



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



(Coram: Isaac Lenaola, DPJ; Faustin Ntezilyayo J. & Monica. Mugenyi, J.)

REFERENCE NO. 1 of 2014

EAST AFRICA LAW SOCIETY.....APPLICANT

VERSUS

- 1. THE ATTORNEY GENERAL OF
THE REPUBLIC OF BURUNDI.....1ST RESPONDENT**
- 2. THE SECRETARY GENERAL OF
THE EAST AFRICAN COMMUNITY.....2ND RESPONDENT**

15TH MAY 2015

JUDGMENT OF THE COURT

I. INTRODUCTION

1. This is a Reference by the East African Law Society (hereinafter referred to as the “**Applicant**”), which is registered as a Company Limited by Guarantee in Tanzania, and as a Foreign Company Limited by Guarantee in Kenya, Rwanda and Uganda. Its address for service, for the purpose of this Reference is No.6, Corridor Area, Arusha, Post Office Box Number 6240 Arusha, in the United Republic of Tanzania.
2. The Reference was filed on 17th February 2014 under Articles 6(d),7(2),11,27,29,30,38,67(3)(d),71,143,146 and 147 of the Treaty for the Establishment of the East African Community and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure (hereinafter referred to as the “**Treaty**” and the “**Rules**”, respectively).
3. The Respondents are the Attorney General of the Republic of Burundi and the Secretary General of the East African Community who are sued on behalf of the Government of the Republic of Burundi and of the East African Community in their respective capacities as the Principal Legal Adviser of the Republic of Burundi and the Principal Executive Officer of the Community.

II. REPRESENTATION

4. The Applicant was represented by Prof. Fredrick Ssempebwa, Mr. Francis Gimara and Mr. Humphrey Mtuy. Mr. Nestor Kayobera appeared for the 1st Respondent, while Mr. Wilbert Kaahwa and Mr. Stephen Agaba appeared for the 2nd Respondent.

III. BACKGROUND

5. The Applicant is a dual membership organization comprising individual lawyers and 6 Law Societies namely, Burundi Bar Association; Rwanda

Bar Association; Law Society of Kenya; Tanganyika Law Society; Uganda Law Society and Zanzibar Law Society. It has formal Observer Status with the East African Community.

- 6.** At all material times, Mr. Isidore Rufyikiri was the President of the Burundi Bar Association and also the President of the Burundi Centre for Arbitration and Conciliation (CEBAC) and sometime in 2013, charges of corruption were made against him in respect of his association with CEBAC.
- 7.** On 24th July 2013, Mr. Rufyikiri, wrote a letter Ref.: CAMRI/0427/2013 to the Governor of Bubanza Province in Burundi and the subject of the said letter read as *“Litigation between Masenge Venant and the Government of Burundi: warning.”*
- 8.** As a result of what was alleged by the 1st Respondent to be injurious and defamatory declarations contained in the abovementioned letter, the Prosecutor General of the Court of Appeal of Bujumbura, by his letter Ref.: No.552/11/1584/2013 of 07th October 2013, filed a complaint against Mr. Rufyikiri to the Bar Council of the Burundi Bar Association and requested that the Council should take disciplinary measures against Mr. Rufyikiri.
- 9.** On 29th October 2013, Mr. Rufyikiri, then also President of The Burundi Bar Association, organized a Press Conference in which he made declarations allegedly considered by the 1st Respondent to be against the rules, State security and public peace.
- 10.** On 30th October 2013, the Prosecutor General of the Court of Appeal of Bujumbura, by his letter No.552/11/1722/2013 of 30th October 2013, requested the Bar Council of the Court of Appeal of Bujumbura to disbar Mr. Rufyikiri from the Roll of Advocates because of the abovementioned declarations made on 29th October 2013.

11. On 17th December 2013, the Prosecutor General made a complaint against Mr. Rufyikiri to the Court of Appeal of Bujumbura requesting his disbarment from the Roll of Advocates and the case was registered under RA10.
12. The Court of Appeal of Bujumbura, on 28th January 2014, by its decision in case RA10, disbarred Mr. Rufyikiri from the Roll of Advocates and ordered immediate execution of the judgment
13. On 03rd March 2014, Mr. Rufyikiri, through his Counsel, applied for review of the judgment of the Court of Appeal of Bujumbura by the Review Chamber of the Supreme Court of Burundi in **Case No. RCC25.103**. On 16th June 2014, the Review Chamber ruled against Mr. Rufyikiri and maintained the decision of the Court of Appeal of Bujumbura.
14. On 23rd December 2013, Mr. Rufyikiri sent an email to the Chief Executive Officer of the East African Law Society (EALS) in which he stated that he was forbidden from leaving the Country following a decision taken by the Prosecutor General of the Anti-Corruption Court. He then requested that EALS should sue, on his behalf, the Government of the Republic of Burundi before the East African Court of Justice seeking a declaration that the impugned decision is unlawful and therefore should be repealed.
15. The instant Reference was therefore filed by the East African Law Society, on 17th February 2014.

IV. THE APPLICANT'S CASE

16. The case for the Applicant was set out in the Reference, an affidavit in reply to the supplementary affidavit sworn on 05th November 2014 by Mr. Rufyikiri, the Reply to the 1st Respondent's Response to the Reference filed on 17th June 2014, the Applicant's written submissions

filed on 07th November 2014, the Reply to the 2nd Respondent's Submissions filed on 15th December 2014 and the Applicant's Submissions in reply to the 1st Respondent's Submissions filed on 15th January 2015.

- 17.** Briefly, the Applicant alleged that on 29th October 2013, Mr. Rufyikiri, in his capacity as the President of the Burundi Bar Association, addressed a press conference in which he raised issues concerning the rule of law, democracy and constitutionalism, and that as a result of the said press conference, the Prosecutor General of the Court of Appeal of Bujumbura made a complaint to the Burundi Bar Council requesting it to take disciplinary action against him.
- 18.** He averred that the Bar Council had 60 days expiring on 30th December 2013, within which it had to consider the complaint lodged by the Prosecutor General, but that, on 17th December 2013, the latter, without following the laid down procedures, introduced an action at the Court of Appeal of Bujumbura requesting that Mr. Rufyikiri be disbarred from the Roll of Advocates. He further alleged that on the same date of 17th December 2013, the Prosecutor of the Anti-Corruption Court made an order prohibiting Mr. Rufyikiri from travelling outside Burundi.
- 19.** It was also the Applicant's case that the Court of Appeal, without following the right procedures and due process, disbarred Mr. Rufyikiri from the Roll of Advocates.
- 20.** The Applicant asserted that when members of the Burundi Bar Association convened a meeting on 28th January 2014 in order to consider and analyse the said decision of the Court of Appeal of Bujumbura, Burundi security forces forcefully disrupted the meeting.

21. The Applicant then alleged that the acts of the servants/agents/institutions of the 1st Respondent of prosecuting Mr. Rufyikiri before the Anti-Corruption Court, disbaring him from the Roll of Advocates and prohibiting him from travelling outside Burundi were unprocedural, and in breach of the rule of law, good governance, the right of free movement, as well as Articles 6(d), 7(2), 11,27,29,30,38,67(3)(d),71,143,146 and 147 of the Treaty.

22. The Applicant further alleged that the 2nd Respondent was in breach of his duty under the Treaty for failure to regularly monitor the observance of Treaty obligations by Partner States so as to advise the Summit and the Council over measures to effect compliance.

23. The Applicant therefore seeks declarations and orders from the Court as follows:

a) A declaration that the system of administration of justice and governance in Burundi is not conducive and enabling for the effective operation of the justice as envisaged by Articles 6(d) and 7(2) of the Treaty;

b) A declaration that by virtue of the legal system currently existent in Burundi, there is no distinctive separation of powers between the Judiciary and the Executive and hence a breach of the relevant provisions in Articles 6(d) and 7(2) of the Treaty;

c) A declaration that the procedure adopted and employed by both the Prosecutor General and the Court of Appeal of Bujumbura to disbar Mr. Isidore Rufyikiri was in breach of the international instruments on the right to a fair trial as provided by Articles 6(d) and 7(2) of the Treaty;

d) A declaration that the decision and order of the Court of Appeal of Burundi [sic] of 28th January 2014; and the travel ban imposed on Mr. Isidore Rufyikiri by the Prosecutor

General of the Anti-Corruption Court of the Republic of Burundi infringe upon and are in contravention of Articles 6(d), and 7(1)&(2) of the Treaty;

- e) An order removing into this Court for purposes of quashing and or setting aside the decision and orders of the Court of Appeal of Burundi made on the 28th January 2014 in case No.RA10 between the Public Prosecutor vs. Mr. Isidore Rufyikiri and an order directing the Court of Appeal of Burundi, the bar Council and the Government of Burundi to immediately and forthwith reinstate Mr. Isidore Rufyikiri to the table of Barristers of the Court of Appeal of Bujumbura [sic];***
- f) An order immediately and forthwith quashing, setting aside and or lifting the decision and orders of the Public Prosecutor to the Anti-Corruption Court of the Republic of Burundi prohibiting Mr. Isidore Rufyikiri from travelling beyond the national borders of Burundi;***
- g) An order directing the 2nd Respondent to constitute and commission an evaluation process to establish whether or not the governance and constitutional framework within the Republic of Burundi adheres to the threshold specified in Articles 6(d) and 7(2) of the Treaty and to advise both the Council and the Summit of the East African Community on whether the Republic of Burundi should be suspended or expelled from the East African Community under Articles 29,67,71,143,146 and 147 of the Treaty;***
- h) An order directing the 1st and the 2nd Respondents to appear and file before this Honorable Court a progress report on remedial mechanisms and steps taken towards the implementation of the Order sought by the Applicant in***

prayer vii above, every three months or such other lesser period as the Court shall deem expedient;

i) An order that the costs of and incidental of this Reference be met by the Respondents;

j) That this Honorable Court be pleased to make such further or other orders as may be necessary in the circumstances.”

V. FIRST RESPONDENT’S CASE

24. The 1st Respondent’s case is set out in his response to the Reference filed on 08th April 2014, an affidavit sworn on 04th April 2014 by Mr. Sylvestre Nyandwi, Permanent Secretary in the Ministry of Justice of the Republic of Burundi, a supplementary affidavit sworn on 10th October 2014 by the same Mr. Nyandwi and the 1st Respondent’s written submissions filed on 16th December 2014.

25. In a nutshell, he denied the Applicant’s allegations and counter-alleged:-

- a) That Mr. Rufyikiri as President of the Centre for Arbitration and Conciliation (CEBAC) mismanaged or caused mismanagement of funds belonging to the organization;
- b) As a result, the Prosecutor General of the Anti-Corruption Court decided to prosecute the said Mr. Rufyikiri for corruption and the case was still pending before the said Court;
- c) That because the said Mr. Rufyikiri wanted to flee the country, the Prosecutor General moved the Director General of Immigration to bar him from moving outside of Burundi;
- d) That the said Mr. Rufyikiri breached his oath as an advocate when he addressed a letter to the Governor of Bubanza Province, copied to high ranking officials of the East African Region and the International Community and organized a press conference and

made statements that were injurious to state security and public peace;

- e) That subsequent to the aforesaid letter and press conference, the Prosecutor General of the Court of Appeal of Bujumbura moved the Court to disbar Mr. Ruffyikiri, following the Bar Council's refusal to take disciplinary action against him;
- f) That the Court of Appeal acted in accordance with the Laws of Burundi in disbaring Mr. Ruffyikiri, and that the disbarment did not result into any injury or loss. In addition, the application for review of that decision was dismissed by The Supreme Court of Burundi; and
- g) That nothing done by the servants/agents/institutions of the Government of Burundi contravened the Treaty.

The 1st Respondent, therefore, prays that the Court should dismiss the Reference with costs.

VI. SECOND RESPONDENT'S CASE

26. The 2nd Respondent's case is set out in his Response to the Reference filed on 07th April 2014, an affidavit sworn by Mr. Charles Njoroge, Deputy Secretary General, filed on the same date, as well as his written submissions filed on 28th November 2014. His case is as follows:-

- a) The 2nd Respondent has denied all responsibility in the matter before the Court as at all material times, and until 27th January 2014 when he received a letter from Mr. Ruffyikiri, he was not aware of the matters complained of by the Applicant; and accordingly and contrary to the Applicant's pleadings, he cannot be blamed of any failure in the discharge of his duties and responsibilities;

- b) That as soon as he learnt of the matters complained of, and in accordance with the dictates of his office, he interceded with the Government of Burundi and established a Task Force to collect information on:-
- i) Alleged breaches of the Treaty by the Republic of Burundi; and
 - ii) The cause of growing litigation on alleged breaches of the Treaty by the Republic of Burundi; and the effect, if any, of this development on the East African Community.
- c) The 2nd Respondent pleads that the granting of the Declaratory Order and other Reliefs sought by the Applicant against him does not arise and that the Reference should be dismissed with costs.

VII. SCHEDULING CONFERENCE

27. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 18th September 2014, at which the following were framed as issues for determination by the Court:-

- 1) Whether the Reference discloses a cause of action taking into account the provisions of Article 30(1) of the Treaty;
- 2) Whether the acts of the servants/agents/institutions of the 1st Respondent in prosecuting Mr. Rufyikiri before an Anti-corruption Court, disbaring him from the Roll of Advocates and prohibiting him from travelling outside of Burundi constituted breach of the provisions of Articles 6(d) and 7(2) of the Treaty;
- 3) Whether the 2nd Respondent failed/neglected his responsibilities under the provisions of Articles 29(1) and 71(1)(d) of the Treaty;
- 4) Whether or not the Applicant is entitled to the remedies sought.

VIII. DETERMINATION OF THE ISSUES BY THE COURT

Issue No. 1: Whether the Reference discloses a cause of action taking into account the provisions of Article 30(1) of the Treaty

Submissions

28. While the Applicant argued that the Reference discloses a cause of action against the Respondents, the latter maintained that no cause of action did arise against them.

Applicant's Submissions

29. The Applicant's Counsel submitted that the Reference discloses a cause of action on different grounds:

Firstly, that Article 30(1) of the Treaty authorizes legal and natural persons, resident in a Partner State, to make a reference to this Court for determination whether a decision or action of a Partner State or the Community is an infringement of the Treaty. He argued that what that person needs to do is to plead facts that show there has been an action, decision, or omission by a Partner State or the Community and that the action, decision, or omission contravenes a provision of the Treaty.

30. In that regard, learned Counsel contended that the Applicant has pleaded in the Reference that the 1st Respondent, the Government of Burundi, a Partner State, unlawfully prosecuted Mr. Rufyikiri before an Anti-Corruption Court without regard to due process which is a component of the Rule of law; disbarred the same Mr. Rufyikiri from the Roll of Advocates without regard to the law or due process and without valid or lawful reason and without regard to due process, prohibited the same Mr. Rufyikiri from travelling outside of Burundi.

- 31.** In line with the foregoing, Counsel for the Applicant submitted that the commitments by the Government of the Republic of Burundi are to *inter alia* adhere to the principles of good governance and rule of law under Article 6(d) and 7(2) of the Treaty.
- 32.** As regards his case against the 2nd Respondent, Counsel submitted that the cause of action arose because he failed in his obligations under Articles 29(1) and 71(1)(d) of the Treaty to regularly monitor the observance of the Treaty obligations by the Government of Burundi so as to advise the Council of Ministers and the Summit of Heads of State over measures to effect compliance by the Republic of Burundi with its commitments under the Treaty.
- 33.** Secondly, Counsel stressed that the cause of action in the instant Reference is not a breach of the human or other rights of Mr. Rufyikiri, but the alleged infringements of Treaty obligations. In support of this contention, Counsel relied to the decision of this Court in ***Samuel Mukira Mohochi Vs The Attorney General of the Republic of Uganda, EACJ Ref. 5 of 2011***. He hastened to add that although Mr. Rufyikiri's rights are referred to in the Reference, the Court had decided that it would not abdicate from exercising its jurisdiction of interpretation under Article 27(1) of the Treaty merely because the Reference includes allegation of human rights violation. [See ***James Katabazi and 21 others Vs The Secretary General of the East African Community and other, EACJ Ref. 1 of 2007 (The Katabazi Case)*** and ***The Attorney General of the Republic of Kenya Vs Independent Medical Unit, EACJ Appeal 1 of 2011 (The IMLU Case)***]
- 34.** Counsel further argued that ***“The Partner States’ obligations, to their citizens and residents, in respect of good governance, have ‘through those States’ voluntary entry into the EAC Treaty, been***

*scripted, transformed, and fossilized into the several objectives, principles and obligations to be found in the Treaty the breach of which gives rise to a cause of action before this Honorable Court.” [See **The IMLU Case** (supra) and **The Attorney General of Rwanda Vs Plaxeda Rugumba, EACJ Appeal 1 of 2012 (The Rugumba Case)**].*

35. It was Counsel’s final submission on this issue that “**Whether some of the matters were litigated before the Burundi Courts is irrelevant to a cause of action. The Applicant and Respondents were not party to the Burundi litigation. The Burundi courts could not, and did not determine the issue of non-observance of the Treaty. Therefore res sub judice and res judicata are not applicable.**” [See **The Katabazi case** (supra) and **Anthony Calist Komu Vs The Attorney General of the United Republic of Tanzania, EACJ Ref. 7 of 2012**].

1st Respondent’s Submissions

36. In reply to the Applicant’s arguments supporting the existence of a cause of action against the 1st Respondent, the latter’s Counsel asserted that this issue had to be addressed together with Issue No. 2 on the alleged breach of Articles 6(d) and 7(2) of the Treaty and relied on the decision of this Court in **Ndorimana Benoit Vs The Attorney General of the Republic of Burundi, EACJ Ref. No. 2 of 2014 (The Ndorimana case)** in support of his allegation.

37. Based on Article 30(1) of the Treaty which provides that “**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 on the grounds that such act, regulation, directive, decision or**

action is unlawful or is an infringement of the provisions of the Treaty”, learned Counsel submitted that there was no action which was unlawful or was an infringement of the Treaty and that, therefore, in the absence of such an action, no cause of action against the 1st Respondent could arise.

38. Counsel further pointed out that as elaborated in the 1st Respondent’s Response to the Reference and in the Supplementary Affidavit of Mr. Sylvestre Nyandwi, Mr. Rufyikiri, in his capacity as the President of the Burundi Centre for Arbitration and Conciliation (CEBAC), was being prosecuted in the Anti-Corruption Court of Burundi in accordance with Law No.1/12 of 18th April 2006 on measures of preventing and combating corruption and related offences and Law No. 1/10 of 3rd April 2013 on Criminal Procedure Code of Burundi, under **Case No.RMPCAC 2066.**

39. He then contended that this case is distinguishable from **The Mukira Mohochi Case** (supra) since the whole process of prosecuting Mr. Rufyikiri and the measure prohibiting him from travelling outside Burundi did not violate any articles of the Treaty, including Articles 6(d) and 7(2) as they were being done in accordance with the relevant Laws of Burundi.

40. In the same vein, Counsel argued that since the disbarment of Mr. Rufyikiri was done in accordance with the applicable Burundian laws and by national competent institutions (i.e. Court of Appeal of Bujumbura and Review Chamber of the Supreme Court of Burundi) as detailed in the Respondent’s case above, there was no ground to support the Applicant’s allegations that the 1st Respondent has violated his Treaty obligations embodied in Articles 6(d) and 7(2) of the Treaty. It is on the basis of the foregoing and again relying on the **Ndorimana**

Case that he submitted that a cause of action against the 1st Respondent had not arisen.

2nd Respondent's Submissions

- 41.** On his part, Counsel for the 2nd Respondent opted to address issues No.1 and No.3 jointly while stating that issue No. 2 did not relate to him.
- 42.** Relying on the decision in ***Prof. Peter Anyang' Nyong'o and 10 Others Vs The Attorney General of Kenya and 3 Others, EACJ Ref. No. 1 of 2006 (The Anyang' Nyong'o Case)*** in which the nature of a statutory cause of action under Article 30(1) was expounded by this Court, he submitted however that no such cause of action as envisaged in the Reference arose against him.
- 43.** He contended that the Applicant's claim against him is mostly based on suppositions that having been well aware of Mr. Rufyikiri's circumstances, he elected to do nothing about the matter, remained silent and failed to undertake, on his own initiative, investigations into the 1st Respondent's conduct in handling Mr. Rufyikiri's issue. Thus, Counsel argued that those suppositions on which the Applicant's claim was premised were not borne by any evidence in the Applicant's pleadings or at all and that the absence of evidence ought to be noted in the Applicant's disfavour.
- 44.** As regards the 2nd Respondent's responsibilities under the Treaty, Counsel pointed out that the relevant provisions regulating this matter are Articles 29 and 71 of the Treaty and that Articles 143, 146 and 147 read together with Articles 67 and 71 of the Treaty referred to matters that were beyond the 2nd Respondent's competence.
- 45.** Article 29(1) of the Treaty provides that ***"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.” Article 71(1)(d) of the Treaty provides that ***“1. The Secretary General shall be responsible for: (d) the undertaking either on its own initiative or otherwise, of such investigations, collection of information, or verification of matters relating to any matter affecting the Community that appears to it to merit examination.”***

46. Counsel deduced from the foregoing provisions that the 2nd Respondent’s responsibilities are, firstly, to submit his findings to a Partner State that has failed to fulfil an obligation under the Treaty with a view of soliciting a response thereto; and secondly, to undertake investigations into matters relating or affecting the Community that appear to him, as head of the Secretariat, to merit examination. He then argued that ***“the two responsibilities cannot be exercised contemporaneously (at the same time), but that they can only be exercised consecutively (one after the other). The import of this is that investigations into a matter will first have to be carried out [Article 71(1)(d)] before the 2nd Respondent can make and submit his findings to the concerned Partner State to respond thereto[Article 29(1)]. Therefore, there cannot be a concurrent infringement of provisions that are supposed to be complied with sequentially. It is not tenable to argue, as the Applicant seeks to do, that the 2nd Respondent ‘infringed Article 29(1) and 71(1)(d) of the Treaty’.***”

47. Basing his reasoning on the sequential approach developed above, Counsel argued that an Applicant would be entitled to a finding that the 2nd Respondent infringed Articles 29(1) or 71(1)(d) of the Treaty if it were proved that the latter had not taken the initiative to investigate a

matter relating to or affecting the Community that appears to it to merit examination or upon investigating such a matter, he had failed or refused to submit findings to the concerned Partner State to respond thereto.

48. It was Counsel's submission that judging from the Applicant's pleadings on record, there was nothing to prove that the 2nd Respondent had failed/neglected his responsibilities under Articles 29(1) or 71(1)(d) of the Treaty. On the contrary, he invited this Court to consider his positive stance and actions on the matters pertaining to Mr. Rufyikiri. In this regard, he pointed out, as deposed in Mr. Charles Njoroge's Affidavit that appropriate steps were taken by way of constituting a Task Force to investigate the alleged breach of Treaty provisions by the Republic of Burundi way before the Applicant had even filed the instant Reference. In addition, he averred that the 1st Respondent was informed about the Team and dates were proposed for a possible meeting to discuss, among other issues, the alleged breach of the Treaty, although despite several reminders, the 1st Respondent did not assent to any proposed schedule in order to start investigations.

49. Moreover, it was submitted that this Court's decision in the ***Katabazi Case*** (supra) cannot be cited to fault the 2nd Respondent because as indicated in his evidence, he, without being prompted but upon his own consideration that the matters allegedly affecting Mr. Rufyikiri merited examination within the meaning of Article 29 of the Treaty, took immediate action.

50. In concluding his submissions, Counsel for the 2nd Respondent contended that ***"the Reference does not disclose a cause of action against the 2nd Respondent because there is no evidence to show that Articles 29(1) and 71(1)(d) of the Treaty were infringed as***

alleged or at all. If anything, the 2nd Respondent has led evidence to show that he complied with Article 71(1)(d) of the Treaty. The obligation under Article 29(1) can only be triggered by the completion of the investigations provided under Article 71(1)(d) of the Treaty. This has not yet happened. Having established that the Reference does not disclose a cause of action against the 2nd Respondent, it cannot also be argued that he failed/neglected his responsibilities under the provisions of Articles 29(1) and 71(1)(d) of the Treaty.”

Determination of Issue No.1

51. It can be gleaned from the Applicant’s pleadings and submissions that the crux of the Applicant’s complaint against the 1st Respondent is the allegations that the act of its servants/agents and institutions in prosecuting Mr. Isidore Rufyikiri before the Anti-Corruption Court, prohibiting him from travelling outside the Republic of Burundi and debarring him from the Roll of Advocates were unprocedural and in breach of the 1st Respondent’s Treaty obligations, in particular Articles 6(d) and 7(2) of the Treaty.

52. In this regard, the Applicant’s Counsel has submitted that the cause of action against the 1st Respondent is constituted by the aforesaid allegations of infringement of specific Treaty provisions by the Government of Burundi. In support of this stance, learned Counsel has referred us to the authorities indicated above.

53. For the determination of the cause of action against the 1st Respondent, we are of the view that the findings of this Court in **Samuel Mukira Mohochi** (supra) referred to us by Counsel for the Applicant are conclusive. In the same line, we find that the Treaty provisions alleged to have been violated have, through Burundi’s voluntary entry into the Treaty, been crystallized into actionable

obligations, now stipulated in among others, Articles 6(d) and 7(2) of the Treaty, breach of any of which by the Republic of Burundi (1st Respondent) would give rise to infringement of the Treaty. It is that alleged infringement which, through interpretation of the Treaty under Articles Article 27(1) of the Treaty constitutes the cause of action in the instant Reference. Facts and applicable Burundian laws in support of the claim have been presented by the Applicant which led him to the allegation that acts committed by the Respondent infringe Articles 6(d) and 7(2) of the Treaty.

54. We are of the opinion that for the Applicant, it is enough to clearly state a complaint against the 1st Respondent that its actions, to wit, prosecuting Mr. Rufyikiri before the Anti Corruption Court and issuing a travel ban without due process of law and alleged irregularities in initiating a case against Mr. Rufyikiri to disbar him from the Bar Association without awaiting the decision of the Bar Council, all constitute a cause of action against the 1st Respondent.

55. In support of his submissions that the Reference does disclose a cause of action against the 1st Respondent, Counsel referred us to some authorities including ***The James Katabazi Case*** (supra) and ***The Anyang' Nyong'o Case*** (supra).

56. We note that in the ***Anyang' Nyong'o Case*** (supra, p. 18)), this Court defined a cause of action as “***a set of facts or circumstances that in law gives rise to a right to sue or to take out an action in court for redress or remedy.***” The Court further opined that the Treaty provides for a number of actions that may be brought to this Court for adjudication. In this regard, the Court was of the view that Article 30 of the Treaty, among others, virtually creates a special cause of action, which different parties may refer to this Court for adjudication.

57. It was also the Court's opinion that in Article 30 as reproduced elsewhere above, "***the Treaty confers on any person resident in a Partner State the right to refer the specified matter to this Court for adjudication and as we have just said, by the same provision it creates a cause of action.***"

58. Regarding the claim in this Reference, we note that the Applicant is a legal person and as "***the umbrella regional organization of the national bar associations within East Africa***", it was prompted to bring this Reference following what it considered as the unprocedural manner in which Mr. Rufyikiri, then President of the Burundi Bar Association, was prosecuted before the Anti-Corruption Court, banned from leaving the country and disbarred from the Roll of Advocates of the Burundi Bar Association.

59. Given the foregoing, we hold that the Applicant has a cause of action against the 1st Respondent under Article 30 of the Treaty.

60. As for the 2nd Respondent, who is the Secretary General of the Community, the cause of action arises from the fact that the Applicant is faulting him for having allegedly sat idly by, omitting or neglecting to act on violations of the Treaty by a Partner State through the alleged illegal treatment of Mr. Rufyikiri by agents/servants/officials of the Republic of Burundi.

61. On his part, Counsel for the 2nd Respondent categorically refuted the Applicant's argument contending that the 2nd Respondent had discharged his obligation as prescribed in the Treaty, and therefore, there is no cause of action against him.

62. Using the same reasoning as above, we are of the view that a cause of action against the 2nd Respondent has arisen by the fact that the Applicant, a legal person resident of a Partner State, is moving the

Court alleging that the 2nd Respondent failed to take appropriate actions, under Articles 29 and 71 of the Treaty, against a Partner State alleged to have violated its Treaty obligations by the unprocedural way it handled Mr. Rufyikiri's case.

63. On Issue No. 1, therefore, we hold that the instant Reference discloses a cause of action against both the 1st and 2nd Respondents.

Issue No. 2: Whether the acts of the servants/agents of the 1st Respondent in prosecuting Mr. Isidore Rufyikiri before an Anti-Corruption Court, disbarring him from the Table of Barristers and prohibiting him from travelling outside Burundi constituted a breach of the provisions of Article 6(d) and 7(2) of the Treaty.

Applicant's Submissions

64. The Applicant contended that ***“the sum total of the treatment so meted out to Mr. Isidore Rufyikiri amounts to a scheme by the Government of Burundi to suppress criticism, and/or democratic advice, to interfere with the rule of law, and a wanton disregard of the human and professional rights of a Burundi citizen and therefore contrary to the principles of the Treaty as provided in Articles 6(d), and 7(2).”***

65. As regards the prosecution of Mr. Rufyikiri and the prohibition from travelling outside the country, Counsel for the Applicant alleged that the scheme of acts that amounts to violation of the Treaty was disclosed by the 1st Respondent's failure to prove that there were any valid grounds for commencing a prosecution against Mr. Rufyikiri in the Anti-Corruption Court.

66. In addition, learned Counsel submitted that given that Mr. Sylvestre Nyandwi's affidavit in support of the 1st Respondent's Response alleged but did not disclose any evidence of mismanagement of CEBAC funds,

the proper inference from that allegation was that no evidence of mismanagement existed. To buttress this contention, Counsel stated that an official audit conducted on the account of CEBAC did not raise any irregularities.

67. Furthermore, it is his stance that there was no nexus between Mr. Rufyikiri as President of CEBAC duly elected by the General Assembly of CEBAC and the Government of Burundi. That therefore, there was no reason for the Government's action when Mr. Rufyikiri was properly accounting to the Assembly of CEBAC, an independent body, which never complained over his alleged misconduct.

68. Counsel also contended that the 1st Respondent had alleged, but had not presented any evidence in proof, that Mr. Rufyikiri was about to flee Burundi so as to defeat justice. On that, he maintained that the prohibition to go out of Burundi was a penalty under Burundian law meted out by a Court and not the Prosecutor General who did it in utter disregard of the rule of law.

69. On this matter, he concluded by submitting that since the contents of the Applicant's Reply had not been contradicted in any way, they represented the correct version of the events and were in proof of ***“the scheme against good governance, particularly, the rule of law.”***

74. Regarding the disbarment of Mr. Rufyikiri from the Roll of Advocates, the Applicant's Counsel submitted that it was because of a press conference held by Mr. Rufyikiri, on 29th October 2013, in his capacity as the President of the Burundi Bar Association and in which he raised issues of lack of good governance, democracy and abuse of human rights, that the Government reacted the following day of 30th October 2013 by commencing the disbaring process against Mr. Rufyikiri.

75. It was his submission that the Government of Burundi's actions could not have been triggered by Mr. Rufyikiri's letter to the Governor of Bubanza Province, dated 24th July 2013, two months before the action by the Government. His submission in that case was that the Government's reaction constituted "**another step in the overall scheme**" to punish Mr. Rufkiri. In support of this submission, he stated that the contents of that letter were clearly alleging violations of rights in Burundi generally, although singling out the particular case of Mr. Venant Masenge.

76. He further argued that since the letter was written in Mr. Rufyikiri's capacity as an advocate pursuing a client's interests, in that capacity, he was entitled to the protection accorded to legal professionals under the Burundian law and International Instruments.

77. Counsel also contended that when reference was made in the said letter to the historical cleavage between ethnic communities of Burundi, it was simply pointing out that all the people of Burundi were entitled to equal protection of their human rights and that peoples' (community) rights were protected by the African Charter on Human and People's Rights, which was in turn, entrenched by Article 6(d) of the Treaty.

78. Learned Counsel further stressed that the 1st Respondent had not presented any evidence that the Governor of Bubanza Province or the Government of Burundi have denied the allegations in Mr. Rufyikiri's letter and that the Government of Burundi's pursuit of that letter in the manner pleaded by the 1st Respondent "**clearly demonstrates Burundi's inclination to suppress criticism and to disregard the rule of law that Mr. Isidore Rufyikiri was attempting to protect.**"

79. Addressing the matter related to the Burundi Courts' approval of the disbarment of Mr. Rufyikiri from the Roll of Advocates, the Applicant's

Counsel submitted that Mr. Sylvestre Nyandwi's supplementary affidavit dated 9th October 2013, in which he indicated that the travel ban against Mr. Rufyikiri had been lifted and that the disbarment of the latter had been approved by the court of last resort in Bujumbura, had no consequence to the Applicant's pleadings and remedies sought.

80. He maintained that the Applicant had stated as a fact also confirmed by Mr. Sylvestre Nyandwi's affidavit dated 4th April 2013, that the Prosecutor General, on 17th December 2013, in total disregard of proper procedures, had made a complaint to the Court of Appeal of Bujumbura to disbar Mr. Rufyikiri. In addition, Counsel averred that before the Prosecutor General made the said complaint to the Court, he had made a complaint against Mr. Rufyikiri to the Burundi Bar Association dated 30th October 2013.

81. Learned Counsel stated that, by law, the Burundi Bar Council had 60 days from the date of the complaint within which to take action. He then submitted that the 60 days began to run from 30th October 2013, the date of the complaint as indicated above. He further contended that there was no nexus between the complaint of 30th October 2013 to the Burundi Bar Council and that made on 7th October 2013. In this regard, he argued that the two complaints were referring to different alleged violations by Mr. Rufyikiri. For him, the complaint of 7th October 2013 was based on the alleged injurious contents of the letter to the Governor of Bubanza Province, while the complaint of 30th October 2013 was driven by the alleged offensive statements at the press conference. Moreover, he pointed out that the demand for disbarment was made in the letter of 30th October 2013 and not the letter of 7th October 2013.

82. It is therefore Counsel's submission that by approaching the Court on 17th December 2013 with a request to disbar Mr. Rufyikiri, the

Prosecutor General had disregarded proper procedures and the law, particularly the requirement to allow the Bar Council of the Burundi Bar Association the time prescribed by law within which to act. He further submitted that the entire process leading to disbarment of Mr. Rufyikiri in such an unprocedural manner was part of what he termed **“the total scheme against the principle of good governance, democracy, the rule of law and the respect for human and people’s rights.”**

83. In support of his stance that **“any wanton disregard of the rule of law as happened in this case should be condemned by this Honourable Court as in breach of the Treaty which is the basic law of the Community”** and supersedes national law on the same issues, learned Counsel referred us to Article 8(4) of the Treaty and the Authorities of ***R.V. Secretary of State for Transport, ex-part factortame Ltd. And Others [1990] ECR 1-2433; N.V. Algemene Transporta Expeditie Onderming Van gen En Loos V. Nederlandse Administratie Del Belastingen [1903] ECA 1*** and ***Samuel Mukira Mohochi*** (supra).

84. Counsel concluded his submission on this matter by contending that accessing a remedy in Burundi was not a bar to the instant Reference and cited in support of his argument ***The Anyang’ Nyong’o Case*** (supra) and ***Antony Calist Komu Vs. The Attorney General of the United Republic of Tanzania, EACJ Ref. 7 of 2012.***

85. The submission of the 1st Respondent’s Counsel on this issue has been reproduced above together with his submission on Issue No.1.

Determination of Issue No. 2

86. We have carefully considered the rival submissions made by the parties on this matter. As framed, the issue can be divided into three

sub-issues referring to impugned acts allegedly committed by the 1st Respondents, namely, the prosecution of Mr. Rufyikiri before the Anti-Corruption Court, the travel ban imposed to the same Mr. Rufyikiri and his disbarment from the Roll of the Advocates. These acts will be reviewed in light of the relevant Burundian Laws referred to us by both parties. The said laws are Law No.1/12 of 18th April 2006 establishing measures on preventing and combating corruption and related offences; Law No. 1/10 of 03rd April 2013 on the Revised Criminal Procedure Code; Law No. 1/014 of 29th November 2002 on the Reform of the Statute of the legal profession and Law No. 1/05 of 22nd April 2009 on the Revised Penal Code.

87. Regarding the prosecution and the prohibition from travelling, in paragraph 7 of Mr. Sylvestre Nyandwi's affidavit, it is deponed that "***on 2/12/2013, the Public Prosecutor to the Anti-Corruption Court took measure to ban Mr. Isidore Rufyikiri to leave the Country in order to get him whenever required in the prosecution of the penal case No. RMPCAC 2066 KI opened in the anti-corruption Court in accordance with Law No. 1/12 of 18th April 2006 on measures of preventing and combating corruption and related offences as well as Law No.1/10 of 3rd April 2013 on Penal procedure Code of Burundi.***"

88. In order to determine whether the two aforementioned acts were done in accordance with the Burundian laws, we found that Articles 1, 3, 5, 6 and 10 of the Anti-Corruption Law No.1/12 (supra); Articles 47, 50 and 65 of the Criminal Procedure Code and Articles 60 and 65 of the Penal Code are relevant in addressing the matter at hand. For clarity's sake, we are respectively reproducing these provisions below.

Law No. 1/12 of 18th April 2006 (Anti-Corruption Law)

Article 1:

This Law aims at preventing and combating corruption and related offences committed by public and private institutions as well as non-governmental organizations.

Article 3:

For the implementation of the national policy on fighting corruption and related offences, it is set up an institutional framework composed of:

- A Special Anti Corruption Brigade***
- An Anti Corruption Court.***

Article 5:

The missions of the Special Anti Corruption Brigade are as follows:

- handle grievances or complaints of suspected corruption or related offences***
 - submit to the Public Prosecutor, after the conclusion of its investigation, facts that may constitute offences of corruption or related offences***
- (..)***

Article 6:

Under the provisions of the Criminal Procedure Code and without prejudice to the powers vested in the judicial police officers, officers of the Anti Corruption Brigade have the powers granted to judicial police officers.

As such, they are competent to investigate offences of corruption and related offences, collect evidence, to find the perpetrators

and, if necessary, proceed to police custody pursuant to the Criminal Procedure Code.

Article 10:

The head of the Special Anti Corruption Brigade may request to the competent authority the prohibition of leaving the territory for any suspect.

Law No.1/10 of 3rd April 2013 on Criminal Procedure Code

Article 47:

The Public prosecutor exercises the public action and requires the application of the law. It directs and controls the activities of the judicial police and all public officials having the quality of judicial police officer

Article 50

The Public Prosecutors may exercise themselves all powers attributed to judicial police officers under this law or under special laws related to Judicial Police

Article 65

The Public Prosecutor conducts or causes to conduct any act necessary to the investigation and prosecution of offences to the penal code.

To that end, he directs and controls the activity of judicial police officers and agents in the Tribunal jurisdiction.

Law No.1/05 of 22nd April 2009 on Penal Code

Article 60

Complementary punishment applicable to physical people are:

(...)

2. Prohibition

Article 65

In cases determined by law, following prohibitions can be pronounced:

(...)

6. Prohibition of going outside the country.

89. Having laid down the above provisions applicable to this matter, we now turn to the first bone of contention, that is, the alleged unprocedural manner in which Mr. Rufyikiri was prosecuted before the Anti Corruption Court.

90. From the outset, it is our understanding that our task as regards this matter is not to determine whether or not acts of corruption were committed by Mr. Rufyikiri as the President of the Burundi Centre for Arbitration and Conciliation, but that it is rather to assess whether the act of initiating his prosecution by the Prosecutor General was in conformity with the relevant laws of Burundi. The same test will be carried out later in this judgment when it comes to determine whether the travel ban was issued in accordance with Burundian Laws.

91. In this regard, we find that the pre-cited Law No.1/12 whose aim is to prevent and combat corruption and related offences applies to both public and private institutions (Article 1) and it also creates the Anti-Corruption Court and the Special Anti-Corruption Brigade as the institutional entities competent to handle offences of corruption and related offences (Article. 3). In addition, Articles 5 and 6 of Law No.1/12 and Articles 50 and 65 of Law No.1/10 clearly spell out the power invested in the Public Prosecutor to initiate the criminal prosecution of any person, being public or private, suspected of committing an act of corruption.

- 92.** Based on the foregoing findings, we are of the view that a plain reading of the abovementioned provisions leads to the conclusion that the Public Prosecutor acted within the limits of the power vested in him by the relevant Burundian Laws when he initiated the prosecution of Mr. Rufyikiri for alleged acts of corruption. Consequently, we hold that the 1st Respondent cannot be faulted for violating Articles 6(d) and 7(2) of the Treaty.
- 93.** Turning to the act of banning Mr. Rufyikiri from travelling outside the Burundian territory, the bone of contention appears to revolve around the authority competent to order a travel ban against a suspect. Counsel for the Applicant argued that such a ban should be issued by a court of law while Counsel for the 1st Respondent contended that the competent authority in that matter is the Public Prosecutor.
- 94.** As it transpired from the material placed before the Court and in submissions during the hearing held on 11th February 2015, both parties relied on Article 10 of Law No/1/12 as reproduced above in support of their respective arguments on this issue. When asked by the Court which authority is referred to in this article, Counsel for the 1st Respondent replied that the Prosecutor General is the one competent to issue a travel ban and that no intervention of a court of law is required.
- 95.** This averment was rebutted by Counsel for the Applicant by quoting the provisions of Articles 60 and 65, paragraph 6 of the Penal Code according to which such a competence is the prerogative of a Court of law.
- 96.** We agree with Counsel for the Applicant's reading of the two provisions that according to Burundi Laws, the prohibition from travelling outside the territory of Burundi is imposed by an order of the court. Accordingly, it is our view that procedural irregularities

amounting to lack of procedural due process were committed in the way Mr. Rufyikiri was banned from travelling outside the Burundian territory. Consequently, we hold that due process of law, one of the cornerstones of the rule of law, was not respected by the 1st Respondent and that this constitutes a violation of its Treaty obligations under Articles 6(d) and 7(2) of the Treaty.

Disbarment from the Roll of Advocates of the Burundi Bar Association

97. As the case stands, the bone of contention appears for us to be whether due process of law was followed in filing a disbarment case against Mr. Rufyikiri before the Court of Appeal of Bujumbura while the time required for the Bar Council to decide on the complaint filed by the Prosecutor General to consider disbarring the same Mr. Rufyikiri had not elapsed.

Applicable Law

98. The applicable law as referred to us by the parties is Law No. 1/014 of 29th November 2002 on the Reform of the Statute of the legal profession (***Advocates Act, 2002***) and the relevant provisions applicable to the instant matter are Articles 57, 61, 63, 65, 67 and 71 of the said law. For ease of reference, we are reproducing them hereunder.

Article 57 provides that:

“Any violation of laws and regulations, any breach of professional rules , any breach of probity and honor even relating to extra-professional facts , expose the lawyer (or trainee lawyer) who is the author to the following disciplinary sanctions:

- Warning;***
- Blame;***

- ***Suspension for a period of one year at most;***
- ***Disbarment from the Roll of Advocates.***

The blame and the suspension may be associated with the ban to be part of the Bar Council for a period not exceeding ten years.

Article 61 provides that:

“The Bar Council is competent to take all disciplinary sanctions against lawyers. The Court of Appeal has jurisdiction to hear appeals against the sanctions imposed by the Bar Council.

The Bar Council shall act on its own motion or at the request of the Prosecutor General to the Court of Appeal.

The Bar Council and the Court of Appeal shall take decide in a reasoned decision after a contradictory hearing.”

Article 63 reads as follows:

“Any decision of the Bar Council in disciplinary matters may be referred to the Court of Appeal by the applicant’s counsel or the Prosecutor General at the said Court.”

Article 65 stipulates that:

“The investigation is conducted by the Bar Council. After investigation, the Bar Council closes the case if it considers the complaint unfounded or declares the penalty it considers proportionate to the offence committed by the lawyer.”

Article 67 provides that:

“The disciplinary matter is referred to the Court of Appeal by the Prosecutor General to the Court of Appeal. The Council may take the matter without any request from outside.

Article 71 provides that:

The Bar Council must take a decision within sixty (60) days from the day a disciplinary matter was referred to it.

99. From the chronology of events that led to the case before the Court of Appeal of Bujumbura filed on 17th December 2013 by the Prosecutor General, it is clear that two complaints had been filed to the Bar Council by the same Prosecutor General in accordance with Article 67 of the Advocates Act, 2002. The first complaint was filed on 7th October 2013 requesting the Bar Council to take disciplinary measures against Mr. Rufyikiri for alleged injurious and defamatory declarations contained in his letter of 24th July 2013 to the Governor of the Bubanza Province. The second complaint was filed by the same Prosecutor General on 30th October 2013 requesting the disbarment of Mr. Rufyikiri for making declarations alleged to be against the rules, State security and public peace, during the 29th October 2013 Press Conference held by Mr. Rufyikiri.

100. If we consider the provisions of Article 71 of the Advocates Act 2002, we note that the Bar Council had up to 7th December 2013 to take a decision on the complaint filed on 7th October 2013 and up to 30th December 2013 as regards the complaint for disbarment submitted to it.

101. From this simple computation of time, it is apparent that the filing of the disbarment case against Mr. Rufyikiri before the Court of Appeal of Bujumbura by the Prosecutor General, on 17th December 2013, falls 13 days short of the 60 days allowed to the Bar Council by Article 71 of the Advocates Act for the Council to take a decision on the matter. In doing so, the Bar Council was bypassed and thus, the right of Mr. Rufyikiri to have his case heard by the very professional body in charge of disciplining advocates was violated.

102. In light of the foregoing findings, we hold that not following the letter of law (i.e. exhausting the period of time allowed to the Bar Council to take a decision on the disciplinary matter) in instituting the disbarment case against Mr. Rufyikiri before the Court of Appeal of Bujumbura, constituted a violation of due process and this contradicts the Respondent's Counsel's contention that Mr. Rufyikiri was disbarred in accordance with the law. Having so found, we see no reason to scrutinize the Court of Appeal process. On the disbarment issue therefore, we hold that the violation of due process by the 1st Respondent offends the rule of law principles enshrined in Articles 6(d) and 7(2) of the Treaty.

Issue No. 3: Whether the 2nd Respondent failed/neglected his responsibilities under the provisions of Articles 29(1) and 71(1)(d) of the Treaty

Submissions

103. Counsel for the Applicant submitted that the gist of the Applicant's case against the 2nd Respondent was that, having got prior knowledge of the alleged violations of the 1st Respondent's Treaty obligations triggered by the unprocedural way in which Mr. Rufyikiri's case was handled, the 2nd Respondent did not take any action that would have compelled the 1st Respondent to comply with its Treaty's commitments.

104. In order to prove that the 2nd Respondent had prior knowledge about allegations of lack of good governance in Burundi, learned Counsel referred to letter Ref.: CAMRI/0484/2013 of 27th December 2013 written by Mr. Rufyikiri to the Public Prosecutor of Burundi and copied to the EAC Secretary General, among others. In addition, he pointed out the contents of letter Ref. ORG/2/1 of 11th November 2013 written by the EAC Secretary General to the Minister to the Office of the President Responsible for EAC Affairs in Burundi, in which the

Secretary General brought to the attention of the 1st Respondent some matters of alleged violations of its Treaty obligations, including allegations that were mentioned in the letter above from Mr. Ruffyikiri.

105. It was also Counsel's submission that rather than waiting to be prompted to act by litigants, the 2nd Respondent ought to have acted on his own and should have exercised pro-activeness in as far as bringing Partner States to account regarding their actions especially those actions that seemingly violate the Treaty's provisions.

106. In response to the Applicant's contentions referred to above, the 2nd Respondent categorically denied any wrongdoing. He rather brought out several actions undertaken as highlighted in his case above, but pointed out that these actions did not bear any positive results, because they have been frustrated by the 1st Respondent's lack of cooperation as regards the operationalization of the Task Force set up to investigate the alleged breach of the Treaty provisions by the Republic of Burundi even before the instant reference was filed on 17th February 2014.

Determination of Issue No. 3

We have carefully reviewed the parties' pleadings and submissions on this matter and we opine as follows:

107. It is on record that by his letter Ref. ORG/2/1 of 11th November 2013 mentioned above, the 2nd Respondent brought to the attention of the 1st Respondent, through the Minister to the Office of the President Responsible for EAC Affairs, two claims about land and property matters while stressing that those claims, if not handled properly, could give rise to failure of due process. In the same letter, the 2nd Respondent expressed his concern at the proliferation of litigation from the Republic of Burundi mainly relating to allegations of failure of due

regard to Article 6 of the Treaty and informed the 1st Respondent of an upcoming mission in the Republic of Burundi to interact with the Ministry of Justice and other relevant Government Departments on these issues.

108. Also on record is the Secretary General's Internal Memo Ref.: RG/2/1 of 15th January 2013 entitled: ***Situation on the Administration of Law and Justice in the Republic of Burundi.*** In the said Memo, the Secretary General stated that pursuant to the powers entrusted to the Secretariat under Article 71(1)(d) of the Treaty, he was appointing some staff members into a Task Force to investigate:

***“a) alleged breaches of the Treaty by the Republic of Burundi;
b) the cause of growing litigation on alleged breaches of the Treaty emanating from the Republic of Burundi; and
c) the effect, if any, of this development on the Community.”***

109. The Task Force was required to undertake a Mission in the Republic of Burundi and prepare a report by 1st March 2014. We note, however, that it was on the same date that the appointment of the said Task Force was communicated to the 1st Respondent, through the Secretary General's letter to the Permanent Secretary of the Ministry to the President Responsible for EAC Affairs. In the said letter, it was indicated that the Task Force had planned to visit the Republic of Burundi on 19th-23rd March 2014.

110. We further note that, on 11th March 2014, the 1st Respondent, through the Minister to the Office of the President Responsible of EAC Affairs, informed the Secretary General that the proposed dates for the visit were not convenient for the Republic of Burundi and that the Republic of Burundi would communicate new dates after further internal consultations.

Since then, no further communication on this matter has been made by either side and the 1st Respondent who is the Republic of Burundi is yet to allow this Task Force to go there and undertake investigations.

111. During the hearing of the instant case held on 11th February 2015, in response to the question put to him as why the 2nd Respondent had not undertaken actions prescribed in Article 29 of the Treaty in the event that a Partner State is not being cooperative to allow him carrying out investigations on alleged violations of Treaty provisions, we heard learned Counsel to be intimating that the Secretary General had undertaken a diplomatic visit to the Republic of Burundi in which the issue of the stalled work of the Task Force was raised. He then conceded, however, that now that the matter was before this Court, any order that the Court might take would be further support for the 2nd Respondent to execute investigations to ensure that the Republic of Burundi is brought to compliance with the Treaty obligations.

112. In the matter at hand, we must note at this juncture that although some actions have been undertaken in line with the 2nd Respondent's responsibilities under Article 71(1)(d) of the Treaty, no effective action to overcome the 1st Respondent's lack of cooperation was initiated as such an action would be effected under Article 29 of the Treaty.

113. In this regard, we are of the view that it is the duty of the 2nd Respondent to actively and proactively carry out his Treaty functions for the sake of bringing Partner States in compliance with Treaty obligations they voluntarily subscribed to in order to ensure the advancement of East African integration. We shall make an order in this regard later in the judgment.

Issue No. 4: Whether or not the Applicant is entitled to the remedies sought

114. We have addressed all the core issues as framed during the Scheduling Conference and we now proceed to determine the prayers sought in the Reference in light of our findings.

115. Starting with the submissions of Counsel for the 1st Respondent, the latter relied on the ***Ndorimana case*** (supra) and submitted that the Applicant is not entitled to any remedy sought and that the Reference ought to be dismissed with costs to the 1st Respondent.

116. The 2nd Respondent's Counsel, on his part, pointed out that out of the ten declarations and orders the Applicant had sought against the Respondents, it was only two of them that specifically related to the 2nd Respondent, namely the proposed orders under paragraphs (vii) and (viii).

117. As regards the order sought under paragraph (vii), learned Counsel contended that such an order cannot be issued because there was already a Task Force duly constituted and mandated to ascertain whether or not the 1st Respondent breached the fundamental and operational principles of the Community.

118. Concerning the order sought under paragraph (viii), the 2nd Respondent's Counsel submitted that Article 29 of the Treaty which covers the matter at issue did not confer upon the 2nd Respondent any advisory role to merit the grant of the order sought by the Applicant. He maintained that the order sought is not tenable and that the practical thing to do was to let the ongoing investigation that led up to the procedure laid out in Article 29 of the Treaty play out.

119. In his reply to the 2nd Respondent's submission, Counsel for the Applicant submitted that what was sought was for the 2nd Respondent to establish an effective Commission/investigative mechanism.

120. Our findings in the above regard are therefore as follows:

Prayer (a): *A declaration that the system of administration of justice and governance in Burundi is not conducive and enabling for the effective operation of justice as envisaged by Articles 6(d) and 7(2) of the Treaty. The evidence on record pertained to specific acts of Treaty violation but it is not sufficient to warrant the declaration sought.*

Prayer (b): *A declaration that by virtue of the legal system currently existent in Burundi, there is no distinctive separation of powers between the Judiciary and the Executive and hence a breach of the relevant provisions in Articles 6(d) and 7(2) of the Treaty. This prayer too cannot be granted for the same reasons as in prayer (a).*

Prayer (c): *A declaration that the procedure adopted and employed by both the Prosecutor and the Court of Appeal of Bujumbura to disbar Mr. Isidore Rufyikiri was in breach of the international instruments on the right to a fair trial as provided by Articles 6(d) and 7(2) of the Treaty. This prayer is in part premised on Issue No. 2. Regarding the procedure leading to the disbarment of Mr. Rufyikiri, this Court finds that not following the prescribed legal process in instituting the disbarment case against Mr. Rufyikiri before the Court of Appeal of Bujumbura constitutes a violation of due process and this violation, imputable to the 1st Respondent, offends the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty.*

Prayer (d): *A declaration that the decision and order of the Court of Appeal of Bujumbura of 28th January 2014, and the travel ban imposed on Mr. Isidore Rufyikiri by the Prosecutor of the Anti-Corruption Court of the Republic of Burundi infringe upon and are in contravention of Articles 6(d) and 7(1) & (2) of the Treaty. The prayer is allowed in the following terms only: The unprocedural way in which Mr. Rufyikiri was banned from*

travelling outside the territory of Burundi is in contravention of the rule of law principle embodied in Articles 6(d) and 7(2) of the Treaty.

Prayer (e): *An order removing into this Court for purposes of quashing and or setting aside the decision and orders of the Court of Appeal of Bujumbura made on 28th January 2014 in case No. RA10 between the Public Prosecutor and Mr. Isidore Rufyikiri and an order directing the Court of Appeal of Bujumbura, the Bar Council and the Government of Burundi to immediately and forthwith reinstate Mr. Isidore Rufyikiri to the Roll of Advocates of the Court of Appeal of Bujumbura.* The prayer is not allowed because it falls outside the Court's jurisdiction owing to the proviso to Article 27(1) of the Treaty.

Prayer (f): *An order immediately and forthwith quashing, setting aside and or lifting the decision and orders of the Public Prosecutor to the Anti-Corruption Court of the Republic of Burundi prohibiting Mr. Isidore Rufyikiri from travelling beyond the national borders of Burundi.* The prayer is overtaken by events since the travel ban has been lifted.

Prayer (h): *An order directing the 2nd Respondent to constitute and commission an evaluation process to establish whether or not the governance and constitutional framework within the Republic of Burundi adheres to the threshold specified in Articles 6(d) and 7(2) of the Treaty; and to advise both the Council and the Summit of the East African Community on whether the Republic of Burundi should be suspended or expelled from the East African Community under Articles 29,67,71,143,146 and 147 of the Treaty.* This prayer is based on Issue No. 3. In determining this issue, the Court finds that although some actions had been undertaken in line with the 2nd Respondent's responsibilities under Article 71(1)(d) of the Treaty, no effective action to overcome the 1st Respondent's lack of cooperation was initiated as such an action would be effected under Article 29 of the Treaty. The 2nd Respondent should

actively and proactively fulfil his Treaty functions in order to ensure Partner States' compliance with their Treaty obligations. An order in this regard will be made at the end of this judgment.

Prayer (i): *An order directing the 1st and the 2nd Respondents to appear and file before this Honorable Court a progress report on remedial mechanisms and steps taken towards the implementation of the Order sought by the Applicant in prayer (7) above, every three months or such other lesser period as the Court shall deem expedient. An order in this regard will be made at the end of this judgment.*

Prayer (j): *An order that the costs of and incidental to this Reference be met by the Respondents. The matter in issue falling in the category of public interest litigation, we deem it just that each party bears its costs.*

Final Orders

121. For the reasons above, the final orders to be made are as follows:

- I. Prayers (a), (b), (e) and (f) are disallowed and are consequently dismissed.
- II. Prayers (c) is allowed in the following terms only: A declaration is hereby made that the procedure adopted and employed by the Prosecutor General to disbar Mr. Isidore Ruffyikiri was in breach of the right to a fair trial and therefore a violation of the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty.
- III. Prayers (d) is allowed in the following terms only: A declaration is hereby made that the procedure adopted and the decision taken by the Prosecutor General of the Anti-Corruption Court of Burundi to impose a travel ban on Mr. Isidore Ruffyikiri infringed upon and was in contravention of the rule of law principle embodied in Articles 6(d) and 7(2) of the Treaty.

IV. Prayers (g) and (h) are granted in the following terms:

(a) An order is hereby issued directing the Secretary General of the East African Community to immediately operationalize the Task Force set up on 15th January 2014 to investigate alleged violations of Treaty provisions by the Republic of Burundi.

(b) The Republic of Burundi is directed to take, without delay, the measures required to implement this judgment, including allowing the Secretary General's Task Force to carry out its investigative mission.

V. Each party shall bear its own costs.

It is so ordered.

Dated, Delivered and Signed at Arusha this 15th day of May, 2015

.....
ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE

.....
FAUSTIN NTEZILYAYO
JUDGE

.....
MONICA MUGENYI
JUDGE