IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION

AT ARUSHA

(Coram : **Emmanuel Ugirashebuja, P.; Liboire Nkurunziza, V.P;**

James Ogoola, JA; Edward Rutakangwa, JA; and Aaron Ringera, JA)

REQUEST FOR AN ADVISORY OPINION NO. 1 OF 2015

IN THE MATTER OF :

A REQUEST BY THE COUNCIL OF MINISTERS

OF THE EAST AFRICAN COMMUNITY FOR AN ADVISORY OPINION

MADE PURSUANT TO ARTICLES 14 (4) AND 36 OF THE TREATY FOR THE ESTABLISHEMENT OF THE EAST AFRICAN COMMUNITY AND RULE 75 (4) OF THE EAST AFRICAN COURT OF JUSTICE RULES OF PROCEDURE, 2013

ADVISORY OPINION

I. Introduction:

1. This Advisory Opinion addresses the question of the application and interpretation of the words "**forfeit**" and "**withdraw**" as they are used, respectively, in Article 67 (2) of the Treaty for the Establishment of the

East African Community ("EAC Treaty"), and in Rule 96 (3) of the EAC Staff Rules and Regulations ("the Staff Rules").

2. The instant Advisory Opinion is the second such Opinion given by the East African Court of Justice ("the Court") in the course of its approximately 15 years of existence. The first Advisory Opinion, concerning the interpretation of the principle of "Variable Geometry" articulated in Article 7 (1) (e) of the EAC Treaty, was given by the First Instance Division of this Court pursuant to Articles 14(4) and 36 of the Treaty and Rule 75 of the former Rules of Procedure of this Court. With the amendment of the Court 's Rules of Procedure in 2013, the jurisdiction to entertain requests for Advisory Opinions was transferred from the Court's First Instance Division, and was conferred, instead, on the Appellate Division of the Court – as the final arbiter of disputes involving the Community and the EAC Treaty.
3. On the face of it the first Advisory Opinion appeared to call for prying into the intricacies of the calculus and geometry of the Community's quest for Integration. Similarly, on the surface of it, this second Advisory Opinion would appear to offer a whimsical play on the semantics and linguistics of that Integration Effort. But outside appearances are not what they always seem to be. Deep inside, the Court in these two Advisory Opinions delves into fundamental operational principles that govern and guide the destiny of the Community. The first Opinion addressed the speed at which some Partner States would sprint (while others merely march marathon-like) on their mutual expedition to the destination of Integration. This second Opinion addresses the extent to which Partner States may be called upon to shoulder the financial responsibility for the Community's Employment Contracts.

II. Background:

4. This instant Advisory Opinion arises from a Request filed on 15th April, 2015, by the Secretary General of the EAC Community ("the Community") on behalf of the Council of Ministers of the Community. The Request was filed pursuant to Articles 14(4) and 36 of the EAC Treaty and Rule 75 (4) of the EACJ Court Rules. It seeks this Court's Opinion on the interpretation and application of Article 67(2) of the Treaty, as read together with Rule 96(3) of the Staff Rules, 2006. In particular, the Request seeks an opinion as to whether or not the words "forfeit" and "withdraw", appearing respectively in Article 67 (2) of the Treaty and Rule 96(3) of the Staff Rules do, in effect, amount to the same thing.

5. The facts giving rise to the inquiry are relatively straight forward. The Republic of Rwanda, as a Partner State of the Community, nominated its national (Mr. Alloys Mutabingwa), for appointment as EAC Deputy Secretary General by the Summit of Heads of State (" the Summit"). Mr. Mutabingwa was duly appointed in that position on 29th April, 2009, for a term of three (3) years. However, on 29th April 2011, well before the expiry of Mr. Mutabingwa's 3-year term, the Republic of Rwanda nominated Amb. Dr. Richard Sezibera (another Rwandan national) for appointment by the Summit as Secretary General of the Community for a term of five (5) years. By virtue of Article 67 (2) of the Treaty:

> "*Upon appointment of the Secretary General the Partner State from which he or she is appointed shall forfeit the post of Deputy Secretary General".*

6. With that forfeiture, Mr. Mutabingwa's contract was brought to an end, exactly 12 months before the due date of its expiry. Upon that premature end of Mr. Mutabingwa's contract of employment, the Community, as Employer, compensated him in an amount equivalent to his full remuneration package for the 12-month balance of his contract. In doing so, the Community based itself on the authority of:

   (i) Rule 96 (3) of the Staff Rules – which provides that:

   "*Where a Partner State withdraws one of its executive staff before the expiry of contract, the individual shall be compensated the full remuneration package he or she would have received if he or she had served the entire period of the running contract. The funds paid by the Community shall be reimbursed by the concerned Partner State."*

   (ii) State practice of the Community regarding similar "withdrawals" in the past – notably in 2001 and 2006, when Uganda and Tanzania, respectively, reimbursed the Community upon "withdrawals" of their respective Deputy Secretaries General.

7. Consequent upon its payment of the above full compensation to Mr. Mutabingwa, the Community Secretariat requested the Republic of Rwanda to reimburse to the Community the amount of that compensation. Rwanda declined to make the requested reimbursement; on the basis that the matter did not fall within the ambit of Rule 96 (3). Additionally, Rwanda contended that there is no clear "**established State practice**" in this regard.

8. Confronted with this impasse, the Council of Ministers took a decision at its 29th Extra-Ordinary Meeting of 23-28 April, 2014, to seek this Court's Advisory Opinion on the matter. Specifically, the Council sought an

opinion on the following framed issue:

> "***Whether 'forfeiture' of the position of Deputy Secretary General under Article 67 (2) of the Treaty for purposes of making way for an incoming Secretary General from the same Partner State is in effect a 'withdrawal' of such Deputy Secretary General?".***

III. Representation:

9. The Secretary General, acting on behalf of the Council of Ministers, was the formal "Applicant" in this matter – duly represented in the Court by the Counsel to the Community (pursuant to Articles 37(2) and 71(4) of the Treaty).

10. In response to the Registrar's notification in that behalf (pursuant to Article 36 (1) and (3) of the Treaty and Rule 75 (2) of the Court's Rules of Procedure), the Attorneys General of the Republics of Uganda, Kenya, Rwanda and the United Republic of Tanzania, as well as the Counsel to the Community filed their views on the question in issue by way of written submissions.

IV. Jurisdiction:

11. Both the Attorneys General of Uganda and of Kenya adverted to the issue of this Court's Advisory jurisdiction. Both were of the considered view that, indeed, the Court has jurisdiction in the matter before us. Be that as it may, however, the Court – any court of law, derives its jurisdiction not from the consensus, nor the admission, nor indeed the consent of the representatives of the Parties (in this case, the Partner States).

12.Rather, jurisdiction is a function of the constitutive Instrument of the particular court – in this case the EAC Treaty; of which this Court is a constituent part. In this connection, Article 36 of the Treaty is clearly apposite. It will suffice, for the purposes of the record, to merely quote (without much elaboration) the relevant contents of that Article – thus:

> "*36 (1) The Summit, the Council or a Partner State may request the Court to give an advisory opinion regarding a question of law arising from this Treaty which affects the Community, and the Partner State, the Secretary General or any other Partner State shall in the case of every such request have the right to be represented and take part in the proceedings.*
>
> *(2) ...*
>
> *(3) ...*
>
> *(4) In the exercise of its advisory function, the Court shall be governed by this Treaty and rules of the Court relating to references of disputes to the extent that the Court considers appropriate."*

13. We need only add that, for reasons of expedition of the process of giving the opinion, as well as for reasons of maximizing the clarity and finality of the Court's opinion on the state of the Community law generally, the exercise of the Court's advisory function has since 2013 been transferred from the First Instance Division (where all References to the Court originate), to the Appellate Division (where appeals are entertained and adjudicated with finality). In this regard, Rule 75 of the Court's Rules of Procedure states, in relevant parts, as follows:

"(1) A request for an advisory opinion under Article 36 of the Treaty shall be lodged in the Appellate Division...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) Provisions of sub-rules (4) and (5) of Rule 68 [on Judgments of the Court] shall apply to advisory opinions under this Rule with necessary modifications."

14. Before departing from this issue of jurisdiction, however, we wish to touch on what both the Treaty and the Court's Rules of Procedure require as necessary preconditions for the rendering of a valid, credible and legitimate Advisory Opinion by this Court. The Court needs to be satisfied that all is done that needs to be done to validate the resulting Advisory Opinion. In this regard, we note that an Advisory Opinion carries the insignia and imprimatur of a "**Judgment"** of this Court – per Rule 75 (7), read with Rule 68 (4) and (5) of the Court's Rules of Procedure.

15. **First** and foremost, the Court needs to be satisfied of its **jurisdiction ratione personae –** that is to say that the Request for the Advisory Opinion emanates from the right quarter (i.e that the Request has been made by a person or entity as the Applicant having proper *locus standi)*. In the instant case, we are entirely satisfied that such was the

case. The Request was made by the Council of Ministers – one of the three entities (Summit, Council, Partner State) that are specifically and expressly entitled and authorized to do so under Article 36 (1) of the Treaty. That Article stipulates that:

"*The Summit, **the Council** or a Partner State may request the Court to give an Advisory Opinion..."* [Emphasis added].

16. In this regard, we observe that at least once in the past, this Court has had occasion to address the issue of who lacks *locus standi* to request an Advisory Opinion from this Court. In **Appeal No. 4 of 2012: Legal Brains Trust (LBT) Ltd. V. The Attorney General of Uganda, Judgment of 19th May, 2012,** this Court held that:

"*legal and natural persons – such as the Applicant/Appellant (LBT) are excluded from requesting an Advisory Opinion."*

17. **Second,** with regard to **jurisdiction ratione materiae,** the subject matter of the Advisory Opinion prescribed under the same Article 36 (1) of the Treaty requires the requested opinion to be one:

"*regarding a question of law arising from this Treaty which affects the Community...*"

18. We are satisfied that the question raised by the Request of the Council of Ministers in this instant case is comprehensive and does, indeed, encompass **"a question of law"** – namely, the interpretation and application of the EAC Treaty on a matter affecting the Community's executive staff (more specifically, the tenure and remuneration of the Community's Deputy Secretaries General, under Articles 67 and 68 of

the Treaty). This matter arises directly from Article 67(2) of the Treaty, as read with Rule 96 (3) of the Staff Rules. Needless to say, the Staff Rules arise from the Council of Ministers' rule-making power under Article 14 (3) (g), and Article 70 (3) of the Treaty and, as such, the Rules form an integral part of the same Treaty.

19. **Third,** the procedure prescribed under Article 36(1) of the Treaty and Rule 75(2), (4) and (5) confer on the Partner State directly concerned, as well as on all other Partner States, and the Secretary General of the Community, the right to be represented and to take part in the proceedings for the Advisory Opinion. Again, we are satisfied that this, indeed, has been the case. The Registrar of this Court, notified all the five Partner States and the Secretary General of the Community that the Council of Ministers had instituted a Request for an Advisory Opinion; and that they had a right to be represented in the proceedings, as well as to submit their views on the issue at hand. In response, all who were so notified through their Attorneys General and the Counsel to the Community, were duly represented at the oral hearings, except Burundi. All the respective representatives did highlight various aspects of the arguments and contentions contained in their written submissions.

20. **Fourth**, Article 36 (2) of the EAC Treaty requires the Request to be formulated as,

"an exact statement of the question upon which an opinion is required".

Moreover, the statement must be:

"*accompanied by all relevant documents likely to be of assistance to the Court."*

21. Here, again, we are satisfied that the "Statement" formulated by the Council of Ministers constituted an "exact" statement – both in its terms, its context, and its reach. We found no ambiguity in its formulation, no uncertainty in its meaning, no vagueness in its content, and no ambivalence in its intent. Altogether, the statement was both precise and concise. Additionally, the Request as required by Article 36 (2) of the Treaty, was suitably accompanied by Annexures of documents and case authorities offering useful explanations to the various aspects of the issue at hand.
22. In summary then, the Court is satisfied that all the preliminary conditions and statutory requirements for this Court to give a legitimate and valid Advisory Opinion, were duly met in the Request for this Advisory Opinion.

V. The Representatives' Observations:

23. In their Submissions, both written and oral, the respective representatives of the Partner States and of the Secretary General of the Community expressed the following observations and views:-

(1) Secretary General (Submissions):

24. The Secretary General was, so to speak, the Applicant making the Request on behalf of the Council of Ministers. In this capacity, his advocate (the Counsel to the Community) contended that:
    (i) The Republic of Rwanda sacrificed the position of Deputy Secretary General to get that of Secretary General. That

"sacrifice" caused the holder of the Deputy Secretary General's position to give way to the new Secretary General. Hence, Rwanda, "withdrew" the then Deputy Secretary General, Mr. Mutabingwa.

(ii) The Republic of Uganda in 2001, and the United Republic of Tanzania in 2006 set the precedent and practice whereby the Secretariat has been refunded the compensation paid to an outgoing Deputy Secretary General. That "established practice" has never been questioned by any Partner State.

(2)The Republic of Kenya (**Submissions):**

25. Kenya asserted this Court's jurisdiction to entertain the matter, pursuant to Article 36 of the Treaty and Rule 75 of the Court's Rules of Procedure.

26. As to the substantive aspects of the Request, Kenya stated that:

(i) In the interpretation of Article 67 (2) of the Treaty and Rule 96(3) of the Staff Rules, the Court should take into account:

(a) the intention of the Partner States, in light of the interpretation principles (of "good faith" and "ordinary meaning") stipulated by the **Vienna Convention on the Law of Treaties**; and

(b) the subsequent state practice – in particular, the precedents set by Uganda and Tanzania to reimburse the amount of compensation paid by the Community to their withdrawing Deputy Secretaries General in 2001 and 2006, respectively.

(ii) In view of all these, the Republic of Kenya was of the view that employing the principles of "good faith" and of the

"ordinary meaning" of words; coupled with the developing state practice, a deduction could be made that the words *forfeiture* and *withdrawal* (as applied in the Regulations), may be construed to have one and the same effect. The use of the word *withdrawal* in Regulation 96(3) is a matter of semantics, but it has a similar meaning with the word *forfeiture* in Article 67 (2) of the Treaty.

(3) The Republic of Uganda (Submissions):

27. The submission of Uganda delved at great length into the jurisprudence of Treaty law and international case law --- with the conclusion that : " *the end result of forfeiture is withdrawal* ". They submitted that it follows that after forfeiting the position of Deputy Secretary General , the Partner State inevitably withdraws its national. Accordingly, the Republic of Rwanda is obliged to meet the consequences of withdrawal of its national to wit, compensation as provided for in Regulation 96(3) of the EAC Staff Rules and Regulations, 2006.

28. Furthermore, Uganda submitted that in the spirit of co-operation for mutual benefits – which is one of the fundamental principles of the Community under Article 6 of the Treaty, Rwanda should follow the **precedent** set by other Partner States and reimburse the Secretariat.

29. In the alternative, but without prejudice to her above submissions , Uganda advised the EAC Council of Ministers to take necessary measures "*to specifically harmonise Regulation 96(3) of Staff Rules with the provisions of the Treaty".*

(4) The United Republic of Tanzania (Submissions):

30 . Tanzania adopted the stand taken by the Secretary General.

31. Like Kenya, Tanzania also affirmed this Court's jurisdiction to give an Advisory Opinion under Article 36 of the Treaty and Rule 75 of the Court's Rules of Procedure.

32. Tanzania pressed the point of its precedent (in 2006), and that of Uganda (in 2001) in reimbursing the Community's payment of compensation to their two nationals whose contracts as Deputy Secretaries General were terminated prematurely to give way to the appointment of new Secretaries General.

33. Moreover, Article 67 (1) and (2), read together, do portray the meaning that no two nationals from the same Partner State can serve as Secretary General and Deputy Secretary General during the same period. The Partner State concerned must forfeit the post of Deputy Secretary General. Regulation 96 (3) has a purposive character: namely, to compensate the outgoing Deputy Secretary General for the unexpired term of his or her contract in order to cover the loss of expected income.

34. While Tanzania contended that "*forfeiture*" implies "*withdrawal*", it also conceded explicitly that "Regulation 96(3) should not supersede and be seen as contravening Article 67(2) through the interchangeable use of the words '*forfeit'* and '*withdraw'.*

35. Furthermore, Tanzania contended that the Republic of Rwanda could have upgraded Mr. Mutabingwa from the post of Deputy Secretary

General, to that of Secretary General. The failure to do so implied that Rwanda had "constructively withdrawn" the Deputy Secretary General and elevated another national instead. Therefore, Rwanda is under legal obligation to reimburse to the Community the funds used to compensate the former Deputy Secretary General.

(5) The Republic of Rwanda (Submissions):

36. Rwanda's invocation of Article 67(1) of the Treaty was an exercise of a legal right to nominate a new Secretary General. The right based on the operation of a Treaty provision is anchored on the principle of rotation in the appointment of the Secretary General of the Community. To interpret all this as a "*withdrawal"* of Rwanda's Deputy Secretary General, would be absurd. The services of that Deputy Secretary General were extinguished by the operation of the law. *Forfeiture* is a consequence triggered by the occurrence of an event provided by law. Once the event happens, the consequences are automatic and do not depend on the will of the Parties involved. *Withdrawal*, on the other hand, is an act entirely dependent on the will of the Party effecting the withdrawal. Indeed, under Rule 96 (1) (a), the Partner State effecting the withdrawal of an executive staff is:

> "*required to give six months written notice to the Summit through the Council..."*

37. Accordingly, Rwanda is under no obligation to reimburse the amount USD $128,891 that was paid by the Secretariat to compensate the Deputy Secretary General for the unexpired term of his contract.

VI. Analysis And Opinion of the Court on the Issues:

38. The decision whether to "forfeit" or not to "forfeit" the post of Deputy Secretary General upon a Partner State's rotational turn to nominate a new Secretary General, may be said to be within that Partner State's will or choice .

39. Indeed, as the United Republic of Tanzania contended in its written submissions, adverted to earlier in this opinion, Rwanda had the choice to elevate the then incumbent Deputy Secretary General (Mr Mutabingwa) to the position of Secretary General , or to nominate, as it did, a new person altogether as the Secretary General. But, looked at more critically, it would have been , at best, only a mirage or a Hobsonian choice – for elevation of Mr Mutabingwa as Secretary General , would still leave his position of Deputy Secretary General vacant. At worst, Rwanda would have been forced to make a nomination it may not have necessarily preferred to make; thus, it would have been deprived of a real choice that is its right to make under the provisions of the Treaty. That would be no choice. That in our view , would , in effect, amount to undermining or debasing the Treaty provisions:a corrosion of the true intent of the principle of rotation of Article 67(1) in the appointment of the Community's Principal Executive Officer.

40. The act of "*forfeiture*" of the position of Deputy Secretary General is not a choice of any Partner State at any given time. It occurs when the confluence of events forces a Partner State to either nominate a new Secretary General or sacrifice an existing position of Deputy Secretary General.

41. Rather, it is an act of the application of law cast in the EAC Treaty's principle of rotation – by which no Partner State is permitted to hold the two top positions of Secretary General and Deputy Secretary General at the same time. By force of Article 67(2), a Partner State from which the Secretary General is appointed must, **by law** , forfeit the position of Deputy Secretary General. It is for this reason that the Republic of Rwanda contended that "forfeiture" is –

    "a consequence triggered by the occurence of an event provided for by the law . Once the event happens , the consequences are automatic and do not depend on the will of the parties involved..

    If a country nominates a Secretary General , then through an automatic legal process it forfeits the position of Deputy Secretary General."

42. We agree. We need not add anything more. Both the law and the logic of that position are self-evident. The "decision", if decision it is, is a decision neither of the Summit of the Heads of State, nor of the Council of Ministers, nor of the Secretariat, nor of the Partner States acting collectively, nor indeed of the individual Partner State concerned acting solo. It is a function of the operation of the law: pure and simple.
43. We will now turn to another aspect of the requested Opinion :namely , the nature and status of the Employment Contract of the Deputy Secretary General .
44. Articles 66-70 of Chapter Ten of the EAC Treaty prescribe broad parameters of the employment contract in the EA Community. The Staff Rules and Regulations (including Rule 96(3) of those Rules) stipulate the more detailed aspects of the Community staff contracts.

45. Article 66 of the Treaty establishes the Secretariat as an executive organ of the Community, having the following offices:

"(a) The Secretary General;

(b) The Deputy Secretaries General;

(c) The Counsel to the Community; and

(d) such other offices as may be deemed necessary by the Council."

46. Both the Secretary General and Deputy Secretaries General are appointed by the Community's Summit of Heads of State under Articles 67(1) and 68(2) , respectively. Both are appointed on a rotational basis (although in more recent times each of the current five Partner States has nominated its own Deputy Secretary General). The Secretary General is appointed upon nomination by the "relevant Head of State"; while Deputy Secretaries General are appointed from nominees of the Partner States and upon recommendation of the Council of Ministers . They are appointed for a fixed term of 5 years for the Secretary General (under Article 67(4) of the Treaty); and 3 years , renewable once, for the Deputy Secretary General (under Article 68(4) of the Treaty).

47. A consequence of the rotation and the non-uniform sequence of these appointments is the specter, from time to time, of a Partner State being faced with the choice of a Secretary General and a Deputy Secretary General, all at the same time. To obviate that eventuality of a dilemma, the framers of the Treaty included in the Treaty a provision which is tailor-made to address that specific conundrum – namely, Article 67(2) which states that:

"(2) Upon the appointment of the Secretary General the Partner State from which he or she is appointed shall forfeit the post of Deputy Secretary General."

48. The framers of the Treaty drafted the above quoted provision with deliberate reflection. They did so in order to avoid the spectre of any Partner State ending up holding the two top executive positions of the Community at one and the same time. By fiat of law, the framers provided for a compulsory "**forfeirture"** of the second Executive position, upon the Partner State acquiring the first position.
49. Be that as it may, the Court is also alive to the fact that upon appointment, by the Summit , of both the Secretary General and the Deputy Secretary General, those appointees (just like all other officers and employees in the service of the Community) cease to be nominees of the particular Partner State of their nationality or nomination.
50. They cease to have any appointment relationship with their original or nominating Partner State. They become staff of the Community , holding their office in the Secretariat under Chapter Ten (Articles 66-72) of the Treaty.
51. By the nature of their employment, they acquire the status and character of international civil servants, beholden to no single Partner State, nor to any Head of State or member of the Council of Ministers. They owe all their loyalty and fidelity only to their Employer: the Community. Conversely, no single Partner State has (and none should have) any employment rights over or employment relationship with any such staff member of the Community.

52. In this connection , Article 72 of the Treaty is emphatic and categorical. It provides, in great detail, as follows:

> *"1. In the performance of their functions , the staff of the Community shall not seek or receive instructions from any Partner State or from any other authority external to the Community. They shall refrain from any actions which may adversely reflect on their position as international civil servants and shall be responsible only to the Community.*
>
> *2. A Partner State shall not, by or under any law of that Partner State, confer any power or impose any duty upon an officer, organ or institution of the Community as such, except with the prior consent of the Council.*
>
> ***3. Each Partner State undertakes to respect the international character of the responsibilities of the institutions and staff of the Community and shall not seek to influence them in the discharge of their functions.***
>
> 4. *The Partner States agree to co-operate with and assist the Secretariat in the performance of its functions as set out in Article 71 of this Treaty and agree in particular to provide any information which the Secretariat may request for the purpose of discharging its functions.* [*E*mphasis added].

53. In view of all the above, therefore, it is difficult to envision how, when and why any Partner State could "withdraw" its national from the staff of the Community as contemplated in Rule 96(3) of the Staff Rules, without offending the solemn obligations and undertakings of the

Partner States stipulated in each and every one of the above-quoted provisions of Article 72 of the Treaty. The Partner States are neither the Employer of the Community Staff; nor are they a party to any staff member's contract of employment. They have no authority or mandate to deploy , supervise, promote, demote or discipline any staff member of the Community – all these functions being the preserve of the Community itself. In our view, the inclusion of Rule 96 (3) in the Staff Rules was patently misconceived, having regard to, especially, Article 72 (3) of the Treaty which obliges Partner States to respect the international character of the Community staff.

54. But even, for argument's sake, in the event that a Partner State were to invoke the provisions of Rule 96(3) of the Staff Rules, the act of withdrawing a staff member (such as the Deputy Secretary General),would be a function exercised with the deliberate and free will of the particular Partner State. The act would be **deliberate** because, among others, Rule 96(1) (a) requires the Partner State intending to effect "withdrawal":

> " *to give six (6) months written notice [of that intention*] *to the Summit through the Council*."

And the act would be one of **free will** because, unlike "forfeiture" under Article 67(2) of the Treaty, " withdrawal" is not mandated nor is it dictated by fiat of law.

55. In all this misty regime of Rules, room for a Partner State to withdraw a Deputy Secretary General under Rule 96(3), is extremely difficult to contemplate or comprehend, let alone to establish or even envision. But in our view, one thing is crystal clear. Rule 96(3), in all its

manifestations, defeats the tenor, the object, and the purpose of the international character of the Community's civil service as conceived and duly recognized under the provisions of the EAC Treaty – in particular, Article 72(3). On this, the Court agrees wholly with the advice and sentiment expressed in the written submissions of the Republic of Uganda, to the effect that the Council of Ministers should take necessary measures to harmonise Regulation 96(3) of the Staff Rules with the provisions of the Treaty.

56. It is clear to us that the attempt to treat the Secretary General and Deputy Secretaries General under the same personnel regime as all other staff members of the Community; and, in particular, to apply to them the bulk and import of the Staff Rules and Regulations, is not a realistic proposition. It is, instead, an unfortunate misconception. It should be revisited to sort out the peculiar status of the "political" appointees among the Staff, from those of the regular professional (and other staff) – with each (for instance) having their own separate, independent, and well-defined administrative, regulatory, and disciplinary regime; the one, answerable only to the Summit through the Council; and the other, answerable to the Secretary General.

57. Accordingly, from all the above, under no stretch of construction, interpretation or imagination can the two concepts "*forfeiture*" and "*withdrawal"* be said to mean the same thing or to cause the same effect.

58. In this connection, we find the principles of statutory interpretation even in a municipal setting, to be quite germane, helpful and wholly in accord with the international principles governing the interpretation of

Treaties – such as the EAC Treaty. In our analysis that follows below, we will start with the former, and end with the latter.

59. We fully subscribe to the view of MAXWELL on **The Interpretation of Statutes,** 12th Edition, (1976) by P. St.J.LANGAN, at p.29, to the effect that:

> *"where the language is plain and admits of but one meaning , the task of interpretation can hardly be said to arise."*

60. It was for this reason, no doubt, that in the English House of Lords case of **Pinner v Everett** [1969] 1WLR,at p.1273**,** LORD REID stated the following*:*

> *"In determining the meaning of any word or phrase in a statute the first question to ask is what is the natural or ordinary meaning of that word or phrase in its context in the statute?* ***It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature , that it is proper to look for some other possible meaning of the word or phrase***. *We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute."* [Emphasis and underlining added].

61. In the same way, CROSS on **Statutory Interpretation,**3rd Edition, at p. 32 [when quoting MAcCORMICK AND SUMMERS' **Interpreting Statutes,** pp 512-513], emphasizes that:

> *"The governing idea...is that if a statutory provision is intelligible in the context of ordinary language , it ought, without more, to be interpreted in accordance with the meaning an ordinary speaker of the language*

would ascribe to as its obvious meaning, unless there is sufficient reason for a different interpretation.

.....

By enabling citizens (and their advisers) to rely on ordinary meanings unless notice is given to the contrary, the legislature contributes to the legal certainty and predictability for citizens and to the greater transparency in its own decisions, both of which are important values in a democratic society."

62. While the above statutory approach to the issue is highly helpful and relevant, it is but a secondary and supplementary source for purposes of interpreting provisions of a Treaty. We, therefore, now turn our next tour of exploration to the realm of international Law and Conventions – more specifically, to the General Rules of Interpretation in Article 31 of the **Vienna Convention on the Law of Treaties, 1969.** That Article stipulates that:

"1. ***A treaty shall 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 its objects and purpose.***

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text , including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty.

3. ***There shall be taken into account*** *, together with the context:*

   (a) any subsquent agreement between the parties regarding the interpretation of the treaty or application of its provisions;

   (b) ***any subsquent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation****;*

   (c) any relevant rule of international law applicable in the relations between the parties .

4. ***A special meaning shall be given to a term if it is established that the parties so intended***." [Emphasis added].

63. Pursuant to the above-quoted guidance of Article 31 of the **Vienna Convention** of 1969, a fair, good faith interpretation and construction of the word "*withdraw*", means exactly what that word says, namely : to "*remove*", to "*take away*" or similar cognate meanings. Therefore, to give the word "withdrawal" a meaning that encompasses the " forfeiture" of Article 67(2) of the Treaty, is clearly to stretch the meaning unreasonably, unrealistically and unnaturally – in light of the context of both Article 67 of the Treaty, and of Rule 96 of the Staff Rules.

64. To "**withdraw**" requires the deliberate decision and voluntary action of the concerned Partner State to recall the Deputy Secretary General. To change the ordinary meaning would be to give that term a special meaning which (under Article 31(4) of the above-quoted **Vienna Convention**), requires one to "*establish that the Partner States intended*" such special meaning. In this instant case, no such special meaning has been established by the submissions of either the representatives of any Partner State, or those of the Secretary General of the Community. In this connection, Rwanda's contention in her

written submission is correct: the act of withdrawal is entirely dependent on the will of the Partner State effecting the withdrawal. On the other hand, to "**forfeit**" is an imposition of the law on the Partner State, forcing it to "*surrender*", to " *forego*", to "*sacrifice*" that to which the Partner State is otherwise entitled – namely, the position of Deputy Secretary General. In this sense, therefore, to "*withdraw*" and to "*forfeit*" stand two poles apart: the one, the polar opposite of the other; the one, standing aloft the pedestal of Volition; the other at the bottom of the valley of Compulsion.

65. Notwithstanding the above analysis, we are alive to the real reason for the effort and quest to equate the two words as amounting to the same thing. That effort is not simply to establish the true, linguistic meaning of each one of these words. Not at all. The effort is more subtle than that. It seeks to establish the capacity of both words to lead to the same effect, same result, and same consequence. To that extent, the effort seeks to have this Court ignore the context, deflect differences, divert nuances, and pervert the true connotation and signification of the ordinary meanings of these two words , in order to somehow establish that their effect is the same. It seeks to equate **"forfeiture**" to " **withdrawa**l", with the aim to have both words attain the same result — namely , to obligate Partner States to bear the financial responsibility of compensating outgoing Deputy Secretaries General for the statutorily mandated premature expirations of their Employment Contracts.

66. We decline to do so. We decline for two related reasons: **First**, if the drafters of the Staff Rules (coming, as they did, long after the drafters of the Treaty) had intended to give the same effect to the two words , nothing would have been easier or simpler than to use the same word

"*forfeit*" in the Rules . But, No. The Rules opted for a different word altogether : namely, "*withdraw*". And this was not for reasons of ignorance , lack of foresight or vision, nor indeed for lack of linguistic agility or verbal dexterity. Not all. On the contrary, the drafters were fully conscious of the word " *forfeit*" – for they used it in the next- door Rule of the same Staff Rules – namely, Rule 91(9) as follows:

" 9. A member of Staff dismissed from the service shall ***forfeit*** *all rights and benefits...".* [Emphasis added].

67. Indeed, the same formulation was used some 10 years before, in Article 57 of the former Staff Rules and Regulations of 1996 – namely:

"*a staff member...dismissed under a disciplinary measure*

shall ***forfeit*** *all retirement benefits". [Emphasis added].*

68. **Second**, the two words stand for two different things in their substantive application. "*Forfeiture*" is an imposition by compulsory fiat of the law . "*Withdrawa*l", is a deliberate act and choice – made by the free will of the Partner State concerned.

69. The essence of this instant Advisory Opinion is on all fours with the recent Ugandan Supreme Court case of the " ***Rebel Members of Parliament****"*—namely, **Hon. Theodore Ssekikubo & 4 Others v The Attorney General of Uganda & 4 Others**, SCt Constitutional Appeal No.1 of 2015, Judgment of October 2015. Ground No.4 of that Appeal , concerned the issue of whether " **expulsion**" of a Member of Parliament from his political party amounts to the same thing as " **leaving**" that party for purposes of vacating his seat in Parliament.

70. The Supreme Court reversed the holding of the Court of Appeal/Constitutional Court which had been to the effect that the word "expulsion" and the word " leave" mean the same thing. The Supreme Court considered the **context** in which the word "leave" occurred, namely Article 83(1)(g) of the Constitution of Uganda – which provides that:

> *" ... if the person leaves [his or her] political party in order to join another party or to remain an independent Member..."*

71. The Supreme Court held that, given the above- quoted context of the Constitution, the word "leave" could only mean **leave voluntarily**, and not by **expulsion** or **compulsion** – inasmuch as the context provides the **purpose** for "leaving" (i.e. to join another party). Expulsion from a party, on the other hand, does not connote any such purpose . Expulsion can be for other purposes or for no purpose at all. Therefore, in the particular context of the above Constitutional provision, the word "**leave**" and the word "**expulsion**" cannot mean the same thing.

72. We, too, after deep reflection, find that the context of Article 67(2) provides a definite, one-of- a-kind **purpose** for the "forfeiture" of the position of Deputy Secretary General – namely, to give way to an in-coming Secretary General. On the other hand, the "withdrawal" of a Deputy Secretary General in the context of Rule 96(3), provides no particular purpose for the contemplated withdrawal. Given these two different contexts, therefore, the two words cannot mean the same thing. They denote and signify two different and opposing concepts.

73. By using the word "*withdraw*", in Rule 96(3), instead of the word "*forfeit"*, the Staff Rules clearly intended to, and did, construct an altogether different concept, having an entirely different effect and consequence from that of the concept "forfeiture" contained in Article 67(2) of the Treaty. To ask us to reverse the semantic gears of these two terms at this late stage, therefore, is to ask us to do violence to the linguistic purity of the two words. Worse still, to do so would be to offend the clear intent and purpose of both the Treaty and the Staff Rules. We must, as we do, decline to do so, however attractive and however compelling the temptation is to do so.

74. Upon their nomination by a Partner State, and recommendation by the Council of Ministers, as well as appointment by the Summit of Heads of State, Deputy Secretaries General serve their term subject to a Contract of Employment. Under Article 68(5):

> *"The terms and conditions of service of the Deputy Secretaries General shall be determined by the Council and approved by the Summit. "*

Article 70(3) of the Treaty is to the same effect as Article 68(5) above.

75. Those terms and conditions of service are contained in a Letter of Appointment which is given to each appointee after appointment. Additionally, the terms of employment as specified in each such Letter of Appointment are also contained in, among others, the Staff Rules and Regulations – including Rule 96(3). In this regard, Rule 1 of the same Staff Rules is emphatic. It states, without equivocation, that:

" 1. These Staff Rules and Regulations, made in pursuance of Article 14(3)(g) and 70(3) of the Treaty ***embody and define the fundamental conditions of service , and basic rights , duties , and obligations of members of Staff*** *of the Community".* [Emphasis added].

76. It is important to note, however, that the contract of employment – with all the terms and conditions included therein, is a contract strictly between the Employer (the Community), on the one hand, and the Employee (the Deputy Secretary General), on the other. It is only those two parties whom that contract binds. The Partner States are not privy to the benefits of that contract; nor are they party to its obligations. They are not bound by the terms of that contract – including the term emanating from the application of Rule 96(3) of the Staff Rules. This is so on account and authority of the international law principles of *Pacta Sunt Servanda* -– which, loosely rendered, translates as: *a pact or contract binds or makes a slave of its parties.*

77. Without being bound by Rule 96(3), the Partner States have no legal responsibility under the application of that Rule. All responsibility -– including the consequences of the breach or non-observance, and the financial obligations arising under that Rule (such as the payment of compensation for the premature cancellation or termination of a Deputy Secretary General's contract), must be borne only by the party to the Contract of Employment, namely the Community; and not by a non-party (such as the Partner State). In all this, what binds the Partner States is Article 67(2) – by which the Partner State concerned willy nilly forfeits the position of Deputy Secretary General upon its national being

appointed Secretary General. That result arises not from any Employment Contract relationship between the Partner States and the Community's employees (for there is none); but purely from the sheer application of the law, namely Article 67(2) of the Treaty).

78. It would be gravely unfair and grossly unconscionable to force a Partner State to pay for a wrong or breach of an employment contract :

- to which the Partner State is neither privy, nor a party;
- with regard to which the Partner State is not bound; and
- under which the Partner State has not itself committed a wrong, a fault or a default.

79. To penalize a Partner State in these circumstances of non-culpability, would be blatantly wrong and patently inequitable. Far from committing any wrongdoing, the Partner State is only exercising her right to an entitlement under the Treaty: namely, the right under the principle of rotation, to have one of her nationals appointed as Secretary General of the Community. It is enough that in that process, the Partner State forfeits the position of Deputy Secretary General. She should not incur (especially gratuitously) an additional "forfeiture" of her finances to meet the expenses of the unexpired term of the Deputy Secretary General – an eventuality which is dictated, not by her own free will to "withdraw" the Deputy Secretary General ; but , rather, one that is imposed on her at the behest of the automatic operation of the law (namely, Article 67(2) of the Treaty).

80. Accordingly, we find no logical or rational basis for holding responsible a Partner State (such as the Republic of Rwanda), for

the ensuing automatic consequences of forfeiture under the prevailing law of the Community.

VII. The Issue of State Practice

81. That brings us to the last substantive issue, of the various aspects of our Analysis – namely , whether or not there is an established State Practice regarding State refund to the Community of compensation paid to Deputy Secretaries General for the pre-mature expiry of their contract of service ?

82. The facts of the matter as gleaned from the written and oral submissions of the representatives of the Republics of Uganda and Kenya, and of the United Republic of Tanzania, as well as of the Secretary General of the Community, are quite simple and uncontested. In 2001, Uganda made a refund to the Community for compensation paid by the latter in respect of the early exit of the Deputy Secretary General (Dr. Sam Nahamya) a national of Uganda, to give way to the in-coming Secretary General (Hon. Amanya Mushega), another national of Uganda. Similarly, in 2006, Tanzania made the refund in respect of Deputy Secretary General (Amb. Ahmed Rweyemamu Ngemera) giving way to the new Secretary General (Amb. Juma Mwapachu) -– both nationals of Tanzania. In 2011, it was Rwanda's turn to effect a change of guards: between outgoing Deputy Secretary General (Mr. Alloys Mutabingwa), and in-coming Secretary General (Amb. Dr. Richard Sezibera). However, this time around, when requested to refund the usual compensation, Rwanda declined to do so -– for all the reasons and contentions

contained in her representative's written and oral submissions, to which we adverted at the outset of this Advisory Opinion.

83. The question to answer, therefore, is: In view of the facts we have recounted above, is there an established State practice on the issue of Partner State refunds to the Community for compensation paid to outgoing Deputy Secretaries General?

84. To put the question differently and in a more detailed fashion, the inquiry is:

(a) Has there, indeed been a practice?

(b) Has the practice been followed for some time (i.e. not merely a-one-off occurrence)?

(c) Is it a practice whose antiquity or longevity could in good logic , good reason and good conscience be said to have been sufficiently accepted and recognized as an established State practice?

(d) How does this practice, if any, stack up and measure up to the variety of tests and standards stipulated by the relevant jurisprudence , especially international jurisprudence, on that matter?

Analysis of a number of examples of international case law, from a number of different international judicial fora on this subject, will yield the appropriate answers to the above inquiry.

85. A well-known example of "subsequent practice" is in respect of Article 27(3) of the UN Charter ; R. KOLB: **La modification d'un traité par la pratique subsequent des parties.....Note l'affaire relative au regime fiscal des pensions versées aux fonctionnaires retraités de l'UNESCO**

résidant en France , sentence du 14 janvier 2003, Revue Suisse 14 (2004) 9 ff.

86.To pass muster, the "practice" in question needs to be an "*active*" practice. That active practice should be *consistent* , rather than *haphazard* ; and it should have occured with a certain *frequency* – see Statement in Vienna by the Delegation of Argentina, **OR 1968 COW 180,** para 23**; WALDOCK Rept.III,** YBILC 1964 II 59**,** para 24**; the avis de droit of the Swiss Federal Department for Foreign Affairs,** SJIR 38 (1982) 86, according to which two *règlements* of the WHO were insufficient to establish a practice in this respect. Indeed, some jurists go even further to state that the practice in question must be "*concordant and common* **to all parties**" [emphasis added] – see, for example, OLIVIER CORTEN & PIERRE KLEIN: **The Vienna Conventions on The Law of Treaties: A Commentary, (Oxford University Press)** 2011, Vol.I, p.826**.** Equally, some "practices" have been dismissed for not being "*uniform*"(hence, not " *relevant*") – see, **LAN Case : Customs Classification of Certain Computer Equipment, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, Report of the Appellate Body** of 5 June 1998**,** para 96**,** see also the case of **Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207 /AB/R, Report of the Appellate Body** of 23 September, 2002, para 272.

87.Other "practices" have been dismissed because their *lapse of time* (i.e their *longevity*) was too short to observe a genuine relevant practice – see the " ***Underwear Case*****" : Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT /DS24/AB/R, Report of the Appellate Body** of 10 February 1997, pp16-17 (where the DSB refused to take into account

the practice of the parties relating to WTO agreements judged to be too recent).

88.The European Court on Human Rights has been fairly flexible in taking into consideration "subsequent practice" . It has not demanded that the practice be followed "*unanimously*" by the Contracting Parties to the European Convention on Human Rights – but merely by " *a great majorirty* " *of those parties* – see the case **of Loizidou V. Turkey,** Judgment of 21 February, 1975**, Golder, Series A, no. 99,** paras 79-80, where the Court also speaks of " *a practice denoting practically universal agreement amongst Contracting Parties*" .

89.According to OLIVIER & KLEIN (*supra*) at p. 828, the Court of Justice of the European Union has, on the other hand, made only moderate use of the subsequent practice of parties – such as in **Case 21-24/72,** 12 December, 1972**, ECR 1972,** p.1219. More usually , however, that Court has tended to opt more for the teleological and ends-focused interpretation (in favour of the intention underlying Community treaties). Indeed, it has even dismissed this practice if it is contrary to its vision of the treaties – see, for example, **Case 232/78, Judgment** of 25 September ,1979, **Commission v France,** ECR 1979, p 2729 (in which the conduct of the States and the absence of application of secondary law by the States or institutions were not considered as an element of interpretation of the treaty).

90.The practice in the International Court of Justice (ICJ) is equally revealing- see , for example, the case of **North Sea Continental Shelf: The Federal Republic of Germany v Denmark & The Netherland ,** ICJ

Reports 1969, p 3 which concerned the " practice" for delimiting the continental shelf between Germany and Denmark; and between Germany and the Netherlands in the areas of the North Sea. As to the question when does a practice become recognised as established , the dissenting opinions of Judges LACHS, TANAKA, and SORENSON explained as follows:

- *LACHS, J : " to become binding, a rule or principle of international law need not pass the test of universal acceptance..... Not all states have an opportunity or possibility of applying a given rule. The evidence should be sought in the behaviour of a great number of States, possibly the majority of States, in any case the great majority of the interested States* ***....."*** *DJ HARRIS,* ***Cases and Materials in International Law****, 6th Edition, Sweet & Maxwell, 2004, at page 32.*
- *SORENSON, J: "According to the classic doctrine.... the practice necessary to establish a rule of customary international law must have been pursued over a certain length of time . There have been those who have maintained the necessity of 'immemorial usage' ... However, the Court does not seem to have laid down strict requirements as to the duration of the usage or practice which may be accepted as law."*

  Quoting SIR HERCHS LAUTERPACHT: **The Development of International Law by the International Court** on *opinio neccessitatis juris* SORENSON, J went on to state that*:*

  > *" it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or in appropriate cases abstentions therefrom) as evidencing the*

opinion necessistates juris except when it is shown that the conduct in question was not accompanied by such intention."

91. As to the question what triggers State Practice? Is it the number of Countries or something more, TANAKA, J observed that:

" *When considering whether usage and opinion juris exist in the formative process of customary law... The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances ... what is important.. is not the number or figure of ratifications of accessions to the Convention or of examples of subsequent State practice , but the meaning which they would imply in the particular circumstances..."*

92. From all the statements and sentiments carefully gleaned from the international jurisprudence we have discussed above , it is quite evident that each "subsequent practice" needs to fulfil a myriad array of preconditions and to meet a veritable maze of standards in order to pass the bar of recognition as an " established State practice". The alleged compensation refund "practice" in the instant case requires no less rigorous scrutiny.

93. Even though there is no required magical number or specified mathematical calculus to trigger the recognition of a particular practice, it is clear that the practice needs to have been frequent, repetitive, consistent, uniform, widespread among the great majority of the group of States involved, and to have been of appreciable duration or vintage age

in terms of its continuity and longevity. The instant 'practice' of compensation-refunds has lasted a bare 10 years, counting from 2001(when Uganda first started it), to 2011 (when Rwanda challenged it giving rise to the request for the present Advisory Opinion). Indeed, with the 2006 Staff Rules as the only basis for Rule 96(3), the practice started in earnest (i.e. backed by the law of that Rule 96(3)) only with the Tanzanian refund of 2006. The earlier refund of 2001 by Uganda was effected some 5 years before the promulgation and commencement of the 2006 Staff Rules. In this regard, it is important to note that the pre-2006 Staff Rules – namely, the Staff Rules and Regulations of 1996, which existed at the time of Uganda's refund, do not appear to have contained the equivalent of Rule 96(3) of the subsequent Staff Rules of 2006. Accordingly, Uganda's refund pre-dates the Rules from which derive the word " **withdrawal**", a word which is at the very core of the present interpretation; and which is the very subject and object of the present Advisory Opinion.

94. Even more importantly, if this " practice" is taken to have validly started only with the 2006 refund by Tanzania, its existence would have lasted for barely 5 years only (i.e. 2006 to 2011) before it was interrupted , disrupted directly contested, and openly challenged by Rwanda's refusal to follow suit – thereby depriving it of the necessary ingredients of , among others, longevity, continuity, uniformity and general acceptability (including its having never been questioned) – which are clear requirements for recognition under international law and jurisprudence.

95. Thirdly, even with the best scenario, the refund " practice" has so far been adhered to by at most only 2 (if you include Uganda) – out of a possible 5 Partner States. The practice would, therefore, appear to lack the

necessary consistency and frequency – let alone concordance and commonality, or near-universality amongst most of the Partner States of the East African Community – in order to trigger its recognition as an established State practice.

96. All in all then, we find the practice of Compensation-and-Reimbursement to be (at best) only "formative", or merely "emerging; and (at worst) simply inchoate. At the material time of 2011, the "practice" had not as yet developed sufficiently to warrant recognition as an established State practice. We hesitate, therefore**, "***to take it into account"* in interpreting the effect of Article 67(2) of the EAC Treaty, and of Rule 96(3) of the EAC Staff Rules and Regulations of 2006.

VIII. CONCLUSION

97. Before rendering our formal Opinion below, we wish to underline the following. The importance of the instant Advisory Opinion lies not so much in the resolution of the immediate issue of whether Rwanda (or other Partner State in similar circumstances) is or is not obliged to bear the financial burden of reimbursing the compensation paid to an out-going Deputy Secretary General for premature termination of tenure in order to give way to an in-coming Secretary General. That is important.

98. More fundamentally, however, the singular significance of the Advisory Opinion lies in the overarching role that the Treaty has carved out for the East African Court of Justice in the overall spectrum of the Integration Process of the Community. The Court's primary and cardinal role is to ensure that the Partner States, the Community, its Organs and its

Institutions – all **adhere to the law** in the course of their expedition to the destiny of Integration (see, in particular, Article 23 of the Treaty).

99. In this role, the instrument of the Advisory Opinion is easily the most potent tool available in the armoury of the Court to fulfil its solemn duty under the Treaty. With the considered advice tendered by the Temple of Justice, by way of an Advisory Opinion, all are guided and instructed as to the status of Community law: past, present, and possibly prospective, on any given subject in the Treaty. It removes the fog from the face of the law. It shines the torch of clarity into the dark chambers of the legal edifice. It is the sober revelation of the law given in the absence of the passion of litigation.

100. The Advisory Opinion is an apt preventive tool to stay the hand of would-be violators and contraveners of the Treaty – just as it is an excellent hands-on Manual and Guide to those who are law-abiding. The instant Advisory Opinion does just that : it seeks to deter, in advance, the violation of Community law . At the same time it aims to ensure the Community's positive adherence to its law.

101. In conclusion**,** then**,** we reiterate the issue contained in the Request filed by the Council of Ministers, for this Advisory Opinion. That issue was :

> ***"Whether 'forfeiture' of the position of Deputy Secretary General under Article 67(2) of the EAC Treaty for purposes of making way for an in-coming Secretary General from the same Partner State is in effect a 'withdrawal' of such Deputy Secretary General ?".***

102. Having regard to our above analysis of the issues, and to the observations and views of the representatives of the Partner States and of the Secretary General who participated in this Request for an Advisory Opinion, we are of the opinion that :

(1) Forfeiture of the position of a Deputy Secretary General pursuant to Article 67(2) of the Treaty for the Establishment of the East African Community, is a function and consequence imposed by automatic operation of the law – without the free will or choice of the Partner State concerned.

(2) Withdrawal of Deputy Secretaries General from their position by a Partner State, for purposes of making way for an in-coming Secretary General of the same Partner State, though contemplated under Rule 96(3) of the Staff Rules and Regulations, 2006 of the Community , would in its application be a function and a consequence of the free will and choice of the particular Partner State involved. To that extent, that function would offend and would clearly be inconsistent with and contrary to the objectives and purpose of the Treaty, in particular concerning the principle of rotation in Article 67(1) and (2) of the Treaty.

(3) Given the above inconsistency between the Treaty and the Staff Rules, which are made pursuant to the provisions of Articles 14(3) (g) and 70(3) of the same Treaty, the Staff Rules must – to the extent of the inconsistency – yield to the primacy of the provisions of the Treaty.

(4) The "*practice*" whereby two Partner States have in the past refunded to the Secretariat of the Community the compensation paid to two former Deputy Secretaries General of their nationality for premature termination of their tenure (in order to give way to the in-coming Secretaries General of the same nationality), has not as yet sufficiently developed to trigger objective recognition under international law as an " *established State practice*". It is, at best, only a *developing practice*. At worst, any *emerging* "practice" from the past two precedents of Uganda and Tanzania, has been fatally wounded and may well be on its way to becoming *inchoate,* if not, *comatose .*

(5) Of the three precedents signifying the alleged "practice" , the first (Uganda's) was effected prior to the 2006 Staff Rules and, therefore, lacked any legal basis at all ; the third (Rwanda's) has been plainly challenged and openly disputed by the Partner State concerned. That leaves only the second (Tanzania's) as the lone "practice". There is therefore, no legitimate basis to hold this as a valid "practice" of the Partner States of the East African Community. Accordingly, it is quite evident that this so called "practice" cannot be taken into account for purposes of interpreting or applying Article 67(2) of the EAC Treaty, and Rule 96(3) of the EAC Staff Rules and Regulations.

(6) To avoid the latent friction between Article 67(2) of the Treaty and Rule 96(3) of the Staff Rules and Regulations, the two need formal, adequate, and appropriate harmonization by the competent organs and authorities of the Community.

(7) In the result, the Republic of Rwanda is under no legal obligation to refund the compensation that was paid in 2011 by the Secretariat of the Community to the outgoing Deputy Secretary General (Mr.Alloys Mutabingwa).

We advise accordingly.

Dated, delivered and signed at Arusha this ..... day of November, 2015.

.....
Emmanuel Ugirashebuja
PRESIDENT

.....
Liboire Nkurunziza
VICE PRESIDENT

.....
James Ogoola
JUSTICE OF APPEAL

.....
Edward Rutakangwa
JUSTICE OF APPEAL

.....
Aaron Ringera
JUSTICE OF APPEAL