IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

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

REFERENCE NO.15 OF 2014

1. BARANZIRA RAPHAEL
2. NTAKIYIRUTA JOSEPH ..... APPLICANTS

VERSUS

ATTORNEY GENERAL,
REPUBLIC OF BURUNDI..... RESPONDENT

22ND MARCH, 2016

JUDGMENT OF THE COURT

A. INTRODUCTION

1. On 31st December 2013, the Republic of Burundi enacted Act No. 1/31 of the 31st December 2013 Concerning the amendment to Act No. 1/01 of 4th January 2011 – Determining the mandate, composition, organization and work of the National Commission of Land and Other Propertyhereinafter referred to as 'Act No. 1/31'), Article 23 of which provides for 'appeals' from the Commission's decision to a Special Court of Land and Other Property.

2. Following a decision by the Constitutional Court of Burundi endorsing the constitutionality of a Bill in respect thereof, the Republic of Burundi did enact Act No. 1/26 of the 15th September 2014 – Dealing with the creation, organization, structure, functioning and power of the Special Court on Land and Other Assets as well as its proceeding (hereinafter referred to as 'Act No. 1/26').

3. The Applicants challenge the legality of Act No. 1/26 on the premise that it impedes the effective administration of justice; obliterates the independence of the Judiciary from the Executive, and negates the right to a fair trial contrary to Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty').

4. The Applicants are natural persons, resident in the Republic of Burundi, and closely interested in the issues of good governance and rule of law in Burundi; while the Respondent is the Principal Legal Advisor to the Government of the Republic of Burundi, and is being sued on behalf of the said Government.

5. At the hearing of the Reference, the Applicants were represented by Mr. Horace Ncutiyumuheto while Mr. Nestor Kayobera appeared for the Respondent.

B. APPLICANTS' CASE

6. It is apparent from the Reference that the Applicants' case is premised on the alleged infringement by Act No. 1/26 of international instruments that underscore the right to a fair and equitable trial. It is the Applicants' contention that Article 2of the Act denies parties a right of appeal to superior national courts by prescribing the finality of the Special Court's decisions when exercising its appellate jurisdiction viz decisions of non-judicial bodies. The Applicants also challenge Articles 5(2), 8 and 9 of the same Act for allegedly eroding the independence of the Judiciary by placing the appointment and determination of judges' emoluments in the hands of the Executive.

7. In the same vein, it is the Applicants case that Articles 22 and 25 of Act No. 1/31 negate litigants' right of appeal and, consequently, the right to a fair and equitable trial in so far as they underscore the immediate enforceability ofdecisions of the National Commission on Land and Other Assets (hereinafter referred to as 'the Commission'), the existence of a pending Appeal before the Special Courtnotwithstanding.The Applicants do also appear to challenge the apparent fusion of the Executive and the Judiciary as denoted by Articles 9 and 31 of Act No. 1/31, which provide for the appointment of members of the Commission by the President of the Republic of Burundi, to whom the Commission reports.

8. The Reference was supported by two identical Affidavits deponed by the First and Second Applicants respectively on 17th November 2014.

The Affidavits basically regurgitate the provisions of Articles 2, 5, 8 and 9 of Act No. 1/26, as well as Articles 4, 9, 22, 23, 25 and 31 of Act No. 1/31, and the deponents' understanding thereof.

C. RESPONDENT'S CASE

9. The Respondent contends that the Reference is time barred, having been instituted on 17th November 2014 yet the Act of Parliament in issue had been enacted on 15th September 2014. It is the Applicant's contention that the Reference was, therefore, filed outside the two-month limit prescribed by Article 30(2) of the Treaty.

10. The Respondent does also question this Court's jurisdiction to determine the matters in issue herein, contending that some of the prayers sought do not fall within the ambit of the Court's mandate. The Respondent specifically took issue with the prayer for the annulment of the impugned Act.

11. It is the Respondent's case that Article 4 of Act No. 1/26 address the Applicants' concerns with regard to parties' right of appeal in so far as it makes provision for an Appellate Division for the Special Court. The Respondent further contends that the alleged lack of dependence of the Judiciary was resolved by the Constitutional Court of Burundi which, by endorsing the constitutionality of the Bill that preceded Act No. 1/26, in effect confirmed that the then proposed Act did not contravene the Treaty.

12. The Respondent relied on the Affidavit of the Permanent Secretary in the Ministry of Justice of Burundi, one Sylvestre Nyanddwi, which in essence reiterated the Respondent's case as stated above.

D. SCHEDULING CONFERENCE

13. Pursuant to a Scheduling Conference held under Rule 53 of the Court's Rules, the Parties framed the following issues for determination:

    i) Whether the East African Court of Justice has jurisdiction to entertain the Reference.

    ii) Whether the Reference is time barred.

    iii) Whether Act No. 1/26 is inconsistent with the right to an independent and impartial judicial system and the right to a fair trial, and therefore inconsistent with international instruments and/ or Articles 6(d) and 7(2) of the Treaty.

    iv) Whether the Applicants are entitled to the prayers sought.

E. ISSUES

Points of law:

14. We propose to dispose of the points of law raised in Issues 1 and 2 above together given that they could dispose of the entire Reference without recourse to the merits thereof.

Issues 1& 2: *Whether the East African Court of Justice has jurisdiction to entertain the Reference AND Whether the Reference is time barred.*

Applicants' Submissions:

15. On the question of jurisdiction, it was submitted for the Applicants that the promulgation of Act No. 1/26 and some of the content thereof constituted a violation of the rule of law and, consequently, contravened the Treaty. We understood it to be Learned Counsel's

argument that the compliance of Act No. 1/26 with the Treaty (or the lack thereof) was a matter of Treaty interpretation, the jurisdiction of which lay squarely with this Court under Articles 27(1) and 30(1) thereof. He relied upon the cases of **Emmanuel Mwakisha Mjawasi& 748 Others vs. Attorney General of the Republic of Kenya EACJ Ref. No. 2 of 2010** and **Samuel Mukira Muhochi vs. Attorney General of the Republic of Uganda EACJ Ref. No. 5 of 2011** in support of his position. Mr. Ncutiyumuheto made no reference whatsoever to Act No. 1/31 in this context.

16. With regard to the question of time limitation, he relied upon the provisions of Rule 3(1)(d) of this Court's Rules of Procedure in support of his contention that where, as in the present case, a deadline for filing of any pleading fell on a weekend, such deadline would be extended to the next working day which, in the present case, was Monday 17th November 2014.

Respondent's Submissions:

17. Conversely, the Respondent raised two (2) arguments. First, that this Court's jurisdiction is restricted to the interpretation and application of the Treaty, and does not extend to the interpretation of Partner States' Constitutions, neither is the Court vested with appellate jurisdiction on constitutional matters decided by National Constitutional Courts. Learned Counsel for the Respondent relied on the provisions of Article 27(1) of the Treaty in support of his argument; as well as the following cases: **Attorney General of the Republic of Uganda vs. Omar Awadh & 6 Others EACJ Appeal No. 2 of 2012**; **Attorney General of the Republic of Rwanda vs. Plaxeda Rugumba EACJ Appeal No. 1 of 2012**, and **James**

Katabazi & 21 Others vs. Secretary General of the East African Community & Attorney General of the Republic of Uganda EACJ Ref. No. 1 of 2007.

18. Secondly, it was argued for the Respondent that this Court does not have jurisdiction to entertain prayers for the annulment of Partner States' national laws, therefore the Court's jurisdiction for present purposes is restricted to Prayers (a), (b), (c), (d), (f) and (g) of the Reference, subject to satisfactory proof thereof. Mr. Kayobera cited Articles 23, 27 and 30 of the Treaty in support of his case, as well as the cases of **Hilaire Ndayizamba vs. Attorney General of the Republic of Burundi & Secretary General of the East African Community EACJ Ref. No. 3 of 2012** and **Professor Nyamoya Francois vs. Attorney General of the Republic of Burundi & Secretary General of the East African Community EACJ Ref. No. 8 of 2011**.

19. With regard to the issue of limitation of time, it was Mr. Kayobera's contention that the promulgation dates of Act No. 1/26 and Act No. 1/31 were such that the Applicants' challenge of the said laws was time barred. Learned Counsel argued that, having been promulgated on 15th September 2014, any challenge to Act No. 1/26 should have been filed by 15th November 2014 but the present Reference had been filed on 17th November 2014. Similarly, he argued that Act No. 1/31 had been promulgated on 31st December 2013 therefore the present Reference was filed well beyond the time stipulated in Article 30(2) of the Treaty. Mr. Kayobera cited the cases of **Independent Medico Legal Unit vs Attorney General of the Republic of Kenya EACJ Ref. No. 3 of 2010**, **Hilaire Ndayizamba** (supra) and **Professor Nyamoya** (supra) in support of his argument.

20. Clarifying his submission on this issue before the Court, Learned Counsel argued that whereas Rule 3(1)(d) of the Court's Rules was applicable to time lines set by the said Rules or by Court Order, it was inapplicable to time frames that were set by the Treaty.

Court's Determination:

21. We have carefully considered the pleadings of both Parties, as well as their respective arguments in submissions. We are constrained to observe that beyond the allegations made in the Reference, no effort was made to address us on Act No. 1/31 in submissions. Clearly, having been enacted in 2013, any purported action in respect of that law would run afoul of the two-month time limit prescribed in Article 30(2) of the Treaty. As quite rightly argued by Mr. Kayobera, the question on limitation of time was well settled in **Independent Medico Legal Unit** (supra) in the following terms:

> **"The Treaty does not contain any provision enabling the Court to disregard the time limit of two (2) months and that Article 30(2) does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the complainant."**

22. We are most respectfully bound by the foregoing decision and do, therefore, find any claim in respect of Act No.1/31 time barred. In any event, it is abundantly clear from the prayers in the Reference that the law that is in issue in this Reference is Act No. 1/26. Consequently, it is to a consideration of the issues raised in respect of that law that we now revert.

23. For ease of reference we reproduce the pertinent Treaty provisions on the issue of jurisdiction.

> Article 23(1): *Role of the Court*
>
> **"The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.**
>
> Article 27(1): *Jurisdiction of the Court*
>
> **"The Court shall initially have jurisdiction over the interpretation and application of this Treaty:**
>
> **Provided that the Court's jurisdiction to interpret and 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): *Reference by Legal and Natural Persons*
>
> **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 ... on the grounds that such Act .... or action is unlawful or is an infringement of the provisions of this Treaty."**

24. This Court has had occasion to consider the question of its jurisdiction in previous cases. We were referred to the case of **Hon. Sitenda Sebalu vs. The Secretary General, East African Community & Others EACJ Ref. No 1 of 2010** where the Court cited with approval its decision in the case of **Prof. Peter Anyang'**

Nyong'o & 10 Others vs. Attorney General of the Republic of Kenya & 2 Others EACJ Ref. No. 1 of 2006 and held:

> **"We have no hesitation in reiterating what this Court said in Anyang' Nyong'o (supra) about the import of Article 30(1) of the Treaty, namely, that a claimant is not required to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the Reference in question. It is enough if it is alleged that the matter complained of infringes a provision of the Treaty in a relevant manner."** *(Our emphasis)*

25. In addition to jurisdiction arising from the infringement of a Treaty provision as stated in **Hon. Sitenda Sebalu**(supra) above, this Court has in the past pronounced itself on the violation of Partner States' domestic laws amounting to a violation of the Treaty and thus constituting a matter that is justiciable before the Court. *See* ***Rugumba vs. Attorney General of Rwanda EACJ Ref. No. 8 of 2010*** and ***Muhochi vs. Attorney General of Uganda EACJ Ref. No. 5 of 2011***.

26. More recently, the issue of the Court's jurisdiction was aptly summed up in the case of **Henry Kyarimpa vs. Attorney General of Uganda EACJ Appeal No. 6 of 2014** as follows:

> **"In short, in adjudging an impugned state action as being internationally wrongful this Court asks itself the question not whether such action is in conformity with internal law, but rather whether it is in conformity with the Treaty. Where the complaint is that the action was**

inconsistent with internal law and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the Principle of rule law, it is the Court's inescapable duty to consider the internal law of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty."

27. Thus, where the subject matter complained of under Article 30(1) is a 'directive, decision or action', it would be evaluated against the totality of a given Partner State's laws to determine its legality. In the instant case, however, where the complaint is that an Act of Parliament contravenes Treaty provisions, the internal or domestic laws of the Partner State that enacted that Act would be immaterial to a determination of whether or not such Act contravenes the Treaty.Rather, it would be incumbent upon this Court to make a determination as to what is envisaged by the principles of rule of law and good governance as invoked by the Applicant and enshrined in the Treaty, and whether, in fact, the provisions of Act 1/26 do violate the said principles as has been alleged.

28. We are fortified in this approach by the provisions of Article 27 of the Vienna Convention on the Law of Treaties. It reads:

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

29. Article 46 pertains to the competence of a State Party to the Convention to consent to be bound by a treaty in contravention of its internal laws. The competence of the Republic of Burundi to be

bound by the provisions of the Treaty has not been questioned in any way in this Reference. Specifically, the Respondent has not advanced any defence as to its consent to be bound by the Treaty having been granted in contravention of its internal laws. Consequently, we are satisfied that the Respondent cannot invoke its internal laws as justification for a Treaty violation. Needless to say, the decisions of national courts do form part of the case law of that nation. *See* ***Henry Kyarimpa*** *(supra).*

30. We do also find appropriate persuasion on this matter in the decision of the International Court of Justice in the case of **Electtronica Sicula S.P.A (Elsi) Judgment (ICJ REPORTS) 1989 p.15, para. 73**. In that case it was held as follows:

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

31. In the instant case, although the constitutionality of the Bill that preceded Act No. 1/26 was tested and sanctified by the Constitutional Court of Burundi, it is the Applicant's contention that the Act nonetheless contravenes Articles 6(d) and 7(2) of the Treaty in so far as it offends the principles of rule of law and good governance. Clearly, the decision of the Constitutional Court of Burundi notwithstanding, there are matters of Treaty interpretation presented by the Reference that beg the Court's interrogation. To that extent,

therefore, we are satisfied that this Court does have jurisdiction to entertain the Reference. We so hold.

32. With regard to the question of time limitation, it is not in dispute herein that Act No.1/26 was enacted on 15th September 2014, neither did the Applicants claim to have been unaware of the said date of enactment. It would appear that the crux of the matter is whether or not the provisions of Rule 3(1)(d) of the Court's Rules of Procedure apply equally to time lines set by the Treaty as to those set by the Rules themselves or by Court Order. Rule 3(1)(d) provides:

> **"Any period of time fixed by these Rules or by any order of the Court for doing any act shall be reckoned as follows:**
>
> **(d) if a period would otherwise end on a Saturday, Sunday or an official holiday, it shall be extended until the end of the first following working day."**

33. On the other hand, Article 30(2) provides:

> **"The proceedings provided for in this Article shall be instituted within two months of the enactment ... or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."**

34. The Court's Rules were promulgated under the provisions of Article 42(1) of the Treaty. It reads: '**The Court shall make rules of the Court which shall, subject to the provisions of the Treaty, regulate the detailed conduct of the business of the Court.**' Consequently, the Court's Rules derive their legality and legitimacy

from Article 42 of the Treaty and, to the extent that they regulate the detailed conduct of the Court's business, they do compliment and operationalize the function of the Court as stipulated in Articles 23(1) and 30 of the Treaty.

35. We take the most considered view that Article 42(1) is couched in terms that postulate that whereas the Treaty makes general provisions for the institutionalization of the Court, the detailed conduct of the Court's business or the Court's routine operations would be provided for in its Rules of Procedure. Therefore, for purposes of implementing the Court's mandate, the Treaty must be applied and read together with the Court's Rules of Procedure. In that regard, it seems abundantly clear to us that the time limit stipulated in Article 30(2) of the Treaty would be computed in the manner outlined in Rule 3(1)(d) of the Court's Rules. We so hold.

36. Before we take leave of this issue, we deem it necessary to distinguish the cases cited by learned Counsel for the Respondent on the issue of limitation of time. We have carefully considered the decisions in **Independent Medico Legal Unit** (supra) and **Hilaire Ndayizamba** (supra). Both cases addressed the import and scope of Article 30(2), categorically designating the time limit prescribed therein as fixed and binding, and negating any considerations of continuing violations on account of the principle of legal certainty advanced therein. We do most respectfully abide by those positions. We hasten to add, however, that the matter under consideration in the present Reference is not the scope or import of Article 30(2) of the Treaty but, rather, how the time limit prescribed therein may be computed.Clearly, the applicable law in that regard would be Rule 3(1)(d) of the Court's Rules.

37. In the result, we find that the Reference was filed within time and do answer Issue No. 2 in the negative.

Issue No. 3: *Whether Act No. 1/26 is inconsistent with the right to an independent and impartial judicial system and the right to a fair trial, and therefore inconsistent with international instruments and/ or Articles 6(d) and 7(2) of the Treaty*

Applicants'Submissions:

38. In a nutshell, we understood it to be the argument for the Applicants that Articles 2, 5, 7, 40, 44, 50, 52, 73, 87 and 89 of Act No.1/26 contravene the principles of constitutionalism, human rights and good governance as stipulated in the Treaty. It was Mr. Ncutiyumuheto's contention that the Respondent's case hinges on the provisions of Article 23(1) of the Treaty, which enjoins the Court to 'ensure the adherence to law in the interpretation, application and compliance with the Treaty.' He cited the cases of **Independent Medico Legal Unit** (supra) and **Attorney General of the Republic of Rwanda vs. Plaxeda Rugumba** (supra) to augment his submission on the court's role in ensuring Partner States' adherence to law and compliance with the Treaty.

39. It was also argued for the Applicants that Act No.1/26 contravened Article 209 of the Constitution of the Republic of Burundi, as well as Article 10 of the Universal Declaration of Human Rights, Articles 7(1) and 26 of the African Charter on Human and People's Rights and Article 14(1) of the International Covenant on Civil and Political Rights, all of which international instruments had been ratified by the

Respondent and fully integrated in the Burundi Constitution by Article 19 thereof.

Respondent's Submissions:

40. Conversely, it was argued for the Respondent that the Constitutional Court of Burundi had rendered a decision in which it held the creation of a Special Court on Land and Other Assets to be in conformity with the Constitution of the Republic of Burundi. Mr. Kayobera argued that the right of appeal was guaranteed under Act No. 1/26 in so far as the said law made provision for an Appellate Division. Finally, citing the case of **East Africa Law Society vs. Attorney General of the Republic of Burundi EACJ Ref. No 1 of 2014**, as well the decision of the Constitutional Court of Burundi, Learned Counsel argued that Act No. 1/26 was consistent with the right to an independent and impartial judicial system, as well as the right to a fair trial, and was therefore consistent with international instruments and Articles 6(d) and 7(2) of the Treaty.

Court's Determination:

41. We have carefully considered the pleadings and submissions of both Parties on the alleged non-compliance of the Act with Articles 6(d) and 7(2) of the Treaty. As can be deduced from paragraphs 5, 11, 15 and 16 of the Reference, the specific legal provisions in contention are Articles 2, 5, 8 and 9 of the Act.

42. However, the Applicants did also take issue with the following provisions of Act No. 1/26: Articles 7, 40, 44, 50, 52, 73, 87 and 89. These Articles provide as follows:

Article 7

"Upon assuming their duties, judges of the Court are placed on secondment position."

Article 40

"The appeal against the Commission's decisions before the Court does not suspend execution of the contested decision. However, property that is subject to litigation pending before the Court can neither be alienated, nor distorted, nor transformed nor encumbered with other rights before the final decision of the Court."

Article 44

"The court hearings are public unless such publicity is a threat to public order or morality. In that case the court immediately orders the hearing to be in camera."

Article 50

"When it is proved that a regular witness called before the Commission is not physically available to be heard, his testimony adduced before the Commission remains with its value in the Court."

Article 52

"In case of connection found between a case under investigation in the court and another pending before the Commission, the President of the Court by order suspends the proceedings initiated before it and is waiting for the

delivery of the decision by the Commission to resume the proceedings and possibly approve the two joined cases."

Article 73

"T he one who does not appear before the court to stand his case at the second occasion by default is no longer allowed to apply for a new opposition.

In any case, the opposition does not stay execution of the judgment already undertaken, unless the President of the Court decides otherwise by a reasoned order. Made contradictorily, this order is served on all parties by the diligence of the court registrar.

However, in case of execution of judgment, property acquired can neither alienated, nor distorted, nor transformed nor encumbered with other rights before the final decision of the Court."

Article 87

"The review can be requested only by people who are parties to the case. After the death or declared absence of a party, the request shall be exercised by his successors or his universal legatees."

Article 89

"The application for review is addressed to the Minister of Justice. If the Minister determines that the application is admissible, it refers the case to the Appeals Chamber of

the Court. This Chamber determines again the case on merits by a new quorum."

43. We are mindful of the function of due process in the determination of matters before this Court or indeed any tribunal. The notion of due process advances the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights. *See* ***Black's Law Dictionary, 8th Edition, pp.538,539.*** Indeed, a basic and fundamental requirement of due process in any proceeding is provision for notice that sufficiently apprises interested parties of the pendency of the action and affords them an opportunity to present their objections or defence. *See* ***Mullane vs. Central Hanover Bank and Trust Co. 339 U.S 306, 314 (1950)***.

44. It is certainly not for cosmetic purposes that Rule 38 of this Court's Rules of Procedure enjoins parties to specifically plead 'the necessary particulars of any claim, defence or other matter', or that Rule 38(2)(b) explicitly underscores the need to plead matters which would otherwise take an opposite party by surprise. This is necessary to avert the undesirable practice of trial by ambush and promote the principle of natural justice. Consequently, it seems to us that the introduction of additional aspects of Act No. 1/26 at the stage of submissions, that were not encapsulated in the Reference, offends the provisions of Rule 38(1) and (2)(a) of the Court's Rules, the notion of due process and, ultimately, parties' right to a fair hearing. We do, therefore, refrain from a consideration of the additional provisions cited in the Applicants' submissions and shall restrict ourselves to the provisions of Act No. 1/26 as cited in the Reference.

45. Before we progress further with this issue, we deem it necessary to reproduce the provisions of the Treaty that are under scrutiny herein for ease of reference.

Article 6(d)

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

(d) good governance including adherence to the principles of .... the rule of law, accountability, transparency ... as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights." *(Our emphasis)*

Article 7(2)

"The Partner States undertake to abide by the principles of good governance, including adherence to the principles of .... the rule of law ... and the maintenance of universally accepted standards of human rights." *(Our emphasis)*

46. Similarly, the provisions of Act No. 1/26 that were challenged in the Reference are reproduced below.

Article 2

"The Court is a legal framework with the jurisdiction to hear appeals at the last resort against decisions made

by the National Commission on Land and Other Properties."

Article 5

"The Court shall be comprised of the President, a President of each Chamber and as many members as needed. The members of the Court shall be appointed from judges and lawyers who are of proven moral integrity, impartiality and independence."

The judges of the Court are appointed by decree on the proposal of the Minister of Justice."

Article 8

"The salary and benefits of the judges of the Court shall be determined by decree."

Article 9

"The President of the Court has the rank of Minister.

The Presidents of the Chambers have the rank of the Vice-Presidents of the Supreme Court.

The judges of the Court have the rank of judges of the Supreme Court."

47. It is a cardinal rule of procedure that s/he who asserts must prove their case. Indeed in **Henry Kyarimpa** (supra) that principle as encapsulated in **Shabtai Rosenne: The Law and Practice of the International Court, 1920-2005, Vol. III, Procedure, p.1040** was cited with approval in the following terms:

"Generally, in the application of the principle of *actori Incumbit probation* the court will formally require the Party putting forward a claim or a particular contention to establish the elements of fact and of law on which the decision in its favour might be given. .... As the Court has said: 'Ultimately ... it is the litigant seeking to establish a fact who bears the burden of proving it.'..."

48. In the instant case and with regard to Article 2 of Act No. 1/26, the Applicants argued that the fact that the Special Court decides in the last instance on the decisions of the Commission, without any possible appeal to the Supreme Court, was a violation of Articles 6(d) and 7(2) of the Treaty as it negated the opportunity for the Court constitutionally designated as 'a guarantor of good application of law' to test the legal soundness of the Special Court's decisions.

49. With regard to Article 5, on the other hand, it was argued for the Applicants that the second component thereof, which deals with the appointment of the Special Court's members, contravened Burundi domestic laws that prescribe consultation with the Superior Council of the Judiciary, as well as the approval of the Senate as part of the appointment process for judges of the higher bench. See *Article 222 and 226 of the Burundi Constitution*. Learned Counsel for the Applicants imputed a violation of the principle of separation of powers in so far as the impugned Act ignored the role of the Senate in the appointment process, placed the said process solely with the Executive and thus rendered judges of the Special Court vulnerable to the influence of the said branch of government.

50. The Court was not addressed on Articles 8 and 9 either in written submissions or during oral clarification of the same. The Articles address the manner in which the emoluments of judges of the Special Court would be determined, and prescribe the ranking or status of judges of the Special Court viz the Supreme Court. Learned Counsel did, nonetheless, cite the **United Nations Resolution No. 40/32** on the independence of the Judiciary in support of his case.

51. We are aware that Article 6(d) of the Treaty designates good governance as a fundamental principle of the Community and, for present purposes, recognizes as inherent within that fundamental principle, the principles of rule of law, accountability and transparency. The same principles are reflected in Article 7(2) thereof. A clear understanding of the cited principles is critical to a determination of the compliance of the impugned Act with the Treaty.

52. In an Article published by the International Fund for Agricultural Development (IFAD), ***'Good Governance: An Overview'*, IFAD Executive Board – 67th Session, September 1999, p. 6**, the term 'good governance' was defined by the United Nations Development Fund (UNDP) as follows:

> **"The existence of effective mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences."**

53. In the instant case, the Applicants' claim that the principle of good governance has been contravened within the context of right to fair trial and the principle of separation of powers does, in our considered opinion, bring into purview the principle of rule of law. In a **Report of**

the (UN) Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616 (2004), para. 6, the concept of the rule of law was defined as follows:

> **"It refers to the principle of governance to 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 the 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. It is quite clear from the foregoing definition that the rule of law is the king-pin that ferments, and by which nation states progressively aspire towards the ideal of good governance. For present purposes, the standard for rule of law captured therein is first, the existence of laws that are publicly promulgated, equally enforced and independently adjudicated, and secondly, measures that ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, and procedural and legal transparency.

55. The evidence on record in the instant case is that Act No. 1/26 was indeed publicly enacted by the Parliament of Burundi. On the other

hand, no question was raised as to whether or not the said law is equally enforced for all persons, natural or juridical. The only bone of contention herein is whether it is independently adjudicated. In the same vein, no issues were raised as to Act No.1/26 being devoid of recognition, supremacy or otherwise being derogated, neither was non-submission or non-accountability to the law in contention herein. On the contrary, the allegation herein is that the impugned law subverts the Constitutional provisions in respect of appeals to the Supreme Court; contains provisions that curtail the notion of fair trial with regard to the independence of the Special Court judges; reflects measures that impede the doctrine of separation of powers, and infringes upon recognized standards of procedural and legal propriety.

56. Before we progress further with the issue of the Act's compliance with the Treaty (or lack thereof), we deem it necessary to interrogate the intrinsic nature of special courts such as the one set up by the impugned Act. The Merriam-Webster dictionary defines a special court as '**a court created for an exceptional and temporary purpose (such as a commission or tribunal to hear claims for war damages against a State by nationals of the victorious State)**.' On the other hand, the Free Online Legal Dictionary defines such courts as '**bodies within the judicial branch of government that generally address only one area of law or have specifically defined powers**.' It expounds the distinction between special courts and general-jurisdiction courts as follows:

> **"Special courts differ from general-jurisdiction courts in several other respects besides having a more limited jurisdiction. Cases are more likely to be disposed of**

without trial in special courts, and if there is a trial or hearing, it is usually heard more rapidly than in a court of general jurisdiction. Special courts usually do not follow the same procedural rules that general-jurisdiction courts follow; often special courts proceed without the benefit or expense of attorneys or even law-trained judges."

57. As may be deduced from the foregoing literature, it is quite commonplace that special courts would hear a much narrower range of cases than those entertained by general-jurisdiction courts; hear the cases before them more rapidly; and do not usually apply the same procedural rules as the general-jurisdiction courts.

58. Against that yardstick, therefore, we do not think that Act No. 1/26 contravenes the principle of rule of law simply because it does not provide for appeals from the Special Court to the Supreme Court. In any event, as quite rightly argued by learned Counsel for the Respondent, the said law does make provision for an appellate process from the First Instance Division to the Appellate Chamber of the Court. In fact, the judges of the Special Court do appear to have the same standing in terms of qualifications as judges of the Supreme Court of Burundi. Hence the question of the legal proficiency of the Court's judgments would not arise. We take the view that the fact that the Burundi Constitution provided for the Supreme Court as the highest court of the land does not necessarily translate into all judicial matters having the option to progress thereto.

59. Indeed, had we considered the provisions of Article 40 of the law, the fact that the commencement of an appeal process does not serve

as an automatic stay of execution would not *per se* impute procedural or legal impropriety or lack of transparency. We cannot yield to the temptation to speculate as to the rationale behind that provision without the benefit of the Respondent's input, but we do note that it is quite commonplace for judicial systems to abide such a clause. Indeed, an analogy can be drawn with the legal regime within this Court's jurisdiction, where Rule 110 of the Court's Rules of Procedure negates the incidence of an automatic stay of proceedings pending an interlocutory appeal.

60. We take the view that it would suffice for purposes of compliance with the rule of law that the law setting up the Special Court is promulgated in accordance with the law, and is applied in a transparent, fair and consistent manner by an independent and impartial tribunal. Such a legal environment would meet the international standards of accountability to and fairness in the application of the law, legal certainty, and procedural and legal transparency propounded earlier hereinabove. In the instant case, as we have stated hereinabove, we did not hear the Applicants to suggest that the law was promulgated in a manner that violated the laws of Burundi. They merely took issue with the content of the law. Consequently, we do not deduce any infringement of the rule of law or good governance from the provisions of Articles 2 and 9 of Act No. 1/26.

61. The Applicants did, however, raise issues about the independence of the judges of the Special Court. It seems to us that the Applicants are particularly aggrieved with the appointment of judges of the Special Court 'by decree on the proposal of the Minster of Justice' to the extent that it restricts the function of appointment solely to one branch

of government – the Executive. To compound matters, the same branch of government is responsible for the determination of the judges' emoluments. Furthermore, the Act's purported concentration of power in the Executive appears to contradict the known procedure for the appointment of judges in Article 222 of the Constitution of Burundi, which provides for judicial appointments to the Supreme Court to be made in consultation with the Superior Council of the Judiciary and subject to the Senate's approval. The Applicants did allude to this anomaly violating the doctrine of separation of powers, as well as parties' right to a fair trial and, ultimately, compromising the independence of the judicial branch of government.

62. We must, from the onset, clarify the distinction between the institutional independence of the judicial branch of government, which concept is inter-related with the principle of separation of powers; and the individual independence or impartiality of judges that has a bearing on the notion of fair trial. We intend to address the issue of judicial independence that was raised herein in that context.

63. The principle of separation of powers is the cornerstone of an independent judiciary. It is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of separation of powers is a *sine qua non* for a democratic State. *See* ***Report of the Special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1995/39, para. 55***. Indeed, under international law, nation states are obliged to organize their state apparatus in such a manner as would be compatible with their international obligations. It is incumbent upon them to ensure that the structure and operation of state power is founded on the true separation of its executive,

legislative and judicial branches, as well as the existence of an independent and impartial judiciary.' *See* ***International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioner's Guide No. 1, International Commission of Jurists, 2004, p.19***.

64. The principle of separation of powers is aptly captured in Articles 3 and 4 of the Inter-American Democratic Charter as follows:

> **"The executive, the legislature and the judiciary constitute three separate and independent branches of government. Different organs of the State have exclusive and specific responsibilities. By virtue of this separation, it is not permissible for any branch of power to interfere into the others' sphere."**

65. However, we do also reproduce a persuasive argument in **Phillips, O. H. & Jackson, P., 'Constitutional and Administrative Law', Sweet & Maxwell, 2001. 8th Edition, p.12** on the limitations of a complete separation of powers:

> **"A complete separation of powers, in the sense of a distribution of the three functions of government among three independent sets of organs with no over-lapping or co-ordination, would (even if theoretically possible) bring government to a stand-still. What the doctrine must be taken to advocate is the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another."**

66. On the other hand, the UN Basic Principles on the Independence of the Judiciary, Resolution 40/32 do, in the First Principle thereof, lay down the requirement of judicial independence in the following terms:

> **"The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."**

67. As can be deduced from the second component of the principle of judicial independence enumerated above, the institutional independence of the judiciary essentially entails the non-subordination of the judicial branch of government to the other branches of government. The non-subordination envisaged therein would encompass issues pertaining to the recruitment and remuneration of judges, as well as the respect by the other branches of the judiciary's decision-making function including the recognition of, compliance with and insulation of judgments emanating from the judiciary from tinkering by any non-judicial authority. *See* ***Report on the Human Rights Committee on the Congo, UN document CCPR/C/79/Add.118, para.14****, and Principles 3 and 4 of the* ***UN Basic Principles on the Independence of the Judiciary****.* It does also entail freedom of the courts from influence, threats or interference from the other branches, as well as appropriate provision for security of tenure and professional training of judges. *See* ***Report on Terrorism and Human Rights, OAS document OEA/Ser.L/V/II.116, Doc. 5, 2002, para. 229.***

68. In the instant case, a special court was set up by the Republic of Burundi under a legal regime that is significantly different from that which governs general-jurisdiction courts in the country, and operates under specially designated powers as enshrined in Act No. 1/26. Whereas the general-jurisdiction courts subscribe to a legal regime that duly makes provision for all the branches of government in the appointment of judges, the regime governing the Special Court designates the appointment and remuneration of the said judges as a preserve of the Executive.

69. We are mindful of the fact that, by their very nature and purpose, the dictates of a special court would vary considerably from the intricacies of general-jurisdiction courts. Special courts are created to address specific issues that are of special concern to a country. In the instant case, as quite elaborately explained by learned Counsel for the Respondent, the Special Court was created to address a grave, historical problem that was intertwined with the Republic of Burundi's socio-political history. Given that background, it would be reasonable that judges to the Special Court would be appointed with the participation of all the branches of government. Therein lies the fallacy of a complete separation of powers or the absolute independence of the judiciary. An eventuality where the appointment of judges is the sole responsibility of the judiciary would, in itself, constitute an unwarranted concentration of power in that branch of government.

70. Similarly inappropriate, nonetheless, is the present scenario where the judges of a special court in Burundi are exclusively appointed by the Executive without any input from the judicial and/ or legislative branches of government. It was argued at length for the Respondent

that the judges are appointed from among duly appointed sitting judges therefore, given the provisions of Article 222 of the Burundi Constitution, the participation of the other branches of government is inadvertently secured.

71. Article 222 provides for the appointment of judges to the Supreme Court in consultation with the Superior Council of the Judicature and with approval of Senate. However, given the express provisions of Article 5 of Act No. 1/26, we do not find the practice highlighted by learned Counsel for the Respondent to provide sufficient protection against the concentration of power for judicial appointments to the Special Court in the Executive. We take the view that Article 5 is couched in language that gives the appointing authority the option to either appoint sitting judges or lawyers. Whereas sitting judges would have been duly appointed in consultation with the Superior Council of Judicature and the participation of the Senate, the same safeguards cannot be said of lawyers appointed to the Special Court as judges.

72. There is no agreement in international law as to the method of appointment of judges. It would appear that a degree of discretion is left to individual States, provided that the appointment procedure guarantees the judiciary's institutional independence and the selection criteria is premised on recognized standards of professional qualifications and competence, as well as personal integrity. This would underscore the principle of separation of powers, as well as provide indispensable safeguards for the individual independence and impartiality of judges.

73. To this end, some international institutions make appropriate provision for the role of the other branches of government in the

appointment of Judges. The Council of Europe has, for instance, detailed guidelines on the appointment procedures that pertain to and the body responsible for selection of Judges. ~~It posit that the body responsible for selection of Judges~~. It posits that the body responsible for the selection of Judges should be independent of 'the government and the administration.' It does, however, acknowledge that whereas the selection of Judges should be undertaken by an independent body, the appointment of Judges by the executive branch of government would not be incompatible with the independence of the Judiciary, provided that certain safeguards are in place. See **International Principles on the Independence and Accountability of Judge, Lawyers and Prosecutors, Ibid., pp.42-43**. We find the position adopted by the Council of Europe quite persuasive and pertinent to the East African Community in as far as it aptly caters for judicial independence.

74. Against that standard, we are satisfied that Article 5 of the impugned act does offend the principle of separation of powers in so as it designates the appointment of judges to the Special court as the sole preserve of the executive brand of government, without any demonstrable safeguards against the unwarranted concentration of the said function in that branch of government. In the same vein, had we considered Article 89 of the same Act our reading of that provision would have been that it constitutes a blatant violation of the principle of separation of powers in so far as it subjugates a purely judicial review process to executive authority and intervention. We so hold.

75. We now revert to the allegations that the pivotal roles of the executive in the appointment and remuneration of the Judges of the Special Court compromises their impartiality and negates parties' right to a fair trial. What would amount to a fair trial is in **Black' Law**

Dictionary, 8th Edition, p. 634 as '**a trial by an impartial and disinterested tribunal in accordance with regular procedures**.'

76. The right to a fair trial requires judges to be impartial, having neither a stake nor interest in the cases they adjudicate, and no prejudices or biases about cases or the parties. See ***International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Ibid. , p.26***. Indeed, Principles 2 and 8 of the UN Basic Principles on the Independence of the Judiciary address the question of judges' impartiality as follows:

> Principle 2
>
> **"The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."**
>
> Principle 8
>
> **"In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."**

77. In **Incal vs Turkey 41/1997/825/1031, para.65**, the manner of appointment of judges was held by the European Court of Human Rights to be an important consideration in determining their

impartiality and independence from the influence of external authority. However, the same case did also portend judges' security of tenure; the existence of safe guards against external pressure, and whether or not judges are employees of the other branches of government or otherwise subordinated to them as critical parameters to a determination of judges' individual independence.

78. No evidence was adduced by the Applicants as satisfactorily established a lack of security of tenure of the Special Court's judges that could engender deference to their appointing authority, or the absence of adequate safe guards in the said court against external pressure. The Applicants did allude to the court's judges as being seconded from civil service but no semblance of evidence was furnished in support of that allegation. The question of judges' partiality might largely hinge on perception but, once subjected to a judicial process such as the present proceedings, must be duly established by cogent and credible evidence. The appointment and remuneration of the Special Court's judges by the Executive *per se* is not sufficient reason to deduce them as impartial, especially given the criteria for appointment stipulated in Article 5 of Act No. 1/26. That provision enjoins the appointing authority to appoint members of the Special Court from judges and lawyers of proven moral integrity, impartiality and independence. Consequently, we would disallow the Applicants' claims of breach of the right to fair trial.

79. In the result, we find that Articles 2, 8 and 9 of Act No. 1/26 have not been proven to contravene the principles of rule of law and good governance, and accordingly do not violate Articles 6(d) and 7(2) of the Treaty. We are satisfied that Article 5 of the said law does contravene the principle of good governance as enshrined in Articles

6(d) and 7(2) of the Treaty in so far as it offends the principle of separation of powers inherent therein. However, we are not satisfied that that appointment and remuneration of the Special Court's Judges as outlined in Articles 5 and 8 of the Act respectively has been proven as outlined in Articles 5 and 8 of the Act respectively has been proven to impute partiality the Executive branch of government on the Judges; part. To that extent, therefore, Issue No.3 hereof succeeds in part and fails in part.

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

80. The Applicant sought the following Prayers in the Reference:

a. A declaration that the system of administration of justice and governance adopted by Act No.1/26 is not conducive to the effective administration of justice as envisaged in the spirit of Articles 6(d) and 7(2) of the Treaty.

b. A Declaration that judicial power is dependent on the Executive, which constitutes a breach of Articles 6(d) and 7(2) of the Treaty.

c. A Declaration that that the procedure adopted by Act No.1/26 and employed by the Special Court is a breach of international instruments on the right to an independent and impartial judge as well as the right to a fair trial as provided by Articles 9(d) and 7(2) of the Treaty.

d. A declaration that Act No. 1/26 constitutes an infringement and violation of the provisions of the Treaty.

e. A Declaratory Order for the immediate annulment of Act. No. 1/26.

81. Given our findings Issue No. 3 above, we are unable to grant the prayers in paragraphs (a), (d) and (e) above are not tenable as the Applicants were only able to establish one (1) aspect of breach of the Treaty in the entire impugned Act. Whereas the Applicants did establish breach of the principle of good governance in aspects of Article 5 of the said Act and thus succeeded in paragraph (b) above, they fell short on proof of the Prayers sought in paragraph (c).

82. With regard to the issue of costs, Rule 111(1) of the Court's Rules explicitly provide for costs to follow the event unless the court, for good reason, decides otherwise. In the instant case, where the Reference has succeeded in part, we deem it just to order each Party to bear its own costs.

83. In the final result, therefore, we hereby make the following Declarations and Orders:

    a. The Declarations and Orders sought in Prayers (a), (c), (d) and (e) of the Reference are not tenable and are hereby disallowed.

    b. A Declaration is issued that Act No. 1/26 does infringe Articles 6(d) and 7(2) of the Treaty in so far as aspects of Article 5 thereof offend the principle of separation of powers inherent in the principle of good governance enshrined in the said provisions of the Treaty.

    c. The Republic of Burundi shall, in accordance with Article 38(3) of the Treaty, cause the amendment of Article 5 of Act No. 1/26 within its internal legal mechanisms.

84. We so order.

85. Dated, delivered and signed at Arusha this 22nd day of March 2016.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

Hon. Justice Isaac Lenaola
DEPUTY PRINCIPAL JUDGE

Hon. Justice Faustin Ntezilyayo
JUDGE