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

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

## REFERENCE NO.7 OF 2013

**BETWEEN**

**BURUNDIAN JOURNALISTS UNION……..…..APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL OF THE**
**REPUBLIC OF BURUNDI……...RESPONDENT**

**AND**

**FORUM POUR LE REINFORCEMENT DE LA SOCIETE CIVILE**
**THE INTERNATIONAL PRESS INSTITUTE …….**
**MAISON POUR DE LA PRESSE DU BURUNDI……**
**FORUM LA CONSCIENCE ET LE DEVELOPEMENT…….....**
**PEN KENYA CENTRE ……. ……... AMICI CURIAE**
**PAN AFRICAN LAWYERS UNION……..**
**PEN INTERNATIONAL ……**
**REPORTERS SANS FRONTIERS …….**
**WORLD ASSOCIATION OF NEWSPAPERS AND**
**NEWS PUBLISHERS……..**

**15TH MAY, 2015**

## JUDGMENT OF THE COURT

### A. INTRODUCTION

**1.** This Reference was filed on 30th July, 2013 by the above named Applicant and was brought under Articles 6(d),7(2), 27(1), 30(1) of the Treaty for the Establishment of the East African Community ("t**he Treaty**") as well as Rule 24 of the East African Court of Justice Rules of Procedure . Certain orders and declarations are sought in the Reference which we shall reproduce later in this Judgment.

**2.** The Applicant describes itself as a legal person under Burundian Law registered by an ordinance dated 8th July, 2013 although its Articles of Association were adopted on 3rd October, 2009. Amongst its stated objectives are the encouragement of the media to defend freedom of the press and social justice as well as freedom of expression.

**3.** The Applicant's address is Boulevard du 28 Novembre, Robert 1, Avenue de Mars, B. P. 6719, Bujumbura, Burundi and at the time of hearing was represented by Mr. Donald Omondi Deya, Advocate of No.3 Jandu Road, Corridor Area, P.O. Box 6065, Arusha, Tanzania.

**4.** The Respondent is the Attorney General of the Republic of Burundi sued in his capacity as such and also as Minister for Justice and Holder of the Seal and his address is P.0 Box 1880 Bujumbura, Burundi. Mr. Neston Kayobera, Director of Judicial Organization in the Respondent's office, at all times during the proceedings, appeared on his behalf.

**5.** By order of this Court issued on 15th August, 2014 in **EACJ Application No.2 of 2014,** nine non-governmental organizations were joined as *Amici curiae*. They are Forum pour le Reinforcement de la Societe Civile, the International Press Institute, Maison Pour de la Presse du Burundi, Forum la conscience et le Developement, PEN Kenya Centre, Pan African Lawyers Union, PEN International

Reporters sans Frontiers, and the World Association of Newspapers and News Publishers.

**6.** They are all represented by Mr. Vital Neston Nshimirimana, Advocate and his address is 6 Avenue de la mission, BP 1745, Bujumbura, Burundi.

**7.** The *Amici Curiae's* roles in the proceedings were limited to the filing of submissions only.

## B. BACKGROUND

**8.** It is agreed that the Reference concerns **Law No.1/11 of the 4th June, 2013**, amending **Law No.1/025 of 27th November, 2003** regulating the press in Burundi ("**the Press Law**"). From the pleadings, the Press Law was adopted by the National Assembly on 3rd April, 2013, passed by the Senate on 19th April, 2013 and signed into effect by the President of the Republic of Burundi on 4th June, 2013.

**9.** It was the Applicant's contention that the Press Law as enacted, restricts freedom of the press which is a cornerstone of the principles of democracy, rule of law, accountability, transparency, and good governance. Further, that the Press Law violates the right to freedom of expression and all the restrictions contained in it are in contravention of the Republic of Burundi's obligations under Articles 6(d), 7(2) of the Treaty.

**10.** In particular, the Applicant claims that the following Articles of the Press Law allegedly violate the Treaty:-

- Articles 5, 6, 7, 8 and 9, which require compulsory accreditation for all journalists in Burundi;
- Articles 17, 18 and 19 which lay down a broad set of restrictions of what may be published by the media in Burundi;

- Article 20 which requires journalists to disclose confidential sources of information;
- Articles 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 44 and 45 which provide an unduly onerous and restrictive framework for the regulation of the print and web media;
- Article 46 which provides for a prior censorship regime for films proposed to be directed in Burundi;
- Articles 48,49,50,51,52,53 and 54 which provide for a right of reply and correction that is vaguely worded and unduly impedes the media's right to freedom of expression;
- Articles 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67,68 and 69 which provide for a regime of fines and penalties that is allegedly unduly restrictive on the right to freedom of expression and fails to comply with generally accepted principles of criminal law and procedure.

**11.** For the above reasons and other reasons to be set out later, the Applicant beseeches this Court to:-

*i)* ***Declare that the Burundi Press Law violates the right to press freedom and thereby constitutes a violation of Burundi's obligation under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d) and 7(2) of the Treaty;***

*ii)* ***Declare that the Burundi Press Law violates the press' right to freedom of expression and thereby constitutes a violation of Burundi's obligation under the Treaty to uphold and protect human and peoples' rights standards as specified in Articles 6(d), 7(2)of the Treaty;***

*iii)* ***Order Government of Burundi to, without delay:***

*a)* ***Repeal the Press Law; or***

b) ***Amend it in accordance with Burundi's obligations as specified in Articles 6(d) and 7(2) of the Treaty by striking out or amending Articles 5 to 10, 17 to 20, 26 to 35, 44 to 46, 48 to 54, 56 to 64 and 66 to 69 of the Press Law.***

## C. THE APPLICANT''S CASE

**12.** The Applicant's case is contained in the Reference, the annexures to it, a document titled "Amended Reply" filed on 30th March, 2014, written submissions filed on 3rd November, 2014, and Rejoinder submissions filed on 2nd December, 2014.

**13.** Mr. Donald Deya at the hearing also handed to Court his talking points to guide his oral highlights of the above submissions.

**14.** It was the Applicant's contention that the Press Law received wide criticism even before its enactment when the UN Office of the High Commissioner for Human Rights in a press statement urged the Burundi Legislature to review it *"to ensure its conformity with international human rights standards".*

**15.** The African Union Special Rapporteur for Freedom of Expression and Access to Information also contended that *"[criminal defamation, insult and false news] are often used by government officials and corporates interests to punish legislative criminal expression.*" He added that Burundi had acted with a view to restricting amongst others *"infringements that could affect the credit of the state and national economy" and "information that could affect the stability of currency" and* if passed, would have the potential to reverse the gains that the country had made in the area of media freedom.

**16.** After the passage of the Law, the Applicant claimed that criticism continued with among others, the United Nations Secretary General, Ban

Ki Moon regretting that it had a negative impact and urged Burundi to take steps to ensure that its legal framework is aligned with democratic tradition. Other organisations like Human Rights Watch, Transparency International, Reporters without Borders, and Amnesty International posted similar criticism of the Press Law.

**17.** The Applicant also contended that this Court has the jurisdiction by dint of Articles 23 and 27(1) of the Treaty to enforce the Treaty and determine whether Articles 6(d) and 7(2) thereof have been violated by the Republic of Burundi as alleged and that the adoption of the Press Law materially violates the principles enunciated in these Articles.

**18.** Further, that no organ of a Partner State has the same primary jurisdiction as this Court to interprete the Treaty and although a Constitutional challenge was made by *Maison de la Presse du Burundi*, an association under Burundian Law, no decision by the Constitutional Court of Burundi had been received by the time this Reference was filed. In any event, that there is no obligation to exhaust local remedies before approaching this Court on any legitimate matter.

**19.** On the principles enshrined in Articles 6(d) and 7(2) of the Treaty, the Applicant has urged the point that they are more than just aspirational and Partner States have to observe them as a matter of Treaty obligation. That once a Partner State has given force of law to the Treaty, then any laws adopted by it should not conflict with it and the Press Law allegedly fails to meet that expectation.

**20.** On Freedom of the Press, the Applicant contended that the principles of democracy, rule of law, accountability, transparency and good governance cannot be upheld where there is no free press. That without a free press, there is no free circulation of information and ideas and the electorate does not have the opportunity to properly inform itself of

choices placed before it. Such an electorate, uninformed as it is, cannot, in turn, properly hold its leaders to account and this is a denigration of the core principles of good governance and democracy.

**21.** The Applicant has specifically complained about Articles 5-9, 10, 17-19, 20, 26-35, 44-45, 46, 48-54, 56-64 and 66-69 of the Press Law and has averred that all their provisions, cumulatively, violate Burundi's obligations under the Treaty. Of importance in that regard is the argument that the role and actions of the National Communications Council (set up by **Law No.1/03 on 24th January, 2013** revising **Law No.1/18 of 29th September, 2007**), violate the principles of fairness and justice as it is akin to a prosecutor, judge and enforcer in matters of the press and yet, it is directly appointed and controlled by the President and the Minister for Information. That although it has been granted wide powers, its function as a censorship body are totally at the behest of the State. Further, that because of its lack of independence, it should not be in a position of imposing potentially major fines on the media and individual journalists.

**22.** Later on in the judgment, we shall delve into submissions on each of the specifically challenged provisions of the Press Law, but for the above reasons, the Applicant seeks the orders and declarations elsewhere set out above.

## D. THE RESPONDENT'S CASE

**23.** The Respondent's case is contained in the Response to the Reference filed on the 20th December, 2013 and the Supplementary Affidavit of Mr. Sylvester Nyandwi, Permanent Secretary in the Ministry of Justice, sworn on 16th October, 2014. Mr. Kayobera also filed written submissions on 4th December, 2014.

**24.** It was his case that the Press Law is in uniformity with the Treaty and specifically Articles 6(d) and 7(2). Further, the acknowledged fact that it has been criticised by some organisations and individuals does not imply that the said Law violates the Treaty. In addition, that the Parliament of Burundi passed the Press Law as the representative of the people and its decisions cannot be replaced by the wishes of any other organization or person.

**25.** In any event, that the Press Law has been challenged in the Constitutional Court of Burundi and since its decision is yet to be delivered, the Reference is premature and misconceived as the latter Court is the only one with jurisdiction to interpret the legality of the Press Law.

**26.** For the above reasons, the Respondent prays that the Reference be dismissed with costs.

**E. <u>SCHEDULING CONFERENCE</u>**

**27.** At the Scheduling Conference held on 18th September, 2014 pursuant to Rule 53 of the Rules, it was agreed that the Press Law came into effect on 4th June 2012 but that the Constitutional Court of Burundi, after the Reference and a response to it had both been filed, had declared parts of it to be unconstitutional.

**28.** The issues that were therefore, drawn for determination were the following:-

***a) Whether the Reference is properly before this Court;***

***b) Whether the provisions of the Burundi Press Law are inconsistent with and in violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community; and***

***c) Whether the Applicant is entitled to the Reliefs sought.***

**29.** We shall now proceed to address each of the above issues.

**ISSUE (A): WHETHER THE REFERENCE IS PROPERLY BEFORE THIS COURT*:***

**30.** This issue was limited to whether the Reference can stand after a challenge to the Press Law was made before the Constitutional Court of Burundi, which interprets its Constitution, and whose decisions are final and cannot be appealed from.

**Applicant's submissions**

**31.** Invoking Articles 23 (1) and 27(1) of the Treaty, the Applicant submitted that this is the only appropriate Court to rule on questions regarding the interpretation and application of Burundi's obligations under the Treaty. In that regard, it placed reliance on past decisions of this Court in **Anyang' Nyongo' & Others vs. the Attorney General of Kenya, EACJ Ref. No. 1 of 2006; Modern Holdings (EA) Ltd vs. Kenya Ports Authority EACJ Reference No.1 of 2008** and **Emmanuel Mwakisha Mjawasi & 78 Others vs. the Attorney General of Kenya EACJ Appeal No.4 of 2011.**

**32.** In addition, it was the Applicant's submission that under Article 33 of the Treaty, decisions of this Court on interpretation and application of the Treaty shall have precedence over decisions of National Courts on a similar matter. In that regard and in any event, the Applicant argued that there is no requirement that a Party must exhaust local remedies before approaching this Court and relied on the decision of **Rugumba vs. Attorney General of Rwanda , EACJ Reference No.1 of 2012** in that regard.

**33.** The Applicant also made the point that, in the present Reference, whereas the Constitutional Court of Burundi has ruled on the Constitutionality of the Press Law, that fact is not a bar either to the

bringing of the Reference or the jurisdiction of this Court to interrogate that Law from a Treaty perspective and to determine whether a Partner State has breached its obligations under the Treaty.

**34.** Finally, it was the Applicant's case that the Reference is not misconceived and this Court has the jurisdiction to determine the salient and important issues raised in it.

**Respondent's submissions**

**35.** The Respondent on this issue submitted that on 7th January, 2014, the Constitutional Court of Burundi declared that the Press Law was constitutional save for a number of Articles that it struck down.

**36.** In the event, it was his argument that the said Judgment is final and not subject to the intervention of any other court ,including the EACJ, and that a contrary decision to the effect that the Law violates press freedom and the right to the freedom of expression would mean bringing chaos to Burundi and would also "*mean challenging the decisions of the Constitutional Court ….and would contravene the powers conferred to the EACJ by the Treaty."*

**37.** In addition to the above, it was the Respondent's submission that Burundi is preparing itself for General Elections in the first quarter of the year 2015 and to invalidate its lawfully enacted Press Law would jeopardize the fragile peace enjoyed by the people of Burundi taking into accounts its history and future.

**Amici curiae's submissions**

**38.** On this issue, the *Amici Curiae* preferred not to make any submissions at all.

**Determination on issue (a)**

**39.** The jurisdiction of this Court is set out in Articles 23(1) and 27(1) of the Treaty which in a nutshell clothe it with the exclusive mandate to apply and interpret the Treaty save in the context of the proviso in Article 27(1) of the Treaty. This fact is not denied by either Party but the Respondent argued that once the issue of the legality and constitutionality or otherwise of the Press Law has been determined by the Constitutional Court of Burundi, then, that issue is finalized and no other Court, including the EACJ, can be properly seized of it.

**40.** With tremendous respect to the Respondent, what is before this Court is not a question whether the Press Law meets the constitutional muster under the Constitution of the Republic of Burundi but whether it meets the expectations of Articles 6(d) and 7(2) of the Treaty. The Applicant has not cited a single provision of the Burundi Constitution which it deems as violated by the Press Law because that would have been a matter well within the jurisdiction of that Court in any event, and in its decision of 7th January, 2014, well after this Reference had been filed, it determined that Articles 61, 62, 67 and 69 of the Press Law were unconstitutional. In Article 225 of the Constitution of Burundi, the Constitutional Court is the best Judge of the constitutionality of the Laws and interprets the Constitutional Act (translated *ad lib* from the original French).

**41.** The above jurisdiction differs from that conferred by Article 27(1) which provides that this Court shall *"initially have jurisdiction over the interpretation of the Treaty."* The proviso thereof is irrelevant for purposes of this Reference, but suffice it to say that interpretation of the question whether Articles 6(d) and 7(2) of the Treaty were violated in the enactment of the Press Law is a matter squarely within the ambit of this Court's jurisdiction.

**42.** In holding as above, we are aware that the issue of jurisdiction has been settled in previous decisions of this Court. In **Anyang' Nyong'o and Others vs. Attorney General of Kenya and Others** [supra] for example, the Court stated that:-

> ***"Under Article 33(2), the Treaty obliquely envisages interpretation of Treaty provisions by National Courts. However, reading the pertinent provision with Article 34 leaves no doubt about the primacy, if not supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty. For clarity, it is useful to reproduce here, the two Articles in full.***
>
> Article 33 provides:-
>
> ***1. Except where jurisdiction is conferred on the Court by Treaty, disputes in which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the Partner State; and***
>
> ***2. Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.***
>
> Article 34 provides:-
>
> ***Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.***

**43.** Further, in **Democratic Party vs. the Secretary General and the Attorneys General of the Republics of Uganda, Kenya, Rwanda and Burundi, EACJ Reference No.2 of 2012**, the Court rendered itself as follows:-

> ***"Jurisdiction is quite different from the specific merits of any case….***
>
> ***As it is, it should be noted that one of the issues of agreement as set out by the parties is that there are triable issues based on Articles 6, 7, 27 and 30 of the Treaty. That is correctly so since once a party has invoked certain relevant provisions of the Treaty and alleges infringement thereon, it is incumbent upon the Court to seize the matter and within its jurisdiction under Articles 23, 27 and 30 determine whether the claim has merit or not. But where clearly the Court has no jurisdiction because the issue is not one that it can legitimately make a determination on, then it must down its tools and decline to take one more step- see: Owners of Motor Vessel Lillian 'S' vs Caltex Oil (Kenya) Ltd - [KLR]."***

**44.** We wholly agree with the above exposition of the primacy of this Court's jurisdiction over the interpretation of the Treaty and we therefore reiterate the above findings and in determining Issue (a), we have no doubt that the Reference as framed and argued, is properly before us and that this Court has jurisdiction to determine the substantive issues raised in the Reference.

**ISSUE (B) – WHETHER THE PROVISIONS OF THE BURUNDI PRESS LAW ARE INCONSISTENT WITH AND IN VIOLATION OF ARTICLES 6(D) AND 7(2) OF THE TREATY:**

**45.** This is the heart of the Reference and the issue requires that this Court should look at the specific impugned provisions of the Press Law

(cited elsewhere above), consider the purpose thereof and determine whether the enactment of and content of the said law are a violation of the Treaty in terms of Articles 6(d) and 7(2).

**Submissions by the Applicant**

**46.** The Applicant submitted that this Court has previously held that Articles 6(d) and 7(2) are justiciable and create an obligation on every Partner State to respect the principle of good governance which includes accountability, transparency and the promotion and protection of democracy. By acceding to the Treaty, then under Article 3 thereof, The Republic of Burundi, like other Partner States, agreed to be bound ,in the context of this Reference, by the two Articles. Reliance in that regard was placed on the decision of this Court in **Samuel Mukira Mohochi vs. AG of Uganda, Ref. No.5 of 2011 and Rugumba vs. AG of Rwanda,** [supra] where a Partner State in each of the two cases was found to have violated the two Articles of the Treaty and in **Mohochi,** Articles 6(d) and 7(2) were held to be binding and not merely aspirational on their part.

**47.** On the right to information, a free press and freedom of expression, the Applicants submitted that various international and regional Courts, as well as tribunals, have upheld these principles including:-

i) The African Commission on Human and People's Rights which in **Scanlan & Holderness vs Zimbabwe,Comm.297/05 (2005)** stated that, it is the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole, that ensures public order.

ii) The Commission in **Law offices of Ghazi Suleiman vs. Sudan, Comm. No.228/099 (2003)** also cited the Inter-American Court of Human Rights' opinion in **Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,**

**Advisory Opinion of – 5/85 (1985**) and found that freedom of expression is a condition *sine qua non* for the development of political parties, scientific and cultural societies and in general, those who wish to influence society. That it is also indispensable for the formation of public opinion.

iii) The same Commission in **Kenneth Good vs. Republic of Botswana Comm.313/05** also stated that free expression constitutes one of the essential foundations of a democratic society and is one of the basic working conditions for its progress and for the development of every man;

iv) The European Court of Human Rights in **Lingers vs. Austria; Appl. No.9715/82 (1986)** stated that freedom of political debate is at the very core of the concept of a democratic society;

v) In South Africa, in **Government of the Republic of South Africa vs. 'Sunday Times Newspaper' & Anor (2) SA 221 (1994)**, it was held that the role of a free press in a democratic society cannot be underestimated and that a free press is in the front line of the battle to maintain democracy.

vi) In the U.S Supreme Court in **New York Times vs. United States 403 U.S 713 (1971) Black J** held that only a free and unrestrained press can effectively expose the deception in Government;

**48.** In invoking the above decisions, the Applicant argued that the Republic of Burundi has an obligation, under Articles 6(d) and 7(2) of the Treaty, to recognize, promote and protect human and people's rights and abide by universally acceptable standards of human rights which include respect for press freedom. Relying on the decision in **Mandela vs. Falati (I) S.A**

**251(W) 1995,** it thus submitted that, freedom of the *speech "is the freedom upon which all other freedoms depends."*

**49.** On specific provisions of the Press Law, the Applicant submitted as hereunder:-

**a)** That compulsory accreditation under Articles 5-9 of the Press Law is not in conformity with Articles 6(d) and 7(2) because it unnecessarily and unjustifiably restricts those who become journalists. Further, that the National Communications Council enjoys vague discretion to withdraw or refuse accreditation in violation of the rights to freedom of expression.

**50.** In support of this submission, reliance was placed on the decision in **Compulsory Membership in an Association [supra], Scanlon & Holderness [supra], Kasoma vs. AG of Zambia Case 95/HP/29/95** as well as **Sunday Times vs. United Kingdom Appl.no 6538/74 (1979),**a decision of the European Court on Human Rights.

**b)** That the broad and vague restrictions on press freedom under Articles 10 and 17-19 of the Press Law are not in conformity with Burundi's obligations under Articles 6(d) and 7(2) of the Treaty. The submission made in that regard was that, the provisions prohibit the publication of certain categories of information in the print media, website as well as broadcasts. That the said restrictions are impermissibly vague and cannot be justified in a democratic society.

**51.** In support of the above submission, the **UN Human Rights Committee's General comments on the Right to Freedom of Expression** was cited and particularly its comment at paragraph 34 that restrictive measures must conform to the principle of proportionality.

**c)** That the right to protect confidential sources of information under Article 20 of the Press Law is not in conformity with Articles 6(d) and 7(2) of the Treaty. Further, that the Law requires that where the information concerns offences against State security, public order, all State secrets and national defense, or moral and physical integrity of a person, then the source ought to be disclosed. Such disclosure, it was argued, negates the well-established norm under International Human Rights Law that a confidential source of information ought to be protected and the right should only be restricted when a court has ordered disclosure, and in that regard the decision of the European Court of Human Rights in **Goodwin vs. UK Appl. No.28957/95 (2009)** and **Saroma vs. Netherlands, Appl.38224/03 (2010)** were cited in support;

**d)** That print media is specifically regulated by Articles 26-35 and 44-45 and such an action cannot be in conformity with Articles 6(d) and 7(2) of the Treaty. The submission made in that regard was that, the Press Law creates a restrictive framework and limits who may be appointed a director of any media outlet and the said framework is unduly erroneous and is open to abuse because of the uncontrolled powers given to the National Communications Council which in itself is lacking in independence and is under the direct control of the Executive. In addition, that the involvement of the Public Prosecutor, various Ministries and Provincial governance in media regulation is worrisome.

**52.** It was also the Applicant's case that following international norms, only a purely administrative regime for the regulation of print media is permissible and the **African Commission on Human Rights Declaration of Principles on Freedom of Expression in Africa** was cited in support of that proposition.

**53.** The Applicant also cited the Cases of **Lapsevitch vs. Belarus UN Human Rights Committee Comm. No.780/1997 (2000)** and **Media Rights Agenda & Others vs. Nigeria, ACPHR Comms 105/93,128/94,130/94 and 152/96 (1998)** where it was held that restrictions that give governments the power to prohibit publication of any newspaper or magazine cannot be sustained.

***e)*** That prior censorship of any films directed in Burundi under Article 46 of the Press Law cannot be in conformity with Burundi's obligations under Articles 6(d) and 7(2) of the Treaty.

**54.** According to the Applicant, the requirement of prior authorization from the National Communications Council before any film can be directed on Burundi's territory amounts to the creation of an illegimate prior censorship regime. In support of their proposition, reliance was placed on **Bantam Books Inc. vs. Sullivan 372 U.S 58 (1963**) in the U.S Supreme Court and **Observer and Guardian vs. U.K Appl. No.13484/88 (1991)** at the European Court on Human Rights (ECHR). In **Bantam Books**, the Court held that there is a heavy presumption of unconstitutionality with respect to prior restraints of expression while the ECHR stated that prior restraints required the most careful scrutiny.

**f)** That the rights of reply and correction regime under Articles 48-54 of the Press Law being vaguely worded, unduly impedes the media's right to freedom of expression thus, violating Article 6(d) and 7(2) of the Treaty. That by allowing corrections by public authorities in such circumstances, the Press Law legitimates continuous interference with the work of the media.

**55.** In addition to the above submission, the Case of **Miami Herald Publishing Co. vs. Tornillo 418 US 241(1994)** was cited where the US Supreme Court ruled that a mandatory right of reply to the print media

was unconstitutional because it represented an unwarranted interference with editorial matters.

**56.** The Applicant also relied on a statement in the **Report of the Mission to Hungary (29th January 1999)** where the **UN Special Rapporteur on Freedom of Expression** took a skeptical view of the right to reply and stated that it should be allowed, if at all, only as part of the media industry's self-regulation and applied to correction of facts and not opinions.

**57.** Further, the Applicant pointed this Court to **Resolution No. (74)2b** where the **Council of Europe's Committee of Ministers** suggested the limited exceptions that should be made to the rule that the right to reply should only be applicable to facts and not opinions. The Press Law, it argued, provides on the other hand, an unduly broad set of circumstances and allows a near- continuous interference with the work of the media.

**g)** That Articles 56-64 and 66-69 of the Press Law create penalties that are unduly severe and restrictive of press freedom and fail to comply with generally accepted standards of criminal law and procedure. That the penalties also depart from the principle of proportionality and it was the Applicant's argument that under International Human Rights' Law, where a sanction is also placed when restricting the right to freedom of expression, such a sanction should not be disproportionally harsh. In that regard, the ECHR decision in **Tolstry Miloslavsky vs. UK, Appl. No.18139/92 (1993)** was cited in support thereof.

**58.** The Applicants also contended that the National Communications Council is not the appropriate authority to enforce the above Articles of the Press Law because it lacks the necessary independence to do so, as

it is closely tied with the Executive. Its functions were also said to be incompatible with international standards on media regulation and its members work closely with Government ministries and annually submit reports to the Government from whom it also obtains its funds. That all these shortcomings are in conflict with the **Joint Declaration by the UN, OSCE and OAS on Special Mandates**. According to that Declaration, public authorities that regulate the media should be protected from political or economic interference.

**59.** In conclusion on this issue, it was the Applicant's submission that the Press Law, for the above reasons, is in breach of Burundi's obligations under the Treaty and the declarations and orders sought in the Reference should be granted as prayed.

**Submissions by the Respondent**

**60.** The Respondent, on this issue, gave a short and concise response; that since the Constitutional Court of Burundi has interrogated the Press law and found it wanting in a few respects only, then that determination is binding on the Applicant and this Court cannot overturn that decision in any respect as decisions of that Court are not subject to appeal. That to do so would jeopardize the powers conferred on the Constitutional Court of Burundi and *"would bring chaos in that EAC Partner State (Burundi) which was improving her security after many years of civil wars …."(sic)*

**61.** Mr. Kayobera also submitted that the Press Law had passed various stages of scrutiny in Burundi to wit the Cabinet, the National Assembly, the Senate, the Presidency and finally, the Supreme Court, in accordance with the principle of separation of powers (and checks and balances) and this Court cannot now overturn the decisions of these Constitutional Institutions.

**62.** Further, it was the Respondent's case that the orders sought cannot be granted as Articles 6(d) and 7(2) have not been violated in any way.

**63.** In making the above submissions, Mr. Kayobera relied on the decision of this Court in **Rugumba vs. AG of Rwanda** [supra] to make the point that although exhaustion of local remedies is not a condition precedent before filing any matter before this Court, the Applicant had exercised its rights under Burundian Law and obtained a decision at the Constitutional Court and had no reason to come to this Court.

**64.** On the jurisdiction of this Court to grant certain orders, he relied on the case of **Nyamoya Francis vs. AG of Burundi & Anor, Ref. No.8 of 2011** and **Masenge vs. AG of Burundi, Ref. No.9 of 2012** to make the point that this Court, under Articles 23 and 23 of the Treaty as read with Article 30 thereof, cannot issue some of the orders sought in the Reference including annulling the Press Law in part or in whole.

**65.** For the above reasons, Mr. Kayobera prayed that the Reference should be dismissed with costs

**Submissions by the *Amici Curiae***

**66.** The *Amici Curiae* submitted that looked at against past decisions of International and National Courts, the Press Law is inconsistent with freedom of expression and freedom of the Press and therefore, also contravenes the Fundamental and Operational Principles of the Treaty under Articles 6(d) and 7(2).

**67.** In his submission and in furtherance of the above position, Mr. Nshimirimana submitted that there is a crucial relationship between freedom of expression, freedom of the press and the Treaty – projected principles of democracy, the rule of law, accountability, transparency, social justice and the promotion and protection of human rights.

**68.** In that regard, he relied on the following decisions *inter alia:-*

i) **Print Media South African & Anor vs. Minister of Home Affairs & Anor [2009], ZACC 22** where the Constitutional Court of South Africa described the press as "*the public sentinel*", and that the free press lies at the heart of democracy;

ii) **R vs. Secretary of State for the Home Department ex-parte Firms [1999] UKHL 33(1999)** where Lord Steyn stated that free expression is a primary right and without it the rule of law is not possible;

*iii)* **Roriesh Thappar vs. State of Madras 1950 SCR 594** where the Supreme Court of India held that freedom of speech and of the press lay at the foundation of all democratic organizations.

iv) The Canadian Supreme Courts' decisions in **Reference RE Alberta Statues [1938] SCR 100, Irwin Troy Ltd vs. Quebec (AG) [1989]1 SCR 927, Canadian Broadcasting Corp; vs. Brunswick (AG) [1996] 3 SCR 480** where freedom of thought and expression, free discussion of public affairs and a free press were upheld as vital to any democracy and its institutions.

v) In the same Court in the case of **Express Newspapers vs. Union of India 1985 SCR(2) 287** it was held that the purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible Judgments.

**69.** Following the principles enunciated in all the above decisions, Counsel for the *Amici Curiae* submitted that good governance and human rights require freedom of the press and freedom of expression for them to flourish and that the Press Law negates these principles in specific ways as shall be detailed here below:-

*a) Accreditation Regime:*

Like the Applicant, the *Amici Curiae* faulted Articles 5-7 of the Press Law and have relied on both the **Compulsory Membership Case** [supra] as well as **Scanlon & Holderness** [supra] to buttress their submissions.

*b) Content-Based Restrictions:*

Regarding Articles 17 – 19 of the Press Law, it was the *Amici Curiae's* submission that the restrictions contained therein limit the ability of the media to be critical of the Government or government officials. That such restrictions are detrimental to democracy and human rights and Courts in several jurisdictions have recognized this type of restriction as unacceptable.

The *Amici Curiae,* on the above submissions, relied on the decisions in **Mills vs. Alabama 384 U.S. 214 (1996), New York Times Co. vs. Sullivan 376 U.S. 254 (1964), Case of Herera – Ulva vs. Costa Rica[2004] 1ACCHR 3** and **Lingers vs. Austria** [supra].

It was their further submission that content-based restrictions that are unreasonable, for example on grounds of *"morality and common decency"* or "*public order and security"* should not be included in any progressive Statute on the Press.

*c) Right of Reply and right of correction under Articles 48-54 of the Press Law:*

On this point, the *Amici Curiae* submitted that while the right of reply has been recognized in some jurisdictions, others have concluded that it is inconsistent with freedom of expression and freedom of the press.

In support of the latter position, the *Amici* Curiae cited the decision in **Miami Herald Publishing Co. Ltd vs. Turnillo 418 US 241 (1974)** where it was held that editorial content and judgment is the choice of a newspaper and it had not been demonstrated in that case that governmental regulation in that regard is consistent with *inter alia,* the guarantee to a free press.

Further, that the **UN Special Rapporteur on Freedom of Expression and Opinion** stated that if a right of reply should exist, it should ideally be part of the industry's self-regulation and in any case, it should only be feasible when applied to facts and not to opinions. That the same position was taken by the **Europe Committee of Ministers in its Resolution 74(2)) of 2nd July, 1974** while Slovakia amended its law to limit the right of reply regarding comments made about public officials in their individual capacities only.

d) *Disclosure of sources under Article 20 of the Press Law*

The *Amici Curiae* submitted that the requirements that journalists should disclose the identities of their confidential sources that have provided information relating to offences against state security, public order, state defence secrets, moral and physical integrity of one or more persons, is an affront to democracy.

Reliance in buttressing the above submission was placed on the decision in **Goodwin vs. UK (1996) 22 EHRR123** and the Supreme Court of Canada decision in **R. vs. National Post 2010 SCC 16.**

e) *Fines and Penalties in Articles 56-64 and 66-69:*

The submissions on this point were that fine-related Articles in the Press Law are contrary to freedom of expression and freedom of the

Press. That while the Constitutional Court of Burundi appreciated that fact and struck some out of the Articles, a number still remain intact in the Press Law. The cited provisions, it was argued, are vague, broad in content restrictions and lack the clarity required of valid criminal laws.

In this regard, the decision in **Lingers vs. Austria** (supra) was cited and particularly in making the point that criminal sanctions should not be used to hamper the Press in performing its task as a purveyor of information and public watchdog.

**70.** In a nutshell, the *Amici*, like the Applicant, found fault in both the spirit and content of the Press Law and urged the Court to allow the Reference as framed.

**Determination on Issue (b)**

**71.** From the submissions above, it is clear that the Applicant and the *Amici* have taken the view that, looking at the freedom of the press and freedom of expression as vital components of every democracy, the Press Law does not meet that test and more so, in spirit and content, is a violation of Articles 6(d) and 7(2) of the Treaty.

**72.** The Respondent on the other hand has taken the view that the Press Law was tested by the Constitutional Court of Burundi and was found wanting in only a few Articles. That this Court must similarly and specifically find and hold that Articles 6(d) and 7(2) have not been violated.

**73.** Articles 6(d) and 7(2) of the Treaty, for avoidance of doubt, provide as follows:-

Article 6(d):

**"*The fundaments principles that shall govern the achievements of the objectives of the Community by the Partner States shall include;***

> ***Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."***

Article 7(2):

> ***"The Partner States shall 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."***

**74.** This Court has in a number of its decisions interpreted the two Articles as being justiciable and not merely aspirational and binds all Partner States to the principles enunciated therein. For example, in **Samuel Mukira Mohochi vs. AG of Uganda** (supra) the Court stated thus:-

> ***"We fully associate ourselves with the above description and we are of the firm belief that herein lays the explanation why the framers of the Treaty went beyond stating the principle and instead negotiated and agreed upon a specific minimum set of requirements that constituted the good governance package that, in their wisdom, suited the EAC integration agenda. The***

***package, for purposes of the EAC integration, as set out in Article 6(d), includes:***

**a)** ***Adherence to the principles of democracy,***

**b)** ***The rule of law, accountability,***

**c)** ***Transparency,***

**d)** ***Social justice,***

**e)** ***Equal opportunities,***

**f)** ***Gender equality, as well as***

**g)** ***The recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.***

***Apart from asserting that the provisions are aspirations and broad policy provisions for the Community, political character and with a futuristic and progressive application, Counsel did not substantiate. They did not explain how and why these fundamental principles are mere aspirations. They failed to show us why we should depart from the position of this Court succinctly stated in the IMLU Case (supra) that these provisions constitute responsibilities of Partner States to citizens which, through those States' voluntary entry into the EAC, have crystallized into actionable obligations, breach of which gives rise to infringement of the Treaty."***

**75.** We reiterate the above holdings and further, in the present Reference, the substantive issue to be addressed is the freedom of the press and freedom of expression in the context of Articles 6(d) and 7(2) as read with the Press Law. In that regard, there is no doubt that freedom of the press and freedom of expression are essential components of democracy. The submissions by the Applicant and the *Amici* on the correlation between the two have not been controverted at all and the

Respondent did not submit on the legal foundation for the twin freedoms, the manner in which they can be restricted nor did he attempt to either distinguish the authorities cited nor submit on any legal authority where a contrary finding was made.

**76.** For avoidance of doubt, we have perused all the authorities submitted by Counsel for the Applicant and the *Amici Curiae* and we are satisfied that they properly express the Law in various jurisdictions. We are particularly persuaded that the holding in **Print Media South Africa** (supra) is pertinent to this Reference. In that case, **Van der Westhuizen J**. held *that* ***"freedom of expression lies at the heart of democracy"*** and went to state as follows:-

> ***"……..It is closely linked to the right to human dignity and helps to realize several other rights and freedoms. Being able to speak out, to educate, to sing and to protest, be it through waving posters or dancing, is an important tool to challenge discrimination, poverty and oppression. This Court has emphasized the importance of freedom of expression as the lifeblood of an open and democratic society"***

**77.** Similarly, in **Ramesh Thappar vs. State of Madras 1950 SCR 594**, the Supreme Court of India stated thus:-

> ***"Freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for proper functioning of the processes of popular government, is possible."***

**78.** The Supreme Court of Canada in **Edmond Journal** (supra) put the matter beyond debate when it emphatically held that:-

***"It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and inhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over emphasized."***

**79.** We adopt the above holdings and findings and all the others cited by the Applicant and *Amici* but closer home, in the case of **Cord vs. the Republic of Kenya and Others H.C. Petition No.628 of 2014**, the High Court of Kenya as a Constitutional bench of 5 Judges stated as follows on the rights to a free media and freedom of expression:-

> ***"It may be asked: why is it necessary to protect freedom of expression, and by extension, freedom of the media? In General Comment No.34 (CCPR/C/GC/34) on the provisions of Article 19 of the ICCPR, the United Nations Human Rights Committee emphasises the close inter-linkage between the right to freedom of expression and the enjoyment of other rights. It observes at Paragraphs 2 and 3 as follows:***
>
> > ***2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.***
> >
> > ***3. Freedom of expression is a necessary condition for the realization of the principles of transparency and***

***accountability that are, in turn, essential for the promotion and protection of human rights.***

**80.** The Court went further to state that:-

***"The importance of the freedom of expression and of the media has been considered in various jurisdictions, and such decisions offer some guidance on why the freedom is considered important in a free and democratic society. In Charles Onyango-Obbo and Anor v. Attorney General (Constitutional Appeal No.2 of 2002..), the Supreme Court of Uganda (per Mulenga SCJ)*** **stated that**:-

> ***"Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with J. J. Rousseau's version of the Social Contract theory. In brief, the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the raison dêtre of the State is to provide protection to the individual citizens. In that regard, the State has the duty to facilitate and enhance the individual's self-fulfilment and advancement, recognising the individual's rights and freedoms as inherent in humanity…***
>
> ***Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance" (***Emphasis added).

**81.** We agree with the Learned Judges and in applying all the above principles to the present Reference, a number of issues must be pointed out.

**82.** Firstly, under Articles 6(d) and 7(2), the principles of democracy must of necessity include adherence to press freedom.

**83.** Secondly, a free press goes hand in hand with the principles of accountability and transparency which are also entrenched in Articles 6(d) and 7(2).

**84.** Thirdly, by acceding to the Treaty and based on our finding above that Articles 6(d) and 7(2) are justiciable, Partner States including Burundi, are obligated to abide and adhere by each of the fundamental and operational principles contained in Articles 6 and 7 of the Treaty and their National Laws must be enacted with that fact in mind. In stating so, we have previously held that whereas this Court cannot superintend the organs of Partner States in the ways they enact their Laws, it is an obligation on their part not to enact or sustain laws that completely negate the purpose for which the Treaty was itself enacted – See **Mohochi** (supra)

**85.** Having said so, what is the test to be applied by this Court in determining whether a National Law, such as the Press Law, meets the expectations of the Treaty? The Treaty gives no pointer in answer to this question but by reference to other courts, it has generally been held that the tests of reasonability and rationality as well as proportionality are some of the tests to be used to determine whether a law meets the muster of a higher law. In saying so, it is of course beyond peradventure to state that Partner States by dint of Article 8(2) of the Treaty are obligated to enact National Laws to give effect to the Treaty and to that extent, the Treaty is superior law.

In that regard, in the **CORD Case** (supra), the Learned Judges stated as follows:-

> ***"We are guided by the test for determining the justiciability of a rights limitation enunciated by the Supreme Court of Canada in the case of R vs. Oakes (1986) ISCR 103 to which CIC has referred to the Court. The first test requires that the limitation be one that is prescribed by law. It must be part of a statute, and must be clear and accessible to citizens so that they are clear on what is prohibited.***
>
> ***Secondly, the objective of the law must be pressing and substantial, that is it must be important to society: see R. vs. Big Drug Mart (1985) ISCR 295. The third principle is the principle of proportionality. It asks the question whether the State, in seeking to achieve its objectives, has chosen a proportionate way to achieve the objectives that it seeks to achieve. Put another way, whether the legislation meets the test of proportionality relative to the objects or purpose it seeks to achieve: see R. Vs Chaulk (1990) 3, SCR 1303.***
>
> ***If a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test. They must be rationally connected to the objective sought to be achieved, and must not be arbitrary, unfair or based on irrational considerations. Secondly, they must limit the right or freedom as little as possible, and their effects on the limitation of rights and freedoms are proportional to the objectives."***

**86.** We shall apply the above test as we interrogate each of the five areas of concern raised by the Applicant as regards the Press Law.

**87.** We deem it appropriate to address each of them as framed and very well-articulated by Learned Counsel for the *Amici Curiae*.

I. *Accreditation Regime*

**88.** Articles 5-7 of the Press Law provide for accreditation of journalists but the main complaint made is that whereas accreditation *per se* is not objectionable, it is the manner of implementation of the law that is problematic. It has been argued by the Applicant in that regard that the National Communications Council combines the role of prosecutor, judge and enforcer in one body and exercises wide power over the media and individual journalists.

**89.** On our part, while we quite understand the complaint, we have no more than bare submissions on the point. We so say because, while accreditation *per se* cannot be a bad thing and where all that is required is details of a journalist's educational background and all other information regarding him, we also heard the Applicant to be saying that in the execution of the law, the National Communications Council has wide powers but that is all that was said. As to how those powers are amenable to abuse, we do not know and in submissions, neither the authorities cited nor the submissions themselves remove the whole issue from the realm of conjecture.

**90.** In any event, what is undemocratic and where is the violation of freedom of the press when a journalist is for example issued with a "*press pass*?" (See Article 5 of the Press Law). Article 7 of the Law gives the reason for the press pass as being an entitlement *"to access all places where journalists are required to perform their job of obtaining information"* and that with the press pass, journalists *"have access to areas reserved for the press, to stadiums, airports, Court rooms in* Court *and Tribunals and generally speaking, are authorised to enter all official or public events."*

**91.** As for accreditation, it is restricted to "*any foreign journalist wishing to cover one or several activities taking place on the territory of Burundi."* One fails to see the basis for the complaint in this regard. Accreditation in our view is a purely technical and administrative registration procedure for foreign journalists – (see **Scanlon & Holders** ). In the circumstances, it cannot amount to a violation of the freedom of the press.

**92.** Returning to the role of the National Communications Council, in Article 9 of the Press Law, *"it reserves the right to refuse or withdraw accreditation from journalists who abuse the facilities granted to them."* Where is the violation of the freedom of the press when the Council can only act in the event of abuse by the particular journalist? Freedom of the press has never been an absolute right in any democracy and the present limitation is reasonable and justifiable. In the circumstance, we see no violation of Articles 6(d) and 7(2) as claimed with regard to accreditation of foreign journalists who wish to cover any activity in Burundi.

II. *Content-Based Restrictions:*

**93.** Articles 17-19 of the Press Law are in Section 2 of that Law under the sub-title, **"*Duties of Journalists."*** The Applicant's complaint relate to the duties imposed on a journalist:-

i) to communicate only balanced information, the sources of which have been rigorously checked – Article 17;

ii) to refrain from publishing or broadcasting information which contravenes national unity, public order and security, morality and common decency, honour and human dignity, national sovereignty, privacy, individuals and presumption of innocence – Article 18;

*iii)* not to disseminate information which relate to national defence secrets, the stability of the currency, privacy (including personal and medical

files), confidentiality of a legal investigation at the pre-trial stage, affronts and insults against the Head of State, calls and advertisements that incite revolt, civil disobedience, unauthorised demonstrations, defend crimes, blackmail or fraud, racial ethnic hatred, defamatory, insulting, libellous, offensive articles or reports regarding public or private persons, propaganda against Burundi, information that may harm the credit of the state and national economy, information concerning military operations, national defence, diplomacy, scientific research and reports of commissions of inquiry by the State, identity of rape victims, protection of minors against obscene and/or images and debates held in closed session concerning minors without prior authorisation - Article 19.

**94.** We must note from the outset that of all aspects of the Press Law, this part caused us great concern. We say so because while some parts of it are obviously reasonable and require no more than the justification outlined in the language used, other provisions are less clear. For example, the restrictions on protection of minors and identity of rape victims can hardly be faulted and so are those that require communication of balanced information the sources of which have been rigorously checked. The latter is what is required of any professional including a journalist and the fact that it has been made into law cannot be an unreasonable provision.

**95.** Our difficulty is with the provisions that relates to say, stability of the currency, reports of commissions of enquiry etc. What justification and what plausible reason can justify such provisions in any law? In our view, citizens of any democratic State should be entitled to information that informs their choices in matters of governance. The above restrictions appear to unduly deny that right.

**96.** The Respondent never addressed us on this issue and in such a situation, we are reminded of the words of Iain Currie and Johan de Waall who in **Bill of Rights Handbook** stated thus:-

> ***"Freedom of speech is valuable, not just by virtue of the consequences it has, but because it is an essential and 'constitutive' feature of a just political society that government treat all its adult members … as responsible moral agents. That requirement has two dimensions. First, morally responsible people insist on making up their own minds what is good or bad in life or in politics, or what is true and false in matters of justice or faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hold opinions that might persuade them to dangerous or offensive convictions.***
>
> ***We retain our dignity, as individuals, only by insisting that no one – no official and no majority has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it."***

**97.** We also agree with the submissions by the *Amici Curiae* that where restrictions are placed on the enjoyment of any right, the same must be reasonable and the restriction must also be rational. What is the reason and rationale preferred for some of the restrictions above? We see none and in **S. vs. Mamabolo [2001] ZACC 17,** Kriegler J. stated as follows:-

> ***"Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced***

***conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore, we should be particularly astute to outlaw any form of thought-control, however, respectably dressed."***

**98.** What we understand the Learned Judge to have been saying, and we agree, is that a government should not determine what ideas or information should be placed in the market place and information and we dare add, if it restricts that right, the restriction must be proportionate and reasonable. We have grave doubts about some of the aspects of the Press Law in applying that test.

**99.** In that regard the following restrictions, in our view, cannot face the test of reasonability, rationality or proportionality i.e. the restriction not to disseminate information on the stability of the currency, offensive articles or reports regarding public or private persons, information that may harm the credit of the State and national economy, diplomacy, scientific research and reports of Commissions of Inquiry by the State.

**100.** Despite a blanket concern therefore by the Applicant about Articles 17, 18 and 19 of the Press Law, noting the circumstances and history of the State of Burundi, and noting that freedom of speech and freedom of the press are not absolute, only the above provisions can properly be said to be unduly restrictive of these rights and we have said why.

**101.** In the circumstance, while we find good reason to uphold some of the provisions in Articles 17-19 of the Press Law, some of those provisions

cannot pass the test we set out above and are therefore in violation of Articles 6(d) and 7(2) to that extent only.

**102.** We therefore find and hold that *"the restrictions not to disseminate information on the stability of the currency, offensive articles or reports regarding public or private persons, information that may harm the credit of the State and national economy, diplomacy, scientific research and reports of Commissions of Inquiry by the State"* in Article 19 of the Press Law are in violation of the principles enshrined in Articles 6(d) and 7(2) of the Treaty.

III. *Right of Reply and Correction*

**103.** Chapter.VI of the Press Law is headed ***"The Right of Reply, Correction and Redress."***

**104.** On this point, we shall spend very little time because looking at the authorities cited by both the Applicant and the *Amici Curiae,* it is our view that in the market place of ideas, if a person is prejudiced in any way by a publication (as is the language of Article 48 of the Press Law), there is good reason to entitle that person to a reply, correction and if need be, a redress.

**105.** Elsewhere above, we have indicated that we find no fault with any law that requires a journalist to publish any accurate information. In the event that he does not, then Chapter VI of the Press Law protects a party prejudiced by such inaccurate reporting. Such a party should, as a maxim of democracy, be entitled to a right of reply.

**106.** In any democracy, even victims have rights and we see no violation of Articles 6(d) and 7(2) of the Treaty as alleged on this issue.

IV. *Disclosure of Confidential Sources*

**107.** Article 20 of the Press law obligates journalists to *"reveal their sources of information before the competent authorities*" in situations where the information relates to State security, public order, defence secrets and the moral and physical integrity of one or more persons.

**108.** On this issue, we are of the same mind as the Court in **Goodwin vs. UK** (supra) where it was stated as follows:-

> ***"Protection of journalistic sources is one of the basic conditions for press freedom .... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."***

**109.** We have taken the above position because whereas the four issues named are important in any democratic state, the way of dealing with State secrets is by enacting other laws to deal with the issue and not by forcing journalists to disclose their confidential sources.

**110.** As for the issue of moral and physical integrity of any person, the obligation to disclose a source is unreasonable and privacy laws elsewhere can be used to deal with the matter. There are in any event other less restrictive ways of dealing with these issues.

**111.** We have no hesitation in holding that Article 20 does not meet the expectations of democracy and is in violation of Articles 6(d) and 7(2) of the Treaty.

V. *Fines and Penalties*

**112.** The contested fines and penalties are contained in Chapter VII of the Press Law which is headed, ***"Penalties and Punishments for Press Offences."***

**113.** It has been agreed that the Constitutional Court in its Judgment of 7th January, 2014 determined that *"Articles 61, 62, 67 and 69"* of the Press Law were unconstitutional and to that extent, we find that any reference to those Articles is misguided.

**114.** In submissions however, the Applicant argued that the sentences meted out for breach of any provision of the Press Law are *"disproportionately harsh*", as did the *Amici.*

**115.** On our part, we find it very difficult to make a finding over penalties and fines. We say so because a comparative analysis of the offences in Burundian Criminal Law has not been made by the Applicant neither can we. We cannot substitute our subjective thinking based on submissions alone to determine that say **BIF2,000,000** is an exorbitant figure if imposed as a fine.

**116.** While therefore, the principle that an offence must attract a penalty comparable to its gravity is agreeable to us, in the present Reference, the context in the making of such a finding is lacking and in that event, we are unable to determine that there is any violation of Articles 6(d) and 7(2) of the Treaty.

**117.** In conclusion on Issue (b), we find that only the following Articles of the Press Law do not meet the expectations of Articles 6(d) and 7(2) of the Constitution:-

- ***Article 19(b), (g)(i) and part of (j), which lay down a broad set of restrictions of what may be published by the media in Burundi and we have indicated the extent to which they violate the Treaty;***
- ***Article 20, which requires journalists to disclose confidential sources of information;***

## Whether the Applicant is Entitled to the Reliefs Sought

**118.** We have addressed all the issues placed before us for determination and turning back to the prayers sought, in prayers (i) and (ii), the Applicant sought orders that this Court should:-

> ***i) Declare that the Burundi Press Law violates the right to press freedom and thereby constitutes a violation of Burundi's obligation under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d) and 7(2) of the Treaty; and***
>
> **ii)** ***Declare that the Burundi Press Law violates the press' right to freedom of expression and thereby constitutes a violation of Burundi's obligation under the protect human and peoples' rights standards as specified in Articles 6(d), 7(2)of the Treaty.***

**119.** We have found that certain provisions of the Press law offend the principles in Articles 6(d) and 7(2) of the Treaty and we shall make appropriate orders in that regard.

**120.** In prayer (ii), the Applicant sought orders that this Court should:-

> ***"Order Government of Burundi to, without delay:***
>
> *a)* ***Repeal the Press Law; or***
> *b)* ***Amend it in accordance with Burundi's obligations as specified in Articles 6(d) and 7(2) of the Treaty by striking out of or amending Articles 5 to 10, 17 to 20, 26 to 35, 44 to 46, 48 to 54, 56 to 66 and 66 to 69 of the Press Law."***

**121.** We have read the Treaty and particularly Article 27(1) thereof. Having found the Press Law wanting in the above respects, we find and hold that

we have no jurisdiction to give any orders as prayed above but we shall instead direct the Republic of Burundi, within its internal legal processes to implement this Judgment under Article 38(3) of the Treaty.

**122.** As for costs, none were sought by the Applicant, but the Respondent did so. Our finding is that no party should benefit from costs as the matters in issue were for the benefit of the wider public and falls in the category of public interest litigation.

**Final Orders**

**123.** Having found as above, the final orders to be made are as follows:-

i) **Prayers (i) and (ii) of the Reference are granted in the following terms only:-**

*a)* **It is hereby declared that Article 19(b), (g), (i) and part of (j) of the Burundian Law No.1/11 of 4th June 2013 amending Law No.1/025 of 27th November 2003 which restrict dissemination of information on the stability of the currency, offensive articles or reports regarding public or private persons, information that may harm the credit of the State and national economy, diplomacy, scientific research and reports of Commissions of inquiry by the State are in violation of the principles enshrined in Articles 6(d) and 7(2) of the Treaty.**

b) **It is hereby declared that Article 20 of the Burundian Law No.1/11 of 4th June 2013 amending Law No.1/025 of 27th November 2003 to the extent that it obligates journalists to reveal their sources of information before the competent authorities in situations where the information relates to offences against State security, public order,**

**State defence secrets and against the moral and physical integrity of one or more persons is in violation of Articles 6(d) and 7(2) of the Treaty.**

c) **The Republic of Burundi shall, in accordance with Article 38(3) of the Treaty take measures, without delay, to implement this Judgement within its internal legal mechanisms;**

d) **Prayer (iii) in the Reference is dismissed; and**

e) **Each Party shall bear its costs**.

**124. Orders accordingly**.

**Delivered, dated and signed this 15th day of May, 2015 at Arusha.**

**……..**
**ISAAC LENAOLA**
**DEPUTY PRINCIPAL JUDGE**

**……..**
**FAUSTIN NTEZILYAYO**
**JUDGE**

**……**
**MONICA MUGENYI**
**JUDGE**