



IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA



APPELLATE DIVISION

(*Coram: E.Ugirashebuja,P; L. Nkurunziza, VP; J. M.Ogoola,JA; E. M. Rutakangwa, JA; and A. Ringera,JA.*)

APPEAL NO. 1 OF 2014

BETWEEN

DEMOCRATIC PARTY..... APPELLANT

AND

**THE SECRETARY GENERAL OF THE
EASTAFRICAN COMMUNITY.....1STRESPONDENT**

**THE ATTORNEY GENERAL OF THE
REPUBLIC OF UGANDA.....2ND RESPONDENT**

**THE ATTORNEY GENERAL OF THE
REPUBLIC OF KENYA.....3RD RESPONDENT**

**THE ATTORNEY GENERAL OF THE
REPUBLIC OF RWANDA.....4TH RESPONDENT**

**THE ATTORNEY GENERAL OF THE
REPUBLIC OF BURUNDI.....5TH RESPONDENT**

[Appeal from the Judgment of the First Instance Division at Arusha, Tanzania (Jean Bosco Butasi, PJ; Mary Stella Arach-Amoko, DPJ; John Mkwawa, J; Isaac Lenaola, J; and Faustin Ntezilyayo, J dated 29th November 2013 in Reference No.2 of 2013]

JUDGMENT

I. INTRODUCTION

- 1 This is an appeal by the Democratic Party (“ the Appellant”) against the Judgment of the First Instance Division dated 29th November 2013 in Reference No. 2 of 2013, by which that Division dismissed the Reference by holding that it had jurisdiction to ensure the adherence to the law in the interpretation and application of and compliance with the Treaty for the Establishment of the East African Community (“the Treaty”); but that it had no jurisdiction to ensure adherence to the provisions of the African Charter on Human and Peoples’ Rights (“the Charter”) and its Protocol(“the Protocol”)
- 2 The Appellant lodged the Reference before the First Instance Division of this Court challenging a delay by the 2nd, 3rd, 4thand 5th Respondents to deposit their declarations under Articles 5(3) and 34 (6) of the Protocol. The Appellant contended that such delay constituted an infringement of Articles 5,6, 7(2),8(1) (c), 126 and 130 of the Treaty; and Articles 1,2,7,13,26,62,65 and 66 of the Charter.
- 3 Before the First Instance Division, the issues raised were as follows:
 - 1) *Whether the Court had jurisdiction to entertain the Reference;*
 - 2) *Whether the issues as presented were justiciable;*
 - 3) *Whether the Reference disclosed a cause of action against the 1st and 4th Respondents;*

- 4) *Whether the Applicant had locus standi to present the Reference;*
- 5) *Whether the delay by the 2nd, 3rd, 4th and 5th Respondents to deposit their respective declarations was a violation of Articles 5,6,7,8(1)(c), 126 and 130 of the Treaty; Articles 1(2), 7, 13, 26, 62, 65 and 66 of the Charter; and Articles 1, 2, 3, 5 and 34 of the Protocol;*
- 6) *Whether the 1st Respondent had a duty under the Treaty, the Charter or the Protocol to compel and/ or to supervise the 2nd, 3rd, and 5th Respondents in depositing their declarations under Article 34 (6) of the Protocol;*
- 7) *Whether the Parties were entitled to the remedies sought.*

- 4 On the 1st issue, the First Instance Division held that it had the requisite jurisdiction to determine the issues raised in the Reference. However, the same Court held that it had no jurisdiction to interpret other international instruments and specifically the Charter and its Protocol.
- 5 On the 2nd issue, the First Instance Division held that the issues placed before it were justiciable.
- 6 On issue No 3, the First Instance Division held that in the context of the Reference before it, neither the facts nor the eventual remedy to be granted or denied would create a cause of action against the 1st Respondent.
- 7 On issue No. 4, the First Instance Division resolved that the Applicant had *locus standi*.
- 8 On issue No.5, the First Instance Division found no contravention of the Treaty, the Charter, or the Protocol.

- 9 On issue No.6, the First Instance Division held that the answer to issue No.3 (cause of action) was sufficiently disposed of this particular issue.
- 10 On issue No.7, the First Instance Division held that each Party should bear its own costs.
- 11 Accordingly, the First Instance Division dismissed the Reference; and ordered each Party to bear its own costs.
- 12 Dissatisfied with the Judgment of the First Instance Division, the Appellant appealed to this Appellate Division.
- 13 The Appellant raised 9 grounds of Appeal which, at the Scheduling Conference were consolidated into the following 5 issues:-

(i) Whether the First Instance Division erred in law when it held that it had no jurisdiction to interpret the Charter, the Protocol, and other relevant international conventions and instruments to which the 2nd, 3rd and 5th Respondents are parties;

(ii) Whether the First Instance Division erred in law when it held that the delay by the 2nd, 3rd and 5th Respondents in depositing their respective declarations was not a violation of the provisions of the Treaty, and of the Charter, the Protocol and the 1969 Vienna Convention of the Law of Treaties (the Vienna Convention),

(iii) Whether the First Instance Division erred in law when it held that the 1st Respondent had no duty under the Treaty to supervise the 2nd, 3rd and 5th Respondents to comply with their

obligations under the Charter; the Protocol 1969 Vienna Convention;

(iv) Where the First Instance Division erred in law when it refused to award costs against the 1st, 2nd, 3rd and 5th Respondents; and

(v) Whether the Appellant is entitled to the remedies sought.

14. In course of the Scheduling Conference, the prayer against the 4th Respondent was abandoned by the Appellant.

II. BACKGROUND

15. The brief background to this Appeal is set out in paragraphs 4, 5, 6, 7 and 8 of the Judgment of the First Instance Division, dated 29th November 2013. Those paragraphs recounts the facts as follows:-

- i. **THAT** the Republics of Uganda, Kenya, Rwanda and Burundi are all signatories to the Charter and the Protocol.
- ii. **THAT** Article 34 (6) of the Protocol provides as follows:-

“At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration.”

iii. **THAT**, Article 5 of the said Protocol provides as follows:-

“1. The following are entitled to submit cases to the Court:-

- a) The Commission;*
- b) The State Party which has lodged a complaint to the Commission;*
- c) The State Party against which the complaint has been lodged to the Commission;*
- d) The State Party whose citizens is a victim of human rights violation; and*
- e) African Inter-governmental Organizations.*

2. When a State Party has an interest in a case, it needs to submit a request to the Court to be permitted to join.

3. The Court may entitle relevant non-Governmental Organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Article 34(6) of the Protocol.”

iv. **THAT** during the pendency of the proceedings, Rwanda complied with the provision of Article 34(6) of the Protocol, by depositing its declaration, dated 22nd January, 2013.

v. **THAT** the 1st Respondent got information of such allegations, but failed to carry out his supervisory role.

vi. **THAT** when the above declaration was brought to the attention of the Applicant, the Reference as against Rwanda was abandoned on 22nd August, 2013. Accordingly, the only issue to address at the end of the Judgment of the First

Instance Division was whether to award costs against the Republic of Rwanda.

- vii. **THAT** with regard to the 2nd, 3rd, and 5th Respondents, it is not contested that they have not filed any declaration pursuant to Article 34(6) of the Protocol which is the gist of the Application.

III. **THE APPELLANT'S SUBMISSIONS**

16. The Appellant presented legal arguments for each ground of Appeal, starting with the first issue as follows:-

Issue No.1. Whether the First Instance Division erred in law in holding that it had no jurisdiction to interpret the Charter, its Protocol and other relevant international conventions and instruments to which the 2nd, 3rd and 5th Respondents are parties.

17. In support of its argument on this 1st issue, the Appellant relied especially on the fact that the 2nd, 3rd, and 5th Respondents are all signatories of the Charter, and the fact that there are several provisions in the Treaty which create obligations for the EAC Partner States to protect human rights in accordance with the Charter. In this respect, the Appellant cited Articles 5, 6(d), 7(2), 126, 130, 131 of the Treaty; and took into account Article 23 of the same Treaty which provides, among others, that the Court shall be a judicial body which shall ensure the adherence to law in the interpretation of and compliance with the Treaty.
18. Having cited the above Articles of the Treaty, the Appellant drew a legal implication that the First Instance Division erred in law when it held that it had jurisdiction over the interpretation and

application of the Treaty, but that it has no jurisdiction to interpret Articles 1(2), 7, 13, 26, 62, 65 and 66 of the Charter, nor Articles 1, 3, 5 and 34 of the Protocol.

19. Furthermore, the Appellant contended that the East African Court of Justice has on several occasions held that it had jurisdiction over principles of the rule of law and over matters that impact on human rights. In that regard, he relied among others on the case of **James Katabazi v. the Secretary General of the EACJ** [Ref No.1 of 2007, Judgment of 20 November 2007].

ISSUE No.2. Whether the First Instance Division erred in law when it held that the delay by the 2nd, 3rd and 5th Respondents in depositing their respective declarations was not a violation of the provisions of the Treaty, and of the Charter, the Protocol, and the Vienna Convention.

With regard to this issue, the Appellant submitted that the 2nd, 3rd, 4th and 5th Respondents have signed, ratified or acceded to the Charter and the Protocol. Consequently, the Appellant averred that the First Instance Division erred in law when it held that the delay by the 2nd, 3rd, and 5th Respondents to deposit their respective declarations was not a violation of Articles 5, 6, 7, 8(1)(c), 126, 130, 131 of the Treaty, Articles 1(2), 7, 13, 26, 62, 65, 66 of the Charter; and Articles 5(3) and 34(6) of the Protocol.

20. In addition, the Appellant contended that the First Instance Division erred in law when it held that the 2nd, 3rd and 5th Respondents had no obligation to a time frame to expeditiously deposit declarations under Articles 5(3) and 34(6) of the Protocol to allow their individual citizens and NGO,s to have access to the African Court of Human and Peoples' Rights (“

the African Court”).The Appellant further, contended that all the EAC Partner States have signed, ratified, or acceded to the Treaty and have thereby undertaken to be governed in accordance with Article 6 (d) of the Treaty which obliges every EAC Partner State to promote and protect “*human rights in accordance with the provisions of the Charter.*”

- 21.** The Appellant went further to mention the requirement of Article 126 of the Treaty under which, all Partner States are enjoined to cooperate in legal and judicial affairs; to harmonize their national laws which appertain to the Community; and, under Articles 130 and 131 of the Treaty, to honor their commitments under the Treaty in respect of multinational and international organizations especially the African Union and the United Nations.
- 22.** The Appellant relied on the Vienna Convention under which, a Partner State cannot invoke its own internal laws to defend its failure to comply with its international obligations. According to him, the failure, delay or neglect of the 2nd, 3rd, and 5th Respondents to deposit the declarations under Articles 5 (3) and 34 (6) of the Protocol to the Charter is not justifiable since they have already ratified the said Protocol; and, by ratification, they have expressed their consent to be bound by the provisions of the Protocol. To that end, the Appellant averred that in accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties, the Partner States are bound to refrain from acts which would defeat the object and purpose of the Treaty.

23. The Appellant submitted therefore that when a State ratifies any of the international Human rights treaties, it assumes a legal obligation to implement the rights recognized in that Treaty; in the sense that, through ratification, the Partner States undertake to put in place domestic measures and legislation compatible with their Treaty obligations.

Issue No.3. *Whether the First Instance Division erred in law when it held that the 1st Respondent had no duty under the EAC Treaty to supervise the 2nd, 3rd and 5th Respondents to comply with their obligations under the Charter, the Protocol, and under the Vienna Convention.*

24. The Appellant submitted that indeed, the First Instance Division erred in law when it held that the 1st had no duty under Articles 29 of the Treaty, 67 and 71 of the Treaty to ensure that the 2nd, 3rd, and 5th Respondents comply with the provisions of Articles 5, 6, 7(2), 126, 130, and 131 of the Treaty, and Articles 5(3) and 34(6) of the Protocol; and that, therefore, Reference No. 2 of 2012 disclosed no cause of action against the 1st Respondent.

25. Furthermore, the Appellant submitted that the 1st Respondent being the Chief Executive Officer of the East African Community (“the Community”), is mandated to play a supervisory role over the Partner States to ensure that the Partner States comply with the provisions of the Treaty. He contended that it is a duty under Articles 29 and 71 of the Treaty to carry out investigations, collect information, and verify matters that are brought to his attention, and, ensure that the Partner States comply with the Provisions of the Treaty.

26. The Appellant further contended that the 1st Respondent failed to supervise the 2nd, 3rd, and 5th Respondents to ensure that they deposit their declarations pursuant to the provisions of the Protocol to the African Charter despite having been informed about it.
27. As to the issue of the cause of action, the Appellant argued that a complaint on the infringement of Treaty obligations under Articles 5,6,8,23,27 and 30 of the EAC Treaty creates a cause of action under the Treaty. In support of his argument in that respect, the Appellant cited various cases of this Court such as **Katabazi & Another V. Secretary General of the East African Community & 4 Others** AHRLR 119 (EACJ 2007), **Callist Mwatela & Others V. Secretary General of the East African Community** (EACJ 2008) Reference No.1 of 2005, **Prof. Anyang' Nyongo & 10 Others v. AG Kenya & Others** EACJ Ref No. 1 of 2006.

ISSUE No.4. Whether the First Instance Division erred in law when it refused to award costs against the 1st, 2nd, 3rd and 5th Respondents in the circumstances.

28. This issue is dealt with in Paragraph 81 of this Judgment.

IV. THE RESPONDENTS' CASE

THE 1ST RESPONDENT'S SUBMISSIONS

29. On the first issue, regarding jurisdiction, the 1st Respondent submitted that the First Instance Division of the Court correctly held that the right forum for litigating over the said matter was the African Court through the African Commission.

Therefore, according to him, the First Instance Division was right to decline to interpret Articles 1(2), 7, 13,26,62,65 and 66 of the Charter and Articles 1, 3, 5 and 34 of the Protocol.

30. As regards the 2nd issue, relating to the alleged delay to deposit the declaration under Articles 5 (3) and 34 (6) of the Protocol, the 1st Respondent submitted that Article 34 (6) of the Protocol does not prescribe any deadline for depositing declarations. Therefore, there was no violation occasioned. Under that Article, discretion is left to each State Party as to the timing of the deposit of its declaration.
31. He distinguished this case from the **Katabazi case** (supra) to the extent that the delay in depositing a declaration does not in any way constitute a violation of any provision of the Treaty.
32. The 1st Respondent concluded on that issue by contending that the case of **Katabazi** (supra) cited by the Appellant is not applicable in the instant case
33. With regard to the 3rd issue, namely, **whether the 1st Respondent had no duty under the Treaty to supervise the Respondents to comply with their obligations under the Charter, the Protocol, and the Vienna Convention, the 1st Respondent submitted, among others, that under Article 29(1) of the Treaty, the Secretary General has a margin of appreciation. To be moved under that Article, he must be convinced that a Partner State has failed to fulfill an obligation under the Treaty or has infringed a provision of the Treaty. The 1st Respondent concluded that a delay to deposit a declaration when there is no constraining time limit to do so, cannot constitute**

a violation of Articles 5(3) and 34(6) of the Protocol; nor indeed, of any of the enumerated provisions of the Charter, or of the Treaty.

- 34. On issue No.5** namely, **of whether the Appellant was entitled to the remedies sought**, the 1st Respondent submitted that in light of the various laws cited above and by the foregoing submissions, the Appellant is not entitled to any of the prayers sought; that therefore, this Appeal be dismissed with costs to the 1st Respondent.

THE 2ND RESPONDENT'S SUBMISSIONS

- 35.** As regards the 1st Issue, Counsel for the 2nd Respondent was in agreement with the Findings of the First Instance Division. He submitted that the instant Reference presented two legal regimes namely, the EAC Treaty; as well as the Charter and the Protocol. Counsel observed that both regimes create institutional mechanisms through which redress can be sought in case of infringement of the Treaty on one hand, or of the Charter or the Protocol, on the other hand.
- 36.** Counsel added that the institutions created under the two legal regimes are not seized with parallel jurisdiction to handle infringements arising out of other instruments which have their own mechanisms to handle disputes referred to them.
- 37.** Counsel submitted that the Appellant has not presented any evidence before this Court to demonstrate that the East African Court of Justice has concurrent jurisdiction with the African Court and African Commission.

38. Counsel challenged the authorities of the Court's jurisprudence relied upon by the Appellant to support the view that the Court has jurisdiction. Counsel contended that these authorities are inapplicable. They do not suggest that the EACJ has jurisdiction to interpret and apply the provisions of the African Charter.
39. Counsel submitted that Article 5(3) of the Protocol is silent as to the time within which a State Party must deposit a declaration. He, therefore, agrees entirely with the Findings and Decision of the First Instance Division.
40. Regarding the remedies sought, Counsel invited the Court to dismiss the Appeal with costs to the 2nd Respondent.

THE 3RD RESPONDENT'S SUBMISSIONS

41. As regards the 1st issue, the 3rd Respondent's answer was an emphatic "No". Pursuant to Articles 9, 23, 27 of the Treaty, Counsel for the 3rd Respondent submitted that the Court is a creature of the Treaty. The Appellant bears the burden to demonstrate that the Court has legally assumed a specific jurisdiction to interpret the
42. On the alleged delay by the 2nd, 3rd, and 5th Respondents to deposit their declarations, Counsel submitted that a delay cannot be established unless if it is measurable against some continuum stipulated in the Charter. Where, as here, the delay cannot be measured, it is not possible to found a claim for violation of the rights of the Applicant, (now the Appellant). Counsel concluded that violations of the Charter are triable under the Charter itself.

43. On the supervisory role of the Secretary General of the East African Community, Counsel for the 3rd Respondent contended that the case of **Katabazi** (supra) cited by the Appellant is distinguishable on the basis of interpretation of Article 71 of the Treaty. Counsel concluded that that case, therefore, was not applicable to the circumstances of the instant Reference.
44. Accordingly, Counsel urged the Court to dismiss the Appeal, with costs to all the Respondents.

THE 4TH RESPONDENT'S SUBMISSION.

45. On the issue of jurisdiction, Counsel for the 4th Respondent submitted that the First Instance Division arrived at a proper decision by holding that it had no jurisdiction to interpret the Charter and the Protocol. In so doing, the Court read Article 23 of the Treaty in conjunction with Article 27 (1).
46. Counsel contended that the Treaty provisions cited above made it clear that the East African Court of Justice can only interpret the Treaty and not the other international Conventions.
47. As to the alleged delay by the Respondents to deposit their declarations as per the provisions of the Protocol, the 4th Respondent submitted that even if, for argument's sake, the Protocol were held to enjoin the State Parties to make declarations within a specific time; and thus, not doing so occasioned a violation of the Charter and the Protocol, the East African Court would not be the proper forum to provide redress. The right forum would be the African Court pursuant to Article 3 of

the Protocol, and to Rule 26 of the African Court's Rules of Procedure.

48. Accordingly, the 4th Respondent prayed this Court to dismiss the Appeal against the 4th Respondent with costs; and to make such other orders as it deems fit.

V. THE COURT'S ANALYSIS OF THE ISSUES

We will deal with Issues No.1 and No.2 together. The two are inter-related- namely: (1) ***Whether the First Instance Division erred in law when it held that it had no jurisdiction to interpret the African Charter, the Protocol, and other relevant international conventions and instruments to which the 2nd, 3rd and 5th Respondents are parties; and Whether the First Instance Division erred in law when it held that the delay by the 2nd, 3rd and 5th Respondents in depositing their respective declarations was not a violation of the provisions of the Treaty, and of the Charter, the Protocol; and the Vienna Convention.***

49. The above two issues involve mainly the concept of **Jurisdiction**. Its meaning needs to be ascertained first in order to apply it correctly.

In SHABTAI ROSENNE'S: "The Law and Practice of the International Court," 1920 – 2005 Vol. II p.524, it is postulated that "*jurisdiction relates to the capacity of the Court to decide a particular case with final and binding force.*"

50. In the **Nottebohm** (cited in the **Law and Practice of International Court. p. 523**), it was observed that the Court must determine the scope of the relevant title of jurisdiction.

51. It is evident that jurisdiction refers to the boundary of authority. It is critical concept which, any court of law has to deal with carefully and in accordance with the established legal principles in order to ensure that the court's findings or decision will have legal and binding effect on the parties.
52. The jurisdiction of the East African Court of Justice can be traced from the following provisions of the Treaty – namely, Articles 23 (role of the Court), 27(jurisdiction of the Court), 28 (Reference by Partner States), 29(Reference by Secretary General), 30 (Reference by Legal and Natural persons), 31 (Disputes between the Community and its employees), 32 (Arbitration clauses and Special Agreements), 34 (Preliminary Ruling of National Courts), 35A (Appeals from the First Instance Division), 36 (Advisory opinion), 39 (Interim orders), 42 (Rules of the Court) and 45(2) (employment of staff). These are discussed in detail in the case of **Independent Medical Legal Unit vs. Attorney General of the Republic of Kenya EACJ Appeal No.1 of 2011**).
53. The primary provision, on which the jurisdiction of the East African Court of Justice is founded, is Article 23 of the Treaty. it provides, in relevant part, that:
- “1. The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty” (Underlining provided)*
54. The above Article should be read together with **Article 27** of the Treaty, which provides that:-
- “1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty:-***

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

2. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalize the extended jurisdiction."

55. In view of the above, it is obvious that once a matter involves the interpretation and application of the provisions of the Treaty, such matter falls *ipso jure* within the jurisdiction of the East African Court of Justice (**jurisdiction *ratione materiae***, namely, jurisdiction over the nature of the case and the type of relief sought).

56. Another test to meet in the assessment of the jurisdiction of the East African Court of Justice is found under Article 30 of the Treaty which provides for the **jurisdiction *ratione materiae***, **jurisdiction *ratione persona*** (i.e. persons/litigants) and **jurisdiction *ratione temporis*** (i.e. territory) as follows:-

"1. Subject to the provision of Article 27 of this Treaty, any person who is a resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision, or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the Treaty"

2. *The proceeding provided for under this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be;*
3. *The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State”.*
4. The above quotation of Article 27 of the Treaty shows that:
 - (1) the initial jurisdiction of the Court is confined to the interpretation, and application of the Treaty, and
 - (2) the subsequent extended jurisdiction of the Court will include original, appellate, human rights and other matters.

57. In SHABTAI ROSENNE’s: The Law and Practice of the International Court, [supra], it was observed that:-

“...In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court. For that purpose, the Court allows preliminary objection procedure to be employed for several different types of disputes as to whether the Court has jurisdiction.....The matter can also arise and be decided at any stage of a case, in quality of ‘a plea”.

58. For the instant Appeal, it is apt to recall that in the First Instance Division, the Appellant was mainly challenging the 2nd, 3rd, 4th and 5th Respondents' failure or delay to make their respective declarations to accept the jurisdiction of the African Court in line with Articles 5(3) and 34(6) of the Protocol. This, he contended, was an infringement of both the Treaty and of the Charter; as well as a contravention of the provisions of the Vienna Convention.

59. In this regard, Article 34 (6) of the Protocol provides as follows:-

*“At the time of the ratification of this Protocol **or any time thereafter, the State [Party] shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration.**” [Emphasis added].*

60. Article 5(3) of the Protocol to which the above Article 34 (6) of the Charter makes reference, provides as follows:-

“3. The Court may entitle relevant non-Governmental Organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Article 34(6) of the Protocol”

61. The above cited Article 34 of the Protocol does not set any specific time limit within which a State Party must deposit its declaration. The wording “... **or any time thereafter...**”, far from stipulating a concrete deadline, provides instead a margin of discretion within which a State Parties may deposit their declarations. Therefore, a State Party which has not yet deposited the said declaration cannot be faulted under the above provision.

62. The question is whether, in light of the above, the nature of the Appellant's case had matters triable under the provisions of the Treaty, especially under Articles 6,7,27 and 30 of the Treaty? The answer is in **affirmative**. Indeed, that was also the finding of the First Instance Division.
63. Article 6(d) of the Treaty obligates the Partner States to adhere to the principles of democracy, the rule of law, accountability, transparency, social justice, as well as recognition, promotion and protection of Human and Peoples' Rights **in accordance with the provisions of the African Charter on Human and Peoples' Rights**. [Emphasis added].
64. The wording "...in accordance with the provisions of the African Charter on Human and Peoples' Rights", creates an obligation on the EAC Partner States to act in good faith and in accordance with the provisions of the Charter. Failure to do so constitutes an infringement of the Treaty. Such violation can be legally challenged before the East African Court of Justice by virtue of its jurisdiction **ratione materiae**, which is provided for especially under **Article 23** read together with **Article 27** of the Treaty.
65. In **the Chorzow Factory (Jurisdiction case page 519 (supra))** the Permanent Court of international Justice established an important [general] principle namely that:
- "The Court when it has to define its jurisdiction in relation to that of another international tribunal cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of*

jurisdiction involving the danger of denial of justice.”[Emphasis added].

66. The Respondents argued that the First Instance Division cannot purport to operate outside the framework of the Treaty and usurp the powers of other international courts established for the enforcement of obligations created by other international instruments, including the African Charter and its Protocol.
67. We have indicated above that Article 6(d) of the Treaty; which sets out the Fundamental Principles of the Community, obliges the Partner States to take into account and observe the provisions of the Charter concerning, the protection and promotion of human and peoples’ rights.
68. The same obligation is emphasized by Article 7(2) of the Treaty which in stipulating the Operational Principles of the Community, provides that:-
“The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and maintenance of universally accepted standards of human rights.”
69. Articles 6 (d) and 7(2) of the Treaty empower the East African Court of Justice to apply the provisions of the Charter, the Vienna Convention, as well as any other relevant international instrument to ensure the Partner States’ observance of the provisions of the **Treaty**, as well as those of other international instruments to which the Treaty makes reference. The role of the Court in the instant Reference, was to ascertain the Partner States’ adherence to,

observance of, and/or compliance with the Treaty provisions – including the provisions of any other international instruments which are incorporated in the Treaty, whether explicitly [as in Article 6(d)], or implicitly [as in Article 7 (2)].

- 70.** The above reasoning has been reiterated in several decisions of this Court. In **The Attorney General of the Republic of Rwanda V Plaxeda Rugumba, EACJ Appeal No.1 of 2012** the Court reaffirmed its jurisdiction to interpret and to apply the provisions of the Treaty, including its Article 6 (d), 7(2) and 8 (1) (c). It held that failure by the authorities in Rwanda to charge Lt. Col. Seveline Rugigana Ngabo with specific offences for 5 months, was fundamentally inconsistent with Rwanda's express undertakings under Articles 6(d), 7(2) and 8(1)(c) of the Treaty to observe the principles of good governance, including in particular, the principle of adherence to the rule of law, and the promotion and protection of human rights. These failures, singly and collectively, constituted an infringement of the said provisions of the Treaty, (see also, the case of **James Katabazi** (supra).
- 71.** Briefly, then, nothing can preclude the East African Court of Justice from referring to the relevant provisions of the Charter, its Protocol and the Vienna Convention on the Law of Treaties in order to interpret the Treaty. In as far as the Articles quoted above especially Article 6(d) recognize the Charter's relevance in promotion and protection of human and peoples' rights, then compliance with those provisions of the Charter become, *ipso jure*, an obligation imposed upon the Partner States under the Treaty.

72. On other hand, as regards the application by this Court of the provisions of the Vienna Convention, it would be simply illogical -- if not downright absurd – for this Court which is (itself a creature of a Treaty, and whose very *raison d'être* is the interpretation of that Treaty), to be barred from applying the provisions of the Vienna Convention. In this connection, we need only refer to two of the Articles of that Convention for an authoritative statement in the matter, namely Article 31 and Article 32(b). Those Articles prescribes the primary canons of construction for interpretation of treaties, and the supplementary means of such interpretation.
73. We are, therefore, of the view that the East African Court of Justice has the jurisdiction to interpret the Charter in the context of the Treaty. Consequently, the Appellant succeeds on Issue No.1.
74. We reiterate what we said above, that the wording of the Protocol, and particularly so the phrase “... **or any time thereafter...**” in Article 34 (6) of that Protocol, allows an elastic margin of discretion within which State Parties may deposit their declarations. It does not provide for any constraining time frame beyond which a State Party which has not yet deposited its declaration can be said to have violated the Protocol. In the result, we find no violation of the Charter, or of the Protocol; nor indeed, of any of the enumerated provisions relied upon by the Appellant.
75. Accordingly, the Appellant fails on of Issue No.2.

Issue No.3: *Whether the First Instance Division erred in law when it held that the 1st Respondent had no duty under the EAC Treaty to supervise the 2nd, 3rd and 5th Respondents to comply with their obligations under the Charter, the Protocol, and the Vienna Convention.*

76. The Secretary General's supervisory role is articulated in Article 29(1) of the Treaty. It provides that:-

"1. Where the Secretary General considers that a Partner State has failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty, the Secretary General shall submit his or her findings to the Partner State concerned for that Partner State to submit its observations on the findings;"

In the **Katabazi** case (supra), it was observed that:-

"....the above provision requires the Secretary General to submit his or her findings to the Partner State concerned and that [and] ...there is nothing to prohibit the Secretary General from conducting an investigation on his/her own initiative..."

77. We do subscribe to the above reasoning that the Secretary General can act, on his own initiative when there are allegations of violation of the Treaty, or when he or she considers that a Partner State has failed to fulfil an obligation under the Treaty. In this case, the Secretary General indicated that, once he got information of the Appellant's complaint, he wrote to all Respondents seeking a clarification on the matter. Once the Reference was filed, he left the matter in the Court's hands. The First Instance Division found that in the circumstances of this Reference, the Secretary General could

not have done more. We agree with that conclusion of the First Instance Division.

78. Accordingly, the Appellant fails on Issue No.3.

ISSUE No.4: whether the First Instance Division erred in law when it refused to award costs against the 1st, 2nd, 3rd, and 5th Respondents in the circumstances.

We remind ourselves that at the Scheduling Conference of the Appellate Division, the Appellant abandoned the issue of costs against the Republic of Rwanda, which had deposited its declaration while the Reference was still pending before the First Instance Division. Nonetheless, the Appellant still maintains his prayer for costs against the 1st, 2nd, 3rd and 5th Respondents which have not yet made their declarations.

In view of our findings, we see no reason to award costs in this Appeal. On the contrary, we associate ourselves with the First Instance Division's finding that the case, being one of great public interest, would be inappropriate to order any Party to pay the costs of the other.

Issue No.5: Whether the Appellant is entitled to the remedies sought.

79. In its prayer for reliefs, the Appellant sought this Court to make the following orders, namely, that the Court:-

(i) uphold the First Instance Division's holding that this Court has jurisdiction to ensure adherence to the law in the

interpretation, application and compliance with the EAC Treaty;

(ii) set aside the First Instance Division's holding that this Court has no jurisdiction to ensure adherence to the provisions of the African Charter and its Protocol;

(iii) set aside the First Instance Division's finding that Appellant's Reference did not disclose a cause of action against the First Respondent be set aside;

(iv) set aside the First Instance Division's order dismissing the Appellant's case against the 1st, 2nd, 3rd and 5th Respondents regarding the delay to deposit their relevant declarations under the Protocol to the African Charter on Human and Peoples' Rights;

(v) set aside the First Instance Division's holding that the 1st Respondent's failure to carry out his supervisory role over all the Partner States of the East African Community was not a contravention of the Treaty;

(vi) set aside the First Instance Division's, holding that neither the Secretary General (1st Respondent), nor the EACJ can compel the Republics of Uganda, Kenya and Burundi (the 2nd, 3rd and 5th Respondents, respectively) to deposit their respective declarations; and

(vii) allow the Appeal.

80. In view of our findings on the specific issues that were before this Court, we grant the Order sought by the Appellant in the above sub-paragraph (ii) of paragraph 79. The prayer in sub-paragraph (i)

of paragraph 79 above, raises no particular dispute requiring any order from this Court.

- 81.** The Orders prayed for in sub-paragraphs (iii), (iv), (v) and (vii) of paragraph 79 are refused.

VI. CONCLUSION

- 82.** In view of all the above findings and reasons:

- (a) The Appeal is dismissed, save as otherwise indicated in paragraph 80 of this Judgment.
- (b) Each Party shall bear its own costs, both in this Division and in the First Instance Division.

It is so ordered.

Dated, delivered and signed at Arusha this 28th day of July 2015.

.....
Emmanuel Ugirashebuja
PRESIDENT

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Liboire Nkurunziza
VICE PRESIDENT

.....
James Ogoola
JUSTICE OF APPEAL

.....
Edward Rutakangwa
JUSTICE OF APPEAL

.....
Aaron Ringera
JUSTICE OF APPEAL