

# **RIGHTS AND FREEDOMS IN EAC: AN ASSESSMENT OF THE IMPLEMENTATION OF THE CMP FROM A HUMAN RIGHTS PERSPECTIVE**

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***Introduction (Presented to the 2014 Secretary Generals Forum- Entebbe Uganda)***

The Protocol for the Establishment of the Common Market provides for basic freedoms and rights to be exercised by East African citizens within the territory of the Common Market Area. The CMP outlines these freedoms and rights as:

- Free movement of goods;
- Free movement of persons;
- Free movement of workers;
- Right of establishment;
- Right of residence;
- Free movement of services; and
- Free movement of capital.

The CMP recognizes that the Exercise of these freedoms and rights shall be progressive beginning 1st July 2010 when the Common Market Protocol becomes operational. The progressive implementation of the Common Market will be defined in the relevant Schedules which have been provided as Annexes to the Protocol and are integral part of the Protocol that will be managed in accordance with the relevant laws of the Community, including domestication of the laws by the EAC Partner States. We shall briefly look at the state of realization of these rights within the CMP territory. Generally progress on implementation of actions to realize envisaged rights has been very slow and in some cases almost non-existent. The main draw-back appears to be the CMP recognition that implementation be progressive which has in effect tied it to bureaucratic policy, legal and political processes at the EAC institutional level but also within and among the member states.

## **Free movement of goods and services**

The right to freely move goods and services is at the core of the CMP and it is perhaps the most talked and written about in business circles. While there have been considerable improvements in actualization of the CMP in formal cross border trade and clear indications

that trade among the EAC member states continues to improve full realization of the right has been slowed down by, slow formulation and enactment of requisite trade and policy legal frameworks as well as slow implementation or outright reluctance to implement enacted frameworks largely evident in the existence of numerous non-tariff barriers to trade among the EAC member states. According to the 2012 *State of East Africa Report* trade between the EAC countries expanded from \$2.2 billion in 2005 to \$4.1 billion in 2010. However, the region's trade with the rest of the world expanded faster, driven by its import-consuming economic growth performance. The result has been that in relative terms the share of total trade that is conducted between EAC countries has stayed within a narrow 11–13 per cent range since 2005 meaning that it could do better. The *State of East Africa Report 2012* highlights persistent high level poverty as leading among development and trade challenges to the EAC. Data suggest that the number of East Africans living below the poverty line increased from 44 million to 53 million, even despite all EAC countries, with the exception of Burundi and Kenya, reducing the share of people living under the poverty line. There is also an intensifying challenge of states and people *consistently achieving food security* across the region through production and trade.

As the process of regional integration deepens, the challenges such as increasing poverty (above) that relate to the fundamental purpose of the regional integration endeavor, namely the transformation, in a positive way, the quality of life and welfare of EAC citizens are intensifying. Key among trade challenges is that despite all the positive changes and recorded increases in cross border trade since the treaty, all indications are that benefits are tilted in favour of the more established formal trade sector. This is despite strong suggestions that the informal cross border trade sector contributes greatly to regional integration because of the large numbers of traders involved and goods and services exchanged as well as contributing to effort to reduce poverty within the region. Unlike the established formal businesses, informal cross border traders lack strong institutions that would advocate their rights and demand for a fair share of the efforts at expanding free trade to also consider their sector.

Numerous studies have demonstrated that the women dominated small scale and largely informal trading activities contribute significantly to poverty reduction, employment and wealth creation in Africa<sup>1</sup>. Of the different trading activities, informal cross border trade features prominently among many women and men's individual strategies for self -

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<sup>1</sup> Kristof Titeca and Celesten Kimanuka *Walking in the Dark: Informal Cross Border Trade in the Great Lakes Region* UN- Women 2012

Nsolo J. N. Mijere *Informal and Cross- Border Trade in the Southern African Development Community* OSSREA 2009

Uganda Bureau of Statistics *The Informal Cross Border Trade Qualitative Baseline Study* 2008

*Unleashing the Potential of Women Informal Cross Border Traders to Transform Intra-African Trade- Facts and Figures* UN-Women 2011

employment, poverty reduction and wealth creation in East Africa as elsewhere in Africa. There is growing body of evidence that informal cross border traders make an important contribution to economic growth and government revenues. Informal cross border trading activities particularly by women have cushioned the effects of the financial crisis and the food crisis on African countries by addressing vital issues of livelihoods such as food and income security, yet they are not well catered for by mainstream trade policies, institutions, and programs thus undermining the profitability and visibility of their activities as well as compromising achievement of their rights as enshrined in the CMP.

Border communities should have been on the frontline of CMP rights realization but all the evidence points to the contrary. Border communities have been identified as a development priority for several reasons, key among them being that they form an important link in trade as they facilitate its passage at the entry and departure point as well as impact on how it is conducted preferably in a secure and mutually profitable environment. Border communities in EAC among others have been identified as more likely to be marginalized and suffer inadequate service delivery partly because they are far from the Centre and on the geographic margins of the respective countries. There is also a general perception of insecurity along borders within EAC partly because of comparatively limited presence of civil security personnel as well as adequate border patrols. The latter is often limited by poor infrastructure. The most vibrant activity across borders remains arguably informal cross border trade conducted by large populations of traders to be found in mostly informal settlements on both sides of the borders as well as large populations of small scale traders who pass through border points on a regular basis. Despite common knowledge and even acknowledgement in the EAC treaty and trade protocols of the importance of informal trade, the sector and traders in particular are bogged down by numerous bottlenecks among them what is highlighted below.

Crossing borders is a risky even dangerous business for traders who face, extortion, harassment, physical and sexual violence, largely directed at women traders, general financial loss through direct robbery as well as bribes and illegal levies by government border officials. Majority of traders operate within an unregulated “survival economy”, they lack representation and even official recognition by legal entities and structures as traders. A most unfortunate result of the anonymity of such trade is that they are often regarded as “illegal traders” with customs, security and immigration officials legitimizing the harsh treatment they suffer on the basis of illegality. In extreme cases, the business is criminalized as smuggling which tends to make it more dangerous for the traders. The above situation underscores the need to take all relevant measures to boost people’s participation in trade equitably across the region and focus at all levels of trading- the crucial one being informal trade since this is where millions of people across EAC secure their livelihoods.

It is apparent that optimum benefits from regional integration and trade in particular shall only be realized when there is truly free movement of people and goods across secured borders of the EAC partner states. Rampant fear, skepticism and cynicism that is common among traders and in particular women ICBT<sup>2</sup> may derive from relative ignorance of the text of the treaties and customs protocol but it is even more so derived from practical observation of conditions of trade at borders. Informal cross border traders are at the frontline of effects of integration policy legal reforms and actions and therefore form a good barometer with which to measure progress. Added to this is the fact that they constitute the majority of traders and improvement in their conditions would have the greatest impact on trade numerically across the region. Women ICBT therefore have to feel the treaty and protocol for there to be any significant gains and this may only happen when;

It is imperative to emphasize those efforts to improve conditions of trade equitably inclusive of informal cross border traders (ICBT) is not just an issue of fairness or social justice, there are many additional benefits that will accrue from a better trading environment if such efforts are successful. Livelihoods for poor women and men- by extension poor households at the borders and across the region will be secured through increased reliable income flows from trade. Liberalization of trade in food items shall lead to better access and with it improved food security with regard to availability even with the challenges of crop failure in many parts. There is evidence to show that food shortages in parts of the region are caused not by scarcity but by inability of traders from the region to access those markets. It is also highly possible that producer prices will improve because of more predictable markets and with it stimulation of overall production of goods and services. This would be a sure way of reducing rampant feminized poverty across the region. Other benefits will come from formalized trade that will see women ICBT recognized and enabled to benefit from services such as credit. Multiplier effects of such an improved trading environment for ICBT shall include more peace along the borders and a reduction in SGBV particularly targeted at women and girls

### ***Free movement of labor***

A 2012 assessment of the achievements and Challenges of Implementation of the EAC Common Market Protocol in Kenya with respect to Free Movement of Labour came up with three major short-comings of the CMP that are related to human rights issues in the labour market<sup>3</sup>. The first concerns workers who during the duration of their work permit (say 5 years)

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<sup>2</sup> as witnessed in the literature

<sup>3</sup> A paper was commissioned by FES and written by Victor Ogalo in 2012; <http://www.fes-kenya.org/media/activities/EAC%20Common%20Market%20Protocol%20and%20Free%20Labour%20Mobility%20Workshop/CMP%20Conference%20Report%20November%202012%20Nairobi.pdf>

decide to undertake part-time training/course in the host country. The CMP fails to elaborate whether such workers also need to have student passes which becomes the basis for denial of such workers the right to part time training. In second place, the CMP prohibits students from other partner states from engaging in employment in the host country except internships and industrial attachment which is against the principle of non-discrimination. Thirdly, the CMP did not envision a situation or indeed provided for cushioning in cases where regime or administration changes in a country might result in public policy changes that discriminate against foreign workers. The limitation on movement of persons and workers on the basis of national policy or security or health might therefore be abused

Other labor challenges for Kenya include several cases of denial of work permits or undue delays in processing of work permits that could have negative implications for EAC workers involved despite favorable reforms in the immigration laws to enable movement of workers from the region. This is an indication that the legislative reforms that ought to facilitate work permit acquisition by foreign workers in Kenya have not been matched by practice.

It is also apparent that the old habit of rent-seeking is still embedded in the new dispensation which complicates the realization of benefits of labor policy reforms. Questions arise why for example it takes 6-9 months to process work permit applications when the same can be processed in 2-3 weeks where one goes through "Immigration Consultants".

The Ministry of Immigration made changes in the immigration laws of Kenya through a Gazette Notice of July 2012, that prohibit granting of work and residence permits to foreign workers if they are 35 years and younger and if they are not assured of monthly salary of US\$2000 and more. The salary cited is high by EAC standards not to mention that most workers who usually move to other countries are youth in the age bracket being restricted-making the regulations blind to the fact that a larger share (more than 60 percent) of the EAC population is youth below 35 years of age. The new rules have also locked out expatriates from employment in the medical, real estate, engineering, accountancy and legal professions. As is the case with other EAC Partner States, Kenya has not harmonized its social security policies, laws and systems with other EAC countries. Kenya is also yet to harmonize its curricula, examinations, standards, certificates and accreditation of education and training institutions- previously Kenyan graduates who have earned their degrees in other countries in the region have been rejected or denied equal participation in the recruitment process. All these issues make it difficult to realize the right of free movement of labor in Kenya.

The situation in Uganda is similar<sup>4</sup>. Uganda issues visitor's pass to EAC citizens free of charge in accordance with the protocol. However, a visitor's pass allows EAC citizens to enter and stay in Uganda for up to 2 months and not 6 months as provided in the CMP. Such is despite free movement of persons being guaranteed under Article 7 of the Uganda Constitution. Movement of persons must be undertaken within the "best interest of the public", health and security. Consequently, entry of prohibited immigrants is illegal. The immigration controls

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have also not been eliminated. Entry into and exit out of Uganda must be at designated points in accordance with the national laws and immigration procedures.

With regard to employment the Minister is empowered by the country's Employment Act to limit range of jobs open to migrants. This is against the principle of non-discrimination.

### **Conclusion**

Navigating the CMP within respective EAC member state protectionist and nationalistic legal policy environments that are slow to adopt the CMP appears to be the main structural drawback to realizing EAC citizen rights. It is also apparent that attitudes towards East Africans other than nationals as foreigners die hard and tend to compromise effectiveness of policy legal changes even when they are enacted. The lack of a consistent tradition of adherence to the rule of law and enforcement of respect for rights even of nationals among the EAC states also means that issues of rights are constantly put on hold as security considerations take precedence in the approach towards regional integration.

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