule of international law, the conduct of an organ of a State must be regarded as an act of that State. ... the conduct of an organ of a State**

– even an organ independent of the executive power – must be regarded as an act of that State.

22. The foregoing legal antecedents unequivocally hold States responsible for the conduct of their judicial organs under international law. Nonetheless, we are mindful of the lingering question as to whether State responsibility for the wrongful conduct of judicial organs or courts would in itself confer *locus standi* upon litigants to challenge the judicial decisions of domestic courts before international courts and tribunals. Embedded within that question is the interface between international and domestic judicial organs for purposes of state responsibility. The issue of state responsibility for the internationally wrongful acts of judicial organs poses the additional question as to how, within the context of international adjudication, a determination may be made that an impugned judicial decision is, in fact, internationally wrong.

23. The first limb to the questions posed above was persuasively addressed in **Antonios Tzanakopoulos, '*Domestic Courts in International Law: The International Judicial Function of National Courts*', 34 Loyola of Los Angeles (Loy. L.A.) International & Comparative Law Review, 133 (2011) at 153, 154**. In that Article, international courts were posited as the arbiters over domestic courts' interrogation of international law in the following terms:

But the question remains: who decides authoritatively, with binding force, whether the domestic court has – in any given case – lived up to the expectation of being the 'natural judge' of international law? Who decides whether in the instance the domestic court settled the

dispute/ enforced the law, or rather created a dispute by not enforcing the law? The answer would have to be: States themselves do .... through the introduction of a third-party instance at the international level to 'supervise' the domestic court.

24. In the same Article (at p. 167), it was further opined:

> **This means that the international law question can effectively be raised and answered at the domestic level. When the outcome is deemed unsatisfactory, international procedures will be called upon to review the 'facts' (including potential decisions of the domestic court) and determine whether a breach of an international obligation has taken place or whether the law has moved on. The process then at the international stage is merely subsidiary or supervisory; intervention will be limited to when the domestic process fails to address the issues appropriately and conform to the international obligation.**

25. We construe the foregoing narrative to suggest that nation states purposively create courts at international and regional level that would play a complimentary role to national courts with specific regard to their international or regional obligations. Within the EAC, this Court was set up to specifically ensure adherence to the law in Treaty interpretation, application of and compliance with the Treaty.[4] It is well recognized herein that disputes before national courts are primarily determined on the basis of applicable domestic laws rather than

[4] See Article 23(1) of the Treaty.

related rules of international law. However, the States within which they operate are concurrently bound by international obligations that derive from international treaties and conventions to which they are party. Thus, the EAC Partner States do obligate themselves to achieve the objectives of the EAC with due regard to the principles outlined in Articles 6 and 7 of the Treaty. To that extent, therefore, it is incumbent upon national courts to apply and enforce domestic laws in such a manner as would ensure compliance by themselves, as well as State parties, with these international obligations.

26. In the matter before us, the specific obligations in issue are the principles of rule of law and good governance. The Constitutional Court of Burundi, as a judicial organ of the Republic of Burundi, was expected to comply with those principles in performance of its adjudication function in **Case No. RCCB 303**. In the event then, as is the contention before us, that a national court is alleged to have violated its domestic law, as well as related Treaty obligations; **Antonios Tzanakopoulos** (supra) postulates that an international adjudication process would be required to interrogate whether indeed there has been a violation of a State's international (Treaty) obligations. Accordingly, we are respectfully persuaded that in the present case, this Court is rightly seized with the duty to interrogate the Burundi Constitutional Court's rule of law and good governance compliance credentials viz its decision in **Case No. RCCB 303** and the Applicant is properly before us in that regard.

27. We now turn to the question as to whether or not the impugned decision in the matter before us is, in fact, wrong and the duty upon an international court (such as this Court) in making such a determination. Stated differently, how would an international court

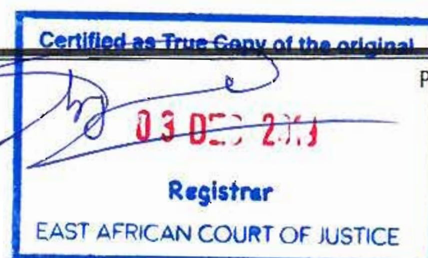
that is faced with an impugned act or decision by a domestic court make the determination that such act or decision is indeed internationally wrongful?

28. It is now well settled law 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 Partner State in its determination as to whether the action complained of amounts to a Treaty violation. *See* **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of Burundi & Others** (supra) and **Henry Kyalimpa vs. Attorney General of Uganda EACJ Appeal No. 6 of 2014**. The question is what parameters would guide and inform such an interrogation by an international court.

29. First and foremost, to allay the legitimate concern of learned Counsel for the Respondent, we state from the onset that the international review of national courts' decisions that is being adopted presently is to be distinguished from the typical hierarchical appellate review that pertains in national judiciaries. An exposition of the salient features of each of these judicial interventions is pertinent.

30. In **Robert D. Ahdieh, '*Between Dialogue and Decree: International Review of National Courts*', 2004, New York University (N.Y.U) Law Review, p. 2029 at 2045, 2046**, the appellate review of a subordinate court's decision was summed up as follows:

> **I identify four core characteristics of "appellate" review. First, and perhaps foremost, is the authority of an**



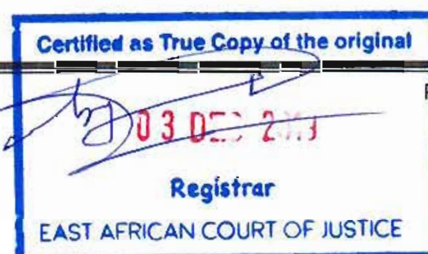
appellate court to undo the determinations of law, and sometimes even the findings of fact, reached by the court subject to review. Following naturally from this phenomenon is the binding nature of that review. Minimally, the judgment of an appellate court binds the trial court in the case at bar. More expansively, decisions on appeal consequently have some formal or informal *stare decisis* effect, binding lower courts in future cases as well. The pattern of review characteristic of the appellate interaction of courts, moreover, is largely unidirectional. With notable exceptions, appellate judgments are not, in the ordinary case, subject to substantive critique in a trial court. Finally, appellate review is constrained in its reach yet expansive in its depth. Appellate review is rarely de novo. Factual findings are subject to an exceedingly deferential standard of review, if they are subject to review at all. As to questions of law, however, courts of appeal possess relatively plenary powers of review and reversal.

31. For the avoidance of doubt, the foregoing definition highlights the following characteristics of appellate review:

I. Authority to undo the determinations of law (and sometimes of fact too) of the lower court.

II. The binding nature of that review on the lower courts.

III. The review is largely unidirectional ie whereas the Appellate Court can critique the Lower Court, the reverse is not usually tenable.

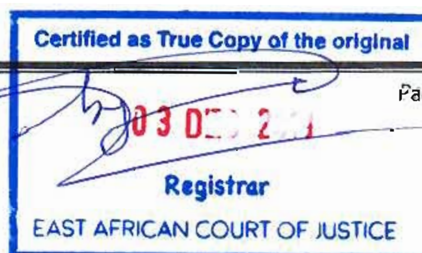


IV. The constrained reach of appellate review ie it is rarely *de novo*.

32. In contrast, the international review of domestic courts' decisions was expounded in the same literature as follows:

> **If there is to be some occasion for international review of national courts - some transnational judicial engagement with some dimension of both review and power - what should be its precise character? ... How might those ends be achieved without unnecessarily challenging values of national sovereignty, and thereby risking a backlash against relevant international regimes? .... one can identify three essential features of an effective pattern of international engagement with national courts: (1) the operation of a bipolar power dynamic, in which both judicial participants possess some capacity for control, and hence power, but neither can assert complete authority over the other; (2) the presence of alternative, and perhaps competing, legal and institutional perspectives; and (3) the existence of structures designed to encourage and facilitate adjudicatory continuity.** *(Our emphasis)*

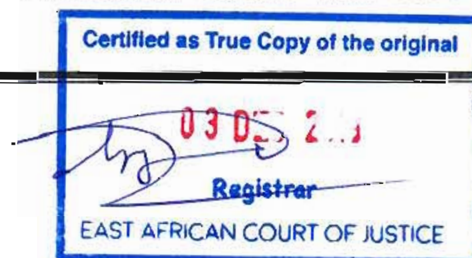
33. It becomes abundantly clear, then, that the international review of national courts does not necessarily subjugate the decisions of the latter courts to the former. Rather, it is characterized by the application of distinct legal perspectives whereby national courts enforce domestic laws while international courts approach the same set of circumstances from the perspective of states'



international obligations. Further, an international review is a trial *de novo* in the context of the international or treaty obligations the international court seeks to enforce. It is not binding upon the national courts as would be the case of a typical appeal, neither does it form *stare decesis* in domestic jurisdictions as would a decision of national states' apex courts. Nonetheless, it is intended to forment the international legal issues inherent in domestic adjudication with a view to engendering a harmonized legal approach to member states' international obligations. For purposes of the EAC, the ultimate purpose of such judicial intervention would be to increasingly entrench a harmonized judicial approach to EAC Treaty obligations within the EAC Partner States.

34. Secondly, and perhaps more importantly, are the evidential rules applicable to the interrogation of national courts' decisions by international courts and/ or tribunals. We do appreciate the onus upon us, as aptly propagated in **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of Burundi & Others** (supra), to interrogate the decision of the Constitutional Court of Burundi to determine that Partner State's international responsibility, as well as evaluate every act or omission made in respect of that decision so as to deduce its compliance with the EAC Treaty (or the lack of it). To that end, we turn to established international adjudication practice for apposite direction as to the burden and standard of proof applicable to international courts, such as ours.

35. As this Court observed in **British American Tobacco Ltd (BAT) vs. the Attorney General of the Republic of Uganda, EACJ Ref. No. 7 of 2017**, the burden of proof in international claims was most ably



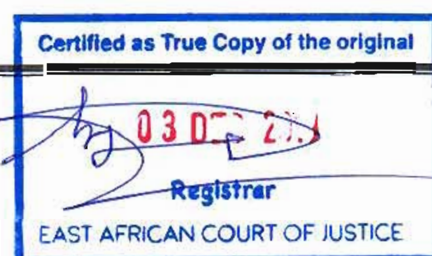
articulated in the case of **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro), Judgment, ICJ Reports 2007, p.43** as follows:

> **On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of** Military and para-military Activities in and against Nicaragua (Nicaragua vs. United States of America[5], **"it is the litigant seeking to establish a fact who bears the burden of proving it.**

36. The foregoing preposition does reflect the reasoning of this Court in the earlier case of **Raphael Baranzira & Another vs. The Attorney General of the Republic of Burundi, EACJ Ref. No. 15 of 2015**, where the cardinal procedural rule that s/he who asserts must prove their case was propounded. In so doing (in both the **BAT** and **Baranzira** cases), this Court relied upon the following exposition of that rule in **Shabtai Rosenne, The Law and Practice of the International Court**,[6] as cited with approval in **Henry Kyalimpa vs. Attorney General of Uganda** (supra)[7]:

> **Generally, in application of the principle of *actori incumbit probation* the court will require the party putting forward a claim or a particular contention to establish the elements of fact and of law on which the decision in its favour might be given.**

[5] Judgment, ICJ Reports 1984, p.437, para. 101
[6] 1920 – 2005, Vol III, Procedure, p. 1040
[7] See para. 29 hereof.



37. In **Bosnia & Herzegovina vs. Serbia & Montenegro** (supra), the International Court of Justice (ICJ) did also re-assert the standard of proof in international claims involving state responsibility in the following terms:

> **The Court has long recognized that claims against a State involving charge of exceptional gravity must be proved by evidence that is fully conclusive.[8] .... The same standard applies to the proof of attribution for such acts.**

38. Be that as it may, we are also mindful of the principle advanced in the case of **B. E. Chattin (USA) vs. United Mexican States, 1927, UNRIAA, vol. IV, p.282 at 288**, where state responsibility for wrongful judicial acts was limited to '**judicial acts showing outrage, bad faith, willful neglect of duty, or manifestly insufficient governmental action.**' In like vein, in the case of **Ida Robinson Smith Putnam (USA) vs. United Mexican States, 1927, UNRIAA, vol. IV, p.151 at 153**, it was held:

> **The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country.[9] A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral**

[8] See Corfu Channel (United Kingdom vs. Albania), Judgment, ICJ Reports 1949, p.17.
[9] See case of Margaret Roper, Docket No. 183, paragraph 8

tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law.

39. From the pleadings in this matter, as well as the extensive submissions of both Parties, we deduce the *act* in issue in the present Reference to be the decision of the Constitutional Court of Burundi in **Case No. RCCB 303**. Going by Mr. Deya's submissions, it seems to us that the Applicant disagrees with the Constitutional Court's opinion that the term 'exceptionally' in Article 302 of the Burundi Constitution is ambiguous as to the intention of the framers of the Constitution. The gist of the Applicant's complaint is that notwithstanding the Court's acknowledgment that the constitutional principles in the Arusha Accord were the bedrock to the Burundi Constitution; it nonetheless went ahead to render an allegedly erroneous judgment, purporting to adjudge Article 302 of the Burundi Constitution as an exception to the unambiguous provisions of Article 96 of the same Constitution. We reproduce both constitutional provisions below.

Article 96

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

Article 302

Exceptionally, the first President for the post-transition period shall be elected by the (elected) 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 the 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 post-transition period may not dissolve the Parliament.

40. We do also deem it necessary to reproduce the provisions of Articles 231 and 237 of the Burundi Constitution (as amended) in so far as they demarcate the Constitutional Court of Burundi as the apex court of that Partner State for purposes of constitutional matters.

Article 231

The Constitutional Court is the jurisdiction of the State for constitutional matters. It is the judge of the law's constitutionality and the interpretation of the Constitution.

Article 237

A provision declared unconstitutional may not be promulgated or implemented.

The decisions of the Constitutional Court are not susceptible to any recourse. (Our emphasis)

41. Before progressing further with this case, we are constrained to clarify the procedural basis for our determination of this case. In the **B. E. Chattin (USA) vs. United Mexican States** case, it was

proposed that states parties can only be held responsible for the most outrageous judicial acts that depict outrage, bad faith, willful dereliction of judicial duty and manifestly insufficient governmental action. Stated differently, a cause of action against a states party for the international review of a wrongful judicial act would only accrue in respect of such purportedly outrageous judicial acts by a judicial organ. It does follow that a judicial decision by a domestic court would be one such judicial act envisaged under that rule. We do respectfully stand most persuaded by that decision to the extent that it *inter alia* delineates outrageous judicial acts by a judicial organ of the State although, admittedly, that list is by no means exhaustive.

42. However, taking into account the importance of the doctrine of separation of powers to judicial efficiency, we are disinclined to accept the preposition therein that '*manifestly insufficient governmental action*' can constitute a wrongful judicial act. Quite clearly, governmental action *per se* cannot be equated to judicial action. Even more significantly, as this Court did observe in **Raphael Baranzira & Another vs. The Attorney General of the Republic of Burundi** (supra), the principle of separation of powers is indispensable to an independent, impartial and effective judiciary. For clarity, we reproduce our observation:

> **The principle of separation of powers is the cornerstone of an independent judiciary. It is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of separation of powers is a *sine qua***

non for a democratic country. [10] **Indeed, under international law, nation states are obliged to organize their state apparatus in such a manner as would be compatible with their international obligations. It is incumbent upon them to ensure that the structure and operation of state power is founded on the true separation of its executive, legislative and judicial branches, as well as the existence of an independent and impartial judiciary.** [11]

43. We find no reason to depart from this position. Consequently, we take the view 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 willful dereliction of judicial duty; and, secondly, where no or manifestly insufficient action has been taken by the appropriate judicial disciplinary body to redress such judicial outrage. We so hold.

44. The **Ida Robinson Smith Putnam** case, on the other hand, sheds some light on the duty upon an international court or tribunal faced with the international review of a domestic judicial decision. In that case it was opined that due respect should be accorded to judicial decisions emanating from the nation states' apex courts, such decisions to only be set aside and a re-evaluation of their issues of fact and law undertaken, where they reflect '**a clear and notorious injustice, visible, to put it thus, at a mere glance**.' We are respectfully persuaded by the approach advanced therein to the

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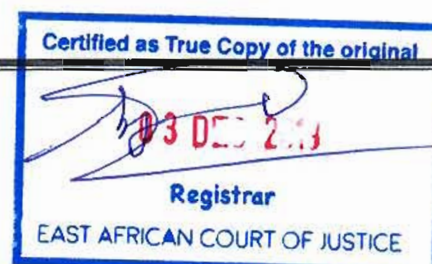
[10] See Report of the Special Rapporteur on the independence of Judges and Lawyers, UN document E/CN.4/1995/39, para. 55

[11] See International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1, International Commission of Jurists, 2004, p.19

extent that it takes due cognizance of the fundamental role of apex domestic courts in the development of municipal jurisprudence, which role cannot and should not be usurped by an international court or tribunal. For present purposes, a clear illustration of the pivotal function of the Burundi Supreme Court in the development of the law in Burundi is reflected in Article 227 of the Burundi Constitution, which holds that court '**responsible for the proper application of the law by the courts and tribunals**' in Burundi.

45. However, we are hard pressed to appreciate the circumstances under which an international court can '**put aside a national decision presented before it and (to) scrutinize its grounds of fact and law.**' It seems to us that such an eventuality would run contrary to the counter-exigencies of the international review of domestic decisions viz the appellate function of domestic apex courts. A distinct feature of the international review of domestic judicial decisions is that the international court or tribunal approaches the set of facts that were before a domestic court from the perspective of international law (as opposed to domestic laws) and the state party's international obligations thereunder. That, clearly, is far-removed from the mandate of an appellate court that tests the correctness of a subordinate court's decision with a view to possibly quashing or setting it aside if it offends the applicable legal regime. Needless to state, such legal regime would be common to both the trial and appellate courts, unlike the scenario under the international review of domestic decisions. Indeed, it would scarcely be the prerogative of an international court sitting in exercise of its international review mandate to scrutinize the grounds of fact and law stipulated in a domestic judicial decision given that the 2 courts primarily apply 2



different legal regimes. The international court is restricted to an interrogation of a domestic decision's adherence to domestic laws only to the extent that such compliance would underscore the domestic court's compliance with the responsible state's international law obligations.

46. It then becomes abundantly clear that this Court cannot set aside the impugned decision. It can only scrutinize it to ascertain its compliance with the Respondent State's international obligations under the Treaty and make consequential orders. The obligations in question would include the adherence to the *rule of law* principle encapsulated in Articles 6(d) and 7(2) of the Treaty. This point is explicitly made in **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of Burundi & Others** (supra) where, expounding its decision that this Court does have jurisdiction to review the impugned judgment (and dispelling the notion that such a review would be tantamount to a disguised appeal), by the Appellate Division of this Court held:

> **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 municipal laws of the**

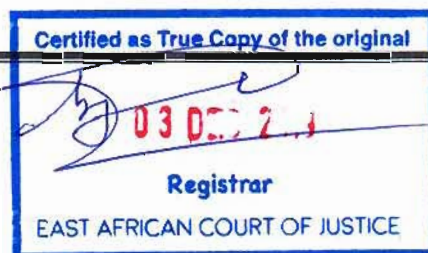
<u>Partner States, but rather makes declarations as to the decision's compliance with the EAC Treaty</u>. *(Our emphasis)*

47. Turning to the matter before us presently, we have carefully considered the impugned judgment of the Burundi Constitutional Court. We find the *ratio decidendi* and the decision thereof in paragraphs 4 and 5 of the judgment respectively. They read:

    4. **STATES that Article 96 means that the number of terms by direct universal suffrage is limited to two only and that Article 302 creates a special mandate by indirect universal suffrage which has nothing in common with the terms of office under Article 96.**

    5. **RULES that the renewal once and for the last time of the current presidential mandate by direct universal suffrage for five years is not at variance with the Burundian Constitution of 18 March 2005.**

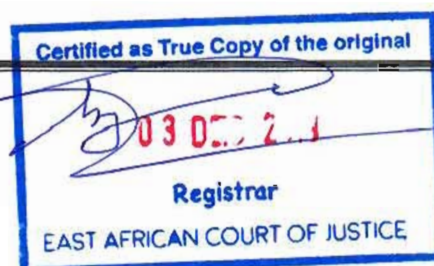
48. The reasoning that informs the foregoing decision is reflected in pages 4 – 7 of the judgment. In a nutshell, it was the Constitutional Court's view that whereas the Arusha Accord (without attaining supra-constitutional status) was the bedrock of the Burundi Constitution, the framers of the 2005 Constitution **'did not strictly follow the recommendations of the Arusha Accord.'** The court further reasoned that Article 302 created a special presidential mandate by indirect suffrage that was an exception to the direct universal suffrage espoused in Article 96, *inter alia* observing that such exceptional mandate is similarly reflected in the Burundi Electoral Code that was enacted one (1) month after the promulgation of the Constitution.



Article 190 of the Electoral Code, which is identical to Article 302 of the Constitution, was noted to be expressly designated in the Code as an exception to Article 186 thereof that, in turn, is akin to Article 96 of the Constitution. The court did also observe that the foregoing interpretation reflects a compromise position that was intended to stabilize the political situation that prevailed in Burundi at the time.[12]

49. We take the considered view that the foregoing decision, as well as the legal reasoning that underpins it, cannot be categorized as an outrageous judicial decision, let alone one that depicts outrage, bad faith or willful dereliction of judicial duty so as to invoke state responsibility therefor by the Respondent State, as espoused in the **B. E. Chattin (USA)** case. The Constitutional Court clearly applied its mind to the background to the Constitution's promulgation; duly acknowledged and tested the Arusha Accord against related foundational laws such as the Electoral Code; took due cognizance of the political situation that prevailed in Burundi at the time in its determination of what emphasis to place on the Arusha Accord, and drew its conclusions on that basis. We find no plausible reason to fault that judicial reasoning or result. Consequently, the impugned decision would not invoke state responsibility therefor given that it neither amounts to an outrageous judicial act nor did it warrant the intervention of the Respondent State to address a non-existent judicial outrage. It does follow, therefore, that this Court's international judicial review mandate is improperly invoked and we do hereby decline the invitation extended to us to improperly exercise that mandate. In the result, we would answer the present issue in the negative.

[12] see p. 5, para. 5 of the judgment.



ISSUE NO.2: **Whether the Applicant is Entitled to the Remedies Sought**

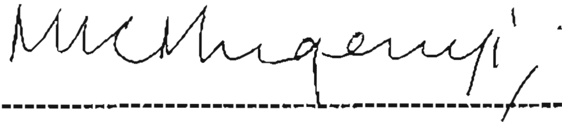
50. The remedies sought by the Applicant in this matter are delineated verbatim in paragraph 9 hereof. We do not deem it necessary to reproduce them here. Be that as it may, having held as we have in the preceding issue that this Reference is improperly before us, the remedies sought herein are untenable, save for the order on costs sought in paragraph 52(h) of the Reference, to which we revert forthwith.

51. Rule 111(1) of this Court's Rules postulates that costs should follow the event unless the Court, for good reason, decides otherwise. In the instant case the Reference has not succeeded so ordinarily the costs thereof would be to the Respondent. However, we take the view that the Reference did raise issues of public interest on the international review of domestic judicial decisions. Accordingly, we deem it just in the circumstances to order each Party to bear its own costs.

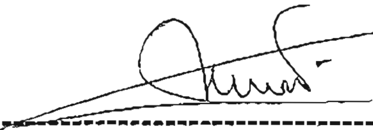
CONCLUSION

52. In the final result, the Reference is hereby dismissed. Each Party to bear its own costs. It is so ordered.

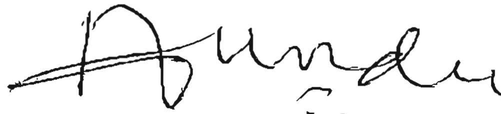
Dated, delivered and signed at Arusha this 3rd Day of December, 2019.



Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

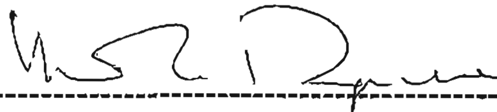


Hon. Justice Dr. Faustin Ntezilyayo
DEPUTY PRINCIPAL JUDGE



*Hon. Justice Fakihi A. R. Jundu
JUDGE

Hon. Justice Dr. Charles Nyawello
JUDGE



Hon. Justice Charles Nyachae
JUDGE

[*Hon. Justice Fakihi A. R. Jundu retired from the Court with effect from 30th June, 2019, but he has signed the Judgment in terms of Article 25(3) of the Treaty.]