IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Charles Nyawello & Charles Nyachae, JJ)

REFERENCE NO. 10 OF 2013

UNION TRADE CENTRE
(UTC) ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF
THE REPUBLIC OF RWANDA ..... RESPONDENT

AND

1. **SUCCESSION MAKUZA DESIRE**
2. **SUCCESSION NKURUNZIZA GERARD**
3. **NGOFERO THARCISSE ..... INTERVENERS**

26TH NOVEMBER 2020

JUDGMENT OF THE COURT

A. Introduction

1. This Amended Reference was lodged under Articles 5(3)(g), 6(d), 7(1)(a) and (2), 8(1), 27 and 30 of the Treaty for the Establishment of the East African Community ('the Treaty'), and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure, 2013. It initially sought to hold the Republic of Rwanda ('the Respondent State') responsible for the actions of the Kigali City Abandoned Property Management Commission but, through subsequent amendment, substituted that Commission with Nyarugenge District Property Management Commission ('the Commission').

2. Union Trade Centre (UTC) ('the Applicant') is a company limited by shares that was incorporated under the Companies Act of the Respondent State to manage a private mall located in Nyarugenge District, Kigali ('the UTC mall'). Its shareholding at incorporation was as follows: Tribert Rujugiro (1933 shares); Theoneste Mutambuka (41 shares); Tharcisse Ngofero (3 shares); Succession Makuza Desire (3 shares), and Succession Nkurunziza Gerald (20 shares).

3. In a Statement of Reference that had been filed on 22nd November 2013, the Applicant faulted the Respondent State for its alleged appropriation of the UTC mall. The dispute was heard and partially determined in favour of the Respondent State, whereupon the Applicant appealed and the Respondent cross-appealed the decision to the Appellate Division of this Court. On Appeal, a retrial *de novo* was ordered to allow for the filing of affidavit evidence by the Parties.

4. The Applicant thereupon lodged a Reference dated 8th July 2016 that was duly supported by the affidavit of one Tribert Rujugiro Ayabatwa, but differed materially from the original Reference. Pursuant to an oral application for the amendment of the Original Reference to reflect the contents of the latter Reference, the latter Reference ('the First Amended Reference') was admitted on the record. The Applicant subsequently amended the First Amended Reference too, introducing the Amended Reference that is presently in issue ('the Second Amended Reference').

5. The said Amended Reference is opposed by the Attorney General of the Republic of Rwanda ('the Respondent'), a self-defining office that was sued in representative capacity for and on behalf of the Respondent State.

6. At the hearing, the Applicant was represented by Mssrs. Francis Gimara and Hannington Amol, assisted by Mr. Lastone Gulume. On the other hand, the Respondent was represented by Mr. Nicholas Ntarugera and Ms. Specioza Kabibi, while Ms. Molly Rwigamba appeared for the Interveners.

B. **Factual Background**

7. UTC was incorporated on 20th May 1997 as a company limited by shares, the main object of which was to manage the UTC mall in Kigali, Rwanda. In August 2013, the Commission sought and obtained information in respect of UTC's operations, following which it did on 2nd October 2013 inform tenants of the UTC mall that it had been 'placed in its hands' and therefore effective 1st October 2013

they were required to redirect their rental payments to a designated bank account.

8. Following the order for a retrial *de novo* and this Court's Ruling of 6th September 2016, the Applicant did file the First Amended Reference. The said Reference essentially substituted the Kigali City Abandoned Property Management Commission with the Nyarugenge District Commission's Committee in Charge of Unclaimed Properties ('the Committee'). It attributed the same actions it had challenged with regard to the Kigali City Abandoned Property Management Commission to the said Committee.[1] It also introduced the averment that proceeds from the UTC mall had been placed in an account that the Respondent State had control over, yet *Law No. 28 of 2004 relating to the Management of Abandoned Property*, on which the Committee's actions were premised, was inapplicable to UTC.[2]

9. In the course of a pre-hearing scheduling conference, it did transpire that the UTC mall had on or about 27th September 2017 been auctioned off by the Rwanda Revenue Authority (RRA) for alleged tax default. The Applicant thereupon lodged the Second Amended Reference that essentially introduces four (4) new facets: UTC's shareholding;[3] a credit facility in the sum of 1,300,000 Rwandan Francs;[4] a new law relating to abandoned property, namely, *Law No. 39 of 2015 relating to the Management of Abandoned Property*,[5] and

[1] See the First Amended Reference, paras. 6 - 13.
[2] Ibid. at paras. 16 and 18.
[3] Seconded Amended Reference, paras. 3 – 5.
[4] Ibid. para. 20.
[5] Ibid. paras. 28 – 30.

the actions of RRA.[6] The Second Amended Reference is also supported by the affidavit of Tribert Rujugiro Ayabatwa, the majority shareholder in the Applicant company, dated 13th December 2017.

10. In response to the foregoing amendment, the Respondent contests the Court's jurisdiction to entertain a Reference premised on the actions of an entity that allegedly lacks *locus standi* to appear before it. It further denies national or international responsibility for the actions of entities with distinct legal personality; faults the attribution of the impugned actions to the Respondent State, and avers that the Reference is time-barred.

11. After the filing of written submissions and pending the hearing of Parties in submission highlights, the Respondent filed **Application No. 24 of 2020** seeking to stay the hearing of the Reference until *Case No. RCOM01304/2020/TC* in a domestic court in the Respondent State had been disposed of. The Application was heard prior to commencement of submission highlights and dismissed, but reasons therefor were reserved to be delivered later. The reserved reasons having since been delivered, we do hereby determine the Reference.

C. Applicant's Case

12. As at 2nd October 2013 when the Commission (acting through the Committee) took over the UTC mall, the Applicant had never received any notification of tax arrears from RRA. It did, however, have a

[6] Introduced in para. 19 of the Second Amended Plaint, but the substance of which is in paras. 31 and 32 thereof.

credit facility with the Bank of Kigali in the sum of 1,300,000,000 (one billion three hundred million) Rwandan Francs.

13. The UTC mall having since its take-over been under the Committee's management, all funds therefrom were pursuant to *Law No. 28/ 2004* under the control of the Auditor General, an organ of the Respondent State. Therefore, the Respondent State purportedly assumed responsibility for the mall and was under a duty to settle all claims and statutory obligations owed, if at all. That duty did not change following the enactment of *Law No. 39/ 2015*; rather, the Respondent State was enjoined to manage abandoned property and deposit half of the collections therefrom into a fixed deposit account. However, it is opined that the Applicant, the UTC mall and the shares in the Applicant company were not contemplated in that law as abandoned property.

14. It is the contention, in any event, that at the time the Respondent State assumed management of the UTC mall, it fetched a monthly rental fee in the sum of USD $ 120,000 (one hundred and twenty thousand). That income would purportedly translate to USD $ 5,760,000 (five million seven hundred and sixty thousand) from the take-over to date, which would have been sufficient to off-set the USD $ 1,100,000 (one million one hundred thousand) that was allegedly due in taxes.

15. It is further proposed that neither RRA nor the Respondent State disclosed the procedures that had underpinned the auction of the UTC mall to the Kigali Investment Company; what sale price it attracted or how the said proceeds had been utilized.

D. **Respondent's Case**

16. It is the Respondent's case that the Commission took over neither UTC nor the UTC mall, but only assumed control and management of the *'Applicant's shares'*. It is the contention that the said shares had been abandoned by the *'Applicant'* given that he did not designate anyone to take control of them, hence their assumption by Commission. We understood reference to the *'Applicant'* in this context to refer to Mr. Rujugiro.

17. Be that as it may, it was the proposition that half of the proceeds from the said shares were deposited in a fixed deposit account pending the return of the owner thereof. In the same vein, no rental fees were collected by the Respondent; rather, such monies were deposited in an account in respect of abandoned property/ UTC. It is further contended that funds from abandoned property are managed by the Commission, and not the Auditor General as opined by the Applicant; but the settlement of claims was not the Commission's responsibility since UTC was operational at the time. Hence the settlement of a credit facility owed by the Applicant Company to Bank of Kigali by UTC's management.

18. In addition, it is the Respondent's case that RRA seized the UTC mall on the basis of unpaid taxes for the fiscal years 2011 and 2013, but the *'Applicant'* had not received notification thereof because he was out of the country at the time. The sale procedure that underpinned the mall's auction was opined to have been explained in the affidavit of one Evode Ndatsikira.

E. **Issues for Determination**

19. At a Scheduling Conference held on 13th November 2019, the following issues were framed:

    i. Whether the Reference is time-barred and should be struck off the record.

    ii. Whether the Applicant has *locus standi*.

    iii. Whether the Respondent was properly sued before this Honourable Court.

    iv. Whether the Respondent's actions of taking over the Applicant's mall and consequently auctioning it are inconsistent with and/ or in contravention of Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a), (b) and (c) of the Treaty.

    v. What are the remedies available to the parties.

F. **Interveners**

20. Upon closure of oral evidence, and pursuant to the Ruling of the Court in **Application No. 4 of 2017** (by virtue of which they were admitted to this Reference), the Interveners were directed to file a Statement of Intervention in this matter. They did file written submissions dated 31st August 2020, in which they address points of law captured in the issues for determination, including whether the Reference is time-barred, the Applicant's *locus standi* before this Court and whether the Respondent has been rightfully sued.

21. The Reference is alleged to be time-barred because it was filed in November 2013 yet the assumption of Mr. Rujugiro's shares (the purported cause of action) ensued between July and August 2013, more than two months earlier. It is also contended that Mr. Rujugiro

had no legal authority to file the Reference on behalf of UTC given that Rwandan domestic law requires a corporate shareholder to secure the leave of court before taking such an action. On the propriety of the legal action, we understood the Interveners to suggest that although the Commission is an independent and decentralized entity in the Respondent State, it is not an institution of the East African Community (EAC) so as to have its actions challenged before the Court.

22. The Interveners did also address the substantive issue on the legality of the take-over and subsequent auction of the UTC mall. It is their contention that the Commission actions were grounded in due process and RRA had valid reasons for auctioning the UTC mall. The Interveners' submissions were accompanied by the affidavits of Jean Freddy Makuza and Nkurunziza Janvier, representing the estates of Succession Makuza Desire and Succession Nkurunziza Gerard respectively.

23. It is noted that the Interveners had earlier in the proceedings filed a Response to the Second Amended Reference dated 10th January 2018, and unsuccessfully sought to cross examine the Applicant's witness. We thus consider it imperative that we dispel forthwith the notion that a person enjoined as an intervener in a matter before this Court would assume the status of a party therein who, for instance, may respond to opposite party's pleadings and cross examine witnesses.

24. The right to intervene in a matter before the Court is granted in Article 40 of the Treaty. Rule 59[7] of the Court's Rules then lays out the manner in which an application for intervention may be brought, as well as the intervener's terms of engagement. Sub-Rule (4) thereof specifically mandates an intervener to submit a Statement of Reference to be filed as directed by the Court, while sub-Rule (5) emphasizes that an intervener would intervene in a case on *as-is* basis.

25. The fact that sub-Rule (5) limits the intervener's intervention in a matter to the status of the case as at the time of intervention would appear to suggest that an intervener does not enjoy the right to file or respond to pleadings of opposite party. We note that the said sub-Rule includes the possibility of an intervener joining a matter at any stage of the pleadings. It would be erroneous, therefore, to expect an intervener that is admitted to a case fairly late in the trial to seek to re-open pleadings. Sub-Rule (5) seeks to forestall that. It enjoins an intervener to accept the case as s/he finds it and await the Court's direction as to when to file a Statement of Intervention. That is the import of Rule 59(4) and (5). Therefore, the present Interveners' purported Response to the Second Amended Reference, as well as their attempt to cross examine the Applicant's witness were and are clearly misconceived and untenable.

26. Similarly untenable is the Interveners' submission on matters of law. Article 40 of the Treaty restricts an intervener's role in a

[7] The present Interveners were admitted to the Reference under the then applicable Rule 36(4) of the Court's Rules of Procedure, 2013. However, Rule 36 thereof is in *pari materia* with Rule 59 of the revised Court Rules, 2019.

Reference to matters of fact (or evidence), and not issues of law. It reads:

> **A Partner State, the Secretary General or a resident of a Partner State who is not a party to a case before the Court may, with leave of Court, intervene in that case, but the submissions of the intervening party shall be limited to evidence supporting or opposing the arguments of a party to the case.**

27. That Article unequivocally limits interveners' intervention to submissions in respect of '**evidence supporting or opposing the arguments of a party to the case**.' Our construction of Article 40 read with Rule 59(4) of the Court's Rules is that the Statement of Intervention required of an intervener should entail submissions on the evidence on record; such submissions to highlight the intervener's support or opposition to the arguments of either party, without either adducing its own evidence or delving into issues of law.

28. As was held in **Hon. Fred Mukasa Mbidde vs. The Attorney General of the Republic of Burundi & Another**[8]:

> **Article 40 restricts the intervention of an intervener to submissions in respect of evidence in support of one or another of the parties, meaning an intervener may provide his/ her/ its perspective on questions of fact adduced by one party viz the other(s). It is, therefore, to that scope of intervention that the statement of intervention in reference in Rule 36(4) would be restricted.**

[8] EACJ Application No. 6 of 2018

29. In the same case, the Court further observed:

> **This is not to say that an intervener may not address the Court on the law applicable to the facts that s/he seeks to substantiate, but s/he would not be at liberty to address the Court on issues of law as between the Parties to a Reference.**

30. Turning to the instant case, we note that the Interveners' submissions sought to address questions of both law and fact. They canvassed *Issues 1, 2 and 3* as framed by the Parties, thus straying into issues of law as between the Parties, which are beyond the domain of their intervention. We would therefore respectfully disregard that aspect of their Statement of Intervention.

31. In addition, the Interveners filed affidavits alongside their written submissions. Without belabouring the point, we do state categorically that this course of action offends every rule of natural justice, due process and fair hearing that primarily hinge on parties' right to be heard. It is inconceivable that a party to judicial proceedings would adduce evidence alongside closing submissions, in the full knowledge that opposite party would not have the opportunity to respond to them at that stage of a trial. It tends towards an abuse of court process when the 'party' seeking to do so is an intervener to whom the liberty to adduce evidence does not accrue. We would therefore expunge the offending affidavits from the record. It is on that premise that we consider the merits of the Reference, with due recourse to the Interveners' submissions as appropriate.

Issue No. 1: **Whether the Reference is time-barred**

32. It is the Respondent's contention that the Commission never assumed management of the UTC mall as alleged, only assuming control of Mr. Rujugiro's shares in the Applicant company. It was suggested that a decision to that effect was taken in a meeting held on 29th July 2013 and therefore that would be the date of reckoning for purposes of computation of time. It was further argued that this was the only decision ever made by the Commission with regard to the Applicant's property, and therefore that would be the date the cause of action herein arose.

33. Learned Respondent Counsel relied on Article 30(2) of the Treaty to argue that the Reference was time-barred, having been filed on 22nd November 2013, more than two months from the date the cause of action first accrued. Article 30(2) reads as follows:

> **The proceedings provided for in 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.**

34. On its part, while conceding that the July 29th meeting was indeed about the management of Mr. Rujugiro's shares, the Applicant nonetheless maintains that the matter in contention in the Reference is the take-over of the UTC mall and not the shares. It was asserted that the said take-over having ensued on 2nd October 2013, the Reference was filed within the time stipulated in Article 30(2) above.

35. We carefully considered the Second Amended Reference. It is abundantly clear that the management of Mr. Rujugiro's shares is not

in issue therein. What is in issue is the alleged take-over of the UTC mall by the Committee, and its subsequent sale by RRA while in the Commission's hands. Those are the matters complained of by the Applicant. Indeed, Article 30(1) does not restrict a cause of action to decisions, but extends to actions as well. Therefore, the contention that the 29th July decision was the only decision taken in relation to the Applicant's property would appear to be misplaced.

36. Whereas the Respondent is very well entitled to the position that it has apparently taken – that it was Mr. Rujugiro's shares and not the UTC mall that the Commission assumed control of, it cannot purport to prescribe that position as the Applicant's case. That would simply constitute its defence to the Applicant's complaint. It is a matter that is in contention in *Issue No. 4* therefore we do revert to a determination thereof later in this judgment. Suffice to note at this stage that it is to the Second Amended Reference that recourse would be had to determine the cause of action for purposes of computation of time.

37. As quite rightly argued by learned Counsel for the Applicant, the time would be computed from the date the action complained of in the Reference first accrued. *See* ***The Attorney General of the Republic of Uganda & Another vs. Omar Awadh & 6 Others***[9] *and* ***The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit***.[10] The action complained of having ensued on or about the 2nd October 2013, we find that the Second Amended Reference was filed within the two-month period prescribed by Article

[9] EACJ Appeal No. 2 of 2012, para. 60.
[10] EACJ Appeal No. 1 of 2011, p. 16

30(2) of the Treaty. We do therefore resolve *Issue No. 1* in the negative.

Issue No. 2: **Whether the Applicant has *locus standi***

38. The Court understood it to be the Respondent's assertion that, although the Applicant is indeed registered in the Respondent State, it never took the decision to file the present Reference.[11] The Respondent further contends that *'the Applicant'* instituted the Reference in the names of UTC yet he was a mere shareholder therein who, being neither the Managing Director nor Chairman of the Board of Directors, has no *locus standi* to institute the Reference.

39. For the Applicant, on the other hand, it was argued that UTC derives its *locus standi* in this matter from Article 30(1) of the Treaty. That provision simply requires a complainant in a Reference to be resident in any of the EAC Partner States. It reads:

> **Subject to the provisions of Article 27 of this Treaty, any person who is 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....**

40. The Applicant's certificate of registration was presented as proof of its being domiciled within the Respondent State. In addition, it was suggested that in so far as authorization to institute the Reference had been secured and the company was represented in Court by duly appointed advocates, the Applicant was properly before the Court.

[11] (locus vs. authority)

Rule 19(1) and (5) were cited in this regard. They are reproduced below:

> Rule 19
>
> **(1) A party to any proceedings in the Court may appear in person or by an agent or an advocate duly appointed to act on his or her behalf.**
>
> (2) .....
>
> (3) .....
>
> (4) .....
>
> (5) **A corporation or company may appear by its director, manager or Company Secretary, who is appointed by a resolution under seal of the corporation or the company, or may be represented by an advocate.**

41. We carefully considered the Parties' rival submissions, as well as their respective pleadings. There appears to be a misunderstanding as to the meaning of the term '*locus standi*'. Black's Law Dictionary[12] defines it as '**the right to bring an action or to be heard in a given forum**.' This, in our view, is to be distinguished from appearances or representations as designated under Rule 19 as we shall expound later.

42. Article 30(1) does hinge *locus standi* to institute a Reference on residence or domicile within any Partner State. Without a doubt, as deduced from its certificate of registration, the Applicant company is indeed domiciled within the Respondent State. No evidence to the contrary was adduced by either party, neither was it proposed or proven that it was not so domiciled. The certificate of registration would therefore be conclusive on the subject. To the extent that it

[12] 8th Edition, p. 960

depicts the Applicant as a company domiciled in the Respondent State, it does denote the Applicant's *locus standi* in the present case.

43. We are constrained to respectfully state here that the domestic law of a Partner State would be irrelevant to the determination of *locus standi* in this Court. The Treaty would have supremacy on that issue. Thus, Article 8(4) of the Treaty gives pre-eminence to Community Laws in the implementation of the Treaty. It reads:

> **Community organs, institutions and *laws* shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty.**

44. Undoubtedly, the Court's role under Article 30(1) of the Treaty is a vital component of the application or implementation of the Treaty. Therefore, with utmost respect, the municipal law of Rwanda that requires a corporate shareholder to secure the leave of court before taking court action might very well be pertinent in that Partner State but would be inapplicable to this case.

45. On the other hand, contrary to the Respondent's contestations, corporate authorizations *per se* do not necessarily confer or negate *locus standi* in a Reference before this Court. They are corporate governance processes that, though critical to the management of a company, do not on their own represent a party's legal standing to institute a Reference. Hence, a party may secure all the requisite authorizations for the institution of a Reference but, if it is not domiciled within any of the EAC Partner States, it would be devoid of *locus standi* to refer a Reference to the Court.

46. In any event, it would appear that the Applicant's shareholders did in fact approve court action as one of the options available to them for the resolution of the present dispute. Annexure U11 to the Second Amended Reference states as much in the following terms:

> *First Resolution*
>
> .....
>
> *The shareholders were informed of the current status of the company,* ***particularly regarding the action to be taken in relation to certain bodies that continue to confuse and compare the company to abandoned property****.*
>
> *They decided to explore all means possible to present the real situation of the company, for not only is it a well managed company but it has also never been abandoned by its shareholders.*
>
> .....
>
> *The Shareholders* ***decided that they do not exclude the option of having recourse to the courts of law if possible for purposes of safeguarding the interests of the company****.* (Our emphasis)

47. The present Reference was thus instituted in pursuance of court action as one of the options that had been decided upon by the Applicant's shareholders.

48. Be that as it may, the Applicant similarly misconstrued the provisions of the Court's Rules that pertain to representations and appearances, erroneously equating them to parameters for *locus standi*. We take a contrary view. Our interpretation of Rule 19(1) is that a party may – for purposes of court appearances and representations – appear before this Court in person (including being

self-represented); or through an agent; or may be represented by duly appointed advocates. This has absolutely nothing to do with such party's *locus standi* or legal standing to institute a Reference. In fact, a party's *locus standi* would have already been established by the time considerations as to its appearance or representation arise.

49. On its part, Rule 19(5) permits a corporate entity to appear through its Director, Manager or Company Secretary or through representation by an advocate. Again, such appearance and representation would have nothing to do with the corporate entity's *locus standi* to institute a Reference. The Applicant in the instant case appeared though advocates, Mr. Rujugiro only appearing as a witness. For as long as the said advocates fulfill the requirements stipulated in Rule 19(7)(a), they would be properly before the Court. That Rule reads as follows:

> **The advocate for a party shall file with the Registrar a current practicing certificate or document that he or she is entitled to appear before a superior Court of a Partner State.**

50. Mr. Gimara and Mr. Amol having met those standards, that would be the end of the matter. We therefore find that the Applicant does have *locus standi* in this matter, and hereby answer *Issue No. 2* in the affirmative.

Issue No. 3: **Whether the Respondent was properly sued before this Honourable Court**

51. It is the Respondent's contention that Article 30(1) of the Treaty only provides for References to this Court arising from the actions of

a Partner State or an Institution of the Community. EAC Partner States are outlined in Article 3, while Institutions thereof are designated under Article 9(2) and (3) of the Treaty. The Commission being neither a Partner State nor an Institution of the Community, it has no jurisdiction *ratione personae* in this matter. It is further argued that the Respondent is not responsible for the Commission's actions, it being a body corporate, and therefore it (the Respondent) in improperly enjoined as a party to the Reference.

52. To buttress the foregoing argument, it was opined that under Article 31(1) of Rwanda's *Law No. 21/ 2012 relating to Civil, Commercial, Labour and Administrative Procedure*, for purposes of court appearances, the office of the Attorney General only appears for the Government of Rwanda, while the District Mayors would represent Districts under Article 31(3). Learned Respondent Counsel further cited the case of **Modern Holdings Ltd vs. Kenya Ports Authority**[13] to augment his position that only acts of Partner States can be litigated before the Court, therefore the impugned acts of the Commission were improperly before it.

53. It is also proposed that Articles 42 – 45 of the *International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts, 2001* ('the ILC Articles on State Responsibility' or 'the ILC Articles') restricts their applicability to inter-State disputes. Those provisions arise under Part 3 of the ILC Articles, titled *'The Implementation of the International Responsibility of a State'*.

[13] EACJ Reference No. 1 of 2008

54. Conversely, the Applicant argued that in order to determine whether a wrongful act was attributable to a State it was necessary to review its internal laws and international obligations. The point was made that a State party's international obligations were to be deduced from the primary law that spells them out, the applicability of the ILC Articles merely being a secondary aid for that purpose. The Treaty was opined to be the primary law in this case, from which the Respondent State's international obligations in and to the EAC may be deduced.

55. Learned Counsel for the Applicant argued that Articles 4 – 11 of the ILC Articles outline the circumstances under which a State may be held accountable under international law. He cited paragraph 6 of the Commentary to Article 4 and paragraph 7 of the Introductory Commentary to Chapter 2 of the ILC Articles to buffer this position.

56. On the basis of Articles 3 and 11 of *Law No. 28/ 2004*, it was proposed that the management of abandoned property in the Respondent State was a preserve of the State, the Commission simply undertaking that function on its behalf. It was similarly suggested that RRA performs its functions on behalf of the Respondent State given that its foundational laws mandate it to exercise a tax administration function on behalf of the Government of the Republic of Rwanda.

57. It would appear that there is no contestation by either of the Parties about the applicability of the ILC Articles on State Responsibility as a secondary source of international law, the Treaty

being the primary law. We do not find any objection to the Commentary to the ILC Articles either.

58. For the avoidance of doubt, Article 31(1) of the *Vienna Convention on the Law of Treaties, 1969* ('the Vienna Convention') underscores the need for treaties to be interpreted '**in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of a treaty's object and purpose.**' Article 32, on the other hand, provides for supplementary means of treaty interpretation to buffer the literal interpretation propounded in Article 31. It states:

> **Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31...**

59. We take the view that the Commentary to the ILC Articles does represent supplementary means of interpretation to confirm the meaning drawn from a literal, good faith interpretation of the Articles. It is a guide to the intention of the framers of the ILC Articles, and has been widely referred to by international courts and arbitral tribunals for a determination of State Responsibility. *See* ***Phillips Petroleum Co. Iran vs. Islamic Republic of Iran***,[14] *and* ***Noble Ventures Inc. vs. Romania***.[15]

[14] Award No. 326-10913-2, Iran-United States Claims Tribunal Reports, Vol. 21 (1989)
[15] ICSID (International Centre for the Settlement of Investment Disputes) Case No. ARB/01/11, 2005.

60. A question did nonetheless arise as to the applicability of the ILC Articles to a dispute that pits a private juridical person against a State party. It was suggested that Articles 42 - 45 of the ILC Articles restrict the Articles' applicability to inter-state disputes.

61. However, Article 33(2) of the same Articles does recognise the international responsibility of a State to a non-State party. For clarity, we reproduce Article 33 in its entirety:

> 1. **The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.**
> 2. **This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.** *(Our emphasis)*

62. We look to the commentary to Article 33(2) to augment our literal interpretation of that Article. Paragraph 4 of the commentary to Article 33(2) does indeed recognise that in instances where a primary law creates a State obligation to a non-State entity, that entity would have the right to invoke the State party's responsibility under the ILC Articles. Paragraph 4 states:

> **Such possibilities underlie the need for paragraph 2 of article 33. Part Two deals with the secondary obligations**

of States in relation to cessation and reparation, and those obligations may be owed, inter alia, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. *(Our emphasis)*

63. Within the EAC, the obligations placed upon Partner States under the Treaty may be litigated by a non-State party by virtue of Article 30(1), which mandates *'any person'*, natural or juridical, to lodge a Reference against a Partner State in this Court. We therefore find that, whereas indeed Part 3 of the ILC Articles is restricted to inter-State disputes, Article 33(2) does provide for litigation by non-State parties. Accordingly, the Applicant acted well within its legal rights in lodging the present Reference, and the ILC Articles on State Responsibility are indeed applicable to the dispute between the Parties. We so hold.

64. Be that as it may, we do agree with the Respondent that Article 30(1) of the Treaty restricts litigation in this Court to actions against a Partner State or Institution of the Community. EAC Partner States are outlined in Article 3, while Institutions thereof are designated under Article 9(2) and (3) of the Treaty. The present Commission being neither a Partner State nor Institution of the Community, it cannot be sued in the Court. The question is whether its actions can be attributed to the Respondent State, which does have jurisdiction

ratione personae in the matter, is responsible for the Commission's actions.

65. The Respondent sought to invoke Article 31(1) and (3) of Rwanda's *Law No. 21/ 2012* to negate its capacity to represent the Commission in Court, urging that it would be the office of the District Mayor to appear on its behalf. However, in the instant case the office of the Attorney General of the Republic of Rwanda is indeed sued on account of the alleged responsibility of the Republic of Rwanda for the internationally wrongful acts of the Commission. Therefore, considering the succinct provisions of Article 31(1) of *Law No. 21/ 2012*, the said office would be the right party to appear in this Court on behalf of the Respondent State.

66. The more fundamental question, in our view, is whether indeed the impugned acts of the Commission are attributable to the Respondent State. Articles 4 and 5 of the ILC Articles do shed light on conduct that is attributable to a State. We reproduce them below:

> Article 4: Conduct of organs of a State
>
> 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 territorial unit of the State.**
> 2. **An organ includes any person or entity which has that status in accordance with the internal law of the State**.

Article 5: Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

67. Before progressing further, however, it is imperative that a determination be made as to what conduct is in contention under the Reference, so that the adjudged conduct can be evaluated against the foregoing ILC provisions. There was contention as to whether the Commission took over the management of the UTC mall or shares held in the Applicant Company. However, as was observed under *Issue No. 1*, Mr. Rujugiro did concede that the management of his shares was indeed taken over by the Commission but he apparently elected not to take issue with that action. The Applicant company, on the other hand, took issue with the alleged take-over of the UTC mall, hence the institution of this Reference. We cannot fault a party's right to sue on its preferred cause of action. We do nonetheless interrogate the Parties' competing claims.

68. The Applicant contends that, vide its letter of 2nd October 2013, the Commission's Committee in Charge of Abandoned Property informed the mall's tenants that the UTC Building (which housed the mall) had been placed in its hands in accordance with *Law No. 28/ 2004*.[16] The foregoing averments were supported by Mr. Rujugiro's affidavit evidence. Conversely, in its Response to the Reference, the

[16] Paragraph 13 of the Second Amended Reference.

Respondent raised points of law that have already been canvassed in this judgment. It was supported on this issue by the affidavit of Mr. Nicholas Ntarugera. However, given his unavailability for cross examination, Mr. Ntarugera's affidavit was expunged from the Court record.

69. Consequently, Mr. Rujugiro's affidavit evidence on the Commission's take-over of the UTC mall remains un-rebutted. It was not impeached in cross examination either and therefore remains uncontroverted. In the same measure, Mr. Natarugera's affidavit having been expunged, the Respondent's allegation that the Commission only took over Mr. Rujugiro's shares remains unproven. In any event, we find the Applicant's evidence on the take-over of the mall unassailable in so far as it is duly corroborated by the documentary evidence in the Committee's letter of 2nd October 2013, which was appended to Mr. Rujugiro's affidavit as Annex U8. In the result, we are satisfied that the Commission did in fact take over the UTC mall. This would therefore be the conduct we interrogate against the ILC Articles on State Responsibility.

70. Article 4 recognizes the role of a State's internal law in the determination of whether or not an entity whose conduct has been impugned is, in fact, an organ of the State for purposes of State responsibility. Paragraph 6 of the commentary to Article 4 confirms this interpretation of that Article in the following terms:

> **In determining what constitutes an organ of a State for the purposes of responsibility, *the internal law and practice of each State are of prime importance.***

71. The same principle is re-echoed in **Noble Ventures Inc. vs. Romania** (supra), albeit with the clarification that only the conduct of entities that are expressly authorized by a State's internal law to act for it (*de jure* organs) would be attributed to the State. It was held:

> **Art. 4 2001 ILC Draft (Article 4 of the ILC Articles) lays down the well established rule that the conduct of any State organ, being understood as including any person or entity which has that status in accordance with the internal law of the State, shall be considered as an act of that State under international law. This rule concerns attribution of acts of so-called de jure organs which have been expressly entitled to act for the State within the limits of their competence.**

72. In the instant case, Article 11 of *Law No. 28/ 2004*, the law under which the UTC mall was taken over, explicitly provides for the establishment of Commissions to oversee the management of abandoned property in the Respondent State. It reads:

> **At the national level, in each Province or City of Kigali and in each District or Town or Municipality, there is hereby established a Commission to manage abandoned property without owners**.

73. The Commission in issue presently is the Property Management Commission that was set up to oversee the management of abandoned property in Nyarugenge District; a function it apparently discharges through its Committee in Charge of Unclaimed Properties.

74. On the other hand, RRA was established by *Law No. 15/ 1997* '**to administer the various taxes and tax related laws and to assess, collect, administer, and account for Fiscal and Customs revenue collected to the Government through the Minister of Finance.**'[17] RRA's administration is also subject to *Law No. 8/ 2009 Determining the organization, functioning and responsibilities of the Rwanda Revenue Authority (RRA)* that, while granting the Tax Administration legal personality,[18] nonetheless subjects it to the supervision of the Ministry of Finance.[19]

75. Quite clearly, although both the Commission and RRA perform distinct public functions, they are not by law designated as organs of the State. Even *Law No. 39/ 2015*, to which we were referred by the Applicant, does not explicitly designate the Commission as an organ of the State. Consequently, both entities cannot be adjudged to be *de jure* organs of the Respondent State, neither can their impugned conduct be attributed to the said State on that premise. It is so held.

76. The question then would be whether the two entities, though not *de jure* organs of the State, were at the material time empowered to exercise elements of governmental authority such as would render their actions attributable to the Respondent State under Article 5 of the ILC Articles. Paragraph 7 of the commentary to Article 5 is quite categorical on the import thereof. It reads:

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[17] Harelimana, Jean Bosco, **The role of taxation on resilient economy and development of Rwanda**, Journal of Finance Marketing, 2018, Vol. 2 Issue 1, p.28.
[18] Article 1(2)
[19] Article 4(1)

The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. ... The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community.

77. The emphasis on the empowerment of an entity by law to exercise governmental or public authority, however limited, was reiterated in the case of **Helnan International A/S vs. The Arab Republic of Egypt**.[20] In that case, although the structure of the Egyptian Company for Tourism and Hotels (EGOTH) revealed that it was '*under the close control of the State*', that was not sufficient to conclude that EGOTH's conduct was attributable to Egypt. The Tribunal adopted the reasoning in ***Crawford, J, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries***,[21] as follows:

The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 (of the ILC Articles) **refers to the true common**

[20] ICSID Case No. ARB 05/19, 2006
[21] Cambridge University Press, 2002, p. 100.

feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specific elements of governmental authority. *(Emphasis ours)*

78. In the instant case, Rwanda's internal laws are instructive as to whether the Commission and RRA were empowered to exercise a function that would otherwise have been a governmental function. As can be gleaned from the Committee's October 2013 letter,[22] the UTC mall was placed in the hands of the Commission under *Law No. 28/ 2014*. Although the Respondent State subsequently replaced that law with *Law No. 39/ 2015*,[23] the latter law's applicability to the impugned take-over action is constrained by the principle of non-retroactivity, which forestalls the retrospective operation of laws. *Law No. 39/ 2015* having come into force on 16th October 2015,[24] it is inapplicable to a determination of state responsibility for the Commission's conduct that ensued prior to its enactment. Accordingly, the applicable law for that purpose would be *Law No. 28/ 2014*.

79. Article 3 of that law succinctly demarcates the management of abandoned property as a function of the State. The Article provides:

From the day of publication of this law in the official gazette of the Republic of Rwanda, any abandoned property shall be managed by the State until the return

[22] Annex U8 to the Second Amended Reference.
[23] See Article 25 of *Law No. 39/ 2015*.
[24] See also Article 26 of *Law No. 39/ 2015*.

of the owners. In case of death of the owner without any legal heir, the property shall devolve to the State.

80. To the extent that the Commission in the present case was, by virtue of Article 11 of the same law, empowered to perform that State function in Nyarugenge District; it is manifestly clear that its conduct would be attributable to the Respondent State under Article 5 of the ILC Articles on State Responsibility.

81. Similarly, *Law No. 15/ 1997* empowers RRA to provide oversight to tax policy formulation and revenue collection on behalf of the Government of the Republic of Rwanda. Indeed, under *Law No. 8/ 2009,* RRA is accountable to and supervised by the said Government's Ministry of Finance for that purpose, to wit, the management of tax-related matters and tax revenue collection. It thus becomes apparent that the said entity is empowered by internal law to exercise governmental authority in respect of national tax administration. The emphasis here is not on its being a public agency but, rather, on the governmental function that RRA performs by dint of statute.

82. In the result, we are satisfied that the impugned conduct of the Commission and RRA is attributable to the Respondent State under Article 5 of the ILC Articles on State Responsibility. We do, therefore, find that the present Reference was properly instituted against the Respondent. Accordingly, this issue is resolved in the affirmative.

Issue No. 4: **Whether the Respondent's actions of taking over the Applicant's mall and consequently auctioning it are inconsistent with and/ or in contravention of Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a), (b) and (c) of the Treaty**.

83. By way of introduction, the Applicant restated the position in **Henry Kyarimpa vs. The Attorney General of the Republic of Uganda**[25] that this Court may, in the course of determining Treaty compliance, inquire into Partner States' adherence with their domestic laws. In that case, it was held:

> **In adjudging an impugned State action as being internationally wrongful, this Court asks itself the question not whether such action is in conformity with internal law, but rather whether it is in conformity with the Treaty. Where the complaint is that the action was inconsistent with internal law and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the principle of the rule of law, it is this Court's inescapable duty to consider the internal laws of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty.**

84. It was also emphasized that the fundamental and operational principles of the Treaty are the foundation upon which the pillars of the Community and integration agenda thereof are constructed, the

[25] EACJ Appeal No. 6 of 2014, p. 30.

breach of which would constitute an infringement of the Treaty. Reference in that regard was made to the Advisory Opinion in **The Attorney General of the Republic of Uganda vs. Tom Kyahurwenda**,[26] as well as **Samuel Mukira Muhochi vs. The Attorney General of the Republic of Uganda**.[27]

85. The point was also made that the Appellate Division did in **The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit**[28] emphatically reiterate the obligation upon Partner States, having voluntarily endorsed the EAC Treaty, to abide by their responsibility to their citizens and residents as **'scripted, transformed and fossilized into the several objectives, principles and obligations now stipulated in, among others, Articles 5, 6 and 7 of the Treaty, the breach of which ... gives rise to infringement of the Treaty**.'

86. Turning to the Reference, it is the contention that whereas the meaning attributed to the term *'abandoned property'* in Article 2(4) of *Law No. 28/ 2004* entails property that was abandoned into the hands of persons that do not own it; in the instant case, the Commission took over the UTC mall, well knowing that its owners were resident in the Respondent State. The definition of abandoned property in Article 2(4) reads as follows:

> **Any immovable and moveable properties which had owners, and were thereafter abandoned which are in the**

[26] EACJ Case Stated No. 1 of 2014 (Advisory Opinion).
[27] EACJ Reference No. 5 of 2011.
[28] Supra (para. ...) at p. 12.

hands of those that are not their owners and those who have rights over them may:

a. Have died and there is no legal heir.

b. Live in exile due to various reasons.

c. Be staying abroad due to various reasons.

87. It is the assertion in any event that, having wrongfully taken over the UTC mall, the Commission violated the applicable municipal law in its management thereof. Hence, although Article 11 of *Law No. 28/ 2004* emphasizes honesty and competence in the management of abandoned properties, such properties to be returned to their owners upon being reclaimed; the circumstances surrounding the appropriation, management and disposal of the UTC mall bespeak to the contrary.

88. It is opined that the mall was taken over in a manner so opaque that no notice was given to its known owners; only for it to be grossly mismanaged by the Commission, resulting in its auction on account of a disputed debt that could have been paid off by the mall's income. In like vein, RRA is alleged to have arbitrarily auctioned the UTC mall to recover supposed tax arrears without serving due notice of the alleged arrears upon the mall's owners.

89. It is the contention that the Commission's re-direction of rent from the UTC mall and replacement of its management contradict the proposition that it only took over Mr. Rujugiro's shares and not the UTC mall. It was argued, in any case, that neither the Applicant, the mall nor the alleged shares would abide the definition of 'abandoned

property' in *Law No. 39/ 2015* either, the inference being that the Commission's intervention with the shares would be illegal too.

90. The Applicant invoked Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1) in support of his claims of Treaty violation by the Respondent. In relation to the rule of law principle in Articles 6(d) and 7(2), it is the contention that upon wrongfully assuming management thereof, the Commission failed in its implementation of Article 13(d) and (f) of *Law No. 28/ 2004*. The pertinent provisions of Article 13 are reproduced below.

> a. .....
> b. .....
> c. .....
> **d. To return the property to its owners or legal claimants after proof is provided.**
> e. .....
> **f. To defend the interest of legal claimants on the property of absent persons.**

91. The Commission and RRA further drew the Applicant's wrath for reneging on the Treaty principles of accountability and transparency. Whereas the Commission was faulted for the 'opaqueness' of its conduct until the disposal of the mall, RRA's auction process fared no better. The Applicant faulted both entities' disregard for due process, right to a fair hearing, and their inconsistency in the application of Rwandan municipal laws; a derogation from the rule of law principle. The conduct of the Commission and RRA as described above is also opined to be inconsistent with the good governance principle in Article

6(d) of the Treaty, as well as the right to property outlined in Article 14 of the African Charter on Human and Peoples' Rights.

92. The Respondent State is further alleged to have flouted Articles 5(3)(g); 7(1)(a) and 8(1) in so far as it reneged on the obligation to strengthen its relations with the private sector and civil society for purposes of socio-economic and political development. Far from being people-centered and market-driven as required in Article 7(1)(a), the conduct of the Commission and RRA allegedly sought to destroy the Applicant company. The impugned conduct is thus considered to have violated the Respondent State's obligations under Article 8(1) of the Treaty.

93. On its part, the Respondent dismissed the allegations of Treaty violations as baseless and unproven, contending that the promotion of the private sector in the Respondent State cannot supersede adherence to its municipal law. Arguing that the burden of proof thereof lies with the Applicant, it is the contention that in so far as the management of Mr. Rujugiro's shares, as well as the auction of the UTC mall by RRA were done in accordance with municipal law, they do not constitute a Treaty violation.

94. Learned Respondent Counsel suggested that international law and municipal law do not always operate in tandem, citing the decision in **Henry Kyarimpa vs. The Attorney General of the Republic of Uganda** (supra) as follows:

> **Be that as it may, we hasten to nonetheless sound a caution that it should constantly be borne in mind that**

the characterization of an act of the State as internationally wrongful - which is what a breach of a treaty is - is governed by international Law, and is not always necessarily coincident with the characterization of the same act as lawful by Internal Law. That principle was well stated in Elettronica Sicula S.P.A. [Elsi] Judgment, [ICJ REPORTS], 1989, p.15 at paragraph 73, as follows:

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

95. Meanwhile, the Intervener's submissions on this issue were to the effect that the Commission rightly intervened in the affairs of UTC to avert further prejudice to its minority shareholders on account of Mr. Rujugiro's alleged insider lending. He is alleged to have transferred to UTC a personal loan that the minority shareholders were not party to, which later accumulated tax arrears leading to the mall's auction. He is further alleged to have siphoned money out of the company without regard for the law or corporate governance framework, to the detriment of the minority shareholders. In the Intervener's estimation, the Commission followed due process; RRA auctioned the Applicant company on valid grounds, and the Respondent is entitled to the reliefs sought in the Reference. It was intimated that the Interveners

had since filed for the liquidation of the company in order to salvage whatever is left of their alleged investment therein.

96. We deem it necessary to address the Intervener's submissions forthwith. They are primarily premised on the Interveners' affidavit evidence, making specific reference to the contents of Annexes 16 and 23 thereof. Given our earlier decision herein that the Interveners' affidavits are improperly before the Court, it follows that they cannot be relied upon by the Court. We do also remind ourselves of the observation in the case of **The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community & Another**[29] that interveners play an advisory role to courts, simply providing assistance to courts on behalf of a third party.[30] Recourse to the present Interveners' submissions shall be made within that contextual framework, after duly weighing them against the evidence on record.

97. Turning to the merits hereof, we deem it necessary to illuminate the Treaty provisions that were invoked by the Applicant.

> Article 5(3)
>
> **For purposes set out in paragraph 1 of this Article and as subsequently provided in particular provisions of this Treaty, the Community shall ensure:**
>
> (a) .....
>
> **(b)** .....
>
> **(c)** .....

[29] EACJ Reference No. 2 of 2018, para. 18.

[30] See also *Mohan, S. Chandra, The Amicus Curae: Friends no more?, 2010, Singapore Journal of Legal Studies, 352 - 371, p. 9.*

(d) .....

(e) .....

(f) .....

(g) **the enhancement and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development.**

Article 6(d)

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(a) .....

(b) .....

(c) .....

(d) **good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.**

Article 7(1)(a) and (2)

1. **The principles that shall govern the practical achievement of the objectives of the Community shall include:**
   a. **people-centered and market-driven cooperation.**
   .....
2. **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 the maintenance of universally accepted standards of human rights.**

Article 8(1)

1. **The Partner States shall:**
    a. **plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of the Treaty.**
    b. **coordinate, through the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community; and**
    c. **abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of the Treaty.**

98. The Treaty does in its interpretation section draw a distinction between *the Community* established under Article 2(1) of the Treaty, and the Partner States that constitute its membership under Article 3 of the Treaty (as amended). Articles 5(3)(g) and 7(1)(a) obligate each Partner State (as part of the composite entity that is the Community) to fulfill the Community's objectives. These communal objectives are encapsulated in Article 5(1) of the Treaty, to wit, **'to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs**.'

99. Article 5(2) then succinctly delineates the Partner States' specific obligations in the realization of that objective, including the establishment of a Customs Union and Common Market. Article 5(3), on the other hand, provides the communal parameters against which

the achievement of the objectives outlined in Article 5(1) may be measured. In addition to the parameters outlined in Article 5(3), Articles 6, 7 and 8 of the Treaty do delineate the fundamental and operational principles that would govern the achievement of the Community's objectives, as well as the Partner States' categorical commitments in that regard.

100. Against that background, we pose the question: does the impugned conduct of the Commission and RRA foster the communal obligation upon Partner States to enhance and strengthen partnerships with the private sector,[31] and entrench people-centered, market-driven cooperation in the Community?[32] Does it reflect the principles of rule of law, accountability and transparency inherent in Articles 7(2) of the Treaty?

101. It is clear from the provisions of Article 2(2) of the Treaty that the establishment of a Customs Union and Common Market is one of the over-riding objectives of the Community. In the case of **British American Tobacco (BAT) vs. The Attorney General of the Republic of Uganda**,[33] a Common Market as envisaged under Article 2(2) of the Treaty and Article 2(4) of the Protocol for the Establishment of the East African Common Market (Common Market Protocol) was defined as '**a customs territory that is characterized by free trade as underscored under a Customs Union, the free movement of goods, capital, labour, services and persons, as well as EAC nationals' right of residence and establishment**.'

[31] See Article 5(3)(g)
[32] See Article 7(1)(a)
[33] EACJ Reference No. 7 of 2017

102. It seems to us that free trade and the right of establishment that underpin a Common Market would only flourish in an environment of rule of law, transparency and accountability; one that enhances and strengthens partnerships with the private sector to create a vibrant market upon which regional trade would be anchored. Accordingly, Partner States are enjoined to direct their policies and resources in a manner that entrenches the said Treaty principles. It is in that spirit that Article 8(1)(c) of the Treaty enjoins Partner States to abstain from any measures that are likely to jeopardize the achievement of the Treaty's objectives or indeed its implementation.

103. In the instant case, the Applicant contends that the Commission and RRA flouted the principles of rule of law, transparency and accountability, as stated in Articles 6(d) and 7(2) of the Treaty, in their handling of the UTC mall. The Applicant also considers the said entities' impugned actions to have obviated the duty upon the Respondent State to enhance public private partnerships, and direct its policies with a view to creating an enabling environment for the realization of the Community's objectives.

104. Having, in our determination of *Issue No. 3*, rendered ourselves on the impugned conduct that is in issue with regard to the Commission, we do not deem it necessary to pronounce ourselves again herein. It is to the Parties residual contestations on the issue under review presently that we turn.

105. The Applicant averred that its incorporation was solely conceived and financed by Mr. Rujugiro, its primary objective being to operate

the UTC mall.[34] It is further averred that the company had at all times since its incorporation abided the laws of the Respondent State, including all its tax obligations to RRA.[35] Conversely, in its Response to the Reference, the Respondent raised points of law that have already been canvassed in this judgment. With the expunging of Mr. Ntarugera's affidavit, the Response to the Reference remained supported by the affidavits of Mssrs. Innocent Karuranga and Evode Ndatsikira, both of which only attest to matters related to RRA's impugned actions herein.

106. As to whether the Commission's conduct was in compliance with the Treaty principles espoused earlier herein, it was proposed that it acted in accordance with the Respondent State's municipal law – specifically *Law No. 28/ 2004*, and cannot therefore be held to have violated the rule of law principle. To that extent, it is the proposition that the Commission did not commit an internationally wrongful act that is attributable to the Respondent State.

107. To be clear, in the case of **BAT vs. The Attorney General of the Republic of Uganda** (supra), the Court cited with approval Article 27 of the Vienna Convention, which constrains a party to a treaty from invoking '**the provisions of its internal law as justification for its failure to perform a treaty.**' This is in addition to the provisions of Article 8(4) of the Treaty, cited earlier herein, which give pre-eminence to Community Laws. Thus in the instant case, the invoked obligations upon Partner States being matters that pertain to the implementation of the Treaty, the Treaty would most certainly take

[34] See Second Amended Reference, paragraph 5.
[35] Ibid. at paras. 7 and 8.

precedence over municipal law in the determination of whether a party is in breach of those obligations. Recourse would only be made to the cited municipal law to specifically determine the Respondent State's compliance with the rule of law principle in Articles 6(d) and 7(2) of the Treaty. This is the import of the decision on the **Henry Kyalimpa** case.

108. Paragraphs 5 and 6 of the Preamble to *Law No. 28/ 2004*, as well as Articles 2(4) and 10 thereof are instructive to an appreciation of that law. We reproduce them below:

> Preamble Paragraphs 5 and 6
>
> **Considering that following genocide, there existed abandoned individual properties which Rwandans who had long lived in the diaspora and the genocide survivors who were left homeless took possession, the Government faced difficulties concerning such properties.**
>
> **Considering that the properties which have no owners began to be abandoned and deteriorated, it shall be managed by the State.**
>
> Article 2(4)
>
> **'Abandoned property' means any moveable or immoveable properties which had owners, and thereafter were abandoned which are in the hands of those who are not their owners and those who have rights over them may:**
>
> **(a) Have died and there is no legal heir.**
> **(b) Live in exile due to various reasons.**
> **(c) Be staying abroad due to various reasons.**

Article 10

A person wherever abroad, is entitled to his or her property which is in Rwanda. However, those persons who are prosecuted for the crime of genocide wherever they are in Rwanda or abroad have no right of sale or cession of their property.

109. The term 'preamble' is defined in Black's Law Dictionary[36] as '**an introductory statement in a constitution, statute or other document, explaining the document's basis and objective**.' We do therefore look to the preamble of *Law No. 28/ 2004* to deduce its objective. The said preamble is couched in terms that do suggest that the abandoned properties sought to be regulated by *Law No. 28/ 2004* are properties that arose from the 1994 genocide and were taken over by Rwandans returning from the diaspora and genocide survivors that had lost their homes. Paragraph 6 of the Preamble suggests that the said properties had started to deteriorate hence the Government's intervention. The foregoing import of the said law is confirmed by the meaning attributed to the term 'abandoned property' in Article 2(4) thereof. When contextualized against paragraph 5 of the Preamble, Article 2(4) clearly relates to properties that previously had owners but, following the genocide, were abandoned and taken over by non-owners.

110. In the instant case, the UTC mall did not amount to property that had been abandoned following the 1994 genocide so as to amount to abandoned property within the ambit of *Law No. 28/ 2014*. No evidence to that effect was adduced at trial. On the contrary, it was the Respondent's contention that the Commission assumed

[36] 8th Edition, p. 1214.

management of Mr. Rujugiro's shares because he was out of the country. However, our earlier decision on the said shares notwithstanding, we find that Article 10 of *Law No. 28/ 2014* points to the contrary. That provision states most categorically that the fact of being abroad would not disentitle him of his property, or the right to manage or otherwise deal with it, the only exception being if he was being or had been prosecuted for genocide. There is no such evidence on record.

111. Perhaps more importantly, the Commission's intervention in the management of the UTC mall vide its October 2nd letter was without legal basis. If, as advanced by learned Respondent Counsel, the Applicant had its own management there clearly was no reason for the Commission to illegally redirect the tenants' rent elsewhere. That conduct in itself would amount to a violation of the Applicant company's right to use and enjoyment of its property. Article 15(1) of the Common Market Protocol provides as follows on the right to property in the Community:

> **The Partner States hereby agree that access to and use of land and premises shall be governed by the national policies and laws of the Partner States.**

112. That provision has universal application within Partner States, placing as much an obligation upon regional Governments as their citizens, to abide by national policies and laws in land and property management. In the instant case, where the Commission applied an inapplicable law to dispossess the Applicant of its right to possession, operation and/ or use of the UTC mall; it acted illegally viz the

Respondent State's own municipal law, and thus occasioned an illegality within the precincts of Article 30(1) of the Treaty. The Commission's conduct does, to that extent, flout the rule of law principle espoused in Article 6(d) and 7(2) of the Treaty.

113. In addition, in so far as it contravenes the property rights that underpin Article 15(1) of the Common Market Protocol, the said conduct amounts to a measure likely to jeopardize the realization of the EAC Common Market as set out in Article 8(1)(c) of the Treaty. Indeed, given the vitality of the rule of law to a conducive commercial environment; the Commission's conduct cannot be deemed to either enhance private sector confidence in partnerships with the public sector or otherwise promote people-centered or market-driven cooperation as envisaged under Articles 5(3)(g) and 7(1)(a) of the Treaty.

114. The obligations highlighted above are, by virtue of the instruments from which they derive, international obligations. Consequently, not only is the Commission's wrongful conduct attributable to the Respondent State under Article 2(a) of the ILC Articles on State Responsibility, its breach of international obligations engenders the Respondent State's international responsibility therefor under Article 2(b) of the same legal instrument.

115. With regard to RRA, we understood it to be the Applicant's case that the RwF 1,174,334,658 tax arrears were not authentic but even if they were, they should have been settled by rental income from the mall as had been done with a credit facility that the company had with the Bank of Kigali. It was the contention that the tax liability was

never brought to the Applicant's attention while it was in charge of the mall, but suddenly came up after the mall had been taken over. The process leading up to the auction of the mall was alleged to have been tainted by illegality, and lack of accountability or transparency.

116. In terms of the alleged illegality, it is the contention that by giving the Applicant company only five days within which to respond to the Tax Rectification Notice that had been served on it, RRA flouted Artilce 27 of *Law No. 25/ 2015* that provides for thirty days therefor. This allegation is supported by the letter of the Alex Muhaya dated 28th November 2014, and attached as Annex RRA 004 to Mr. Karuranga's affidavit. With regard to lack of transparency and accountability, on the other hand, it is opined that although the Respondent State did have access to the revenue generated by the mall, it whimsically opted to sale it off. Hence, despite executing a garnishee order on UTC's bank accounts, RRA provided no accountability on monies taken therefrom. Further, having sold the mall at RwF 6,877,150,000, there is allegedly no indication that the balance thereupon (after off-setting the tax liability) was remitted to the Applicant Company, or an explanation given in the spirit of transparency.

117. We carefully considered the provisions of Article 27(2) of *Law No. 25/ 2015*. It does grant tax payers in the Respondent State the right to give their opinion on rectification notes within thirty days. Article 27(5) then provides that **'any rectification note which does not respect provisions of this article is void**.' We are satisfied

therefore that that aspect of the tax audit process was illegal, null and void.

118. In relation to the garnished bank accounts, garnishee notices to the affected banks were availed as annexes to Mr. Ndatsikira's affidavit. The same affidavit, in Annex RRA 17, reveals that the garnishment of UTC's accounts notwithstanding, RRA did go ahead and seize the UTC mall to recover the same tax liability. We do agree with learned Counsel for the Applicant that transparency dictates that having garnished the accounts, the monies retrieved therefrom should have been declared prior to seizing the mall. In the same vein, the outstanding balance after the recovery of the tax arrears should have been remitted back to the Applicant company in accordance with the principles of transparency and accountability encapsulated in Articles 6(d) and 7(2) of the Treaty.

119. It was the contention of both the Respondent and the Interveners that RRA had discharged itself in accordance with due process and Rwandan municipal law in its dealings with the UTC mall. In the case of **Male H. Mabirizi K. Kiwanuka vs. The Attorney General of the Republic of Uganda**,[37] citing **Bosnia & Herzegovina vs. Serbia & Montenegro**,[38] the Court held as follows on the burden of proof:

> **The foregoing decision depicts a two-pronged process of proof: proof of an applicant's case against a respondent, and proof of a specific fact by the party asserting it.**

[37] EACJ Reference No. 6 of 2019, paragraphs 115, 120.

[38] **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnis & Herzegovina vs. Serbia & Montenegro), Judgment, ICJ Reports 2007, p. 43.**

120. It was further clarified:

> **The general rule is that the complaining party should establish a *prima facie* case of the alleged inconsistencies with a cited treaty, before the legal and evidential burden shift to the opposite party to demonstrate their consistency.[39] A *prima facie* case is deemed to have been established once a contestation has been '*supported by sufficient evidence for it to be taken as proved should there be no adequate evidence to the contrary*.'[40]**

121. In the instant case, as demonstrated above, the Applicant has so sufficiently demonstrated RRA's inconsistency with the Treaty as to shift the evidential burden to the Respondent to demonstrate its consistency. However, the Respondent's evidence falls short on the requisite rebuttal of the Applicant's contestations. In fact, aspects of the Respondent's evidence do in fact lend credence to and corroborate the Applicant's allegations.

122. We are satisfied, therefore, that by circumventing the express provisions of Article 27 of *Law No. 25/ 2015*, RRA's tax audit process contravened the rule of law principle in Article 6(d) and 7(2) of the Treaty. Furthermore, having omitted to declare the monies retrieved from UTC's garnished accounts so as to justify its seizure and auction

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[39] See **BAT vs. The Attorney General of Uganda (supra) at para. 56** and Trebilcock, Michael J. and Howse, Robert, The Regulation of International Trade, 1999, 2nd Edition, Routledge, p. 68 .

[40] See **Oxford Law Dictionary**, 2009, 7th Edition, Oxford University Press, p. 422.

of the mall, RRA's conduct was riddled with a lack of transparency that contravenes Article 6(d) and 7(2) of the Treaty. The said entity did similarly offend the principle of accountability in the same Treaty provisions by not remitting to the Applicant the monies outstanding from the mall's sale. RRA's impugned conduct is attributable to the Respondent State under Article 2 of the ILC Articles on State Responsibility.

123. In the result, we do answer *Issue No. 4* in the affirmative. We find that the Respondent State's action of taking over the UTC mall and subsequently auctioning it off to be inconsistent with Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a) and (c) of the Treaty. We, however, find no proof of contravention in respect of Article 8(b) of the Treaty. It is so held.

Issue No. 5: **What are the remedies available to the Parties.**

124. The Applicant sought the following reliefs:

i. Declarations that the actions of the Respondent of taking over the claimant's property and consequently selling it off are illegal and contravene Articles 5(3)(g), 6(d), 7(1)(a) and (2) and 8(1)(a), (b) and (c) of the Treaty.

ii. An order directing the Respondent to account for all proceeds from the claimant's mall from 1st October 2013 to date.

iii. An order directing the Respondent to return and hand to the claimant the said mall and all the properties therein.

iv. General damages and costs of this Reference.

v. That this Honourable Court be pleased to make such further or other orders as may be just and necessary in the circumstances. (Interest?)

125. Having decided *Issue No. 4* as we have, we would grant the declaration in the terms sought, save in respect of Article 8(1)(b) of the Treaty, breach of which was not established by the Applicant.

126. Turning to the orders prayed for, as well as the award of general damages, it is not in dispute that the Court is clothed with jurisdiction to grant such reliefs to parties as the justice of the case warrants. This was settled quite conclusively in the case of **Hon. Dr. Margaret Zziwa vs. The Secretary General of the East African Community**.[41] In that case, the duty upon the Court with regard to granting appropriates remedies to parties was spelt out as follows:

> **The full effectiveness of East African Community Laws including the Treaty and the protection of the rights granted by such laws requires the Court to grant effective relief by way of appropriate remedies in the event of breach of such laws. Otherwise such laws would be no more than pious platitudes. ... Articles 23(1) and 27(1) of the Treaty do not confine the Court's mandate to mere Treaty interpretation and the making of declaratory orders but confer on the Court, being an international judicial body, as an aspect of its**

[41] EACJ Appeal No. 2 of 2017.

jurisdiction, the authority to grant appropriate remedies to ensure adherence to law and compliance with the Treaty.[42]

127. In addition, the legal consequences of breach of Treaty obligations were held to include reparation (in the form of restitution or compensation), compensation (otherwise known as damages) being an entrenched remedy in international law; provided that a claimant establishes that the act complained of has caused him/ her a loss that is financially assessable.[43]

128. That position resonates with Articles 35 and 36 of the ILC Articles on State Responsibility. They are reproduced below:

> Article 35 Restitution
>
> **A State responsible for an internationally wrongful act is under an obligation to make 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 a burden out of all proportion to the benefit deriving from restitution instead of compensation.**
>
> Article 36 Compensation
>
> **1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.**

[42] Ibid. at p. 19, para. 35
[43] Ibid. at p. 36, para. 75

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

129. Articles 35 and 36 above outline the legal consequences that accrue to a State found to be responsible for an internationally wrongful act, such as the Respondent State herein. Such State is obliged to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed and/ or to compensate for the damage caused as a result of the wrongful act. However, an order for restitution would not be valid where it is materially impossible. In the instant case, where the UTC mall has since been sold to a seemingly bonafide third party, it would not be materially possible to return it to the Applicant, as prayed. We would therefore disallow that prayer. We would, nonetheless, grant the order directing the Respondent to account for all proceeds from the UTC mall from 1st October 2013 to 27th September 2017 when it was sold, including accountability for the monies realized from the sale.

130. In terms of compensation, where injury to a complainant is not made good by restitution, the State responsible for a wrongful international act is obligated to pay compensation.[44] In this case, since the UTC mall cannot be returned to the Applicant, we would grant the claim for compensation as provided under Article 36(1) of the ILC Articles on State Responsibility.

131. In **Grand Lacs Supplier S.A.R.L vs. The Attorney General of the Republic of Burundi**,[45] the compensation awardable at international law was held to be **'those for pecuniary loss or**

[44] See Article 36(1) of the ILC Articles on State Responsibility.
[45] EACJ Reference No. 6 of 2016, p. 26, para. 60.

damage (also referred to as 'special damages') and (those) **for what is termed moral, non-material or non-pecuniary loss or damage (also referred to as 'general damages').'**

132. In the instant case, no claim was made for special damages, neither were they established before us. We would therefore restrict ourselves to an award of general damages as claimed. In terms of the actual assessment of damages, the **Grand Lacs Suppliers** case is instructive. In that case, the Court awarded USD $ 20,000 as general damages for unlawful seizure of a consignment of goods worth USD $ 130,524; Treaty and Protocols violations; wrongful deprivation of property, and hampering EAC citizens' business, trade and economic activity.

133. The foregoing injury is virtually identical with that suffered by the Applicant in this Reference. In the instant case, it was Mr. Rujugiro's uncontroverted evidence that the UTC mall was fetching a monthly rental of USD $ 120,000 as at the date of its take-over. This would translate into a yearly earning of USD $ 1,440,000 and, over the four year period it was in the Commission's hands, total income of USD $ 5,760,000. Although these monies were not proven for purposes of special damages, we would apply the *pro rata* rate in the **Grand Lacs Supplier** case as the basis for an award of general damages. After discounting monies expended in the maintenance of the mall, we consider USD $ 500,000 a fair award of general damages.

134. Meanwhile, Article 38(1) of the ILC Articles provides that '**interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation**.' Given the

totality of the circumstances of this case, we do deem it necessary to grant simple interest on the compensation awarded at 6% per annum from the date of this judgment until payment in full.

135. Finally, on the question of costs, Rule 127(1) of the Court's Rules of Procedure provides that costs shall follow the event unless the Court for good reason decides otherwise. This rule was emphatically reinforced in the case of **The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community & Another**.[46] The Reference having succeeded in this case, we would award costs to the Applicant.

G. Conclusion

136. The upshot of our determination hereof is that the Reference is allowed in the following terms:

i. A Declaration is hereby issued that the Respondent's actions of taking over the UTC mall and subsequently selling it off are illegal and contravene Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a) and (c) of the Treaty.

ii. The Respondent is directed to furnish the Applicant with accountability for the rental and sale proceeds realized from the UTC mall between 1st October 2013 to 27th September 2017.

iii. Compensation in general damages is awarded in the sum of USD $ 500,000 (five hundred thousand).

[46] EACJ Appeal No. 2 of 2019

iv. Simple interest at 6% per annum is awarded against the compensation designated above from the date of this judgment until payment in full.

v. Costs are awarded to the Applicant.

It is so ordered.

Dated and delivered by Video Conference this 26th Day of November, 2020.

Hon. Lady Justice Monica K. Mugenyi

PRINCIPAL JUDGE

Hon. Justice Dr. Charles Nyawello

JUDGE

Hon. Justice Charles A. Nyachae

JUDGE