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

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

REFERENCE NO. 12 OF 2016

LE FORUM POUR LE RENFORCEMENT
DE LA SOCIETE CIVILE (FORSC) ..... 1ST APPLICANT

ACTION DES CHRETIENS POU L'ABOLITION
DE LA TORTURE (ACAT) ..... 2ND APPLICANT

ASSOCIATION BURUNDAISE POUR LA PROTECTION DES
DROITS HUMAINS ET DES PERSONNES DETENUES (APRODH)
..... 3RD APPLICANT

FORUM POUR LA CONSCIENCE RT LE
DEVELOPPEMENT (FOCODE) ..... 4TH APPLICANT

RESEAU DE CITOYENS
PROBES (RCP) ..... 5TH APPLICANT

VERSUS

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

THE SECRETARY GENERAL OF
THE EAST AFRICAN COMMUNITY..... 2ND RESPONDENT

4TH DECEMBER 2019

JUDGEMENT OF THE COURT

INTRODUCTION

1. This Reference was brought under Articles 6(d), 7(2) and 127(3) and (4) of the Treaty for the Establishment of the East African Community ('the Treaty'), challenging the banning the Applicants' operational activities by the Government of Burundi, an act that allegedly constitutes a violation of Burundian law, the Treaty, as well as pertinent international legal instruments.

2. The Applicants are five (5) non-governmental organisations (NGOs) incorporated under Presidential Decree No. 1/11 of 18/04/1992 that regulates the activities of non-profit associations in Burundi. The Applicants are all resident in Burundi although some of their officers reside outside that Partner State.

3. The First Respondent is the Attorney General of the Republic of Burundi, sued on behalf of the Government of Burundi as its Principal Legal Advisor. The Second Respondent is the Secretary General of the East African Community (EAC), sued on behalf of the EAC, being the Principal Executive Officer of the Community and the Head of its Secretariat.

4. At trial, the Applicants were represented by Mr. Dolald Deya and Mr. Nelson Ndeku. On the other hand, the First Respondent was represented by Mr. Diomede Vizikiyo, State Counsel; while Dr. Anthony Kafumbe, Counsel to the Community, appeared on behalf of the Second Respondent.

BACKGROUND

5. In connection with the events in Burundi in the period from 2015 to 2016, the Burundi Prosecutor General froze the Applicants' bank accounts in the context of prosecutions that arose out of the insurrections and abortive *coup d'etat* in that period.

6. Subsequently, the Minister of Home Affairs issued the Ministerial Order No 530/1597 of 23/11/2015, suspending the Applicants' activities. On this matter the Applicants were not given the opportunity to make presentations, neither before the suspension nor after the suspension.

7. Around eleven months later, the Minister issued the Ministerial Order No 530/1922 of 19/10/2016, banning their activities. Again, they were not availed the opportunity to make their case before the banning order.

8. In the event, the Applicants made oral and written communication with Second Respondent for his intervention in the matter but in vain.

9. Aggrieved by the steps that culminated in the ban of their activities, as well as the Second Respondent's failure to intervene, the Applicants lodged this Reference on 19th December 2016.

APPLICANTS' CASE

10. The Applicants' case is set out in their Statement of Reference; Affidavits sworn in Kigali by one Ntiburumunsi, Ernest Nkurunza and Gervais Nibigira on 20th and 21st November 2018 respectively, on 20 November 2018 in Brussels by Pierre Caver Mbonimpa and Janvier Bigirimana, and on 21 November 2019 in Kampala by Dushimirimana

Leatitia; and written submissions filed on 25 January 2019, as well as oral highlights thereof made during the hearing on 18 March 2019.

11. It is the Applicants' case that the procedures adopted by the Minister of Home Affairs and leading to the ban of their activities were not in accordance with the laws of Burundi, particularly the Presidential Decree No 1/11 of 18/04/1992 that regulates non-profit organisations. The Applicants contend that the actions of the First Respondent and the omissions of the Second Respondent were unlawful in that they constituted infringements of Articles: 6(d), 7(2) and 127(3) and (4) of the Treaty.

12. The Applicants seek the following reliefs:

    a) ***A declaration that the system of administration and governance in Burundi is not conducive to enabling environment for civil society.***

    b) ***A declaration that by virtue of the damaging decision taken by the Minister of Home Affairs and Prosecutor General, civil society in Burundi is tremendously threatened, its activities sabotaged, and its future undermined and hence a breach of the relevant provisions in Articles 3(3)(b), 6(d), 7(2) and Article 127(3)(4) of the Treaty and the Arusha Accord.***

    c) ***A declaration that the procedure adapted and employed by the Minister of Home Affairs was in breach of International Instruments on the principles of separation of powers and the right to a fair trial.***

d) ***A declaration that the Ministerial Ordinance infringes upon and is in contravention of Article 3(3)(b), 6(d) and 7(2) and 127(3)(4) of the Treaty.***

e) ***An Order immediately and forthwith quashing, setting aside and or lifting the Ministerial Ordinance and related decisions including the freezing of the NGO's bank accounts.***

f) ***An Oder directing the Government of Burundi to put in place specific mechanisms aimed at ensuring enabling environment for civil society in Burundi.***

g) ***An Order directing the Secretary General of the of the EAC to constitute and commission an evaluation team to establish whether or not the government and administration system in the Republic of Burundi are in line with the relevant provisions of the Treaty and whether the Republic of Burundi should continue being a member of the EAC.***

h) ***An Order directing the Government of the Republic of Burundi, to appear and file a progress report on mechanisms and steps taken towards the implementation of the principles of good governance to this Honourable Court every quarter or such other lesser period as the Court shall deem expedient.***

i) ***An Order that the costs of and incidental to this Reference be met by the Respondents.***

j) ***That this Honourable Court be pleased to make such further or other.***

FIRST RESPONDENT'S CASE

13. It is the First Respondent's case that the action complained of in the Reference violated neither Burundian Law nor the Treaty. Learned Counsel for the First Respondent argued that the procedure that culminated in the banning of the Applicant Civil Society organisations ensued in strict compliance with the Article 30(2) of the Presidential Decree No. 11 of 18 April 1992, which empowers the Minister of Home Affair to take measures of safeguard where the involvement of a civil society organisation in the country's political affairs or in breaching public order arises. It was his contention that accordingly the said law does not oblige the Minister to resort to the national court on the matter of banning a civil society organisation. In that way, from his perspective, measures taken under Article 30(2) of that law did not violate the principles of good governance under Article 6(d) and 7(2) of the Treaty. He clarified his position by distinguishing between the regimes established by the first two sub-articles of Article 30: 30(1) that captures the resolution or liquidation of an association that is no longer able to meet its obligation *vis-a-vis* a third party, and 30(2), which deals with the banning of an association on ground of meddling in political affairs or of committing breach of public order and security.

14. He further argued that when leaders of the Applicant Civil Society Organisations called upon their members to participate in an insurrectional movement they were endangering the nation, and failure to take measures to ban them would amount to violation of good governance under Article 6(d) and 7(2) of the Treaty. It was also his contention that there has been an enabling environment for

private sector and civil society in the Respondent State because many of the civil society organisations that did not call their members to participate in the insurrectional movement had been carrying on their activities. Since they had not involved themselves in political affairs, they were functioning peacefully and enjoying the state of good governance and rule of law in the Respondent State. Thus, in his view, the Ministerial Order No 530/1922 of 19/10/2016 did not violate Article 127(3) and (4) of the Treaty in any way.

15. In conclusion, learned Counsel for the First Respondent opined that the Ministerial Order banning the Applicants was taken in accordance with the law in order to safeguard public order and security, and in conformity with the East African Treaty. On that basis the Learned Counsel pleads that prayers 4 and 5 be dismissed on ground of no violation and prayer 5, 6, 7 and 8 on ground that the Court has no jurisdiction to order them. Thus, he prays that the Reference against his client be dismissed.

SECOND RESPONDENT'S CASE

16. On his part, Learned Counsel for the Second Respondent did not contest the jurisdiction of the Court, but challenged the case against his client on account of its failure to disclose a cause of action against him given that the office of the Secretary General had not played any role in the matter presently before the Court.

17. Learned Counsel argued that the circumstances giving rise to the current Reference only came to the attention of the Second Reference upon the filing of the Reference and it would not be tenable on the part of his client to commence an investigation into a matter that was now *sub judice*. He further submitted that since 2006

there had been an ongoing Inter-Burundi Dialogue that had served as a window where civil society organisations could influence what happened in Burundi and seek remedies to what they thought was unsatisfactory. He cited **East African Civil Society Organisation Forum v. The Attorney-General of Burundi & 2 Others**[1] in support of his case.

ISSUES FOR DETERMINATION

18. At a Scheduling Conference held on 8th November 2018, the Parties framed the following issues for determination:

    a) Whether the East African Court of Justice has jurisdiction to hear and determine the Reference
    b) Whether there is a cause of action against the Secretary-General of the East African Community.
    c) Whether the banning of the Applicants violates the Articles 3(3)(b), 6(d) and 7(1)(2) and 127(3)(4) of the Treaty.
    d) Whether the Applicants are entitled to the remedies sought.

COURT'S DETERMINATION

ISSUE NO.1: Whether the East African Court of Justice has Jurisdiction to Hear and Determine the Reference

19. Counsel for the First Respondent conceded that this Court derives the mandate to interpret, apply, and ensure compliance with the Treaty from Article 23(1), 27(1) and (2) and Article 30 thereof. In line with that concession, Learned Counsel for the First Respondent clearly stated that he was not contesting the jurisdiction of the Court to entertain the matter but invited it to note that the Applicants seek

[1] Reference No. 2 of 2015

ten remedies some of which fall outside the its jurisdiction. He went on to point out that the remedies under paragraphs (i), (ii), (iii), (iv), (x) and (xi) might be granted if proved by the Applicants, but the remedies sought under (v), (vi), (vii), and (viii) could not be granted, being matters that (in his view) fall outside the jurisdiction of the Court. He cited the case of **Hilaire Ndayizamba vs The Attorney General of the Republic of Burundi and The Secretary General of the East African Community**[2], where the Court held (p.12, para. 34):

> **"We are of the decided opinion, and in agreement with the Respondents, that the Court has jurisdiction to entertain prayers (a), (b) and (e) of the Reference, and that it is not clothed with the jurisdiction to grant prayers (c) and (d), since the latter clearly falls outside the Court's jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty."**

20. On that basis, learned Counsel for the First Respondent concluded that this Court lacked jurisdiction to grant remedies that fall outside its jurisdiction as provided for by Article 23 and 27 as read with Article 30 of the Treaty. The Second Respondent did not contest the jurisdiction of the Court, thus detached itself from the jurisdiction issue and leaving it as an issue of contention between the First Respondent and the Applicants.

21. Conversely, it was argued for the Applicants that this Court does have jurisdiction to hear and determine this Reference under both

[2] Reference No.3 of 2012

Article 27(1) and 30(1) since the matter relates to the interpretation of the Treaty. Articles 27(1) and 30(1) read as follows:

> Article 27(1)
>
> The Court shall initially have jurisdiction over the interpretation and application of this Treaty: **Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.**
>
> Article 30(1)
>
> **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 this Treaty.**

22. It was also the Applicants' contention that they had sought the interpretation and application of Articles 6(d), 7(2) and 127(3) and (4) of the Treaty as the interpretation and application of the Treaty does not fall within the jurisdiction conferred by the Treaty on organs of Partner States. For avoidance of doubt, we reproduce the cited articles below.

Article 6(d)

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

b) **(..)**

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

Article 7(2)

The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

Article 127

(1) (....)

(2) (.....)

(3) The Partner States agree to promote enabling environment for the participation of civil society in the development activities within the Community.

(4) The Secretary General shall provide the forum for consultations between the private sector, civil society organisations, other interest groups and appropriate institutions of the Community.

23. To buttress his position, Counsel for the Applicants relied on international jurisprudence codified by the International Law Commission, particularly Article 4 of Draft Articles on Responsibility of State for Internationally Wrongful Acts [3]. Article 4 reads:

> **The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.**

24. To guide the interpretation of Article 4 as cited above, Mr. Deya cited paragraph (6) of the Commentary to the Draft Articles, which reads:

> **Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local**

[3] http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

level. No distinction is made for this purpose between legislative, executive or judicial organs.

25. He further invoked the case of **Mohamed Abubakar vs United Republic of Tanzania**[4], where it was held:

> **The Respondent State has violated Article 7 of the Charter and Article 14 of the Covenant as regards the Applicant's rights to defend himself and have the benefit of a Counsel at the time of his arrest; to obtain free legal assistance during the judicial proceedings; to be promptly given the documents in the records to enable him defend himself; his defense based on the fact that the Prosecutor before the District Court had a conflict of interest with the victim of the armed robbery, to be considered by the Judge; not to be convicted solely on the basis of the inconsistent testimony of a single witness in the absence of any identification parade; and to have his alibi defense given serious consideration by the Respondent State's Police and Judicial Authorities.**

26. In the light of the above-mentioned jurisprudence and precedents, learned Counsel for the Applicants maintained that, as an international court responsible for interpreting and applying international legal instruments, such as the EAC Treaty, this Court did have jurisdiction to determine whether a decision and/or an omission of any organ of the Respondent State was in violation that State's international obligation. To buttress this position, he referred us to the

[4] The African Court of Human and People's Rights, Application 007/2013, Mohamed Abubakar vs The United Republic of Tanzania. Judgement of 3 June 2016.

case of **Burundi Journalists' Union vs Attorney General of Burundi**[5], where the Court decided that it had jurisdiction over matters where violation of the EAC Treaty were alleged; stating as follows:

> **With tremendous respect to the Respondent, what is before this Court is not a question whether the Press Law meets the constitutional muster under the Constitution of the Republic of Burundi but whether it meets the expectations of Articles6 (d) and 7(2) of the Treaty. (...) The above jurisdiction differs from that conferred by Article27(1) which provides that this Court shall "initially have jurisdiction over the interpretation of the Treaty."The proviso thereof is irrelevant for purposes of this Reference, but suffice it to say that interpretation of the question whether Articles 6(d) and 7(2) of the Treaty were violated in the enactment of the Press Law is a matter squarely within the ambit of this Court's jurisdiction.**

27. On our part, having carefully considered the arguments of both Parties, we find that contesting jurisdiction with regard to some of the remedies sought in a Reference is not the same thing as contesting the jurisdiction of the Court to entertain the Reference. Indeed, at paragraph 31 of the judgment in the **Burundi Journalists Union** case, this Court rendered itself as follows:

> **Given the foregoing and guided by the Courts previous decisions on similar matters [see for example - Plaxeda**

[5] East African Court of Justice, 1st Instance Division, Reference No. 7 of 2013. Judgement of 15 May 2015, paras. 40 - 41.

Rugumba case (supra) , professor Peter Anyang' Nyong'o & 10 others vs. Attorney General of Kenya & 3 others, EACJ Ref. No.1 of 2006; James Katabazi's case (supra)] , we are of the decided opinion, and in agreement with the Respondents, that the Court has jurisdiction to entertain prayers (a), (b) and (e) of the Reference, and that it is not clothed with the jurisdiction to grant prayers (c) and (d), since the latter clearly falls outside the Court's jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty.

28. Moreover, Counsel for the First Respondent expressly conceded this Court's jurisdiction to hear and determine the issue, save for some of the remedies sought. This formulation on the part of the First Respondent in effect varied the issue. As a result of that variation, we find that the issue, as framed, ceased to be a point of contention between the parties. We so hold.

29. However, in relation to prayers (c) and (d) that were perceived by the First Respondent to have fallen outside the jurisdiction of this Court, it is our considered view that those prayers are remedies and, by definition, remedies would follow the Court's findings of both violation of law and the infliction of injury. Black's Law Dictionary (13 ed., 2014) reflects this sequencing in its definition of the concept of remedies by denoting the term 'remedy' to refer to '**the means of enforcing a right or preventing a wrong ; legal or equitable relief**.'

30. A related source propounds the granting of remedies as a sequel to the finding of violation in the following terms:

> **A "remedy" is a legal reparation ordered by a court, i.e. a court order designed to make amends for something wrong that has happened. A court will give a remedy after it finds there has been a legal wrong committed against a party. This formal finding is very important.**[6]

31. In spite of that concession on the part of the First Respondent, it seems to us that an understanding of the matters over which the Court has jurisdiction is critical for the determination of this issue, down to the remedies in issue between the Parties. We find apposite guidance on this point from both Articles 27(1) and 30(1) of the Treaty, as well as the jurisprudence developed by this Court, particularly the landmark case of **Burundi Journalists' Union vs Attorney General of Burundi** (supra). It is clear to us that the Court has jurisdiction to hear and determine any Reference in which violation of the Treaty is alleged. We so hold.

Issue No.2: Whether there is a cause of action against the Secretary General of the East African Community

32. In submissions, learned Counsel for the Applicants faulted the Second Respondent for failing (or neglecting) to ensure adherence to the provisions of the Treaty, arguing that on that account was a cause of action against the 2nd Respondent. It was his argument that as the Chief Executive Advisor to the East African Community (save for the Court and the Assembly), the Second Respondent was mandated to

[6] www.google.com/search?client=firefox-b-d&q=remady%2Clegal+proceeding

play a supervisory role over the Partner States to ensure that they comply with the provisions of the Treaty. Further, that the said Respondent ought to weigh in on all the important legal that arose in the Community, but had failed to do so with regard to the matters in contention under the instant Reference. Counsel thus concluded that the Second Respondent ought to be held accountable for failure to discharge his duties under Articles 4(3). 29(1), 67(3) and 71(1) of the Treaty.

33. For ease of reference we reproduce the said provisions below:

Article 4(3)

The Community shall, as a body corporate, be represented by the Secretary General.

Article 29(1)

Where the Secretary General considers that a Partner State has failed to fulfill 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 67(3)

The Secretary General shall be the principal executive officer of the Community and shall:

a. be the head of the Secretariat;

b. .....

c. .....

d. **carry out such other duties as are conferred upon him by this Treaty or by the Council from time to time.**

Article 71(1)(d)

The Secretariat shall be responsible for:

a. .....

b. .....

c. .....

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;**

e. (...)

p. **such other matters that may be provided for under this Treaty**.

34. Mr. Deya further cited the following decisions of this Court in support of his case: **Sitenda Sebalu v Secretary General of the EAC and Attorney General of Uganda**[7], **East African Law Society v AG of Burundi and the SG of the EAC**[8], and **Democratic Party v The Secretary General of EAC and 4 others** [9]. In the **Sitenda Sebalu** case, this Court held:

[7] Reference No. 1 of 2010
[8] Reference No.1 of 2014, paragraphs 60 and 61
[9] Reference No.2 of 2012

The Secretary General (in that case the 1st Respondent), representing the Community, takes no effective corrective measures, such as invoking Article 29 of the Treaty, justification arises for a complainant to seek alternative legal means of obtaining redress. The EACJ is a legitimate avenue through which to seek redress, even if all the Court does is to make declarations of illegality of the impugned acts, whether of commission or omission. It would be well to remember that the court is a primary avenue through which the people can secure not only proper interpretation and application of the Treaty but also effective and expeditious compliance therewith.

35. On the other hand, in the case of **Democratic Party v The Secretary General of EAC and 4 others** (supra), the Court followed cited with approval its earlier decision in the Katabazi case and held:

> **Article 29(1) of the Treaty requires the Secretary General to submit his or her findings to the partner state concerned and that ... there is nothing to prohibit the Secretary General from conducting an investigation on his/her own initiative.**

36. In the more recent case of **East African Law Society v AG of Burundi and the SG of the EAC** (supra), this Court found a cause of action against the Secretary General of the East Africa Community for failing to take appropriate action against the Partner State that had dishonoured its obligations under the Treaty.

37. On the basis of the foregoing precedents, it was argued for the Applicants that they had engaged the Second Respondent on the situation in Burundi in two (2) respects: they engaged him on more than one occasion to intervene, and they engaged him through a copy of the correspondence from the president of the East African Law Society to the prosecutor of the International Criminal Court. We do note, however, that this assertion was contested in paragraph 4 of the Response to the Reference, where it is averred that the Second Respondent had not only provided an enabling environment for civil society organisations in the Community, as provided by the Treaty, but had also catered for the private sector and other interest groups. This averment is supported by the attestation in paragraph 7 of the Affidavit in support of the Response to the Reference. In the same vein, the averment in paragraph 4 of the Additional Affidavit affirms that neither the Second Respondent nor any other person in the Secretariat could recall any civil society organisation in Burundi engaging the Second Respondent about any deteriorating situation of human rights and shrinking civil space in Burundi to which the Second Respondent did not propose any remedy. By implication, thus it aligns with the pleading in paragraph 4 of the Second Respondent's Response to the Reference.

38. Indeed, learned Counsel to the Community (CTC) referred us to Annexures 1-5 of the Response to the Reference, all of which demonstrate the Second Respondent's activities as undertaken under the directive of the Council of Ministers and in accordance with the Calendar of Activities of the Secretariat. These activities and Calendar do cover the situation in Burundi.

39. Dr Kafumbe further invited this Court to have regard to three (3) Communiqués of the Summit of the East African Heads of States in the accompanying List of Authorities. The Communiques are:

a) **Communique emanating from the 17th Extraordinary Summit (of of September 2016), which touches on Burundi in paragraph 24;**

b) **Communique emanating from the 18th Ordinary Summit of the East African Heads of States (of May 2017), which mentions Burundi in paragraph 21;**

c) **Communique emanating from 19th Ordinary Summit of the East African Heads of States (of February 2018), which pertains to Burundi in paragraph 22 and**

d) **Communique 20th emanating from Ordinary Summit of the Heads of States (of 2019), which makes reference to Burundi in paragraph 21.**

40. These Communiques indicate that the affair of Burundi has been in the domain of the Summit of the East African Heads of States since September 2016, or even earlier. Dr. Kafumbe also intimated that the Inter-Burundi Dialogue was initiated to address the issues arising from the alleged instability in the Republic of Burundi, that the matter was already being handled by the Summit, and that there has been continuous reporting.

41. In response to the allegations arising from additional affidavits of the Applicants, learned Counsel for the Second Respondent stated that his client had convened the "Forum for the Secretary General" in Burundi in accordance with Article 127(4) of the Treaty, in line with the directives of the Council of Ministers under Article 16 and

approved calendar of activities, and in line with the directive of the Sectoral Council under Article 14(3)(i). He thus maintained that the Second Respondent neither participated in what happened in Burundi nor did that office have any control over it. On that basis, as argued hereinabove, he implores the Court to dismiss the Reference as against the Second Respondent.

42. We have carefully considered the arguments and evidence of both sides. As quite rightly opined by both sides, the pertinent functions of the Second Respondent are spelt out in Articles 29(1), 67(3) and 71(1), which have been reproduced hereinabove. His other duties in relation to the Council of Ministers are prescribed by Articles 14, 16, and 127(4), which are reproduced below.

Article 14(3)(i)

For purposes of paragraph 1 of this Article, the Council shall:

(i) establish from among its members, Sectoral Councils to deal with such matters that arise under this Treaty as the Council may delegate or assign to them and the decisions of such Sectoral Councils shall be deemed to be decisions of the Council.

Article 16

Subject to the provisions of this Treaty, the regulations, directives and decisions of the Council taken or given in pursuance of the provisions of this Treaty shall be

binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may under this Treaty be addressed.

Article 127(4)

The Secretary General shall provide the forum for consultations between the private sector, civil society organisations, other interest groups and appropriate institutions of the Community.

43. From the totality of the cited Articles, what can be discerned as the elements of the duty of the Secretary General (the Second Respondent) are:

a) **among other functions, the Secretary General (the Second Respondent in the Reference) represents the Community, as a body corporate, since a corporate body acts only through the agency of a natural person [Article 4(1)];**
b) **he polices the Partner States with reference to their Treaty obligation;**
c) **on his own initiative, he investigates where he considers that a Partner State has failed to fulfil an obligation under the Treaty or has infringed a provision thereof;**

d) **he submits his finding to the pertinent partner state to submit her observations on the finding within 40 days;**

e) **If he either receives no response from that partner state or receives unsatisfactory comments, he submits his report to the Council;**

f) **upon receiving that report, the Council decides either to resolve the issue itself or refers the matter to the Court for adjudication.**

44. Hence, by analogy, whereas the Secretary General investigates and indicts, it is the function of the Council to progress matters to court in the light of accomplished investigation.

45. This Court has had many occasions to address the question of the cause of action against the Secretary General (the Second Respondent in this Reference). It has consistently found a cause of action against the Secretary General to have been sufficiently established where the matter relates to the violation of Article 29(1) and associated Articles of the Treaty. See **Sitenda Sebalu v Secretary General of the EAC and Attorney General of Uganda**, **East African Law Society v AG of Burundi and the SG of the EAC**, and **Democratic Party v The Secretary General of EAC and 4 others** (all supra). In the present Reference, the case of **Auto Garage v Motokov**[10] was also invoked with regard to what amounts to cause of action. We are constrained to observe that in the **Anyang Nyong** case,[11] the Court disallowed the definition of a cause of action in the **Auto Garage** case, distinguishing the parameters of the

[10] (1971), EA,514

[11] REFERENCE NO. 1 OF 2006. pp. 15-16

common law cause of action described therein from those that define a cause of action under the EACJ. It held:

> **That description** (in Auto Garage vs. Motokov) **sets out the parameters of actions in tort and suits for breach of statutory duty or breach of contract. However, a cause of action created by statute or other legislation does not necessarily fall within the same parameters. Its parameters are defined by the statute or legislation which creates it. This reference is not an action seeking remedy for violation of the claimants' common law rights. It is an action brought for enforcement of provisions of the Treaty through a procedure prescribed by the Treaty. The Treaty provides for a number of actions that may be brought to this Court for adjudication. Articles 28, 29 and 30 virtually create special causes of action, which different parties may refer to this Court for adjudication. Under Article 28(1) a Partner State may refer to the Court, the failure to fulfill a Treaty obligation or the infringement of a Treaty provision by another Partner State or by an organ or institution of the Community. Under Article 28(2) a Partner State my also make a reference to this Court to determine the legality of any Act, regulation, directive, decision or action on the ground that it is ultra vires or unlawful or an infringement of the Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power. Under Article 29 the Secretary General may also, subject to different parameters, refer to the**

Court failure to fulfill a Treaty obligation, or an infringement of a provision of the Treaty, by a Partner State.

46. On the other hand, in the case of **James Katabazi & 21 others vs. The Secretary General of the East African Community & Another**[12], the Court interpreted Article 29(1) as follows:

> **The Secretary General is required to "submit his or her findings to the Partner State concerned". It is obvious to us that before the Secretary General is required to do so, she or he must have done some investigation. From the unambiguous words of that sub-Article there is nothing prohibiting the Secretary General from conducting an investigation on his/her own initiative. Therefore, the glaring answer to the second issue is: Yes the Secretary General can on his own initiative investigate such matters. But the real issue here is not whether he can but whether the Secretary General, that is, the 1st respondent, should have done so. It was in this regard that there was heated debate in the preliminary objection on whether or not the Secretary General must have intelligence of some activity happening in a Partner State before he undertakes an investigation. .... We are of the decided opinion that without knowledge the Secretary General could not be expected to conduct any investigation and come up with a report under Article 29(1).**

[12] EACJ Reference No. 1 of 2007

47. Meanwhile, in the case of **East African Civil Society Organisation Forum (EACSOF) vs. The Attorney General of Burundi, Commission Electorale Nationale Independante and the Secretary General, EACJ Appeal No. 4 of 2016,** the Court did not find the Secretary General accountable for alleged violation of duties. It was held:

> **Whereas the Secretary General's powers and functions are clearly spelt out in Article 67 and 71 of the Treaty, we have seen no evidence that he has breached any of his duties in the context of this Reference. We reiterate that the Reference is predicated upon a specific decision of the Constitutional Court of Burundi issued on 5th May, 2015 with attendant events. What was the role of the Secretary General in that matter? None whatsoever.**

48. The common thread running through the **Katabazi** case and the **EACSOF** appeal is that each was an instance where the Court could not find a cause of action against the Secretary General on ground of his proven compliance with Article 29 (1) and allied provisions of the Treaty, or on ground of the failure of the Applicant to show a cause of action premised on violation thereof. Thus, in each case, the Court has had the occasion to interpret Article 29(1). In this Reference, the Applicants seek to hold the Second Respondent accountable for failure to take action under Article 29(1) in connection to the alleged deteriorating political situation and shrinking space for civil society organisations in Burundi. The action the Applicants had hoped to see happen comprises the steps numerated above as the constituent

elements of the duty of the Secretary General (see paragraph 52 supra).

49. On the other hand, there is the sequence of actions that has culminated in the four Communiques mentioned earlier in this judgment. The sequence consists of:

a) **Actions of the Sectoral Council of Ministers in response to some reporting, which, among other directives, directed the Secretary General to resume meeting in Bujumbura;**

b) **Actions of the Council of Ministers, which especially has resulted in the Calendar of Activities and the directive to the Partner States to abide thereby;**

c) **Actions of the Summit, which resulted in the appointed a Head of State to mediate toward the settlement in Burundi and the issuing of the Communiqués.**

50. This sequence is revealed by the four Communiqués, along with other Annexures, and Affidavits filed on behalf of the Second Respondent. By juxtaposing the list of the constituent elements of the duty of the Secretary General (the Second Respondent, in this Reference) and the sequence of activities culminating in the issuance of the Communiqués, it becomes apparent that the Second Respondent has complied with all the elements of his duty under Article 29(1) and associated Articles of the Treaty. It does also seem to us that there was due reporting which culminated into the presentation of the matter to the Summit through the Sectoral Committee and the Council of Ministers. Therefore, we find that no

cause of action has been established against the said Respondent in this Reference. We so hold.

ISSUE NO.3: Whether the banning of the Applicants violates Articles 3(3)(b), 6(d) and 7(1)(2) and 127(3)(4) of the Treaty

51. The Applicants faulted the Respondent State for issuing the Ministerial Order No. 530/1922 of 19 /10/ 2019, which (in their view) ran contrary to the Presidential Decree No 1/11 of 18/04/ 1992. They do also contest the freezing and seizing their bank accounts vide the Prosecutor General's decision dated 19/11/2015.

52. It was argued for the Applicants that:

a) **The act of banning the Applicants coupled with the continued silence and inaction by the Secretary General(the Second Respondent) constitute violation of Articles 3(3)(b), 6(d), 7(2) and 127(3) of the Treaty;**

b) **The action of the Minister of Home Affairs was not only in violation of Burundi's obligations under the EAC Treaty, but also in violation of the provisions of Burundi law relating to the dissolution of associations as provided for under the Presidential Decree No 1/11 of 18/o4/1992, and**

c) **By failing to follow the procedures prescribed by Burundi's own law, the Ministerial Order No 530/1922 of 19/10/2016 and No 530/1597 of 23/11/2015 contravened the principal of rule of law, as the correct**

procedure to ban the Applicants should have been through a competent court.

53. In relation to the principle of the rule of law captured by Article 6(d) of the Treaty, the learned counsel resorted to the definition offered by the UN Secretary-General in his Report of 23/08/2004.[13]. We reproduce his definition below:

> **The rule of law is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.**

54. Learned Counsel further referred us to the following international instruments:

> a) **Article 10 of the African Charter on Human and People's Rights; Article 22 of the International**

[13] The rule of law and transitional justice in conflict and post-conflict societies Report of the Secretary-General, p.4, para. 6. Available from https://digitallibrary.un.org/record/527647.

Covenant on Civil and Political Rights (16 December 1966;

b) **Article 20(1) of the Universal Declaration of Human Rights(1948);**

c) **Articles 5 and 12 of the United Nations Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (1998) (UN Declaration of Human Rights Defenders);**

d) **UN Human Rights Council Resolution 21/16 (2012);**

e) **ACHPR Resolution 5/1992 on the Right to Freedom of Association, and**

f) **Article 28 of the Kigali Declaration (2003) recognising the role and importance CSO.**

55. We understood the Applicants' case to premised on their collective right to association and the right to pursue collective interests in groups such as NGOs. This right comprises the right to form and join associations freely any interference with which being permissible only to the extent that it is be prescribed by law. Reference in that regard was made to the African Court on Human and Peoples' Rights case of **Monim Elgak, Osman Hummeida & Amir Suliman v Sudan.** [14] Learned Counsel for the Applicant did also refer us to Guideline 29 of the African Union on Guidelines on Freedom of Association Assembly

[14] Communication 379/09 –Monim Elgak, Osman Hummeida and Amir Suliman(represented by FIDH and OMCT)v Sudan (2014), para. 118

in Africa,[15] to argue that States are enjoined to uphold the right to freedom of association save where a legitimate reason exists for a limitation on the freedom of association. Guideline 29 states:

> **Any limitations imposed by states shall be in accordance with the principle of legality, have a legitimate public purpose, and be necessary and proportionate means of achieving that purpose within a democratic society, as these principles are understood in the light of regional and international human rights law**.

56. Citing **Manariyo Desire v The Attorney General of Burundi** [16], learned Counsel argued that the burden of proof of the Applicants' participation in an insurrectional movement lay with the First Respondent. In that case the Court inter alia held that it was the litigant that sought to establish a fact that bore the burden of proving it. On the question as to whether a state action meets the general standard of rule of law and good governance, he referred us to the case of **Managing Editor , Mseto and Another v Attorney General of Tanzania**,[17] where the Court held:

> **The Treaty gives no pointer in answer to this question but by reference to other courts , it has generally been held that the test for reasonability and rationality as well as proportionality are some of the tests to be used to determine whether a law meets the muster of higher law.**

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[15] Guidelines on Freedom of Association and Assembly in Africa, p.14. Available from http://www.achpr.org/files/instruments/freedom-association-assembly/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf

[16] Refernce No 8 of 2015, para. 66

[17] Reference No. 7 of 2016, para. 65.

57. Finally, learned Counsel for the Applicants maintained that the First Respondent had deprived his clients of the right to property in the form of money in their bank accounts; and that as that deprivation had not been done in public interest, there was no justification for it.

58. Conversely, it was argued for the First Respondent that Article 3(3)(b) was irrelevant to the instant Reference as that Article relates to matters to be taken into account by Partner States in considering the application by a foreign country for the member of the Community. With regard to Articles 6(d) and 7(2), learned Counsel for the First Respondent argued that in so far as the 2 legal provisions relate to the fundamental principles that govern the achievement of the objectives of the Community, the banning of the Applicant associations had been taken in compliance therewith.

59. It was his contention that since 26th April 2015, the Applicants had been participating in an insurrectional movement that had not only bought chaos to Burundi, but had culminated in the aborted Coup d' Etat of 13th May 2015. Consequently, the Prosecutor General of Burundi was constrained to open criminal charges against the Applicants' legal representatives, who had been operating outside the country to distabilise the peace and security of Burundi. He further argued that whereas the Constitution of Burundi did recognize the right to freedom of association envisaged by Article 127(3) the Treaty, under that constitutional regime the legal personality of a civil society association organisation was granted by the Minister of Home Affairs under Article 3 of the Presidential Decree. However, the Minister of Home Affairs was mandated to take safeguard measures under Article 30(2) of the Decree if the activities of a civil-

society organisation endangered public order, as the principle rule of law does not allow anarchy in the conduct of civil society activities. He invited the Court to agree with him that by going to the extent of participating in the activity leading to the aborted Coup d' Etat, the Applicants had rendered themselves political organisations and, therefore, had excluded themselves from the scope of the Presidential Decree No 1/11 of 18th April 1992, which provides the organic framework for non-profit organisations.

60. In conclusion, Mr. Kayobera maintained that the decision of the Minister of Home Affairs had not liquidated the Applicants, but had banned them. In his view, the said measures were undertaken as safeguard measures in accordance with Article 30(2) of the Presidential Decree, which empowers the Minister to take safeguard measures when public order is infringed. In his view, the decision was thus taken in compliance with the fundamental and operational principles enshrined in Articles 6(d) and 7(2) and 127 of the Treaty. Learned Counsel referred us to the case of **Bénoit Ndorimana v The Attorney General of the Republic of Burundi**,[18] where this Court declined to grant a consequential order sought on the premise that the applicant therein had not adduced evidence that there had been a Treaty violation imputable to the Respondent. He maintained that, as in that case, the present Applicant had not proven that the banning of the Applicant organisations violated Article 3(3) (b), 6(d), 7(2), and 127(3) and (4) of the Treaty.

61. We have carefully considered the rival arguments of both sides. As intimated by both Parties, compliance with the Treaty in the context of

[18] Reference No.2of 2013, p. 14, para. 44.

this Reference is compliance with Articles 6(d), 7(2), and 127(3) thereof. Those Articles are quoted hereinabove, and need not be reproduced below. What is in issue at this point is the legality of the sequence of actions that culminated in the banning of the Applicants in Burundi. There is contention between the Parties as to whether those actions did or did not violate the Burundian law and, as such, violated the cited provisions of the Treaty. We commence our determination with consideration of Article 3(3)(b). we reproduce it for ease of reference.

> Article 3(3)(b)
>
> **Subject to paragraph 4 of this Article, the matters to be taken into account by the Partner States in considering the application by a foreign country to become a member of, be associated with, or participate in any of the activities of the Community, shall include that foreign country's:**
>
> **(a)** .....
>
> **(b) adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice.**

62. As quite ably argued by learned Counsel for the First Respondent, we find nothing in that treaty provision that is applicable to the instant Reference. The Respondent State is certainly not a 'foreign country' seeking to become a member of the Community; rather, it is already a partner State therein. We therefore find no merit in the Applicants' case in that regard.

63. We now turn to a consideration of Articles 6(d), 7(2) and 127(3) and (4) of the Treaty From the pleadings and submissions, we deduce both parties herein to be agreed on the following:

a) **In relation to events in Burundi, a Commission was set up to inquire into the causes of the "insurrection".**
b) **Based on the report of that Commission, the Prosecutor-General took a number of steps and submitted a request to the Minister of Home Affairs regarding the Applicant Organisations.**
c) **The Minister granted the request hence Ministerial Order No. 530/1597 of 23rd November 2015 was issued, suspending the activities of the Applicant organisations and, ultimately, banning their operations vide Ministerial Order N°530/1922 of 19 October 2016.**
d) **The banning was based on both the Ministerial Orders N° 530/1597 of 23rd November 2015 and** Article **30 of Presidential Decree No 1/11 of 18 April 1992.**

64. It is the legality of the eventual banning of the Applicants' activities that remains in issue. In that regard, Counsel for the Applicants challenged the banning on ground that 'according to Article 30 of the Presidential Decree cases against non-profit association may be raised before competent courts in the case of breach of its constitution , or when the said non-profit association is no longer able to perform its obligations in line with its partners.' (See paragraph 28 of the Statement of Reference). On the other hand, Counsel for the First Respondent contended that 'the Minister of Home Affairs may

take safeguard measures if the activities of the civil society endanger public order as provided for under Article 30(2) of the Decree-Law.' (See the last half of the last sentence in the First Respondent's written submission).

65. We reproduce the provisions of the invoked Burundi law below.

Article 32 of the Constitution of Burundi, 2005:

The freedom of assembly and of association is guaranteed, as well as the right to found associations or organizations in accordance with the law.

Presidential Decree No. 1/11 of 18th April 1992

Article 1:

This Decree-Law is intended to govern the organization and the functioning of any non-profit organization whose legal existence is not subject to a particular law.

In particular, mutual organizations, organizations of a political nature, public service corporations and foundations shall be excluded from its scope.

Article 30:

At the request of any interested person or the Public Prosecutor, the competent jurisdiction may dissolve any organization which is no longer able to honor its commitments vis-à-vis third parties, which allocates its assets or income to purposes other than the purpose for which it was established or which infringes its statutes,

the mandatory provisions of this Decree-Law or public order.

In the latter case, the Minister in charge of interior may, in advance, order safeguards measures, in particular those provided in Article 36 and 38 below.

Article 36:

The organization of foreigners, which is the subject of an application for judicial dissolution brought by the Public Prosecutor pursuant to Article 30 may jointly be prohibited from carrying out its activities by Order of the Minister in charge of Interior.

Article 37:

The period of the validity of this measure may not exceed two months.

Article 38:

On expiry of the term of suspension, the measure taken under the preceding Article shall be lifted ipso jure, unless the jurisdiction seized confirms them with a view to deciding on the dissolution of the Organization.

66. First and foremost, we note that Articles 36, 37 and 38 the Presidential Decree N° 1/11 of 18th April 1992 fall under the theme 'SPECIAL PROVISIONS FOR ORGANIZATIONS OF FOREIGNER AND FOREIGN ORGANIZATION', which is self-explanatory. On the other hand, this Reference pertains to organisations registered in Burundi and licenced to operate in that country. Further, the

Reference is premised on the actions of the Burundian Government in relation to Applicant organisations that are Burundian civil-society entities. We therefore find Articles 36, 37 and 38 of the said Decree inapplicable to the matter before us. Consequently, we find no breach of those provisions of the Burundian law. We so hold.

67. We now revert to a consideration of Article 30 of the same Decree. Counsel for the applicants equated the reference in that Article to 'competent jurisdiction' to a 'court'. However, in the absence of an authoritative definition equating "jurisdiction" to "court", we find ourselves bound to determine what is meant by that term in the Decree by taking the ordinary meaning thereof within the context of that legal provision. In our considered view, "jurisdiction" in that context denotes "authority" that is inclusive of, but not restricted to, a court. The second limb to that provision clearly designates the 'Minister in charge of interior' as the competent office to order safeguard measures in the event of an infringement by any organisation of, among other things, public order. In the instant case, the First Respondent's affidavit evidence did attest to the Applicants having breached public order. This attestation was not rebutted beyond the assertion in submissions that the First Respondent bore the burden of proof of that allegation.

68. Further, as we did observe earlier in this judgment, Ministerial Order N° 530/1922 of 19th October 2016 was issued by the Minister of Home Affairs under Article 30 of Presidential Decree No 1/11 of 18 April 1992 on the basis of the report of a Commission that had been set up to inquire into the causes of the "insurrection" in Burundi. We find the terms 'Minister of interior' and Minister of Home Affairs' to

denote basically the same thing and, accordingly, find the said Minister of Home Affairs to represent competent authority within the precincts of Article 30 of the Decree. Consequently, we are satisfied that Ministerial Order N° 530/1922 of 19th October 2016 was issued in compliance with the Burundian law and, accordingly, does not infringe Articles 6(d), 7(2) and 127(3) and (4) of the Treaty. In the result, we would answer this issue in the negative.

Issue No. 4: Whether the Applicants are entitled to the remedies sought

69. The Applicants sought the following reliefs highlighted in paragraph 12 of this judgment, which we do not find it necessary to reproduce here. Since all the issues have been resolved in favour of the Respondents, the substantive reliefs sought by the Applicants are not tenable.

70. On the question of costs, Rule 111(1) of this Court's Rules postulates that costs should follow the event unless the Court, for good reason, decides otherwise. In the instant Reference, where the Applicants have not succeeded, ordinarily the costs thereof would be to the Respondents. However, the Applicants are NGOs whose mandate is essentially to provide necessary checks and balance to governments, and it was in the spirit of exercising this mandate that they filed the instant Reference. Consequently, we would depart from the gneral rule on costs and exercise our discretion to order each Party to bear its own costs.

CONCLUSION

71. In the final result, we hereby dismiss this Reference and order each party to bear its own costs. It is so ordered.

Dated, signed and delivered at Arusha this 4th day of December, 2019.

HON. LADY JUSTICE MONICA K. MUGENYI
PRINCIPAL JUDGE

HON. DR. JUSTICE FAUSTIN NTEZILYAYO
DEPUTY PRINCIPAL JUDGE

HON. JUSTICE FAKIHI A. JUNDU
JUDGE

HON. DR. JUSTICE CHARLES O. NYAWELLO
JUDGE

HON. JUSTICE CHARLES NYACHAE
JUDGE

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