IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION

(Coram: Tunoi, VP; E. R. Kayitesi, and J. M. Ogoola, JJA)

APPEAL N0. 2 OF 2012

(Arising out of Application No 4. of 2011 in Reference No. 4 of 2011)

BETWEEN

ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA ....APPELLANT

ATTORNEY GENERAL OF THE REPUBLIC OF KENYA .....INTERESTED PARTY

AND

OMAR AWADH AND 6 OTHERS .....RESPONDENTS

(Appeal from the Ruling of the First Instance Division at Arusha by J. Busingye, PJ; J. J. Mkwawa, and J. B. Butasi, JJ, dated 1st December 2011, in an Application arising from Reference Nº. 4 of 2011).

JUDGMENT OF THE COURT

FACTUAL BACKGROUND

1. The Appeal before this Court has its origin in Application No. 4 of 2011 arising from Reference No. 4 of 2011 lodged in the First Instance Division on 15th June 2011. The facts that gave rise to this Reference, happened in both Kenya and Uganda.

2. The Applicants in the above Reference averred that they were arrested, and forcibly removed from Kenya through abduction between 22nd July and 17th September 2010, and handed over to Uganda where they are now illegally detained, without due process of extradition; and that their impending trial in Uganda is in violation of their fundamental rights, both under Kenyan and Ugandan Constitutions, under International law, and also under the Treaty establishing the East African Community ("the Treaty"). It is against those acts that the Applicants (Omar Awadh, Hussein Hassan Agade, Idris Mogandu, Mohamed Hamid Suleiman, Yahya Suleiman Mbuthia, Habib Suleiman Njoroge) moved the First Instance Division of this Court for orders that:

    a) *"This motion…… before this Court……be lodged without payment of fees and the fee in connection with the said Reference be waived and/or refunded as the case may be.*

    b) *Due to the nature and urgency of this Application, and to avoid irreparable injustice this Honourable Court be pleased to prohibit, restrain and injunct the Government of Uganda (the Second Respondent herein) ……., from proceeding with the prosecution and/ or*

trial of the Applicants pending the hearing and the determination of Reference No. 4 of 2011 before this Honorable Court.

c) *The time lag for institution of this Reference as prescribed by Article 30 (2) of the Treaty be condoned by extension of time and the Reference be deemed to be within time.*

d) *The costs of and incidental to this Application abide the result of Reference No.4 of 2011 lodged with this Honorable Court``.*

3. At the hearing of the matter, the Applicants dropped prayers (c) and (d), and maintained prayers (a) and (b) relating to fees and injunction, respectively.

4. However, in opposition to the Application, the Second Respondent (Attorney General of Uganda) raised a preliminary objection on limitation of time. He contended that the Reference on which this Application is based is itself out of time, consequently the Application is time barred. The First Instance Division on 1st December 2011, concluded that the alleged Treaty violations complained of in the Reference, were continuous; could not be subjected to mathematical computation of time; and that, therefore, the Reference was properly lodged before it. Accordingly, that Court disallowed the objection.

5. Aggrieved by the above decision, the Appellant (Attorney General of Uganda) lodged an appeal to this Appellate Division on 17th February 2012, based on only one ground of appeal as framed in the Memorandum of Appeal, namely: "*that the First Instance Division erred in law in finding that Reference No. 4 of 2011 was not time barred and was properly before the Court".*

6. The Appellate Division of this Court is mandated under Articles 23 (3) and 35A of the Treaty and Rule 99 of the East African Court of Justice Rules of Procedure, to hear and dispose of this appeal.

7. During the Scheduling Conference, Learned Counsel for both Parties decided to adopt all their original arguments set forth in their written submissions that were filed in the lower Court; and would only highlight them during the hearing.

8. Mr. Ngugi, Learned Counsel for the Attorney-General of Kenya as an interested party, associated himself with the Appellant's prayers that this Court ought to reverse the decision of the First Instance Division.

9. Mr. Mureithi, Counsel for the Respondents, informed the Court that the Third Respondent, Mr. Mohamed Adan Abdul was released from Uganda in November 2011 and was, therefore, no longer interested in this appeal.

APPELLANT'S SUBMISSIONS

10. The Appellant relied on the one ground of appeal, namely that the Learned Judges of the First Instance Division erred in law in finding that the Reference No. 4 of 2011 was not time barred. Specifically, the Appellant contended that the Application was time-barred because the Reference on which it is based was itself filed in Court out of the time limit prescribed by Article 30 (2) of the Treaty. The Appellant explained that while the acts complained of in that Reference (including the arrest, rendition and detention of the Respondents), happened between 22nd July and 17th September 2010, the Applicants had filed their Reference only on 9th June 2011, vastly in excess of two months after they, and persons claiming under them, became aware of the alleged infringement.

11. The Appellant submitted that while the Court did not challenge this evidence, it nevertheless overruled the preliminary objection. In doing so, the Court held that it was alive to the strict limitations of Article 30 (2); but that the acts complained of were continuous, not capable of mathematical computation of time and, therefore, they could not be subjected to the time-limit of Article 30 (2) of the Treaty.

12. The Appellant contended, in particular, that their Lordships' interpretation that Article 30(2) does not apply to the continuing violations, in effect disregards the time limit stipulated by that Article. Such an interpretation is an error of law because it ignores and negates the ordinary meaning of Article 30(2).

13. The Appellant further contended that the Court had no inherent power to give an interpretation which does not give effect to the Treaty; or which invalidates a Treaty provision. Furthermore, by invalidating the time limit, the Court acted in violation of Article 9(4) of the Treaty, which binds it as an Organ of the East African Community to give effect to the provisions of the Treaty.

14. The Appellant highlighted the point that the effect of their Lordships' interpretation of Article 30 (2) is that regardless of a claimant's knowledge of an infringement, he remains at liberty to bring an action at any time as long as the infringing situation continues. Actions would thus arise at the discretion of a claimant regardless of the time lapse from when the infringement first occurred or when he first became aware of it. Such an interpretation is erroneous. It invalidates the ordinary meaning of Article 30(2).

15. Lastly, the Appellant raised the issue of their Lordships' reliance on their own decision in *Reference No.3/2010:* ***Independent Medico Legal Unit v Attorney General of the Republic of Kenya.*** *That decision has since been overturned by the Appellate Division of the Court in* ***Appeal No.1/2011: Attorney General of the Republic of Kenya v Independent Medico Legal Unit****.* The Appellate Division rejected the concept of continuing violations; and opted, instead, for the strict interpretation of Article 30 (2), with emphasis on upholding and protecting the principle of legal certainty.

16. In sum, the Appellant avers that the Court has a duty to interpret the East African Community Treaty according to its ordinary meaning, and that the ordinary meaning of Article 30 (2) of that Treaty is that a claimant is required to file his Reference within two months of the act or after the offending act comes to the claimant's knowledge.

17. The learned Counsel for the interested party associated himself with the Appellant's submissions. He emphasized the interpretation of Article 30 (2) and its applicability to the facts of the instant case. He underscored to the Court the fact that a reading of Article 31 (1) of the Vienna Convention requires fora such as this Court, when interpreting a Treaty to do so in good faith, in accordance with the ordinary meaning to be given to the terms of the Treaty in their context, and in light of its objects and purpose. Moreover, Article 9 (4) of the East African Community Treaty places temporal limits within which all organs and institutions of the Community, including this Court, are under a duty: "*to perform the functions and act within the limits of the powers conferred upon them by or under this Treaty".*

18. He contended that the First Instance Division, in its interpretation of Article 30 (2), erred in its decision that the Article provides for a concept of "continuing violations". Article 30 (2) does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the claimant; nor is there any power to extend that time limit. Indeed, the jurisprudence of the Appellate Division of this Court has put an end to that dispute: the said Article in letter and in spirit, does not conceive of any concept of continuing act(s) or violation(s).

RESPONDENTS' SUBMISSIONS

19. In response, the Respondents focused on two points: First, whether the Treaty provides room for the concept of continuing violations? Second, whether Article 30 (2) must be given a strict interpretation; including whether the Court has power to extend the time limit provided in that Article 30 (2)? On all these, the Respondents emphasized the applicability of the principle of continuing violations; and the doctrines of the interpretation of the Treaty as a whole, and in good faith.

20. The Respondents opposed the Appeal, contending that the Reference was not time barred because the infringements inflicted on them are still ongoing. They explained that their arrest and rendition without due process of extradition, were clearly unlawful;

given the illegality of a rendition in abuse of process. Accordingly, the subsequent detention and all that followed, are likewise illegal, because the origin of the whole process was illegal. Consequently, the current detention of the Respondents, based on those illegalities, is equally unlawful. As the detention is still ongoing, it has inevitably become a continuing violation.

21. The Respondents asserted that a Reference or an Application cannot be lodged in the Court until this illegal situation ends. They emphasized that this is the position in the European Commission of Human Rights, in the Inter-American Court, and in the African Human Rights Commission.

22. They based their above assertion on the various jurisprudence of those Judicial Bodies which have permitted exceptions to the six month limit on instituting claims, and have legitimized the principle of continuing violations. They added that the African Human Rights Commission has gone so far as to distinguish between "instantaneous"` acts and "continuing" violations.

23. The Respondents considered that as long as their detention continues, the " two month limit" to institute proceedings as provided for by the Treaty, could not run against them. They prayed that the Court, under the first limb of Article 30 (2), hold that the actions complained of are still extant and, therefore, time has not even started to run. Therefore, the Court should make an exception to the time limit, and conclude that this is the interpretation to be given to Article 30 (2) for cases of continuing detention. Such interpretation would help to avoid the impunity of the continuing violations of the rights of accused persons.

24. The Respondents concurred with the Court that nowhere in the EAC Treaty, nor in the corpus of its related instruments, is the term "continuing violation", or "continuing breach" to be found. Notably, the term is also not found in any of the constitutive instruments of the African, European or Inter-American Systems. Nonetheless, they submitted that, despite this, and as is evidenced in the above jurisprudence, judicial and

quasi-judicial bodies have defined, interpreted and continue to enforce the principle of continuing violations.

DECISION OF THE COURT:

25. After considering arguments from both parties, the First Instance Division made a ruling that the Reference was not time barred. The ruling and order of the First Instance Division were based on the reasoning that the alleged violation was a "*continuous act which cannot be subjected to mathematical computation of time"***.**

26. The Appellate Division of this Court has carefully considered the rival submissions of the Parties in support of their respective positions**.** First and foremost, we find (supported by the Parties' own affirmation), that the acts complained of (such as the arrest, rendition and detention of the Respondents) happened between 22nd July and 17th September 2010; and that those acts were well known by the Applicants/Respondents, right from the inception of the various acts.

27. In the above regard, it is plainly evident that both parties have no dispute concerning the fact that the Applicants promptly filed their legal challenges on behalf of their relatives (the Respondents) in the domestic Courts – namely, the High Court of Kenya and of Uganda, seeking their release. Later on, they lodged their Reference in this Court, in June 2011. This was more than one year after the expiry of the two-month time limit prescribed by the Treaty.

28. This Court finds that there can be no disputation on the computation of time. This is so because the Applicants readily admitted to having been aware of the acts complained of, as and when those acts were happening – as evidenced, in any event, by the prompt lodging of their complaints in the national courts of Kenya and Uganda. That being the case, this Court must conclude that the Reference, having been filed in this Court more than one year after the happening of the events complained of, was time-barred for non-compliance with Article 30 (2) of the Treaty. Consequently, the

applicability of the second limb of that Article is not relevant to the circumstances complained of in the instant Reference.

29. However, the position is vastly different as regards the application of the first limb of Article 30 (2). The Applicants/Respondents met a formidable challenge on the applicability of that particular limb to their complaint concerning "the detention of the Respondents".

INTERPRETATION OF ARTICLE 30 (2) OF THE TREATY:

30. Article 30 (2) states 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"`*

31. In interpreting Article 30 (2) in the ***Independent Medico*** **case** (supra), this Court held that:

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

32. We find the submissions of the Respondents to be ingenious in respect of the interpretation of Article 30 (2). Mr. Mureithi, for the Respondents, contended that Article 30 (2) contains two considerations as to when time begins to run. Under the first limb of the provision, time begins to run within two months of the action complained of. Under the second limb, time begins when the party coming before the Court had knowledge of the action complained of.

33. While it seems easy to apply and interpret the first limb of the provision, it might not be as straight forward to apply or interpret its second limb, which starts with the phrase **"in the absence thereof".** Indeed, it is quite evident that the second limb comes into play only *where* the first limb cannot apply. However, it is not clear as to *what* should be absent. Is it the enactment, publication, directive, decision or action complained of? Or is it the date of such enactment, publication, directive, decision or action? To any reasonable mind, the first question can only be answered in the negative, since one cannot complain against something that does not exist. We are convinced that by the phrase **"in the absence thereof",** the drafters of the Treaty meant "**in the absence of any known date thereof**".

34. The second limb would then apply where the claimant does not know the exact date of the action complained of. For instance in the case of ***The Attorney General of the Republic of Rwanda v Plaxeda Rugumba,*** **Appeal No. 1 of 2012,** decided by this Court on 22nd June 2012**,** the action complained of was the incommunicado detention of the Complainant. The detainee's sister who filed the complaint in Court, did not and could not know of the date of her brother`s detention. But that is not the same situation in this instant case of **Omar Awadh.**

35. In the circumstances of the instant Appeal, the Court must determine the specific actions complained of. In this regard, the Respondents indicated that **the dominant action complained of was the detention**. They also alleged other wrongful actions, such as their arrest and rendition. Nonetheless, they conceded that all those were "instantaneous actions", meaning that they are capable of being time barred – unlike detention which is "continuous". For the purposes of this Appeal, therefore, detention is the action which the Respondents aver cannot be time-barred (on account of its being a "continuous violation").

36. The Court finds that the detention complained of followed a chain of events – all of which can be very well located in time. Applying Article 30 (2) and following the approach described above would establish whether the first limb of the provision applies

to the detention complained of — which detention is allegedly still ongoing. We should count the two months commencing from the day when the detention started. The Respondents, on the other hand, contended that the time limit should start to run when the detention ceases. In our considered view that contention would not fit with what the first limb of Article 30 (2) dictates — namely, that:

> "*The proceedings provided for in this Article shall be instituted within two months of the … action complained of*"`

37. The "action" in the instant case was the detention. That detention was effected and started on the same date of the arrest and rendition of the Respondents. Accordingly, it is clear that the two months started to run from the day that the arrest/rendition/ and detention were effected; and the resultant cause of action before this Court is clearly time - barred. This is the proper interpretation to be given to the first limb of Article 30 (2), in accordance with the ordinary meaning given to its terms and in their context — as stipulated by Article 31 (1) of the Vienna Convention. We should emphasize that the cause of action for the Reference now before this Court is not the alleged unlawful detention of the Respondents in Uganda, nor indeed their arrest and rendition from Kenya to Uganda — which are a matter of criminal law. Rather, it is the alleged infringement of the EAC Treaty by the Partner States of Kenya and Uganda – which is a matter of civil law.

38. The Appellant contended that the two-month limit starts running from the date the Respondents became aware of their detention. But that contention is tantamount to jumping to the second limb of Article 30 (2) which, as we have indicated earlier, comes into play only where the first limb cannot apply. Indeed, in this Court's view, the second limb is a defence for he who alleges that he did not know the date of the enactment, publication, directive, decision or action. He may come to Court years after the enactment, publication, directive, decision or action to prove to the Court that indeed he had no such knowledge. In that event, the Court would compute the two months from the date that person acquired such knowledge.

UNLAWFUL DETENTION.

39. The Court noted the Respondents' express admission that the victims are currently before the competent courts of Uganda, having been committed to that Country`s High Court, where judicial procedures are ongoing. Specifically, the Respondents/Applicants in their written submissions of 10th August 2011(at p. 6) lodged before the First Instance Division, stated as follows:

> *4. That the Uganda Government has already filed charges against the Applicants and intends to try them in Uganda for alleged murder, terrorism and suicide attacks;*
> *5. That although already charged with various offences, the trial of the Applicants in Uganda has not commenced but is expected to commence any time"*

40. Notwithstanding the above, the Respondents contend that their current detention in Uganda is unlawful because, it is based on an arrest and a rendition that were unlawful *ab initio* (from the beginning). They aver, therefore, that the resulting detention is equally unlawful and as such a continuing violation; and that, in these circumstances, computation of the time limit will not be possible, until the cessation of their continuing detention. It is quite evident, therefore, that what is construed as "continuing violations" derives from an interpretation of the first limb of the Article 30 (2) to determine when an act complained of begins and ends.

41. First, this Appellate Division of the Court has a duty to put an end to the confusion surrounding the legal analysis of the detention of the Applicants/Respondents. According to the Constitution of Uganda, as we read it, this kind of detention is "unlawful" when a person arrested is kept in custody beyond the prescribed time of 48 hours, without being produced before a competent court of law and charged with a crime. The continued detention of a suspect who has already been produced before a court and charged with an offence, is quite a different matter altogether.

42. It is erroneous to refer to the current situation of the Respondents as unlawful detention. This is for two reasons: first, the Respondents went before the courts of Kenya upon their arrest; and right now, they are currently before the competent courts in Uganda duly charged and awaiting trial. Second, it is for the courts of law, not anyone else, to judge whether or not a detention is unlawful. Lastly, the illegality of the Respondents' detention cannot be determined by the alleged abuse of process in effecting their arrest and rendition.

43. We note in particular, that both the arrest and the rendition were proximate. Both happened simultaneously, virtually on the same date(s) — dates of which the respective Respondents were fully aware: a fact which the Respondents have not and cannot deny or contest. On the contrary, they have conceded as much. It was precisely because of this knowledge that the Respondents had their matters brought promptly to the Kenyan courts (and subsequently to the Ugandan courts). Alas, later the same Respondents came to this Court to file their complaint, but too late: approximately one year after the expiry of the time limit of two months prescribed in Article 30 (2) of the Treaty.

44. In the instant case, both parties including the Court itself recognize that the Respondents were arrested in one country and rendered to another without the intervening process of extradition. But whether this was unlawful and whether any such unlawfulness has affected or tainted the Respondents' initial and even current detention, are matters to be decided by the courts, including this Court, on the merit of the case. Cleary, under our law, such merits can only be gone into by this Court if the Respondents are able to surmount the preliminary but formidable hurdle of the time - bar that is prescribed by Article 30 (2).

DETENTION AS A CONTINUING VIOLATION AND THE PRINCIPLE OF LEGAL CERTAINTY IN LIGHT OF THE MEANING OF ARTICLE 30 (2).

45. The Court finds also that the situation of the Respondents in the instant case is quite different from the situation of the **Plaxeda Rugumba** case (supra). In the **Rugumba**

case, all that the Appellant needed to prove was the date the Applicant became aware of the action. The Appellant had raised a preliminary objection to the effect that the Reference was time barred. The Applicant argued that he did not know the date his client had been arrested and detained; and the Respondent failed to prove that the Applicant knew that date. We held that, in that case, the first limb of Article 30 (2) could not apply; and stated that:

> *"In our view, it was not possible with any degree of certainty to determine when time begun to run. The pleadings do not tell us. Furthermore, the affidavits of the subject's sister and wife are merely hearsay in that they only depone that "they were told" of the detention. …… the onus was on the Appellant to establish the time at which the detainee or his family members or his lawyers were told or otherwise made aware of the detention of Lt. Col. Ngabo. The Appellant failed to discharge that burden. He cannot turn around to impeach the Respondent for any failure to file the Reference within the two (2) months prescribed under Article 30 (2) of the Treaty."*

46. In deciding that case as we did, this Court could not pinpoint the date on which the Applicant had knowledge of the time Rugumba was arrested. The Appellant himself was not able to provide the Court with any clear and tangible evidence of when the Applicant, or Rugumba' s family members became aware of Lt. Col. Ngabo's detention as a starting point for computing the time limit of Article 30 (2).

47. However, we note that in the instant case, the Appellant based his argument on the principle of legal certainty. The principle is reflected in this Court's recent decision in the **Independent Medico case** (supra), in which the Court stood firm and clear on the principle of legal certainty; and gave the following interpretation of Article 30 (2):

> ''*Again, no such intention [to extend the time limit] can be ascertained from the ordinary and plain meaning of the said Article [30 (2)] or any other provision*

of the Treaty. The reason for this short time limit is critical – it is to ensure ***legal certainty*** *among the diverse membership of the Community":*
see ***Case 209/83 Ferriera Valsabbia Spa v EC Commission OJ C2009, 9.8.84 p.6, para 14, ECJ*** *quoted in* ***Halsbury's Laws*** *(supra)* ***Para 2.43.***

48. The Court is still of the same view: that the objective of Article 30 (2) is legal certainty. It still notes that the purpose of this amended provision of the Treaty was to secure and uphold the principle of legal certainty; which requires a complainant to lodge a Reference in the East African Court of Justice within the relatively brief time of only two months. Nowhere does the Treaty provide for any "`exception"` to the two month period. Therein lies the critical difference between the EAC Treaty (which governs trade matters as the objective of cooperation between Partner States) on the one hand; and, on the other hand, Human Rights Conventions and Treaties which provide "exceptions" (for continuing violations) on the grounds that securing the fundamental rights of the citizens is of paramount essence. For this reason, the Judicial Bodies that have Human Rights jurisdiction must strenuously uphold and protect all such rights through a liberal and purposive interpretation.

49. As regards the instant case, however, there is nothing in the express language of Article 30 (2) that compels any conclusion that continuing violations are to be exempted from the two month limit. Nor does the nature of the particular violation alleged in the instant case demonstrate any intent on the part of the drafters of the Treaty to treat unlawful arrest and rendition as "continuous violations" for purposes of the time limit of Article 30 (2) – see the two part test (for determining "continuing offenses") set by the USA Supreme Court case of **Toussie v United States 397 US 112 (1970):** namely, (a) if the explicit language of the statute compels such a conclusion; and (b) if the nature of the crime is such that Congress must assuredly have intended that it be treated as a continuing one.

50. It is clear that both the content and intent of Article 30 (2) provide a legal framework for determining the starting date of an act complained of, or alternatively the date on which the complainant first acquired the requisite knowledge — all with the objective of ascertaining the commencement and expiry of "the time limit of two months". In that spirit, the Article does not contemplate the concept of "continuing" breach or violation, in as much as the acts complained of, or the time when a claimant had knowledge of the breach or infringement, have a definitive starting date and expiry date within the two - month period. The only "continuing" period envisaged under the Article is the grace period (implicitly allowed in the second limb of that Article) for the complainant to have knowledge of the act. From the date of such knowledge, the legal clock for the two-month period starts to tick.

51. Furthermore, in respect of the principle of legal certainty, the Court must underscore the necessity for strict application of the two-month limitation period of Article 30 (2). To contend, as the Respondents do, that complainants should wait (possibly for years and years) until the end of a "continuing breach" before lodging their complaint in this Court, is to militate against the very spirit and grain of the principle of legal certainty. True, the complainant has an interest, a personal interest, in prosecuting his case against the particular breach. But so too do all the other citizens of the East African Community, its organizations, institutions, and Government entities of the Partner States – whose collective interest is in ensuring legal certainty in the efficient and effective operation of the affairs of the Community throughout all the territories of the Partner States.

52. The solution that was designed to balance the interest of the individual complainant against the collective interests of all the other Community citizens, is the overall framework of Article 30 – in which the collective interest of legal certainty is secured under Article 30 (2), but without compromising the individual complainant's right to judicial redress (if promptly lodged within two months under Article 30 (2), including the grace period afforded the complainant to acquire knowledge of the particular act). That grace period can be as long as it takes for the complainant to be possessed of the

requisite knowledge. Only after the complainant has that knowledge, will the period of the two-month limitation begin to run. That, in this Court`s view is a perfectly fair, equitable and rational solution to balance the competing interests. We find nothing arbitrary, capricious, or unreasonable concerning this comprehensive solution of Article 30 – especially so in a Treaty which governs not Human Rights matters, but Trade and Social interests within and between the Partner States. In this regard, it is necessary to emphasize that the Court does not, as yet, have the substantive Human Rights jurisdiction envisaged under Article 27 (2) of the Treaty. Nonetheless, as this Court has consistently held, mere inclusion of allegations of human rights violations in a Reference will not deter the Court from exercising its interpretation jurisdiction under Article 27 (1) of the Treaty – see especially the case of **Katabazi and 21 Others v EAC Secretary General and Attorney General of Uganda, Reference No. 1 of 2007.**

53. Indeed, this Court is not alone in strictly applying the legal certainty principle. We are fortified in this regard by the rich history and rationale of the European Court (the prototype, after which our Court was modeled) concerning the brevity and strict application of the two-month limitation rule. The European Court applies the short limitation period strictly, precisely because of the rationale of legal certainty — see for instance, that Court`s judgment of 14 September 1999, on appeal by the Commission of the European Communities: **Appellant v. Assi Doman Kraft AB, Iggesunds Bruk AB, Korsnas AB MoDo Paper AB**; and on appeal against the Judgment of the Court of First Instance of European Communities (2nd Chamber) of July 1997 **in Case T-227/95 Assi Doman Kraft Products and Others Commission [1197] ECR II-1185**, seeking to have that judgment set aside. The Court held……in paragraphs 57, 60, 61 that:

> "*It is settled case-law that a decision which has not been challenged by the addressee within the time-limit laid down by Article 173 of the Treaty becomes definitive as against him (see, in particular, the Judgment in case 20/65 Collotti v Court of Justice [1965] ECR and the Judgment in TWD Textilwerke Deggendorf."*

54. In that case of **TWD Textilwerke Deggendorf** (*supra*) – the rationale was elaborated at length as follows:

> "*The court held that Article 173 of the Treaty precluded the recipient of state aid who could have challenged the Commission decision declaring the aid unlawful and incompatible with the Common Market by bringing an action for annulment within the time-limit laid down in the fifth paragraph of Article 173 of the Treaty and who did not bring such an action from challenging before the national court the measures implementing the Commission decision by seeking to rely on the illegality of that decision. A ruling to the opposite effect would give such a party the power to overcome the definitive nature which the decision has in relation to him once the time-limit for bringing legal proceedings has expired.*
>
> *Such a rule is based in particular on the consideration that the purpose of giving time-limits for bringing legal proceedings is to ensure certainty by preventing Community measures which produce legal effects from being called in question indefinitely as well as on the requirements of good administration of justice and procedural economy".* [emphasis added]

55. The Respondents laboured valiantly to avail to us all the abundant jurisprudence of the European Human Rights Court, the Inter-American Court, the African Commission and others, that recognize the principle of "`continuing violations"`. While this jurisprudence is perfect for its particular circumstances, it is all about Human Rights violations, governed by particular Conventions on Human Rights. Furthermore, the background to that jurisprudence concerns criminal matters, whose prosecution does not in, most cases, have a prescription of time limit. In the instant case, the Respondents` cause of action was clearly the alleged infringement of Partner States' Treaty obligations – a matter which lies outside the province of human rights and the realm of criminal law.

56. We note that even the applicability of the continuing offense doctrine, as a criminal law concept, requires extreme judicial circumspection. The doctrine is usually advanced by the Prosecution to avoid the running of the statute of limitations – see the United States of America case of **State v Ganier, 227 Kan.670, 672 (1980)**. In this regard, the USA Supreme Court did, by this doctrine, create an exception to the general limitations rule by carving out the continuing offense doctrine – namely, that the statute of limitations for continuing offenses begins to run not when the elements of the offense are first met, but when the offense terminates – see the Supreme Court`s seminal decision of **Toussie v the United States 397 US, at 115 (1970**). Nonetheless, in that very same hallmark decision (at p.115), the Supreme Court recognized the ``inherent tension between the continuing offense doctrine and the statutes of limitations``. It, therefore, directed that the continuing offense doctrine `` be applied sparingly``. In his penetrating article: **Easing The Tension Between Statutes of Limitations And The Continuing Offense Doctrine, 7 NW. J.L. and Soc. Policy, 219 at p.222 (2012), http://scholarlycommons.law.northwestern.edu/nj/sp/vol7/iss2/1,** JEFFREY R. BOLES categorically and emphatically states that:

> "the [continuing offenses] doctrine *is disfavored by the Supreme Court and should be applied only in rare circumstances……it circumvents the protections to dependants afforded by the statutes of limitations … it is part of a larger shift towards retributivism [ie proportionate punishment]…. [is] disruptive… [and needs] reforming and restoring order in this problematic area of jurisprudence".*`

57. As regards the doctrine of continuing violations as a civil (not criminal) concept, the principle of legal certainty, is equally upheld in the courts where issues of human rights are litigated. The courts have underscored the necessity, even in human rights litigation, for litigants in any society to canvass their rights prompty, at the earliest possible opportunity — thereby, to assure non-derogation of the accrued rights and relationships of other members of society. Hence, the generally applied principle of law and equity to the effect that: he who claims a right, must not (like Rip Van Winkle) sleep or slumber on his right. An example of this philosophy is reflected in Uganda's

Constitutional Court decision in **Joyce Nakacwa v Attorney General and Others; Constitutional Petition No. 2 of 2001 [2020] UGCC1"** in which the Court made the following highly pertinent and perceptive statements:

> *"In view of the specified time limitation on other jurisdictions the Court is not in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame but in my mind there can be no justification for the Petitioner`s delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases. I have carefully considered the case of DOMINIC ARONY alluded to earlier in this judgment where my learned colleagues in a bench of three Judges awarded damages to the Applicant who came to Court to enforce his fundamental rights after about 20 years. With great respect, I wish to depart from their finding concerning limitation. In my view, a party who wishes to enforce his rights in court must do so within a reasonable time and must be prompt. In addition it would be in the interest of good public administration to adjudicate finally in such matters at the earliest time possible. The claim before me transcends nearly six (6) Parliaments and two political regimes or administrations. Granted that one of the possible reasons for not coming to court was fear of the then regime, surely such grave violations as alleged ought to have been instituted so as to test the regime, the courts and the pretence and the commitment of the then regime to adherence to democratic principles. In each phase of history it is a few brave people who have taken change to higher heights. The timid souls have had no place. Surely the applicants were soldiers and made of sterner stuff! If they sat on their rights for 24 years how would ordinary folks fair"? [emphasis added]*

58. Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The

overarching rationale for statutes of limitations, such as the time limit of Article 30 (2) of the EAC Treaty, is to protect the system from the prejudice of stale claims and their salutary effect on the twin principles of legal certainty and of repose (namely: affording peace of mind, avoiding the disruption of disruption of settled expectations, and reducing uncertainty about the future) — see TYLER T. OCHO and ANDREW J. WISTRICH'S article: **The Puzzling Purposes of Statutes of Limitations, 28 Pac. L.J. 453, 460 (1997),** quoted in JEFFREY R. BOLES' article (supra) at p.255, footnote 37. Time limits provide predictability both to the litigants and to society at large — see **Dogett v US, 505 US, 647, 665-66 (1992).**

CONCLUSION

59. The Court finds the Respondents' argument that when the act complained of is a continuous detention, the starting date for computation of its limitation time is the day when it ceases is erroneous. It is erroneous in terms of the East African Community Treaty, and of the economic and social interests of the Community. Moreover, the principle of legal certainty requires strict application of the time-limit in Article 30 (2) of the Treaty. Furthermore, nowhere does the Treaty provide any power to the Court to extend, to condone, to waive, or to modify the prescribed time limit for any reason (including for " continuing violations").

60. In light of all these considerations, the Court concludes (1) that the starting date of an act complained of under Article 30 (2) (including the detention of a complainant), is not the day the act ends, but the day it is first effected; (2) that the Respondents in the instant case filed their Reference out of the prescribed time; and (3) that,consequently, the underlying Reference to this appeal is time barred for not complying with the provisions of Article 30 (2) of the Treaty.

In the result:

1. This appeal is hereby allowed.

2. The Application arising from Reference No. 4 of 2011 lodged in the First Instance Division on 15th June 2011, is hereby struck out for having been filed outside the time limit prescribed under Article 30(2) of the EAC Treaty.
3. Each party shall bear its own costs of the appeal.

It is so ordered.

Dated and delivered at Arusha this **15th day of April, 2013.**

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Philip K. Tunoi
VICE PRESIDENT

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Emily R. Kayitesi
JUSTICE OF APPEAL

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James Ogoola
JUSTICE OF APPEAL