IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Mary Stella Arach-Amoko, DPJ, John Mkwawa, J, Isaac Lenaola, J.)

REFERENCE NO. 8 OF 2010

PLAXEDA RUGUMBA.....APPLICANT

VERSUS

THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY.....1ST RESPONDENT

THE ATTORNEY GENERAL OF THE REPUBLIC OF RWANDA.....2ND RESPONDENT

DATE: 1ST DECEMBER, 2011

JUDGMENT OF THE COURT

INTRODUCTION

1. The Reference dated 8th November 2010 is premised on the provisions of Articles 6(9), 7(2) and 30(1) of the East African Community Treaty as well as Rule 24(1) of the East African Court of Justice Rules of Procedure (hereinafter referred to as **"the Treaty"** and **"the Rules"** respectively).

2. The Applicant, Plaxeda Rugumba **(hereinafter referred to as the "the Applicant")**, claims that she is the natural elder sister of one, Seveline Rugigana Ngabo, a Lieutenant Colonel in the Rwanda Patriotic Front (RPF), the Defence Force of the Republic of Rwanda (which is a member of the East African Community, hereinafter referred to as the "EAC".)The Applicant alleges in paragraph 5 of the Reference that:

   "(a) One Seveline Rugigana Ngabo, a Lieutenant Colonel in the Rwanda Patriotic Front (RPF), was arrested by the agents of [the] Rwanda Government on 20th August, 2010;

   (b) Lieutenant Colonel Ngabo's next of kin including his wife and children were not told why he had been arrested;

   (c) Lieutenant Colonel Ngabo is believed to still be in detention in any place within Rwanda (sic);

(d) The grounds of belief are that the family has not been informed that he is dead nor has his body been seen anywhere;

(e) The next of kin of Lieutenant Colonel Ngabo have not been informed where Lieutenant Colonel Ngabo is detained;

(f) Lieutenant Colonel Ngabo has not been visited by his family, doctor, nor a member of the Red Cross and is held incommunicado;

(g) Lieutenant Colonel Ngabo has not been formally charged before any Court of Law in Rwanda nor is it disclosed anywhere what offence he is alleged to have committed;

(h) Lieutenant Colonel Ngabo's wife is not in a position to file an Application for habeas corpus to cause the release of her husband within Rwanda as the Government is hostile to such [a] process and her attempts to follow up the detention of her husband has led to her being harassed into hiding;

(i) The Applicant is the elder sister of the said Lieutenant Colonel Ngabo and has capacity and locus to bring this Application to protect the fundamental Human Rights of her brother."

3. The Applicant now seeks the following declarations from this Court, that:

(a) The arrest and detention by the 2nd Respondent's agents without trial of Lieutenant Colonel Seveline Rugigana

Ngabo is a breach of the fundamental principles of the Community, to wit; Articles 6(d) and 7(2) which demand that partner states shall be bound to govern their populace on the principles of good governance and universally accepted standards of Human Rights.

(b) The failure by the 1st Respondent to investigate the failure of the partner state, Rwanda, to fulfill obligations of the Treaty enunciated in Articles 6(d) and 7(2) and submit its findings as required in Article 29(1) is wrongful.

(c) Any other relief as the Court may deem fit to grant.

(d) Costs of the Application.

APPLICANT'S CASE

4. It is the case for the Applicant as appears in her Affidavit sworn on 5th October 2010 and in Submissions by her Counsel, Mr. Rwakafuuzi, that:

5. Firstly, the 1st Respondent acted in breach of Article 29 of the Treaty when he failed to take the **"necessary action"** concerning the alleged breach by the Government of the Republic of Rwanda with respect to the arrest and detention of Seveline Rugiga Ngabo (hereinafter referred to as **"the Subject"**).

6. Secondly, that the 2nd Respondent, representing the Republic of Rwanda, was in breach of Articles 6(d) and 7(2) when the Government of Rwanda detained the Subject, unlawfully. In furtherance of this issue, it was the argument of Counsel for the Applicant that the 2nd Respondent in fact admitted the breach when in his Amended Reply to the Reference, he conceded that agents of the Government of Rwanda had unlawfully detained the Subject from 20th August 2010 to 28th January 2011. That since the African Charter on Human and Peoples Rights was specifically accepted as one of the sources of the fundamental principles governing the achievement of the objectives of the EAC, **(in Article 6(d) of the Treaty)**, then it follows that the unlawful detention of the Subject must be held to be in breach of the Treaty.

7. Thirdly, an issue arose as to whether this Court is clothed with the Jurisdiction to determine the two (2) issues raised above. The Applicant's position in that regard is that by dint of Article 30(1) of the Treaty, legal and natural persons resident in the Partner States are granted the right to refer an action or decision of any Partner State, for the Court's interpretation under Article 27(1) of the Treaty and for it to determine whether or not that act or decision infringes on any provision of the Treaty.

8. It is further contended that the Applicant has invoked Article 6(d) of the Treaty which enjoins a Partner State to govern its people in accordance with the principles of good governance including strict adherence to the Principles of Democracy, Rule of Law, including, the protection of human and peoples' rights as enshrined in the African Charter on Human and Peoples Rights. It is the Applicant's argument that she has placed sufficient evidence by way of Affidavits, that the Subject was arrested and detained without being charged before a competent Court and he was therefore not afforded the opportunity to appear and defend himself and those actions were against the Rule of Law and clearly a breach of Articles 6(d) and 7(2) of the Treaty and also of the Laws of Rwanda.

9. It is also contended that the court has the Jurisdiction to make a declaration under Article 27(1) of the Treaty that the act of arresting and detaining the Subject was in breach of the Treaty and the Government of Rwanda should bear culpability in that regard.

10. Fourthly, it was the Applicant's further argument that it had no legal obligation to exhaust all local remedies in Rwanda before filing the present Reference. That in fact, the special Jurisdiction conferred on this Court to interpret the Treaty

cannot be assumed by any Local Court in a Partner State and in the instant case, the remedy sought can only be granted by this Court and not any Local Court in Rwanda.

11. Fifthly, the Applicant also stated that the Reference was filed within time because whereas Article 30(2) of the Treaty limits the time for filing proceedings to two (2) months after the cause of action has risen, in the instant case, the Subject was arrested on or about 20th August 2010 and while the reference was filed on 8th November 2010 the ***"detention whose legality is the subject of this reference continued up to 28th January 2011 when the Subject was put in preventive detention by an Order of Court as provided by the Laws of Rwanda."*** That therefore, by the time the Reference was filed, the cause of action was still subsisting and Article 30(2) cannot apply to bar the present proceedings.

12. For all the above reasons, the Applicant states that she is entitled to the reliefs sought and the Court should exercise its discretionary Jurisdiction under Article 27(1) of the Treaty and grant the declarations as set out elsewhere above.

1ST RESPONDENT'S CASE

13. The 1st Respondent filed a Response to the Reference on 14th December 2010 and in it, raised the following issues:

(i) That although he was not aware of the Subject's arrest and detention as claimed, upon the Reference being filed and served on him, ***"all necessary measures [would] be undertaken to address the situation."***

(ii) That the Reference is misconceived, frivolous and vexatious because the Applicant has failed to exhaust the local remedy of habeas corpus to seek the production of the Subject and neither has she shown that the Republic of Rwanda has failed to fulfill its obligations under the Treaty and therefore necessitating an investigation by the 1st Respondent or even the filing of a Reference in that regard.

In Submissions, the Counsel for the 1st Respondent added that:

(iii) Upon learning of the Applicant's complaint, the 1st Respondent initiated correspondence with the 2nd Respondent and he was informed that the Applicant's allegations were being appropriately addressed. That therefore, the 1st Respondent had no further role to play in the matter and this Court should not find that he has failed in his obligations under the Treaty, in any way.

(iv) The Court had no Jurisdiction to handle the complaint as the same was being adjudicated by competent organs of the Republic of Rwanda and in any event, the Applicant ought to exhaust all Local remedies before approaching this Court.

14. Lastly, the 1st Respondent also contends that since the Reference was filed out of time, it should be struck off and that being the case, then the Applicant is not entitled to any remedy as against the 1st Respondent.

2ND RESPONDENT'S CASE

15. The response by the 2nd Respondent is the one titled, **"Amended Response to Reference",** dated 16th June 2011 and filed on 21st June 2011. Together with that Response is an Affidavit sworn on 16th June 2011 by one Lieutenant Jean de Dieu Rutayisire, Chief Registrar, Military Court of Rwanda ,as well as copies of proceedings of the said Court conducted on 28th January 2011 and on subsequent dates, all relating to the Subject herein.

Of relevance to the Reference are the following matters:

(i) That the Subject was arrested for being **"suspected [to have] committed crimes against National Security (sic)."** And that on 21st January 2011, the Military Prosecution lodged its case for Preventive Detention and it was only on 28th January 2011 that the Military High Court ruled that **"the detention of Lieutenant Colonel Ngabo from the date he was arrested until the date his case was brought before the Court was irregular and contravened the provisions of Articles 90 to 100 of the Rwandan Code of Criminal Procedure."**

(ii) That since that date, the Military High Court for reasons of gravity of the alleged crimes committed by the Subject, has continued to extend the Preventive Detention Order for regular periods and the Subject is detained in a known Military Prison and exercises all his rights, including visitation by his family, lawyers and friends.

Further, it is the 2nd Respondent's case that:

(iii) The Reference was filed in breach of Article 30(2) of the Treaty and it was time- barred.

(iv) The Court has no Jurisdiction to deal with Human Rights issues and has no Jurisdiction to deal with issues that are

pending before a lawful Court in Rwanda and which Court is yet to issue a verdict on the said matter.

That in any event, the EACJ should only be considered as a Court of last resort when National Courts are unwilling or unable to render justice to the people in their jurisdictions,otherwise,it will attract millions of cases that would ,in normal circumstance, be competently handled by Local Courts in Partner States.

(v) The Government of Rwanda has at all times acted by the principles of good governance, including adherence to the principles of democracy, the rule of Law, Social Justice and maintenance of accepted Standards of Human Rights and so the Reference is without merit and should either be struck off or dismissed.

ISSUES FOR DETERMINATION

16. From the contested matters set out above and from the agreed issues as framed during the Scheduling Conference, the following questions ought to be determined:

(a) Whether the East African Court of Justice's (EACJ) First Instance Division has Jurisdiction to entertain the Reference herein.

(b) Whether it was permissible to file the Application out of time.

(c) Whether the Applicant should have exhausted local remedies before filing the Reference.

(d) Whether the 1st Respondent is in breach of the Treaty by his failure to investigate the alleged breaches by the 2nd Respondent.

(e) Whether the 2nd Respondent's arrest and detention of Lieutenant Colonel Rugigana Ngabo was a violation of the Laws of the Republic of Rwanda.

(f) Whether the 2nd Respondent breached the East African Treaty in Articles 6(d) and 7(2) when it detained Lieutenant Colonel Rugigana Ngabo unlawfully.

(g) Whether the Applicant is entitled to the reliefs sought.

(h) Who should bear the costs of the Reference?

17. Our opinion on the above issues is as follows:

(A) WHETHER THE EAST AFRICAN COURT OF JUSTICE (EACJ) HAS JURISDICTION TO ENTERTAIN THE REFERENCE HEREIN

18. It cannot be denied that the Applicant is a person who is resident in a Partner State as defined by the Treaty.

In her Reference, she stated that she is a Ugandan of Rwandan extraction and a natural elder sister of the Subject. She has

added that her address is in Kampala, Uganda and no party has raised issues with those facts. Article 30(1) of the Treaty provides as follows:

> ***"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."***

19. In terms of locus standi therefore, and from the facts pleaded, the Applicant is a fit and proper person to file the Reference.

The second limb of this question is whether the act complained of, is one that clothes the EACJ's First Instance Division with Jurisdiction to determine the Applicant's allegations against the Respondents. In that regard Article 27 of the Treaty provides as follows:

> ***"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.

2. The Court shall have such <u>other</u> original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction."

20. We have heard the 2nd Respondent to argue that the issues raised by the Applicant are matters of a Human Rights nature which are not part of the **"initial"** Jurisdiction of the Court and therefore without a Protocol to operationalise any extended Jurisdiction, the Court cannot purport to exercise jurisdiction which has specifically been denied to it by the Treaty.

21. There is no debate that the extended jurisdiction as envisaged by Article 27(2) has not been conferred on this Court and in **<u>Katabazi and 21 others vs. Secretary General of the East African Community and A. G. Uganda, Reference No. 1 of 2007</u>**, the predecessor to this Court stated partly as follows;

"It is very clear that Jurisdiction with respect to Human Rights requires a determination of the Council and a conclusion of a protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court <u>may</u> not adjudicate on

disputes concerning violation of Human Rights per se."

22. Having so said however, the Court went further to state as follows:

> ***"… Article 6 sets out the fundamental principles of the Community which governs the achievement of the objectives of the Community, of course as provided in Article 5(1). Of particular interest here is paragraph (d) which talks of the rule of Law and the promotion and the protection of Human and Peoples Rights in accordance with the provisions of the African Charter of Human and Peoples' Rights."***
>
> ***Article 7 spells out the operational principles of the Community which govern the practical achievement of the objectives of the Community in Sub-Article (1) and seals that with the undertaking by the partner States in no uncertain terms of Sub-Article (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. (Emphasis supplied.)***
>
> ***Finally, under Article 8(1) (c) the Partner States undertake, among other things to:***

Abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of this Treaty.

While the Court will not assume Jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation."

23. We respectfully adopt the above reasoning as was also adopted in **Mwakisha and 74 Others vs. A.G. Kenya, Reference No.2 of 2010** and would wish to clarify that the Applicant in the Reference is asking only one fundamental question, with more than one facet to it; has the Republic of Rwanda breached the principles set out in Articles 6(d) and 7(2) of the Treaty? She therefore seeks the interpretation of that question by this Court under Article 27(1) and we see no bar to our doing so. It would be absurd and a complete dereliction of this Court's Oath of Office to refuse to do so as long as the two Articles are in the Treaty. There is no doubt that the use of the words, **"Other original, Appellate, Human Rights and Other Jurisdiction …"** is merely in addition to, and not in derogation to, existing Jurisdiction to interpret matters set out in Articles 6(d) and 7(2). That would necessarily include determining whether any

Partner State has **"promoted"** and **"protected"** human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights and the Applicant is quite within the Treaty in seeking such interpretation and the Court quite within its initial Jurisdiction in doing so and it will not be shy in embracing that initial Jurisdiction.

We should conclude this question by adding that **"Human Rights"** is defined in Black's Law Dictionary – Eighth Edition as:

> ***"the freedoms, immunities and benefits that, according to modern values (esp. at an international level), all human beings should be able to claim as a matter of right in the society in which they live"***

24. When the Applicant seeks to know whether the Subject's arrest and detention was a breach of the Treaty, she is not asking the Court to interpret the enforcement of any human right available to the Subject, and that is why she withdrew her prayer for **"an order that the said Lieutenant colonel Seveline Rugigana Ngabo be released from illegal detention",** because this court would obviously have no such Jurisdiction. All she is seeking are certain declarations within the mandate of the Court and we have said why such Jurisdiction to make such declarations exists.

25. The objection to Jurisdiction as framed and argued by the Respondents is misguided and is hereby dismissed.

(B) WHETHER IT WAS PERMISSIBLE TO FILE THE APPLICATION OUT OF TIME

26. Article 30(2) of the Treaty provides as follows:

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

27. The Applicant has made the point that because the detention of the Subject was continuous, time could not have stopped running two (2) months after his arrest. We have taken into account the objections by the 2nd Respondent and we note that in the Amended Response and in the Affidavit of Lieutenant Rutayisire, not once has any of them stated the exact date when the Subject was arrested and detained by the agents of the Republic of Rwanda. The 2nd Respondent's objection as to time is premised on the candid statement of the Applicant that her brother was arrested on 20th August 2010. **Should we then take it that time stopped running on 20th October 2010 and**

the Reference filed on 8th November 2011 was out of time? This Court considered a similar matter in the case of **Independent medical unit vs. A.G. Kenya and 4 Others, Reference No.3 of 2010** and it rendered itself partly as follows:

> ***"It was contended on behalf of the Respondents that the pleadings show that the Complainant was aware of the complaint way back in 2008 and that, therefore, the Reference is barred by limitation in that it was filed outside the 2 months limitation period stipulated under Article 30(2) of the Treaty.***
>
> ***Counsel for the Claimant submitted that the Reference is not time barred in that, the matters complained of are criminal in nature and concern the Rule of Law, good governance and justice which do not have any statutory limits. The case of Stanley Githunguri vs. Republic (1986) KLR 1 AND Republic vs. Gray Ex-parte Graham (1982) 3 All ER 653 were cited in support of this Submission.***
>
> ***Article 30(2) provides that:***
>
> > ***"The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."***

Upon careful consideration of this point of objection, it is our considered view, that the matters complained of are failures in a whole continuous chain of events from when the alleged violations started until the Claimant decided that the Republic of Kenya had failed to provide any remedy of the alleged violations. We find that such action or omission of a Partner State cannot be limited by mathematical computation of time."

28. We adopt the same reasoning and agree with the Applicant that where issues in contest are criminal in nature and the action complained of is continuous (such as detention), it would be against the principles known to the rule of Law to dismiss the complaint on the basis of strict mathematical computation of time. We must also add that it is patently clear to us that the Applicant only filed this Reference when she realized that the Republic of Rwanda had failed or refused to provide any remedy for the alleged violation and she cannot now be penalized on the basis of the inaction of a Partner State.

29. The Reference, in our humble view, was within time and we shall say something about the period starting 20th August 2010 and ending on 28th January 2011, later in this Judgment.

(C) WHETHER THE APPLICANT SHOULD HAVE EXHAUSTED LOCAL REMEDIES BEFORE FILING THE REFERENCE

30. We shall spend little time with this question because it is not in doubt that there is no express provision barring this Court from determining any matter that is otherwise properly before it, merely because the Applicant has not exhausted Local remedies. It has been agreed by the parties that upon the Reference being filed, the Republic of Rwanda produced the Subject before the Military High Court of that Country. **Can that action be said to be sufficient for this Court to tell the Applicant to go to Rwanda and exhaust whatever remedies are available there?** We must answer the question in the negative.

31. We say because it has been admitted by the 2nd Respondent that from 20th August 2010 until 28th January 2011, the Subject was held in detention without lawful authority. The Military High Court in Rwanda found that action to be a contravention of Articles 90 – 100 of the Rwandan Code of Criminal Procedure. Thereafter, the Subject was placed in Preventive Detention as is the Law in Rwanda. This Court was already seized of the Reference now under consideration when the Rwandan Military High Court made its order for Preventive Detention and whereas the Applicant may well have a remedy in the Rwandan Justice System, this Court cannot abdicate its mandate under the Treaty to apply, interpret and ensure compliance therewith.

The Rwandan Justice System has no jurisdiction to do so neither does any other Judicial body in a Partner State have that jurisdiction. The EACJ is the only Court mandated to determine whether the EAC Treaty has been breached or violated and we have said elsewhere above that in the present case, there is Jurisdiction to do so. Whether the Applicant's complaints can be addressed elsewhere is immaterial to the exercise of Jurisdiction under the Treaty and so the 2nd Respondent's contention to the contrary is dismissed.

(D) WHETHER THE 1ST RESPONDENT IS IN BREACH OF THE TREATY BY HIS FAILURE TO INVESTIGATE THE ALLEGED BREACHES BY THE 2ND RESPONDENT

32. In answer to the above issue, it has not been denied by the Applicant that prior to the filing of the Reference, the 1st Respondent had no notice of the alleged complaint. It would not therefore be reasonable to expect him to have taken any necessary action before 8th November 2010 when the Reference was filed. We have seen correspondence initiated by the 1st Respondent subsequent to that date and since the matter relates to actions taken prior to that date, we are convinced that to condemn the 1st Respondent for inaction in a

matter he had no knowledge of, would be unfair and we shall dismiss the Applicant's complaint in that regard.

(E) WHETHER THE 2ND RESPONDENT'S ARREST AND DETENTION OF LIEUTENANT COLONEL NGABO WAS IN VIOLATION OF THE LAW OF RWANDA

33. It is admitted by the 2nd Respondent that for reasons said to be of **"national"** security, the agents of the Republic of Rwanda arrested and detained the Subject at a known facility within Rwanda. Were those actions a violation of the Laws of Rwanda?

In his Affidavit, Lieutenant Rutayisire deponed partly as follows:

> ***"That on 28th January 2011, the Military High Court ruled that the detention of Lieutenant colonel Ngabo from the date he was arrested until the date his case was brought before the Court was irregular and contravened the provisions of Articles 90 to 100 of the Rwandan Code of Criminal Procedure. However, basing on strong reasons to suspect him and the gravity of the crime against him, taking into consideration the fact of preventing him from interfering with the investigation and as insurance against potential evasion of justice, the Military High Court ruled on his preventive detention, applying Article 89 of the Rwandan Code of Criminal***

Procedure (as modified and complemented by Article 19 of the Law n° 20/2006 of modified and complemented by Article 19 of 22/4/2006), which provides that <u>"when a person is detained unlawfully, …….. A judge or magistrate then makes an order arresting or releasing the person on bail …</u>

That for the purposes of investigations and the gravity of the charges against Lieutenant Colonel Rugigana Ngabo, which require enough time and security precautions, the military prosecution complied with Article 100 of the Rwandan Criminal procedures, which provides that <u>"An order authorizing for preventive detention remains in force for 30 days including the day on which it was delivered. After the expiry of that time, it can be renewed for one month and shall continue in that manner."</u> The same Article provides that the time cannot be extended after one year for felonies. The crime against Lieutenant Colonel Rugigana Ngabo is qualified as felony under Article 20 of Rwandan Criminal Code."

34. Further to this clear admission that the detention of the Subject was unlawful for a period of five (5) months, we have the unchallenged Submission by Counsel for the Applicant that:

"The Laws of Rwanda provide that a person arrested shall not be detained beyond forty eight (48) hours before being taken to court, or released (sic). The Laws of Rwanda further provide that

detention beyond forty eight (48) hours can only be by an Order of a competent Court."

35. There is little more to say in answer to the question posed above except to state that the continued detention of the Subject without trial in a competent Court was a breach of the Laws of the Republic of Rwanda and we so declare.

36. As a corollary to the above, we must now turn to the single issue that concerns the interpretation of Articles 6(d) and 7(2) of the Treaty. Although we have touched on the issue in passing, elsewhere above, it is clear to us that the arrest of the Subject on suspicion of having committed a crime known to the Laws of the Republic of Rwanda may per se not attract the intervention of this Court. However, his detention from 20th August 2010 to 28th January 2011 must do so. **In making the intervention in this case, as we shall shortly do, we are not questioning the Partner State's right to apprehend and prosecute criminal suspects. In fact, we recognize this as every Partner State's duty and obligation to its populace. What we respectfully reiterate however, is that Partner States should apprehend and prosecute criminal suspects in accordance with established laws and if they do not, then they violate the Treaty.**

37. We say so because we are of the firm view that the principles set out in Article 6(d) and 7(2) were not inscribed in vain. The Jurisdiction of this Court to interprete any breach of those Articles was also not in vain, neither was it cosmetic. The invocation of the provisions of the African Charter on Human and Peoples Rights was not merely decorative of the Treaty but was meant to bind Partner States hence the words that Partner States must bind themselves to the **"adherence to the principles of democracy, the rule of Law …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"** (ACHPR). It is common knowledge that Article 6 of the Charter provides that a person shall not be deprived of his liberty except in circumstances permissible by Law.

38. Where a person is deliberately deprived of his liberty for a period of five (5) months by a Partner State and the Military High Court of the Partner State finds the deprivation to be **"irregular"** and therefore unlawful, how can this Court in its interpretive mandate find otherwise?

39. It has been suggested by the 2nd Respondent that once the Subject's situation was **"regularized"** by the military High

Court's order of preventive detention, then the matter was settled. The fundamental question is; how can such an action validate what was previously and patently arbitrary, unlawful and in breach of the principles set out in Article 6(d) of the Treaty? How can it be said that a Partner State is adhering to the principles of good governance and the rule of law when a citizen is arrested and held incommucado without any competent Court being seized of his matter? It matters not, as claimed by the 2nd Respondent, that the subject was held in a known facility and it matters not that his family, lawyers and friends may have had access to him. **Where is his liberty when his incarceration has not been ordered by any Court of Law that is competent to order such incarceration?**

40. These questions are not addressing any human rights issue per se but are addressing adherence to issues of good governance and the rule of Law, generally. In **Katabazi** (supra) the Court partly adopted the decision in **Bennet vs. Horsefery Road Magistrate's Court and another** where Lord Griffith stated as follows:

> ***"If the Court is to have power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a***

willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law." (Emphasis added).

His Lordship went on to add that:

"***It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by."***

He then went further to refer to the words of Lord Devlin in **Connelly vs. DPP [1964] 2 All ER 401 at 442**: where His Lordship said that:

"***The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused."***

41. We wholly subscribe to the above position and even without the extended jurisdiction in human rights issues, this Court cannot stand idly by and declare itself to be impotent of the capacity to render itself forcefully where the rule of law is threatened in its eyes and in the eyes of the Treaty.

In submissions, the 2nd Respondent contended partly as follows:

"As stated previously, the 2nd Respondent is of the humble opinion that if the EACJ declares itself competent to deal with a case pending before national courts, it would create very

serious problems for itself in the execution of its mandate. The 2nd Respondent is still concerned that this would create a very dangerous precedence where any individual in the region of millions and millions would bring any human right issue before this Honourable Court, including those pending before national courts of Partner States especially those who are politically motivated (sic) ……."

Our view, with respect, differs considerably with that stated above by the 2nd Respondent. We say so because the EACJ is one of the organs of the EAC established by Article 9(1)(e) of the Treaty. Article 27 of the Treaty grants locus standi to **"any person who is resident in a Partner State"** to bring for determination to the court ,but within the mandate and jurisdictional parameters created by the Treaty, any matter regarding alleged breach of the Treaty. Whether the residents come in small numbers or in millions, is not a matter for the court to be overly concerned with. What should concern it is whether any Partner State has breached any provision of the Treaty and whether a remedy is available to the resident/Applicant. It would be expected that when the Court rules in favour of a particular resident/Applicant, the effect

would be to deter the Partner State/Respondent from repeating the breach and thereby reduce the anticipated millions of Applicants with similar complaints of breaches of the Treaty. In the event, the 2nd Respondent's fear of an avalanche of litigation in the EACJ is misplaced and is accordingly overruled.

42. We need say no more; the conduct of the 2nd Respondent with regard to the detention of the Subject without trial and without at the very least, production of the Subject before a competent Court or Tribunal for a period of five (5) months was in breach of Articles 6(d) and 7(2) of the Treaty and we so declare. As he is now before a competent authority in the Partner State, we decline to say anything of the proceedings subsequent to 28th January 2011, save that by Rwandan law, to wit Article 100 of the Rwandan code of Criminal Procedure, the Preventive Detention Order cannot exceed one year and the 2nd Respondent must appreciate that fact, noting that the initial order was made on 28th January, 2011 and must necessarily come to an end on 28th January, 2012.

(F) COSTS

43. We have shown above, that the actions of the 2nd Respondent in relation to the Subject were arbitrary and unlawful and the Applicant is properly before this Court. Rule 111 of the Rules of this court provides that **"costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order."** We have found no good reason to order otherwise in this case, and so the 2nd Respondent shall bear the costs of the Reference but payable to the Applicant only.

CONCLUSION

44. While thanking all Counsel appearing for their industry and courtesy extended to the Court, the final orders to be made in this Reference are as follows:

> ***(a) A declaration is hereby issued that the detention of the Subject, Lieutenant Colonel Seveline Rugigana Ngabo by the agents of the Government of the Republic of Rwanda from 20th August 2010 to 28th January 2011 was in breach of the fundamental and operational principles of the East African Community as enunciated in Articles 6(d) and 7(2) of the Treaty which demands that Partner States shall be bound by principles of inter alia, good governance and the rule of Law.***

(b) The case against the 1st Respondent is dismissed with no order as to costs.

(c)The 2nd Respondent shall pay to the Applicant the costs of this Reference.

45 Orders accordingly.

DATED, DELIVERED AND SIGNED AT ARUSHA THIS.....DAY OF 2011

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MARY STELLA ARACH-AMOKO
DEPUTY PRINCIPAL JUDGE

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JOHN MKWAWA
JUDGE

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ISAAC LENAOLA
JUDGE