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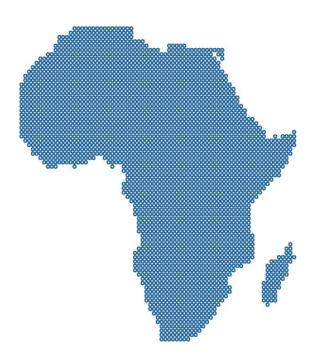
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Case Review:

Examining the Implications of the East African Community Strategies on Irregular Migration Governance

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Abstract:

In recent decades, governance of irregular migration has attracted the interests of many Regional Economic Communities (RECs). This is due to the impacts that irregular migration causes on individual states' social, economic and political sectors and beyond. While the East African Community (EAC) Treaty and the Protocol on Peace and Security list some mechanisms for governing irregular migration, some critical structural and policy reforms at both Community and Partner States level are necessary for implementing such strategies.

This paper examines the implications of the EAC strategies on the Community and Partner States on irregular migration governance as contained in the aforementioned legal instruments. This paper shows that the existing policies and structures at the Community and in the Partner States do not support the realization of the listed mechanisms, thus devoid of implementation.

Keywords: *Irregular Migration; Irregular Migrants; (Irregular) Migration Governance; East African Community; Regional Economic Communities (RECs); Partner States*

1. Introduction

Governance of irregular migration through RECs involves multiple measures ranging from legislative and structural to operational. In some regions and sub-regions the emphasis has been placed on the role of consultative processes, and informal multilateral platforms for enhancing cooperation among stakeholders. In other blocs, specific policy and operation coordination agencies have been set up. Moreover, agreements connecting the sending and receiving zones or countries have frequently been resorted to. These policy, legal and institutional frameworks aim to enhance cooperation in addressing common security challenges, safeguarding the rights and interests of migrants and states, and harnessing economic potentials through addressing the migration-development nexus. It follows that governance of irregular migration becomes necessary to achieve REC's objectives. This creates

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necessary conditions to be fulfilled at different levels of implementation by a range of stakeholders.

Regarding the East African Community (EAC), the legal instruments of the Community list several mechanisms and signal out some obligations to be fulfilled by the Community and Partner States in realizing the Community objectives towards combating irregular migration. They include enhancing cooperation in handling cross-border crimes, establishing common communication facilities for border security and exchanging information on national mechanisms for combating criminal activities.[1] Along the same line, the EAC Protocol on Peace and Security calls for establishing a regional database on cross-border crimes, trainging, and sharing information on the *modus operandi.*[2]

In the next sections, the article appraises different EAC and Partner States legal instruments governing intra-regional and international migration. It also examines different implementation strategies and discusses the implications of EAC's socio-economic and political activities to migration governance.

2. EAC Regional (Irregular) Migration Governance Strategies

Like in other RECs, migration has been among the important agenda for EAC integration process since its re-establishment in 2000. Cognizant of the impact of migration to regional integration and beyond, most regional economic and political communities consider migration governance a crucial component of their economic, political, social and security agendas. Indeed, migration and economic integration have been simultaneous processes of regionalism in major global regions. Essentially, regional migration governance strategies in the EAC take two broad forms. There are those aimed at facilitating intra-regional mobility and those designed to control inter-regional migration.

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[1] The EAC Treaty 1999, Art. 124.

[2] Ibid, art. 2.

2.1 Strategies on Intra-regional Mobility

Governance of intra-regional mobility is central to every integration process. Its centrality rests on the fact that regionalization processes are driven by inter alia interactions between people where regular and irregular cross-border movements occur, adding to economic, social and cultural ties. Majority of the international movements take place within regions. In turn, regional blocs have developed frameworks to govern mobility of participating states' citizens to realise regional socio-economic agenda. Thus, it is common to witness the proliferation of formal and informal regional arrangements on the free movement of persons, joint border patrol and information sharing agreements and protection of forcibly displaced people, among others.

The movement of persons, especially those involved in production sectors, constitutes an important factor for the actualization of a common market in the EAC. Therefore, it is expected to see the EAC regime limiting freedom of movement to specified categories of persons. However, the Community has progressively expanded the scope to include visitors, students, persons in transit and persons seeking medical treatment. EAC rules in the Treaty, protocols, directives and soft documents provide for the removal of visa restrictions, common travel documents, capacity building and exchange of information. Also, there are several mutual agreements between the Partner States on the movement of citizens, especially those residing in border communities. Bilateral arrangements are usually entered to maintain EAC's existing social and cultural ties. In totality, these comprise a regional regime for managing intra-regional movements of citizens of the Partner States.

2.2 Strategies for Inter-regional Migration

Strategies on inter-regional migration comprise common rules defining the regional position on migration matters of inter-regional and general international concern. These strategies entail the regulation of both regular and irregular inter-regional migration as opposed to intra-regional mobility. Regional policies in this category are often driven by security discourse, economic partnerships, and humanitarian and human rights norms. In this

regard, trans-regional dialogue and programmes are initiated and implemented to enhance the partnership between regions and individual states.

In spite of the importance of inter-regional migration towards achievement of a safe and economically prosperous regional integration, EAC lacks coherent formal and informal strategies to govern inter-regional or trans-regional migration. On its part, EAC contains, albeit sketchy, provisions that address inter-regional migration. Persuaded by human rights and security agendas, the Community has developed guidelines to govern some aspects of irregular migration. Among the areas which have attracted the attention of the Community, in this regard, include human trafficking, smuggling of persons, terrorism and asylum[3]

3. Implementation of Outlined Strategies

Scrutiny of the EAC regime reveals a dual system of mandates implementing rules on irregular migration governance. This is to say, irregular migration governance obligations are directed either to the Community or Partner States. Likewise, implementing some provisions and programs calls for actors' actions at both levels. The obligations imposed on Partner States and institutions of the Community correspond in nature to the general classification of state obligations under international law. This entails obligations requiring some conduct in the form of action or an omission (obligation of conduct); or those requiring achievement of particular results without stipulating the means of achieving it (obligation of result).[4]

3.1 State Cooperation

According to Black's Law Dictionary, "cooperation" entails voluntary, coordinated and joint action of two or more states to achieve particular objectives.[5] However, given the intergovernmental nature of EAC, where

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[3] EAC Treaty 1999, Art. 124; EAC Peace and Security Protocol, Art. 12
[4] Philippe Gautier., "On the Classification of Obligations in International Law" in Hestermeyer, H.P et al (eds.), *Coexistence, Cooperation and Solidarity*, (Martinus Nijhoff Publishers, 2012).
[5] Garner, B.A (ed.), *Black's Law Dictionary*, West Group, 1999, p. 336.

execution of Treaty provisions and Directives made by policy organs largely depends on cooperation, imposing an obligation on the Partner States to cooperate is indispensable. Thus, the Treaty under Article 1(1) defines "cooperation" to mean;

> the *undertaking* by the Partner States in common, jointly or in concert of activities undertaken in furtherance of the objectives of the Community as provided for under this Treaty or under any contract or agreement made thereunder or in relation to the objectives of the Community (emphasis supplied).

Due to its importance, cooperation is among the fundamental principles guiding EAC that the Partner States must adhere to throughout the integration process.[6] The dependence on cooperation as the means to achieve the Community agendas is clearly and extensively articulated in several Treaty provisions and reiterated in Protocols and Council Directives. As a result, Partner States, Community Organs and Institutions are generally obliged to cooperate to fulfil their Treaty obligations.

On the same basis, the Treaty emphasizes that the realization of Community objectives, specifically maintenance of peace and security, which are pre-requisites to social and economic development, can be possible through cooperation and consultation.[7] Therefore, actualising Community policies and programs governing irregular migration depends on cooperation between Partner States, Organs of the Community and other stakeholders. Thus, cooperation is called for in different areas of intervention, including technical support, handling of cross-border crimes, exchange of information, joint operations and patrols.[8] Moreover, cooperation and consultation are necessary for capacity building, counter-terrorism initiatives, and achieving common solutions.[9]

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[6] EAC Treaty, Art. 6(f).
[7] Ibid, Art. 124(1).
[8] Ibid, Art. 124(3) & (5).
[9] Ibid, Art. 124(1) & (6).

The Treaty further extends the obligation on the Partner States to cooperate with AU, UN and its Agencies, and other international organisations interested in the objectives of the Community.[10] This implies the duty on Partner States to participate in programs and implement policies initiated by named organisations, including those targeting migration governances. Within this logic, Partner States are reminded of their obligations to implement binding and non-binding instruments, particularly with AU, UN, ILO, UNHCR, and IOM. These and many other regional and international organisations have shaped migration governance by developing binding norms, non-binding instruments and guidelines, and facilitating and coordinating programs.

Similarly, the EAC Protocol on Peace and Security reiterates under Article 2(3) that the Community efforts to combat transnational and cross-border crimes, including human trafficking and illegal migration, management of refugees, and combating terrorism, are reliant on the commitment by Partner States to cooperate. This position in the EAC reflects the global trend of cooperation on migration governance as expressed in the Global Compact for Safe, Orderly and Regular Migration, the 2030 Agenda for Sustainable Development (SDGs), and the Global Commission on International Migration. However, achieving effective State cooperation on migration governance at the regional level, as at other levels, is a challenge. Micinski and Weiss identified divergent interest between receiving and sending countries, nationality, hostile public opinion and disagreement on burden sharing as among the critical barriers to effective cooperation on migration.[11]

 Cooperation on irregular migration governance among EAC countries takes place under inter-state bilateral agreements. Equally, migration policies of EAC Partner States occasionally acknowledge the importance of cooperation between national institutions and regional bodies as a necessary mechanism for governing irregular migration. For instance, in Tanzania, the Immigration

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[10] Ibid, Art. 130(4).
[11] Nicholas Micinski, & Thomas Weiss, "Global Migration Governance: Beyond Coordination and Crises" in Capaldo, G.Z. (ed.), *The Global Community Year Book of International Law and Jurisprudence* (Oxford University Press, 2017).

Act of 2015[12] and the Foreign Policy[13] mention cooperation with Immigration Departments of other countries and international organisations as essential in combating irregular migration. In Uganda, apart from the Draft Migration Policy, which extensively covers the matter, the duty to cooperate with regional bodies can elusively be inferred from the Constitutional provision pledging respect for international law and treaty obligations.[14] Kenya guarantees cooperation with other countries and regional and international organisations through the Foreign Policy.

3.2 Development of Policies and Institutions

It is evident throughout the surveyed RECs that governance of irregular migration at regional and sub-regional levels requires the setting up policy (binding and soft rules) and institutional systems. The rules and institutions are developed to guide the harmonious implementation of various programs at the Community and Partner States levels. The EAC is not an exception to this global trend. In line with this, Article 151(1) of the EAC Treaty imposes a broad duty on Partner States to conclude Protocols in each area of cooperation to spell out the objectives, scope and corresponding institutional mechanisms. Also, being a policy organ of the Community, the Council must initiate and submit bills to the Assembly, issue directives and make regulations.

Further, implementation of this Treaty obligation has witnessed the development of policies and institutions which impact irregular migration governance in one way or the other. They include the Common Market Protocol,[15] the Protocol on Peace and Security,[16] One Stop Border Posts Act,[17] Anti-Trafficking Bill,[18] Child Rights Policy[19] and the Gender Policy,[20] to mention but a few. Despite their weaknesses related to scope and

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[12] Section 12(1)(h) and (I)
[13] Para 31.
[14] Art XXVIII(i)(b)
[15] EAC Common Market Protocol 2009.
[16] EAC Peace and Security protocol 2013.
[17] EAC One Stop Border Posts Act 2016.
[18] EAC Anti-Trafficking Bill 2016.
[19] EAC Child Rights Policy 2016.
[20] EAC Gender Policy 2018.

enforceability, regional policies focus on intra-regional mobility, smuggling and trafficking, human rights of migrants, border security, and refugee management. The EAC Peace and Security Protocol is the most important Community instrument that recognizes the development of policies as an essential mechanism of governing irregular migration. In this case, article 12(2) (f) provides:

> For purposes of paragraph 1, the Partner States shall develop appropriate mechanisms, policies, measures, strategies and programmes to combat cross-border crimes including: the enactment of laws on mutual legal assistance in criminal matters.

Given the nature of current policy and institutional systems at the EAC and in the Partner States, it is clear that implementation of this obligation largely remains a challenge. Since irregular migration is among the issues requiring collective intervention, one would expect EAC organs to take the lead in developing common policies and institutions to guide the matter. The obligation of the Community to develop policies and programmes aimed at widening and deepening cooperation among Partner States in all fields of cooperation is clearly provided for under Article 5(1) of the Treaty. On the contrary, as shown above, the Community rules direct Partner States to cooperate in measures, including developing policies and programs on irregular migration. This tendency to try to implement a common agenda through individual state actions reflects the shortcomings of the intergovernmental model for RECs. In our view, this defeats the logic of seeking a collective solution and thus the objectives of the Treaty.

3.3 Harmonization of Rules and Practices

Harmonisation of laws and practices is another important mechanism through which common migration governance systems can be realized. This paper subscribes to the description by Kitonsa, who is of the view that harmonisation of laws in the EAC context "implies bringing together in proximity, common areas of agreement for a state of peaceful co-existence;

identifying and ironing out areas of divergences in the laws, all aimed at providing an environment that would support effective operation and smooth management and development of the Community."[21] Perhaps, it is from this context the word "approximation" is often used interchangeably with harmonisation in spite the inherent technical differences underlying them.[22]

Harmonisation of policies and integration of programmes is imperative towards achieving RECs' objectives. The emphasis on harmonisation as a guiding principle in implementation of RECs objectives is contained in a number of RECs instruments. These instruments include the Treaty Establishing the African Economic Community,[23] the Agreement Establishing IGAD[24] and the ECOWAS Treaty.[25]

Thus, EAC Partner States undertook under Article 126(2) (b) of the Treaty to, through their appropriate national institutions, take all necessary steps to harmonize all their national laws pertaining to the Community. This means, the obligation to harmonise and align national laws primarily lies with national authorities. The EAC Treaty, Protocols and Acts of the Community call harmonisation of laws, standards, policies, regulations and procedures in many areas of cooperation.[26] In an attempt to implement the Treaty obligation enshrined under Article 126(2) (b), the Council established a Sub-Committee on Harmonisation of National Laws in the EAC Context (hereafter Sub-Committee). The Sub-Committee is led by the Law Reform Commissions of Partner States, and it works under the Sectoral Council on Legal and Judicial Affairs. It is worth noting that the creation and roles of this Sub-Committee

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[21] Edward Kitonsa "The Status of the EAC Harmonisation Process in Uganda" A Paper Presented at a Conference on Creating a Predictable and Facilitative Legal Environment for Business in the East African Community, (2012) 3.

[22] Michel Ndayikengurukiye "Some Observations on Practical Aspects of the Harmonisation of Economic Laws in the East African Community Context" in Johannes, D et al. (eds.), *Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Other Regional Economic Communities*, (LawAfrica 2018).

[23] (1991) Art 3(c)

[24] (1996), Art. 7(a) & (b)

[25] (1993), Arts. 3(2) and 4(c).

[26] Richard Oppong, "Legal Harmonisation in African Regional Economic Communities: Progress, Inertia or Regress" in Johannes, D et al. (eds.), *Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Other Regional Economic Communities*, (LawAfrica 2018) 118-121.

trace their roots in the then Tripartite Committee of National Experts on Harmonisation.[27] This Tripartite Committee was created by the Coordination Committee of the Secretariat of the Commission for East African Cooperation in November 1997.

The Partner States' immigration, refugee and labour laws form part of the EAC strategic areas on which harmonisation is necessary. The logic behind the harmonisation of these laws is that the inconsistencies of policies between Partner States on the one hand, and between Partner States and the Community, on the other hand, could hamper realization of integration agendas particularly on common market and peace and security. Thus, apart from Article 126(2) (b) of the Treaty, harmonisation of migration-related policies and programs is echoed in several EAC instruments. Importantly is Article 47(1) of the Common Market Protocol under which Partner States undertook to approximate their national laws and harmonise their policies and systems. To ensure intra-regional mobility of EAC citizens and enhance effective border management, Regulation 8(f) of Regulations on Free Movement of Persons obliges States to consult and advise the Council on harmonisation of immigration procedures. The EAC Peace and Security Protocol is another Community law that considers harmonisation of Partner States' law, policies, strategies and programmes among the important mechanisms to ensure migration governance. However, Article 10(2) of the Protocol restricts this mechanism to refugee management.

With respect to labour policies and standards, Article 104(3) (e) of the Treaty categorically calls for Partner States to harmonise their labour policies, programmes and legislation. The realization of Common Market Protocol provisions related to the movement of labour depends on harmonisation of laws, standards and programs of Partner States.[28] Consequently, the Sub-Committee identified priority areas in the immigration and labour laws of Partner States impeding intra-regional mobility of EAC citizens and thus

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[27] EAC Report, *the Meeting of National Experts on the Harmonisation of Laws in the East African Co-operation Context,* (1998).
[28] EAC Common Market Protocol, Arts. 5(2) (c) and 12(1).

affecting the realization of Common Market Protocol. Some areas where harmonisation is at different stages include residence and work permits, standard travel documents, issuance of National Identity Cards, the reciprocal opening of borders crossing points, free visa regime and conditions and classification of passes. To this end, in 2015 and 2016, Tanzania reviewed her laws and regulations on immigration, passport and travel documents, citizenship, and anti-trafficking. Kenya enacted the Citizenship and Immigration Act and its Regulations in 2011 and 2012 respectively. On her part, Uganda amended immigration and citizenship laws in 2015.[29] It is important to mention that in the eyes of the Sub-Committee, the immigration laws of Partner States are proximate enough regarding categories of irregular migrants, conditions of entry and immigration offences.[30] In our view, this conclusion is unrealistic considering the current state of affairs. The impact of this conclusion by the Sub-Committee can be seen in the measures proposed under the EAC Peace and Security Protocol to prevent irregular migration as opposed to those intended for management of refugees.

So far, four main approaches have been used to harmonised laws in the EAC. The first and perhaps common approach in the EAC. EALA report aptly summarizes this approach as undertaken by the Sub-Committee.[31] Other approaches to harmonisation include developing model laws, implementing Council Directives and passing of Community Act. Development of model laws was preferred as an appropriate approach toward harmonisation of contract and intellectual property laws of Partner States. It is also important to recall that according to Article 16 of the EAC Treaty Council, Directives bind Partner States, organs and institutions of the Community (other than the Summit, EALA and the EACJ). When Directives require, legislative measures can be used to speed-up harmonisation. Also, according to Article 14(3) (a) of the Treaty, the Council is bestowed with powers to make decisions for the efficient

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[29] Vide the Uganda Citizenship and Immigration Control Act (Chapter 66, Revised 2015)
[30] EAC Report, *the Meeting of the Sub-Committee on Approximation of Municipal Laws*, (EAC Secretariat 2003).
[31] EALA Report, *the Committee on Legal, Rules and Privileges on the Oversight Activity on the Approximation and Harmonisation of National Laws in the EAC Context*, (2016).

and harmonious functioning of the Community. The last approach involves the role of the EALA in passing Community Acts which create common binding standards. The enactment by the Assembly of the One Stop Border Posts Act offers a practical example of harmonisation of immigration and border practices of Partner States through the Community Act. Apart from the above four named approaches, the EACJ is also said to play an instrumental role in harmonising policies in the Partner States. This is made possible through harmonious interpretation and application of the Treaty and other Community laws, thus, contributing to the development of regional jurisprudence.[32]

Within Partner States, harmonising national laws affected by EAC laws is mainly coordinated by Ministries responsible for EAC, Law Reform Commissions, offices of Attorneys General, other sector ministries and National Assemblies. Despite the available frameworks to guide and coordinate the harmonisation of Partner States' laws in the EAC context, the realization of this Treaty obligation is faced with numerous challenges. Challenges faced realization of this Treaty obligation comprise poor coordination, slow pace in implementation of Directives and decisions, differences in Partner States legal systems, conflicting commitments, technical and financial deficiency. On this, once the EALA had a view that existing challenges of harmonisation of Partner States laws appertaining to the Community can be dealt with through enactment of a Community omnibus law.[33]

3.4 Coordination of Implementation

The role of coordination in realising RECs' objectives is stated under Article 28(2) of the Abuja Treaty. It is indisputable that effective implementation of policies and programmes intended to govern irregular migration requires well-coordinated and concerted efforts among the responsible actors. Without

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[32] John Ruhangisa, "Role of East African Court of Justice in the Realization of Customs Union and Common Market", *A Paper Presented During the Inter-Parliamentary Relations Seminar,* (2010) p. 2.
[33] EAC Report, 2015; EALA Report, 2016.

proper coordination of implementation, the developed Community laws and strategic policies would be a dead letter.

An analysis of EAC normative and policy documents shows that the obligation to coordinate the implementation of different mechanisms for governance of irregular migration and managing refugees rests with Community organs and Partner States. Basically, according to Article 26 of the Vienna Convention on the Law of Treaties, the Partner States are bound by the Treaty and assume obligation under the *Pacta sunt servanda* rule to implement it in good faith. For that reason, EAC Partner States undertook under Article 8(1) (a) the general obligation to implement the Treaty. Equally Partner States have an obligation under Article 8(1) (b) of the Treaty to coordinate, through the institutions of the Community, their policies to the extent necessary to achieve the objectives of the Community. Further, to ensure effective coordination of Community activities Article 8(3) of the Treaty requires each Partner States to designate a Ministry for EAC affairs.

At the Community level, the Secretariat is tasked to oversee and coordinate policies and strategies, initiate studies and research related to implementing the Community's programmes, and mobilize funds, among others.[34] In other words, being the executive organ of the Community, the Secretariat is responsible for overseeing the implementation of the Treaty and coordinating with Partner States, institutions, and organs of the Community. In executing its obligations, the Secretariat is supposed to coordinate with Partner States through the Co-ordination Committee. Indeed, the Secretariat should initiate fact finding on infringement or failure to fulfil provisions of the Treaty by a Partner State and refer the matter to Council or, if unresolved, to the Court. The inaction by the Secretariat following a violation of Treaty provisions by a Partner State has, in more than one incident, been declared by the East African Court of Justice (EACJ) to amount to a failure to fulfil its obligations. This was, for instance, the situation in the cases of *James Katabazi and 21 Others vs. Secretary General of the East African Community and the Attorney*

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[34] EAC Treaty, Art. 71(1).

General of the Republic of Uganda;[35] and *East Africa Law Society vs. The Secretary General of the East African Community.*[36]

Equally, the Secretariat is tasked under Article 71(1) (l) of the Treaty to coordinate the implementation of Decisions and Directives of the Summit and the Council. This is due to the fact that, by their nature, implementation of such Directives and Decisions cannot be possible without effective coordination by the Secretariat. On the contrary, the Council observed in its 30th meeting that a number of Directives and Decisions issued by the Summit and the Council to the Partner States have largely remained unimplemented due to a lack of coordination by the Secretariat.[37] Consequently, the Council directed the Secretariat to always coordinate the implementation of the Summit Decisions/Directives to the Council and the Council Decisions/Directives to the Partner States as a whole.[38]

This takes us to another yet closely connected challenge impeding the implementation of some Treaty obligations. The tendency to impose obligations on Partner States for regional-wise initiatives ought to be coordinated by the organs of the Community. In this regard, Community organs, especially the Secretariat, the Council and Committees, are expected to take the lead in coordinating such obligations. This controversy, for instance, was noted during the 38th Ordinary Meeting of the Council of Ministers where a previous Council's decision directing Partner States to establish a Regional Technical Working Group on Harmonisation of National Laws was deferred through Council Directive No. EAC/CM 38/Decision 01.[39] A similar interpretation can be attributed to obligations imposed on the Partner States but which require the coordination of EAC organs if they are to be implemented. For example, the obligation to adopt common mechanisms for managing refugees, develop joint training, establish systems for sharing information, establish a regional database on cross-border crimes, and

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[35] EACJ, Reference No. 1 of 2007.
[36] EACJ, Reference No. 07 of 2014.
[37] EAC Report, *the 30th Meeting of the Council of Ministers*, (EAC/CM/30/CM/2014).
[38] See particularly (EAC/CM 30/Directive 03).
[39] EAC Report, *the 38th Ordinary Meeting of the Council of ministers*, (2019).

undertake joint operations. No way these and similar obligations expressed under various Community instruments can be individually or collectively realized without effective coordination by EAC organs and institutions.

Corollary coordination by the Secretariat is lacking in a number of areas affecting implementation of strategies and programmes on irregular migration governance. For example, in 2016 the Heads of EAC National Anti-Narcotics and Anti-Human Trafficking Units urged the Secretariat to initiate the development of a basic regional border management strategy.[40] Also, the meeting observed that due to weak or absence of coordination by the Secretariat, the region lacks regional-wise cross-border surveillance mechanism, capacity building to law enforcers and other stakeholders, and strategy and Plan of Action to combat human trafficking.

Within the Secretariat, internal coordination of departments and offices dealing with different matters pertaining to migration in general and irregular migration, in particular, is very important. This is because migration issues cross different departments or offices within the Secretariat. For instance, while activities on peace and security are within the mandates of the office of the Deputy Secretary General-Political Federation, the implementation of programmes on intra-regional mobility is coordinated under the office of the Deputy Secretary-General-Productive and Social Sector. Nevertheless, the office of the Secretary-General directly coordinates *inter alia* resource mobilization, harmonisation of national laws, and cooperation in defence.

3.5 Protection and Promotion of (Human) Rights of Migrants

It is a settled principle under international human rights law that all human beings are entitled to human rights, protections and freedom regardless of their status. These include the right to life, equality before the law, the right to human dignity, freedom from slavery or servitude, torture, and cruel, inhuman and degrading treatment or punishment. States are obligated to promote and respect such rights. From this understanding the EAC Partner

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[40] EAC Report, *the 5th Meeting of the Heads of EAC National Anti-Narcotics and Anti-Human trafficking Units,* (24th-26th November, 2016).

States undertook, under Article 7(2) of the Treaty, to maintain the universally accepted standards of human rights as one of the operational principles to guide the achievement of the Community objectives.

Apart from the general obligations enshrined under international legal frameworks, EAC Partner States are obliged under Article 6(d) of the Treaty to recognise, promote, and protect human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights (African Charter). The African Charter contains a range of rights to be enjoyed by every individual, regardless of status. Despite the jurisdictional challenges faced by the EACJ in entertaining human rights cases, the available jurisprudence from the Court has demonstrated that the obligations expressed in Article 6(d) and 7(2) of the Treaty are mandatory, justiciable, and any non-observance amount to a serious breach of the Treaty obligations. Additionally, Article 123(3) of the Treaty underscores the ascendency of human rights consideration in policy formulation by stating that the Community policies on foreign and security matters must seek to *inter alia* develop and consolidate democracy, the rule of law and respect for human rights and fundamental freedoms. The importance of this Treaty provision derivess from the fact that "foreign" and "security" policies predominantly shape how states and RECs respond to irregular migration.

Besides Treaty provisions, some EAC soft law documents impose obligation to Partner States to protect and respect the human rights of migrants. Significantly, the Child Rights Policy and the Gender Policy is significant. The Policies address, albeit indistinctly, specific risks migrant children and women face. Further, as part of policy actions, the documents impose specific obligation to Partner States and the Secretariat. For example, the EAC Gender Policy categorically calls for the Partner States to develop and implement effective mechanisms to address migrant trafficking and smuggling and establish rehabilitation and reassurance conditions for women and girls who have been victims of smuggling and trafficking. The Policy also works to strengthen gender-sensitive observance of migrants' rights during and after the episode and to integrate perspectives into migration management policies

and strategies. The Secretariat, on its part, is required to mainstream gender throughout migration management policies and strategies and develop common guidelines for externalisation of labour to third parties.

The efforts by EALA members to legislate on human rights and human trafficking through private Bills have yet to yield positive results as the process has protracted since 2011 and 2016 respectively. Nevertheless, it suffices to mention that the Bills seek *inter alia* to impose obligations on Partner States towards the protection of special groups, including the victims of trafficking. One would say that the limited regional human rights architecture is attributed by the unwillingness by the Partner States to institutionalize human rights into integration agenda. Lack of considerable codification of relevant rights and corresponding obligations is one thing, but installing institutional structure necessary for realising those rights is critically another different thing.[41]

4. The Implications of EAC Socio-Economic and Political Processes on Migration Governance

Apart from migration specific frameworks and programmes, an array of socio-economic and political policies and practices in the EAC are expected to affect migration patterns in the region. This is true because drivers of human migration, whether taking regular or irregular form, are not mutually exclusive and usually cross-cut between natural and manmade factors. From this, the evaluation of EAC integration pillars and initiatives to identify their implications on causes and governance of migration becomes imperative. We are convinced by Betts that "[u]nderstanding the politics of each area of migration is important in order to identify the 'boundaries of the possible for change, and the nature of the cooperation problems that need to be overcome."[42]

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[41] Kunz *et al.*"Governance through partnerships in international migration" in Kunz et al (Eds.), *Multilayered Migration Governance: The promise of partnership*, (Routledge 2011) pp. 1-20.

[42] Alexander Betts "Introduction: Global Migration Governance" in Betts, A (ed*.), Global Migration Governance,* (Oxford University Press 2011) 20.

4.1 Political Federation

Despite the challenges impeding its realization, the ultimate goal of the EAC integration process as per Article 5(2) and 123(1) of the Treaty remains the attainment of a Political Federation. Since its re-establishment, EAC has taken several measures to actualise this goal. Notably, the formation in 2004 of the Committee on Fast Tracking East African Federation, famously known as "the Wako Committee," was to examine ways and means to fast-track the regional integration process. This was followed by a wider national consultation in the Partner States between 2007 and 2009. Later on, the Council studied the matter and recommended to the Summit to adopt a Confederation as a transitional model of the EAC Political Federation.[43] The Summit adopted the Council's recommendations at its 18th Ordinary Meeting and directed the Council to initiate the process of making a Constitution for the EAC Political Confederation.[44] As a result, the team of constitutional law experts was constituted drawing 3 members from each Partner State, two being experts in constitutional law matters and one in legislation drafting. The process of preparing a Draft Constitution and developing Common Foreign and Security Policies is underway.[45] It is worth mentioning that Article 123(1) of the Treaty identifies Common Foreign and Security Policies as key pillars towards realization of a Political Federation. Particularly the Treaty states;

> In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty particularly with respect to the eventual establishment of a Political Federation of the Partner States, the Partner States shall establish common foreign and security policies.

Despite the fact that the Constitution will stipulate the areas to be covered under the envisioned EAC Political Confederation, it is potentially correct to

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[43] EAC Report, *the 33rd Meeting of the Council of Ministers* (Ref: EAC/CM/33/2016).
[44] EAC Report, *18th Summit of EAC Heads of State*, (Ref: EAC/SHS 18/2017).
[45] EAC Report, 2019.

argue that the outcome of the process could have significant implications on governance of irregular migration. This anticipation finds justification in a parallel process of developing common policies in security and foreign relations. Certainly, finalising these policies will trigger ceding state sovereignty in some specified areas. Partner States' policies most likely to be affected by this situation, include those on border management, citizenship and foreign relations. Since the experience from other RECs has demonstrated that governance of international migration is mainly defined under common security and foreign policies, EAC expected to borrow a leaf from them. Generally, it is anticipated that federalism would strengthen regional bodies with more executive authority to make and implement decisions and programmes. However, it remains to be seen whether a confederation or federation model would seriously create a regional superstructure with full executive mandate on most jealousy State-prerogatives like migration control, foreign affairs, defence and security, among others.

On the other hand, there are arguments on the possible negative implications a political federation can cause to migration governance and border security in particular. For instance, Mshomba argues that "a political union may spread terrorism to areas that were initially relatively safe, as borders become more porous."[46] Ancillary, worries have been expressed with regards to the governance of some areas likely to concurrently fall under both competencies of the federal government and constituent states like citizenship.[47] Lastly, the proposed confederation's effectiveness in implementing matters to be conceded to confederal authorities is questionable. Unlike the federation, Partner States under confederation retain executive powers and dominate the confederal institutions.[48] This is more or less the same as the EAC's current state of play. Consequently, effective governance of migration issues which mostly require ceding of Partner States' sovereignty if they are to be governed

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[46] Richard Mshomba, *Economic Integration in Africa: The East African Community in Comparative Perspective*, (Cambridge University Press 2017).

[47] EALA Report, *the Committee on Legal, Rules and Privileges on the Assessment of Adherence to Good Governance in the EAC and the Status of the EAC Political Federation* (2013).

[48] John McCormick, *European Union Politics*, (Palgrave Macmillan 2015).

commonly under regional integration arrangements, would remain impractical.

4.2 Good Governance Programmes

There is a causal relationship between good governance and irregular migration. Both conceptual and empirical evidence suggest that most of the push-pull factors behind international migration are largely influenced by economic, political, social and environmental governance dynamics. It is a settled fact that poor governance, corruption, politically-motivated conflicts, weak economy, poverty and unemployment, human-influenced environmental disasters, and injustices, among others, have fuelled irregular emigration. On the contrary, good governance, prosperous economic systems, stable political environment, rule of law, and respect of human rights attract immigrants.[49] From this construction, it is obvious that development, human rights and good governance are inseparable determinants of human migration. Based on this relationship, this subsection tries to envision the likely implications of EAC policies and programmes on good governance to irregular migration.

We begin by looking at what really good governance entails. Borrowing a leaf from the fundamental and operational principles of the Community, the EALA Committee on Legal, Rules and Privileges describes good governance as "a process whereby public and private institutions manage resources in a manner that promotes development, human rights, justice, peace, accountability, responsiveness, inclusiveness, democracy and adherence to the rule of law."[50] According to the Community's principles contained under Articles 6(d) and 7(2) of the EAC Treaty, it is imperative for Partner States to adhere to principles of good governance to realise integration objectives. Besides, adherence to universally acceptable principles of good governance is among the basic conditions to be met by any foreign country applying to become a Partner State to EAC pursuant to Article 3(3) (b) of the EAC Treaty.

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[49] UN, *The Global Compact for Safe, Orderly and Regular Migration* (UN 2018). GCIM Report, *Migration in an Inter-connected World: New Directions for Actions*, (GCIM 2005).
[50] EALA Report, *the Committee on Legal, Rules and Privileges on the Assessment of Adherence to Good Governance in the EAC and the Status of the EAC Political Federation*, (EALA 2013).

Apart from the Treaty, EAC has endeavoured to promote pillars of good governance through the Draft Protocols on Good Governance and Preventing and Combating Corruption. According to the Draft Protocol on Good Governance, good governance in the EAC context entails fundamental principles, including consolidation of democracy, the rule of law and respect for human rights and fundamental freedom, preserving peace and peaceful resolution of disputes. Also, it entails strengthening transparency, accountability and fairness; equitable access and sharing of opportunities; popular participation, among many others.

In line with the above, the EAC, through its organs, has taken some decisions and pursued activities to enhance good governance in the Partner States. The significant measures so far taken in this area to enhance good governance include the establishment of regional electoral support programme, establishment of different sectoral forums such as EAC Forum of Electoral Commissions, Forum of National Human Rights Commissions, Anti-Corruption/Ombudsman Agencies and Forum of Chief Justices and the Nyerere Centre for Peace Research. Also, it aims to initiate the EAC Annual Conferences on Good Governance, establish the EAC Early Warning Centre, and the envisaged EAC Panel of Eminent Persons and EAC Governance Unit within the Secretariat. According to EAC Development Strategy, these measures aim at, inter alia, creating a platform for national institutions of governance to exchange information, share experiences and dialogue on policies, strategies, laws and programs, to develop regional standards. Likewise, they offer the opportunity to discuss challenges and best practices related to policy formulation, conflict prevention, the rule of law and access to justice, thus contributing to a culture of dialogue among governance stakeholders.

Despite the significant progress made, the challenge remains with taking bold steps to implement passed decisions. For example, EAC is criticized for taking a neutral position during post-election violence in Kenya and Burundi in 2008 and 2011 respectively. The indecisiveness of EAC was also observed during

the political crisis in Burundi following the attempted coup d'état of 13th May 2015. The series of Council and Summit decisions and the proposals by the EAC facilitator for Burundi peace dialogue, the former Tanzanian President Benjamin Mkapa, were neither complied nor imposed sanctions. Instead, external donors, mainly GIZ, USAID, and EU, impose restrictions compelling compliance with good governance principles. The Republic of Burundi and the Republic of South Sudan are the EAC Partner States that faced restrictions from external donors.[51] All these add to the concerns about readiness and commitments by EAC Partner States to genuinely adhere to pillars of good regional governance. Thus, as the capacity to effectively address factors inducing irregular migration is undermined, influx of migrants in an irregular situation is likely to escalate.

4.3 Socio-Economic Policies

EAC is primarily a regional economic bloc to achieve socio-economic development of Partner States. In turn, it is expected to raise the standard of living and improve the quality of life of their populations.[52] All regional development initiatives in infrastructure, investment, services and industries are intended to achieve equitable, sustainable and balanced socio-economic development. Further, the EAC Common Market Protocol premises realization of socio-economic development of citizens in the Partner States on the free movement of goods, persons and labour, rights of establishment and residence and the free movement of services and capital.[53]

That being the overall objective of the EAC, its realization attracts a number of implications for irregular migration governance. First, it is clearly understood that migration and development interlink in a number of ways. Low level of socio-economic development tends to induce irregular emigration in search of better life opportunities. However, in some circumstances, increased household income also promotes realising long-awaited migration aspirations. Viewed from this perspective, the on-going and future EAC socio-

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[51] EAC Report, *the 37th Meeting of the Council of Ministers*, (Ref: EAC/CM/37/2018).
[52] EAC Treaty, (1999) art. 5.
[53] Article 4(2) (a).

economic development programmes will likely cause macro-structural changes. In turn, this may accelerate intra-regional mobility as well as inter and trans-regional migration. These migratory processes are too likely to take place outside the migration policies of Partner States and the Community. Partly, this explains the reservations by some EAC Partner States, particularly Tanzania, about the implications of EAC free movement of persons' policy to local labour markets.

5. Conclusion

This article examined various mechanisms used by EAC to govern irregular migration, obligations arising out of them and the implications of EAC socio-economic and political processes on migration governance. It observed that the EAC has resorted to both formal and informal mechanisms in governing irregular migration. Formal mechanisms form binding regional rules, and bilateral and multilateral agreements. A typical example is the development of policies governing intra-regional mobility of persons, regional rules proscribing human trafficking and smuggling of persons, and a common policy on refugee management

Lastly, it has been established that realization of EAC strategies on irregular migration governance depends on State Parties cooperating and coordinating with each other; harmonising their laws and practices; and making policies. In spite of the promising endeavours by EAC organs and Partner States, it has been revealed that effective realization of the proposed strategies is confronted by several challenges, including weak and improperly coordinated institutional structure; scant, conflicting and fragmented policy frameworks and unwillingness by the Partner States to create supranational structure.