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**A CRITICAL ANALYSIS OF THE IMPLEMENTATION OF
MIGRATION LAW AND REGULATIONS IN EAST AFRICA: THE
CASE OF REGULATIONS ON FREE MOVEMENT OF PERSONS.**

BY

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DECLARATION

I Shiraku Mutende Rodgers hereby declare that this thesis is my original work and has not been presented for a degree in any other University.

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ABSTRACT

This study critically analyzes the implementation of migration law on free movement of persons in East Africa herein contained in the Protocol Establishing the East African Common Market. This study recognizes this Protocol as the only regional attempt to establish a regional migration law in East Africa.

This study further reveals that notwithstanding the weaknesses inherent in this law, the established law is itself not substantive enough as its implementation is guided by individual state will and practice. It is this individual state will and practice that is the source of disharmonies in management of migration in the region since all the states are not compelled or sanctioned to implement it owing to their sovereignty. This sovereignty is used to exclude certain groups of individuals from the national boundaries of respective states. At the same time, this has left migration practice to individual state discretion which is the source of rigidities, bureaucracy and back-passing over migration issues.

It is further noted in the study that the established law covers only one aspect of migration by addressing itself to nationals of East Africa while leaving out non-East Africans who are important to the region to individual state discretion.

This study also takes note of the little research done into migration law in East Africa. The little research shows how misunderstood migration law is in the region.

This study relies on both primary and secondary data. Primary data will be sourced from interviews with relevant resource persons in immigration. Secondary data will be sourced from academic journals, books, magazines, electronic media and the internet.

LIST OF ACRONYMS

AChHPR	-	African Charter on Human and Peoples Rights
ADIS	-	Assistant Director of Immigration Services
BCP	-	Border Control Post
BMIS	-	Border Management Information System
CERD	-	Convention on the Elimination of All Forms of Racial Discrimination
CIO	-	Chief Immigration Officer
COMESA/PTA	-	Common Market for East and Central Africa
CSR	-	Convention on the Status of Refugees
CTA	-	Certificate of Temporary Assignment
DDF/EDF	-	Departure/entry declaration forms
EAC	-	East African Community
EACJ	-	East African Court Of Justice
ICCPR	-	International Covenant on Civil and Political Rights
IML	-	International Migration law
IOM	-	International Organization for migration
KVP/B/H/I/s	-	Kenya Visitors Pass/ Business/ Holiday/ Investigating Settlement
NTB	-	Non-Tariff Barriers
OSBCP	-	One Stop Border Control Point
PIRS	-	Personal Identification and Registration System
PISCES	-	Personal Identification Secure Comparative and Evaluation System
Protocol	-	Protocol on the Establishment of the East African Community Common Market
SIO	-	Senior Immigration Officer
SSA	-	Sub-Saharan Africa
Treaty	-	Treaty of the East African Community
UDHR	-	Universal Declaration for Human Rights
UN	-	United Nations
UNHCR	-	United Nations High Commission for Refugees

DEDICATION

To Baba Mutende and Mama Alice, and Gebrielle and David, their beloved grandchildren.

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This research was a result of a lot of thought on a suitable topic that could achieve dual objectives; need to satisfy interest in pursuing a topic related to international law and the need to research on a topic related to my professional line of immigration. After pre-research in libraries and the internet, I realized that being an interesting topic it was but there was very little in form of publications in this area of international law. Am grateful to all whom I shared with and who in one way or another encouraged me to undertake this research. My special gratitude goes to my very able supervisors; Prof. Maria Nzomo Mr. Tirimba Machogu for their insightful advice and guidance during the whole process of writing this thesis. The library staff at Parklands Law School, JKML and IDS library: good work. The following were quite a resource to this research; Mr. J.M. Change ADIS, Mr. Wambiliyanga, ADIS, Mr. Dume Wanda, Mr. Wilfred Chepkolel, In Charge Malaba Border, Mr. Hamisi Said, Deputy In Charge Namanga Border, Mrs. Angela Steven, Mrs. Hadija Ngomiya, Abutwalib Harus I.Os Namanga Tanzania, Mr. Kioko Taveta Border, Mrs Philis Sio Nyayo House, Mr. Benon Kusemererwa SIO Busia Border Uganda Mr. William Kuserwa In Charge Malaba Uganda. Last but certainly not least my family Mme Caroline Musimbi, Son and Daughter for bearing the long lonely times while I was busy with my books, my mum Alice and Dad Isaac for patiently encouraging me even when it became really hard to go on. TO ALL OF YOU, I OWE GRATITUDE.

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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.0 Introduction

This study is about the implementation of migration law and regulations in East Africa. The study analyzes the implementation of the Regulations on Free Movement of Persons of the Protocol Establishing the East African Common Market herein referred to as the Protocol. How effectively this law is implemented has an important bearing on the deepening of integration in the region, reduction of suspicion among states over tensions generated due to different approaches to migration management, and the mutual realization of the benefits of migration to respective states and the region at large.

The Protocol on the Establishment of the East African Community Common Market¹ and its Annex One is the only East African instrument that addresses itself to the issues of migration in the region and therefore can be said to be the migration law for East Africa. The Protocol highlights several freedoms to be enjoyed by East Africans while Annex One gives an implementation of the provisions of the Protocol by giving the procedure to be followed in handling East Africans on matters of migration. It is this migration law that we are analyzing how it is being implemented in East Africa.

Migration is an irrepressible human urge²; an inevitable, inalienable human right. It is continuous cyclic practice, which cannot be stopped or controlled with a view to restricting it. Migration has acquired prominence in international economic management

¹Protocol on the Establishment of the East Africa Common Market 2005

² Bohning W.R. 1984: Studies in International Labour Migration. New York, St.Martin's Press. P 12-13 as quoted in Moses W.J 2006: International Migration: Globalization's Last Frontier. Zed Books London P 35

and trade relations³ owing to the realities of time and the trends that define the practice. Conditions necessitating migration have over time been changing though more prominent are political and economic reasons⁴. Political reasons range from wars, forced displacements, mass relocations of people and state persecution. Economic reasons are informed by the relative disparities between countries. The increased interest with migration results from the fact that migration is a human right which should be protected by all states especially the protection of vulnerable migrants, it affects both sending and receiving countries economically, socially, politically and morally.

By the year 2002, the United Nations⁵ estimated a third of the world population as living outside their countries of birth. As of 2005, this figure stood at 200 million people. This trend continues motivated by globalization⁶ and relative social, economic and political disparities⁷ that define the world we live in today.

In East Africa, as of 2011, Tanzania had 659,200 migrants compared to Kenya's 817,700, while Uganda had some 646,500 migrants, Rwanda and Burundi had 465,500 and 608,000 migrants respectively according to UN Department of Economic and Social

³ Adepoju A. 2007: Migration in Sub Saharan Africa. *A background paper commissioned by the Nordic Africa Institute for the Swedish Government White Paper on Africa*. Lagos 14 July 2007. P 5

⁴ Olivier M. 2009: *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)*. SP Discussion Paper No. 0908 The world Bank P 11

⁵ Russell S.S.et al 1990: International Migration and International Trade. The World Bank Washington DC P 40-43.

⁶ Moses W.J 2006: International Migration: Globalization's Last Frontier. Zed Books London P35 Also on the relation between migrations and globalization, see Koslowski R. (ed) 2004: International Migration and the Globalization of Domestic Politics. Routledge, London. P 5-26, Solimano A. 2010: International Migration in the Age of Globalization: Historical and Recent Experiences. Cambridge.

⁷ See Thomas B. 1955: Economics of International Migration. London Macmillan and co. Limited

Affairs⁸. It is this migration trend that we seek to analyze how the laws regulating it are implemented in the region.

The term freedom of movement is used as a generic term to comprise specific rights and freedoms of a person related to his or her locomotion. It covers movements of individuals within a State as well as from one State to another. While the former embrace the right of a person to move freely and to choose a place of residence according to his or her own will within the territory of a State, the latter cover the right to leave a country including his or her own and to (re-)enter the home country⁹.

Freedom of movement is an umbrella term that includes all freedoms related to locomotion or mobility rights. This include the right to leave a country, the right to re-enter or enter a country including ones own country, the right to reside anywhere in a given country, the right to establishment, right to seek and obtain asylum, the right to obtain travel documents among others. This rights are protected by various international instruments and national constitutions the world over as inherent inalienable and natural human rights.

1.1 Statement of the Research Problem.

The study aims at analyzing the implementation of migration law and regulations in East Africa as enshrined in the Regulations on Free Movements of Persons of the Protocol¹⁰.

⁸ UN Department of Economic and Social Affairs, Population Division 2011: The Age and Sex of Migrants 2011. *Wall Chart UN publication*. no.12 xiii.2 See also. I.O.M: World Migration Report 2008: Managing Labour Mobility in the Evolving Global Economy. I.O.M. Geneva. P 407-418.

⁹ Klein E. 2013: *International Law and Freedom of Movement*. Max Planck Institute Of Comparative Public Law and International Law, Hiedelberg And Oxford University Press P 1

¹⁰ Protocol *op cit*

It is customary practice that each of the member states of East Africa has national legislation on migration reflecting its main self-interest. This individualistic approach has proved ineffective and a major source of conflict in migration management considering the geo-strategic position of the region hence the need for an effective, collaborative and cooperative approach to migration management.

The poor, uncoordinated and half hearted implementation of East Africa migration law as enshrined in the Regulations threatens the mutual relations between and among countries of the region. For instance, Kenya and Tanzania have on more than one occasion been at logger heads with each other over management of migrants most of whom originate from the Horn of Africa transiting to South Africa¹¹. Such migrants are returned to Tanzania and illegally sneaked in Kenya by Tanzania officials and smugglers. Kenya blames Tanzania of dumping inadmissible people in Kenya. The result is tensions between these two countries.

Such ugly scenes have also been witnessed between Uganda and Kenya over “misunderstanding” of migration practice. These and many more incidents point to a lack of a coordinated, cooperative approach to migration management in the region due to inadequate laws. Such cooperative and coordinated approach can only take place when “confined and structured¹²”, that is controlled according to rules, laws and regulations. This sets the limits to the “migration power”¹³ in question and prescribes the manner of

¹¹ I.O.M 2009: In Pursuit of the Southern Dream: Victims of Necessity. I.O.M Nairobi.

¹² Goodwin-Gill G.S.1978: International Law and the Movement of Persons between States. Clarendon press. Oxford P 3

¹³ Researchers own term, migration power is the discretionary power bestowed to immigration officers in exercise of their duties. This power results from the fact that they have the final authority on matters of admission of aliens in any state. This power is not shared by any other agency neither is it contestable in a court of law. Migration power originates from the sovereign power of the state.

exercise of that power. This confining and structuring happens in a clear, deliberate and substantive migration law for East Africa.

Due to structural weaknesses in these countries, migrants are able to defeat the individual state efforts and sometimes even make a mockery of the same laws by finding refuge in neighbouring states. This is achieved by the use of “reverse routes”¹⁴ to defeat the migration procedures in place. Thus the need for cooperation, which is only possible if in place there, is a sound, substantive and adequate national and regional migration law. This law standardizes rules, laws, policies and procedures in the management of migration in the region. It is this standardized law on migration in East Africa that is the mainstay of our study.

1.2 Objectives of the Study

The objectives of this study are;

- a) To assess the implementation of the Regulations on Free Movement since 2010 and its implications to migration policies and laws of individual states.
- b) To identify the challenges facing the above implementation of the Regulations and how these challenges affects integration of the region.
- c) To establish whether the Protocol and its Regulations as provided is adequate in addressing immigration issues in the region as a superior law to national immigration laws and how this contributes to the integration project.

¹⁴ An event where an alien who wants to enter Kenya for instance but does not meet the migration requirements for admission well aware that such person will be returned to the country of origin opts enter a neighbouring country first from where he sneaks in Kenya through the porous borders. This is common among Somali migrants.

1.3 Literature Review.

In this section a comprehensive review of academic materials will be undertaken. The literature reviews is organized around broader literature on migration, literature on international migration law, literature on free movements, and reviews of protocol on free movement of persons and learn from the EU.

1.3.1 General Literature on Migration

The literature on migration presents divergent debates for consideration. This ranges from migration and economics to development and law in which the inter-linkage between the economics, development and migration is established, to migration and law.

For instance Thomas'¹⁵, *Economics of International Migration* is one attempt to interweave the relationship of economics to migration. According to classical economics, the relative economic disparities and comparative advantages create conditions for migration. Economists therefore argue that migration is important in addressing labour shortages between labour importing and labour exporting countries¹⁶. Migrants move from areas economically unviable to those with high comparative advantage in search of better economic conditions. For instance migrations take place from low income countries to high income countries. This migration circus also takes place in East Africa region thus necessitating a study on the laws regulating this motion. A study of Thomas¹⁷ magnitude though has not been carried out in east Africa leading to a knowledge deficit.

¹⁵ Thomas B. 1955: *Economics of International Migration*. London Macmillan and co. Limited

¹⁶ Todaro M 1992: *Economics for Developing Countries: An Introduction to Principles, Problems and Policies for Development*. Prentice Hall London. P 143,165

¹⁷ Thomas op cit

Birks¹⁸ advances this debate in his discussion of the role of migration in development in the case of the Arab region. In ‘International Migration and Development in the Arab Region’, Birks highlights the importance of labor migration to development both of the receiving and sending countries through labor supplement and remittances. He criticizes restrictive policies where “labor-importing countries adopt policies oriented towards limiting the duration of stay of foreign workers¹⁹”. He argues that the trend towards limiting immigration and selectivity in admitting immigrants given the receiving states’ inability to cope with the influx and offer social security²⁰ to migrants is anathema to development.

Crush and Tevera use the terms ‘push-pull factors²¹’ to immigration in analyzing the Zimbabwe exodus in their book *Zimbabwe’s Exodus*²². The authors note the long history of Zimbabwe’s migration and argue that it should not be linked to the recent political instability and economic crisis of 2010, but should be seen from the perspective of a longer history of Zimbabwe’s engagement with the world especially South Africa. They note the importance of migrants to Zimbabwe thus; ‘without the involvement of Zimbabwe Diaspora the country would be in an even more desperate situation. Migration ensures the survival of those who leave and those who stay’²³. This demonstrates the economic importance of migration. Despite the push factors in Zimbabwe, its migration is historical.

¹⁸ Birks J.S. 1980: *International Migration and Development in the Arab Region*. ILO Geneva

¹⁹ Birks *Ibid*

²⁰ Birks *ibid*

²¹ Skeldon R 1997: *Migration and Development: a Global Perspective*. Longman. P 26

²² Crush J. and Tevera D. 2010 (eds): *Zimbabwe’s Exodus: Crisis, Migration, Survival*. SAMP. Kingston. P 52

²³ Crush J. and Tevera D. *ibid* P 52.

Borjas and Crisp²⁴ take this debate further in their analysis of poverty as a push factor to international migration and asylum. Poverty is one of the ‘push factors’ of migration. In their *Poverty, International Migration and Asylum*, the authors contend that “trends towards increased international migration appear to result from aspects of globalization process in combination of continued huge income gaps between different countries²⁵”. Globalization²⁶ is thus a boost to pull factors to migration since it increases economic disparities that define poverty areas and opulent areas. Borjas and Crisp identify the push factors to migration as poverty, environmental degradation, political instability, human rights abuses, globalization, and technological differences²⁷ among others.

These push factors are prevalent in Africa. In analyzing the Africa situation, Adepaju and Hammar²⁸, explore the *International Migration In and From Africa*. They observe that the continent's international migration is rooted in its pre-colonial history hence the migratory trends reflect either Anglophonic or franc phonic dichotomy. This pre-colonial history also continues to shape Africa's immigration policies, thence their influence on the immigration laws. In Africa, most migrations take place in search of opportunities given the scarcity or poverty in their countries.

²⁴ Borjas G.J. and Crisp J. 2005: Poverty, International Migration and Asylum. Palgrade. P xi.

²⁵ Rusell S.S. 1990 et al: International Migration and International Trade. The World Bank. Washington DC P 4

²⁶ On the relation between migration and globalization, see Moses W.J *Op cit* P 36-37, Solimano A. *op cit* at P 103, Koslowski R. eds *op cit* P5-26.

²⁷ Todaro *op cit*.

²⁸ Adepaju A. and Hammar J.(eds) 1996: International Migration In and From Africa: Dimensions, Challenges, and Prospects. Dakar Impremerie Saint-Paul. P 13

The debates in Thomas, Birks, Crush and Tevera, Borjas and Crisp, and Adepoju and Hammar highlight the causes of migration globally. These causes persist in East Africa too be they economic causes or social causes.

From the development perspective, one argues that the problem with migration is a result of “lack of policies” or inadequate policies to appropriately deal with influx of foreigners and use them for economic development of sending and receiving countries. What policies are ideal for developing or sending states and receiving states is a major debate.

In his MA thesis titled Africa Immigration Policies: the case of Kenya 1906-2000, Opon²⁹ tries to trace the immigration policies in Africa using Kenya as his case. The immigration policies in Africa Opon writes are a replica of the colonial policies and ordnances that were aimed at encouraging entry of white settlers while restricting movement of Africans. He traces the history of immigration policies in Kenya from the Immigration Ordinance of 1948³⁰ to the 1972 Immigration Act³¹. The policies on nationality and citizenship are ideally common law policies adopted from Britain. These policies cannot tackle the migration challenges facing Africa and Kenya today. One example is the quest for dual or multiple nationality in Kenya which to date is not well understood among policy makers and implementers. Opon appreciates the need to discuss immigration policies of Kenya as a way to appreciate the weaknesses therein and create understanding.

²⁹ Opon D.O. 2003: African Immigration Policies: case study of Kenya 1906-2000. MA Thesis University of Nairobi

³⁰ Government of Kenya 1948: The Kenya Immigration Ordinance. Government Printer

³¹ Government of Kenya 1972: The Immigration Act CAP 172 Laws of Kenya. Government Printer

The UN report on International Migration Policies³² presents the most concise examination of issues surrounding immigration policies and practices from all perspectives. The book includes history and origins of issues that are crucial to understanding of current legislations and behavior of states towards immigration. It describes policies designed to influence international migration and traces the changes in immigration policies overtime. The report notes the need to harmonize immigration policies world over in line with the human rights standards which are a norm in state practice. Out ward oriented, open door policies that encourage migration rather than migration restricting policies are ideal for both receiving and sending states so as to benefit from migration equitably³³.

Don Nanjira's³⁴, "The Status of Aliens in East Africa" highlights the problems faced by aliens in the region. Using the Asians and Europeans in Uganda, Tanzania and Kenya as his case study the author scoffs at migration policies and laws adopted by governments after independence as restrictive and punitive. Uganda took this higher by expelling Indians and Asians. But what obligations former colonial masters have towards such aliens is dealt with in the discussion on Britain's responsibilities to Asians in the East Africa.

Don Nanjira's analysis raises questions of "legal position of the state towards individuals" both citizens and aliens, and states among themselves. Functionalists³⁵ argue that the state exists for its citizens more than aliens. This conception of the state owing

³² United Nations 1998: International Migration Policies. UN New York. P 5

³³ DeWind J. and Holdaway J. eds. 2008: Migration and Development Within and Across Borders: Research and Policy Perspectives on Internal and International Migration. I.O.M/SSRC.Geneva. P 360-365.

³⁴ Don Nanjira D.D.C. 1976: The Status of Aliens in East Africa; Asians and Europeans in Tanzania, Uganda, and Kenya. New York. Praeger Publishers. P 13, 103, 135.

³⁵ Daddow O.2009: International Relations Theory. SAGE P76. See also Mitrany D. 19

more legal obligation to the citizens can be traced to classical conception of the state. The state is legally bound to the individual by the link of nationality³⁶. It is only the state which can claim and confer nationality. Such reserved powers of the state elevate it above the individual.

International law obligates states to give to aliens not lesser treatment than it gives its own nationals³⁷. This is enshrined in the principle of non-discrimination advanced as a custom of international law.

Aliens in a state owe the state of their sojourn the same obligations they owe their nation of origin/birth. Oppenheim observes that” by admitting an alien, a state brings in being a series of legal relationships with his state of nationality”³⁸ thus a state is legally bound to another state by admitting the other state’s nationals to provide protection the alien.

This debate is relevant given it attempts to explore immigration policies which are part of this study. The weaknesses in the policies including but not restricted to poor, discriminatory and politically instigated policies and the lack capacity to implement them is one of the recurrent challenges facing East African countries and the region at large. This is seen in the works of Opon, research commissioned by UN and Don Nanjira’s analysis of the aliens’ plight in East Africa and Uganda. This weaknesses form part of this study.

³⁶ Plender R. 1988: International Migration Law. Martinus Nijhoff Publishers. Dordrecht. P 3, 12.

³⁷As quoted in Perrouchoud R and Tomolova K. 2007: Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live 1985.T.M.C Asser Press. P 106

³⁸ Plender *op cit*. See also Oppenheim as quoted in Goodwill – Gill G.S (1978): International Law and the Movement of Persons between States. Clarendon Press Oxford. P 63.

Parry's³⁹ book, *Nationality and Citizenship Law of the Commonwealth and of the Republic of Ireland* can be said to be the pioneer in this topic. The thesis in this book is all commonwealth countries rather follow the same 'common' immigration laws. The book explores the immigration laws of selected commonwealth countries before concluding on the similarities that exist between these countries. This is because most commonwealth countries borrow heavily from common law of England. This is the same case in East Africa where a look at citizenship laws is basically similar.

The question to ask then is who is a citizen or a national of the commonwealth or broadly who is a citizen or "Who is a national and who is not⁴⁰". All commonwealth countries follow have adopted different principles of *jus sanguinis* (citizenship by blood) and *jus soli* (citizen by soil)⁴¹ in determining citizenship. Thus to them citizenship is acquired more by birth or soil, then by allegiance. Commonwealth countries are not keen to embrace the third principle of *jus domicile* where nationality is granted by residence thus a result of allegiance.

Hall⁴², in his *Nationality, Migrants Rights and Citizenship of the Union* advances the theory of union citizenship. The book dwells on the nationality issue in the European Union. He quotes extensively from views of Aristotle and Plato, and others on citizenship in Europe. Hall's contribution to the nationality and migrants' rights debate thus becomes more explicit as one reads through the book.

³⁹ Parry C. 1960: Nationality and Citizenship Law of the Commonwealth and of Republic of Ireland. London. Stevens & sons limited.

⁴⁰ Plender R. 1988: International Migration Law. Martinus Nijhoff Publishers Dordrecht P13. See also Oppenheim as quoted in Goodwill – Gill G.S (1978): *ibid*. P 63

⁴¹ Plender *Ibid*

⁴² Hall S. 1995: Nationality, Migration Rights and Citizenship of the Union. Martinus Nijhoff Publishers Dordrecht P i

Thus important for us to ask is if at all there is an East Africa citizen to whom the Protocol⁴³ is addressed to. The question to ask is who is this East Africa citizen or national. The Protocol contemplates such though state practice shows contrary opinion. This can be borrowed by East African countries in their definition of community citizenship as anticipated in the Protocol and its Annex. The East Africa conception of union citizen is the same as European Union concept of union citizen though the rights in European Union are clearer and entrenched without internal borders than the East African case.

Aleinkoff and Martin⁴⁴ take the same view as Phelan⁴⁵, in their analysis of the Immigration and Nationality Laws of the US. This volume also presents selected statutes, regulations and forms on immigration in the US. The book in simplified way presents requirements for entry and residence in the US to its readers. It is a complete guide to those seeking immigration services in America.

Parry 1960, Hall 1995 and Aleinkoff and Martin 1992 indulge into the often sensitive question of nationality. International law has provided several positions on this question. In East Africa, the protocol define who an East African citizen as a citizen of the partner state. The national laws of East Africa partner states have separate laws on nationality all displaying different principles of jus sanguinis and jus soli. These laws define who is a citizen and who is not.

⁴³ Protocol on the Establishment of the East African Community Common Market

⁴⁴ Aleinkoff T.A. and Martin D.A. 1992: Immigration and Nationality Laws of the US: Selected Statutes, Regulations and Forms. West publishing company

⁴⁵ Phelan M. 2001: Immigration Law Handbook. 2nd edition Oxford University Press

In Kenya nationality issue is dealt with by the Constitution of Kenya⁴⁶ Chapter three article 13 1-3, article 14 1-3, and article 15 1-5 articles 16 on dual nationality together with clause 30 of the sixth schedule. Article 12 provides for documents of identity of citizens. Also the Kenya citizenship and immigration act 2011⁴⁷ in article 6, 7, 8 1-7 10 1-11 all provide for acquisition and loss of Kenyan citizenship. The citizenship laws and guiding principles in Kenya are similar to those of Tanzania and Uganda.

The Tanzania Citizenship Act No 6 of 1995 and regulations of 1997⁴⁸ part VI article 4, 1 to 7, d and the Tanzania Passports and Travel Documents Act of 2002 and Regulations of 2004⁴⁹ together with the Constitution of Tanzania⁵⁰ provides the manner of acquisition of and loss of citizenship.

Article 10 of the Constitution of the Republic of Uganda⁵¹ as amended by article 15, 11 of 2005 and the Uganda Citizenship and Immigration Control Amendment Act 2009⁵² provide for matters of citizenship in Uganda and related matters thereto. these laws adequately respond to citizenship needs in the region at national level but fail desperately at regional level given there are still internal borders.

The East Africa laws on citizenship and the whole concept of east Africa citizen is similar to the EU's union citizenship. The difference is in the EU the concept is buttressed by the elimination of internal borders between states. Union citizens are exempt from both exit and entry visas into the EU member state territory. The only requirement is an identity card or valid passport for admission.

⁴⁶ Government of Kenya 2010: The Constitution of Kenya 2010. Chapter 3 Government Press

⁴⁷ The Kenya Citizenship and Immigration Act No 12 of 2011 Part III. Government Press

⁴⁸ Tanzania Citizenship Act No 6 of 1995 and Regulations of 1997 part VI

⁴⁹ Tanzania Passports and Travel Documents Act Of 2002 and Regulations 2004. Government Press

⁵⁰ The Constitution of The Republic of Tanzania Government Press

⁵¹ Constitution of The Republic of Uganda Article 10 as Amended by Article 15 of 2005

⁵² Uganda Citizenship and Immigration Control Amendment Act 2009

Clayton⁵³ argues that control of immigration is an exercise of executive power; only exercised by the executive arm of government. But the source and limits to this power is not clear thus there is too much discretion upon which immigration practice is hinged.

This view is expounded again in Bigo's⁵⁴ *Immigration Control and Free Movement in Europe* where he notes the "tension between legal systems driven by openness and security driven rhetoric which justifies coercive and often ostracizing practices against foreigners".

Admission or expulsion of aliens is the judicious⁵⁵ discretion of the executive. The question then is whether a state is treaty or legally bound to admit individuals or certain class of individuals into its territory or it is just a mere act of expediency.

The UDHR, (1948), ICCPR (1966), ICESCR 1966⁵⁶ among other instruments confine this debate. Article 12, b of the UDHR 1948 protects the "right to leave any country⁵⁷". Neither is there a right to enter a country except ones own⁵⁸. Only nationals are by law given the right to return to their countries.

⁵³ Clayton G. 2008: *Textbook on Immigration and Asylum Law*. 3rd edition Oxford University Press P 25

⁵⁴ Bigo D 2009: *Immigration Controls and Free Movement in Europe*. *International Review of the Red Cross* Vol.91 no 875 P1-5

⁵⁵ International law places restrictions on the executive exercise of discretion. Admission in a state is at the discretion and subject to individual state conditions but expulsion is highly protected by international law. It must satisfy legal conditions and must be seen to be fair and reasonable. Collective expulsion of aliens and communities is prohibited in international law.

⁵⁶ UN Focus 2004: *Treaties on the protection of civilians*. New York. See also Perrouchoud R. and Tomolova K. 2007: *Compendium of International Migration Law Instruments*. T.M.C. Asser Press.

⁵⁷ Universal Declaration for Human Rights 1948 Article 12. see also Hurst H. 1987: *The Right to Leave and Return in International Law and Practice*. Martinus Nijhoff publishers P 22, 150; Liu Guofu 2007: *The Right to Leave and Return and Chinese Migration Law*. Martinus Nijhoff Publishers Leiden

⁵⁸ The rights to enter ones own country was a subject of UN General Comment. The contention was on the meaning of own country and whose own country it refers to. Those who fall in own country category broadly include nationals of a given state, long term residents and asylum seekers and refugees. Reference to own country of nationality would therefore mean only nationals/citizens of any state have the exclusive

The lack of “complementary right of admission of aliens⁵⁹” shows that the admission of aliens in a given state is an act of expediency and not a legal obligation. A state is not under obligation resulting from international law whether in form of covenants or declaration to admit aliens. The Most Favored principle though not binding comes near to securing the right of admission as seen in the Protocol. The fact that there are still immigration controls, visa regulation, border controls, and grounds of expulsion of aliens such as national security, public order, among others demonstrates that states still have discretion on admission of aliens into their territory. Therefore, admission of aliens to a state is a mere act of international comity or expediency and not a legal obligation.

International law only obligates states to admit their nationals or returning nationals whatever their state provided such individual shows proof of nationality; commonly the national passport. This is further discussed in IOM’s “Return Migration: Policies and Practices in Europe”⁶⁰. States also have special obligation as to admission and treatment of diplomats and members of certain international bodies that enjoy diplomatic privileges⁶¹.

right to enter/ return. see CCPR General comment no. 27 article 12(freedom of movement 1999)Adopted at the 1783rd meeting 67 session held in October 1999 and adopted on 1st November 1999 in Perruchoud R and Tomolova K. 2007: Compendium Of International Migration Law Instruments. T.M.C Asser press. P135

⁵⁹*ibid* at 150

⁶⁰ International Organization for Migration 2004: Return Migration; Policies and Practice in Europe. The Netherlands

⁶¹Geneva Conventions on Diplomatic 1961 2005 United Nations, *Treaty Series*, vol. 500, p. 95. And Geneva Conventions on Consular Relations 1963 2005 United Nations, *Treaty Series*, vol 596, p. 261

Legomsky⁶² notes the growing interest and debate about immigration and the law. In his *Immigration and the Judiciary*, Legomsky notes “the magnitude of sometimes competing national and individual interests, the foreign affairs ramifications, economic impact of immigrations, environmental issues, the socio-cultural and racial and philosophical questions raised by immigration control” all which coalesce to make immigration law a prime target for heated debate. In exercise of their mandates, Legomsky finds courts advancing the principle of sovereignty through the way they handle immigration related cases. Courts are reticent to interfere in migration matters and almost always agree with the state’s decision. The executive is vested with extensive powers on issues of migration; detention, expulsion, deportation among others.

Given that national courts are reticent in immigration cases due to respect of sovereignty and the international law has given states unfettered, though checked responsibility over management of migration either through conferring to states powers to determine nationality, admissions, expulsion, detention and to enter into agreements and make claims on behalf of the individual who are nationals, is there a need for an international migration law? This takes in the debate of globalization versus sovereignty.

International law still recognizes the principle of sovereignty as fundamental basis in inter-state relations, while on the other hand advocating for globalism⁶³ through international cooperation⁶⁴ and free movements⁶⁵. Free movement is an aspect of

⁶² Legomsky S.H. 1987: Immigration And the Judiciary: Law and Politics in Britain and America. Oxford. Clarendon press.

⁶³ Moses W.J *Op cit* P 36-37, Solimano A. *op cit* at P 103, Koslowski R. eds *op cit* P5-26.

⁶⁴ Evans. M. 1976: Immigration Law. London. Sweet and Maxwell. Pg 133,179. See also

⁶⁵ Condinanzi M, Lang A and Nascimbene B 2008: Citizenship of the Union and Freedom of Movement of Persons. Martinus Nijhoff Publishers Leiden. P 19-33

globalization⁶⁶. The elimination of restrictions on migration is a reflection of globalization but the continued emphasize of state sovereignty on matters of nationality, admission, expulsion among others is a reflection of state sovereignty. Thus proponents of free movements while advocating for globalization; find themselves at logger heads with the proponents of sovereignty and “national security”⁶⁷.

Goulbourne⁶⁸, in her *Law and Migration*, rejects restrictive policies. The exercise of sovereign powers is an exercise of restrictive immigration. This view is supported by Weiss⁶⁹ in his *Nationality and Statelessness*. But whatever the policies and laws adopted by a country, they have little impact on the number of entrants relative to financial costs, and with regard to the threat to human rights. The author further notes the difference in immigration statuses as reflecting inequality of treatment in society as regards to race, sex, and economic status among others. Goulbourne sees immigration laws as lacking legitimacy given their failure to achieve their goals amid increasing economical and social costs to the state implementing them.

Evans’ *Immigration Law*⁷⁰ is an attempt to discuss immigration law and its administration in historical and administrative context. The book exposes some of the conflicting policies and considerations that have contributed to this body of law. Evans identifies the purpose of immigration control as; economic, community relations, population growth, housing and social services, international relations and civil liberty issues. He sees immigration as a necessary evil for filling gaps in manpower and as a

⁶⁶ Moses W.J. *op cit* Koslowski R. eds *op cit*.

⁶⁷ Hotton, R.J 19 : Globalization and the Nation State. Palgrave. New York. P See also Guild E. and van Selm J. 2005: International Migration and Security: Opportunities and Challenges.

⁶⁸ Goulbourne S. 1998: Law and Migration. An Elgar reference collection Cheltenham UK. Pg ix.

⁶⁹ Weiss P 1979 as quoted in Goulbourne S. 1998: Law and Migration. An Elgar reference collection Cheltenham UK Pg ix

⁷⁰ Evans J. M. 1976: Immigration Law. London. Sweet and Maxwell Pg 133,179

general force for economic expansion. To him immigration law modeled on traditional conception of state sovereignty is outmoded and should be changed with the cooperation of other governments. This is the only way we can realize an international migration law.

Several international instruments provide for the exercise of immigration control by states. Some of these are UDHR, ICCPR, and CESC. Clayton 2005, Legomsky 1987, Goulbourne 1998 and Weiss 1979 also delve into this debate on immigration control. Immigration control is exercised through immigration laws established by individual states to cater for immigration matters and address areas of these states particular interest. The response to a state self interest in migration is seen in the visa regimes of all countries. Why there are different visa regulations on each nationality is a reflection of that country's self interest. Visa regimes are guided by the principle of complementarity where states extend complementary favoured treatment to their national.

These immigration laws are meant to restrict and control immigration and emigration into and out of a state. The view of immigration control is anathema to integration and free movement which is the cornerstone of any integration project. Given the cyclic, dynamic nature of migrations, it is not easy for an individual state to control or restrict movement of persons be they nationals or non-nationals. This makes individual efforts at arresting illegal migrations futile thus leaving the only best option at cooperation among and between states in controlling migrations.

The protocol of East African Community Common Market and the Regulations thereto are meant to structure migration among East Africans only leaving out other migrants who are in the region. For instance the treatment of Chinese and West African nationals is turning out to be a regional issue given that each state handles them

differently. In the case of Somalis Kenya and Tanzania has similar regulation by putting them on the referred visa regime while in Uganda they have free entry. Their main interest being to enter Kenya, they fly to Uganda then sneak to Kenya through porous land borders thus putting security interest of neighbour states in compromise. These shows the immigration laws in these countries are not sufficient to tackle migrations whether regular or irregular.

Examples of these laws are the Kenya citizenship and Immigration Act 2011⁷¹, Uganda Citizenship and Immigration Control Amendment Act 2009⁷², the Tanzania Immigration Act 1972⁷³, Rwanda Immigration Act 2009⁷⁴ and the various visa regulations

1.3.2 Literature Review on International Migration Law

Perruchoud and Tomolova⁷⁵ in the Compendium of International Migration Law Instruments note the lack of “worldwide legislature establishing on exact legal framework for the movement of persons with which states must comply⁷⁶” This shows the dilemma for all scholars when talking about international migration law. The exactness of this law is completely lacking since as demonstrated in the review of the legal instruments, it is spread in various several instruments that can be said to contain this kind of law. The reason is clear that migration issues are national issues; they are

⁷¹ Kenya citizenship and Immigration Act 2011

⁷² Uganda Citizenship and Immigration Control Amendment Act 2009

⁷³ Tanzania Immigration Act 1972

⁷⁴ Rwanda Immigration Act 2009

⁷⁵ Perruchoud R. and Tomolova K. 2007: Compendium of International Migration Law Instruments. T.M.C. Asser press. Pg v

⁷⁶ Perruchoud R and Tomolova K. *ibid* See also Schau J. eds 2009: International Migration Bill of Rights. in *Georgetown Immigration Law Journal* Vol 24 2009-2010 no 3-4 P 395.

sovereign issues of any state thus not easy to internationalize. This expounds the dilemma of whether there is actually an international migration law.

In order to “promote the understanding and awareness of the legal norms and principles that govern the movement of persons today, with regard both to rights and obligations of migrants and states responsibility”⁷⁷The International Migration Law Series (IML) was established by the International Organization for Migration (IOM) in 2004. This series provides a one source both in terms of books and journals in international migration law and migration in general.

One publication in this series is the Glossary on Migration⁷⁸ which is a complete glossary of the many terms and concepts as they are used in migration. This is significant in that it attempts to standardize migration language indispensable for coordination and cooperation of states in matters migration at bilateral, regional or international levels.

The idea of standardization does not apply to definitions alone but even to whole texts. For instance Plenders’ Basic Documents of International Migration Law⁷⁹ attempts in one volume to present instruments i.e. treaties, conventions, protocols and general comments that inform international migration law. This is despite the absence of an “exact legal instrument”⁸⁰ on migration. This believe in the existence of an international migration law resulted in another volume; International Migration Law⁸¹ that deepens this debate on such subjects as nationality, statelessness, sovereignty and other related topics.

⁷⁷*ibid.*

⁷⁸International Organization for Migration 2004: Glossary on Migration Law. I.O.M. Geneva.

⁷⁹.Plender R 1988: Basic Documents on International Migration Law. Martinus Nijhoff Publishers. Dordrecht.

⁸⁰ Perruchoud R and Tomolova K. 2007: Compendium of International Migration Law Instruments. T.M.C. Asser press. Pg v

⁸¹ Plender R. *Supra*.

Perruchoud and Tomolova⁸² in *Compendium of International Law Instruments* present us with a comprehensive compilation of universal instruments relevant to international migration. These instruments touch on refugee law, human trafficking and smuggling, nationality and statelessness, labor migration law, human rights of migrants, diplomatic and consular protection, and maritime law among others.

The *International Migration Law; developing paradigms and key challenges*⁸³ advance the conception of an international migration law further by its capture of migration issues such as; human rights of migrants, human rights of victims of trafficking and smuggling, statelessness as well as the recent development of terrorism and the quest of states to ensure national security, especially reflected in the tension between anti-terrorism legislation and immigration control measures⁸⁴.

Aleinkoff on the other hand in “*Migration and International Legal Norms*⁸⁵” “provides a comprehensive up-to-date analysis of the international norms on state authority to regulate migration, freedom of movement, forced migration, human rights as among topics discussed. This discussion aims to identify the source and scope of international law on migration”⁸⁶.

Protection of migrants’ rights is a fundamental principle in international migration law, without which there can absolutely be no such law. In fact the whole idea of an

⁸² Perruchoud R and Tomolova K. *Supra*

⁸³Cholewhiski R. et al (eds) 2007: International Migration Law: Developing Paradigms and Key Challenges. T.M.C Asser Press. Introduction

⁸⁴ Bigo D. 2009: Immigration Controls and Free Movement in Europe. *International Review of the Red Cross*. Vol 1 no 875.P 1

⁸⁵Aleinkoff T.A and Chetail V (2003): Migration and International Legal Norms. T.M.C Asser Press Introduction.

⁸⁶ Openski B. 2009: The Influence of International Law on the International Movement of Persons. UNDP/*Human Development Report research Paper 2009/18*. P 1,6-12.

international migration law is hinged on the idea of the existence of an international human rights law whose concern is with protection of human rights.

The debates in international migration law seek to establish a body of law to be referred to as international migration law. Immigration issues globally are found scattered in many international instruments ranging from UDHR to regional instruments such as the AChHPR, and the Protocol. The aim of IML is to confine and structure the practice of immigration at the global level so as to reduce tensions resulting from different and often individual approaches to migration management. These include the important aspect of protection of migrants which has occupied international attention for long time given the vulnerable nature of migrants. Thus instruments like the 1984 Convention against Torture⁸⁷, the International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families 1990⁸⁸ and the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Countries in Which They Live 1985⁸⁹.

Mobility rights are human rights protected by these instruments including the Protocol. Free movement of persons is protected by the regional Protocol and national laws of each east African state. For example article 39 1 to 3 of the Kenya constitution⁹⁰ provides for freedom of movement including freedom to leave the country and to return. This practice of protecting migrants can also be seen in the European Union.

⁸⁷ Convention against Torture and other cruel, inhuman or degrading treatment or punishment 1984 in Perruchoud R and Tomolova K op cit P 66

⁸⁸ International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families 1990 in Perruchoud R and Tomolova K op cit P100

⁸⁹ Declaration on the Human Rights of Individuals Who Are Not Nationals of the Countries in Which They Live 1985 in Perruchoud R and Tomolova K op cit P 106

⁹⁰ The Constitution of Kenya 2010 Article 39 op cit P 29

1.3.3. Literature Review from the European Union

Literature review from the EU enables an understanding of the development of free movement of persons compared to the EAC.

Sarolea's "Migrations et Protection des Droits del'Homme"⁹¹ (Migrations and Protection of Persons outside their Country) (translation), gives a convincing analysis of legal norms and principles at global and regional level relating to the protection of migrants human rights.

Protection of migrants is important if the right to free movement of persons and labour is to be achieved. Various instruments that offer these guarantees to protection of the person and as a requisite for realizing free movement can be found aplenty

Sarolea's contribution falls shy of proposing a migration bill of rights. This project was undertaken by the Georgetown University in its Journal of Immigration Law⁹²in which a draft of migration bill of rights is explored. In the preamble the contributors note the lack of a single mechanism to coordinate global migration policy, neither is there a law protecting migrants. Articles 10, e. f of this bill provides for the free movement of persons.

Free movement of persons has been a concern of states for over long ever since the thought of community of states emerged.

In the European Community Treaty article 18, the concept of free movement is greatly developed. In citizenship of the union and freedom of movement of persons,

⁹¹ Sarolea S.2005: Migrations et Protection des Droits del l'Homme. I.O.M Geneva

⁹² Schau J. (eds): International Migration Bill of Rights in *Georgetown Immigration Law Journal* Vol.24 2009-2010 no 3-4. P 395

Condinanzi⁹³ and his colleagues analyze the concept of union citizenship and how this guarantees freedom of movement of person. In order to achieve a union, freedom of movement must be guaranteed and protected in instruments establishing the union. That citizens of the union have freedom to move and reside freely within the territory of member states subject to limitations and conditions in the treaty is itself enough safeguard to this right. The European Union has to large extent achieved this right to free movement within member states.

Favell⁹⁴ in *Euro Stars and Euro Cities: Free Movement and Mobility in an Integrating Europe* also explore mobility as an element of free movement of persons in Europe.

Free movement has its challenges as Cremers⁹⁵ clearly shows in his book the free movement of workers in Europe: outstanding problems. These challenges are among others social security issues, pay and conditions of employment, visas, residence and work permits.

Van Der Mei⁹⁶ in *Free Movement of Persons within the European Community: cross-border access to public benefits* dwells on the challenges free movement poses on social security. Whether free movement also means free access to medical care and education by citizens of the union and non-citizens living within the community are debatable.

⁹³ Condinanzi M, Lang A and Nascimbene B 2008: Citizenship of the Union and Freedom of Movement of Persons. Martinus Nijhoff Publishers. Leiden. P 19-33

⁹⁴ Favell A. 2008: Euro stars and Euro cities: Free Movement and Mobility in an Integrating Europe. Blackwell Publishers. London P 1-3.

⁹⁵ Cremers J. 1999: Free Movement of Workers in Europe: Outstanding Problems.

⁹⁶ van Der Mei 2003: Free Movement of Persons within the European Community: Cross Border Access to Public Benefits. Hart Publishers. Oxford Portland. P1, 10, 21-22.

Papagianni G, in *Institutional and Policy Dynamics of EU Migration Law*⁹⁷ takes note of the hesitation of the EU to clearly establish a migration policy in a strictly legal sense. It took the EU many years to recognize free movement of persons as a fundamental requirement for integration. This can be seen by the length of time it took to realize the objective of free movement from 1989-1992. Papagianni observes “ Whereas the Member States declared their will to cooperate “in order to promote the free movement of persons...without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries”, at the same time they underlined the fact that nothing in the relevant provisions shall affect the “right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries ...”⁹⁸. Thus the right of free movement is contradicted by the right of states to control migration from third countries. This makes a mockery of the right to free movement.

Free movement does not take place in a legal vacuum as one may presuppose. In the influence of international law on the international movement of persons, Openski⁹⁹ observes that the existence of national migration laws is a constraint to international free movement of persons. The reason states control movement is because of the so called “state jealousy” over sharing their sovereignty. Control of movement is an exercise of state sovereignty which all states are unwilling to share with other states or international organization. The development of humanitarian and human right law according to Openski has helped to check the sovereignty of states on movement of persons.

⁹⁷ Papagianni G 2006: *Institutional and Policy Dynamics of EU Migration Law*. Martinus Nijhoff Publishers. P 9.

⁹⁸ Papagianni op cit p10

⁹⁹ Openski op cit p 1-22.

International law observes Openski responds to state sovereignty by limiting state power on migration issues through formation of treaties that serve to limit the said states power. Example is convention on the protection of migrants.

Proponents of free movement are in favour of open borders or borderless states where goods and services including persons move freely across territorial borders between states. This according to Bigo¹⁰⁰ and co-open market economists will enable the realization of free market economies. Free movement foresees the elimination of internal borders just as free market foresees the elimination of trade barriers.

1.4 Justification of the Research Problem.

This study is about implementation of migration laws and regulations in East Africa. Presently there is no research on this subject and therefore a poverty of information on the implementation of this law and on migration law in general. Most of the contributions made in this field are either individual country analysis or regional level analysis elsewhere with no particular study about East Africa. This study therefore is intended to fill this knowledge gap; to pioneer and stir interest among scholars and immigration practitioners to focus on this hitherto unexplored area.

1.5 Theoretical Framework

In this study we adopt the New Haven School of thought of McDougall J.M and Lasswell H as our theoretical framework. This is a policy-oriented perspective which

¹⁰⁰ Bigo D 2009: Immigration Controls and Free Movement in Europe. *International review of the Red Cross*. Vol 91 no.875 Sept 2009.

focuses on the formulation of policy and policy implementation by decision-makers rather than on mere rules for their sake.

McDougall and Lasswell opine that “decision-makers should fashion "a more usable conception of international law" not simply by consulting rules, but by balancing emphasis on "authority and control" and on "perspectives" and "operations.”¹⁰¹. To McDougall, “universal doctrines such as sovereignty, domestic jurisdiction, and non-interference are used to resist institutional reconstruction which is indispensable in society”¹⁰². This “doctrines’ are the fundamental principles of international law, therefore a hindrance to the implementation of a regional migration law and its development. This explains why there is presently no substantive law on migration like in other areas where international law is well developed.

To New Haven, law is not merely a system of rules but must be seen to achieve a more empirical account of operation of law in society and must be instrumental in achieving human dignity¹⁰³. Thus law is what it achieves, the tangible, quantifiable evidence of the contribution of that law to society. Thus what the regulations on free movements quantifiably, empirically achieve is essential and not the mere provisions of free movements. There is this law in east Africa but how this law contributes to societal good for attainment of human dignity is of essence to this research.

The New Haven School exhibits three distinguishing features. These are: the resistance to realism by rejecting the realist doctrines of sovereignty, non-interference

¹⁰¹ McDougall M.S et al. 1994: Interpretation of International Agreements and World Public Order. Martinus Nijhoff. Dordrecht. P 100

¹⁰²Kleimann D. 2006: Positivism, the New Haven School, and the Use of Force in International Law. BSIS Journal of International Studies Vol. 3, 26

¹⁰³ Scobbie I: Wicked Heresies or Legitimate Perspectives: Theory of International Law In Evans D.M. 2006: International Law 2nd ed Oxford University Press P93-95

and territorial integrity, the interdisciplinary approach to international law where it links law and political science and social sciences and its attention to policy and policy-making and implementation¹⁰⁴. The New Haven approach is accused of drowning international law into policy. The goal of the new haven school is to emphasize interpretation of international law as a system of creating minimum world public order with continued progress towards the development of shared values into optimum order¹⁰⁵. It is this goal of creating community order of maximizing shared community values like wealth, social values among others that makes this school of thought relevant to this study since our study is about East African community migration law implementation.

1.6 Hypotheses

Our study is informed by the following hypotheses;

- a) The implementation of the Regulations on free movements is weak, half hearted, ad hoc, and uncoordinated thus resulting in poor policies, weak, unenforceable and restrictive laws and regulations that are an obstacle to integration.
- b) There is the lack of clear laws and rules, procedures, principles guiding the implementation of regional migration laws and regulations in East Africa which is an obstacle to integration.
- c) The migration laws in the region are not adequate, institutionalized, and facilitative to migration thus increasing instances of conflict in migration management in the region.

¹⁰⁴ Mcdougall and Lasswell *Supra*.120.

¹⁰⁵ *ibid*

1.7 Methodology

The research methodology adopted in this study relies on both primary and secondary data in the investigation of the implementation of the migration laws and regulations in East Africa.

The research will focus mainly on the principal officials from all the countries selected for study, being the Departments of Immigration, Ministries of East Africa Community as well as the East Africa Community Secretariat.

1.7.1 Geographical scope.

The geographical scope of this study will cover the East African countries of Uganda, Tanzania and Kenya. These countries throughout our study will be regarded representing the EA region considering the convenience i.e. geo-strategic position in terms easy to access to the rest of the world. b) These three countries experience with migrants is unique and significant in number than the other two partners of Burundi and Rwanda.

1.7.2 Sample population and data collection.

Our target will be the Departments of Immigration, the Ministry of East Africa Community and the Secretariat who are involved in overall implementation of the regulations on free movement. A total of fifty (50) officials are targeted for interviews spread across selected border control posts.

This geographical and sectional dispersion will enable us gather wide range of information on the implementation of the migration law and regulations. The choice of

the sample size and distribution was randomly done informed by the number of officers present at a given BCP at anyone given time and their man hours so as to reduce the number of hours spend at a given BCP. Primary Data collection will be undertaken using semi structured interview method¹⁰⁶ where pro-fomas will be filled out by the interviewer during the interview or immediately after the interview so as to capture the information as accurately as possible.

A review of national and regional legal instruments on migration will also be undertaken as our primary source of data. This include the Kenya citizenship and foreign nationals Act, the Tanzania immigration act, the passports act of Tanzania, the Uganda immigration Act among others to establish their compliance to the requirement for harmonization and to their adequacy in addressing the migration challenge. Secondary data will also come in handy from relevant publications on immigration law in East Africa, journals, magazines, news papers.

1.8 Expected Outcome

At the end of our study we expect to expose the weaknesses in the implementation and obstacles facing the implementation of the regulations on free movement in East Africa as a requirement for integration. We also expect to find out whether the principles, rules and procedure of implementation of the regulations have succeeded or not and the changes that need to be introduced for effective implementation of the regulations. The regulations on free movement are essential ingredients in the integration process of the East African community. There can be no integration without free movement of persons.

¹⁰⁶ Walliman N. (2010): Social Research Methods. Washington DC. SAGE. Pg 91,92

In this study we expect to understand whether integration has been deepened following the implementation of the regulations.

1.9 Limitations of the Study

During the conduct of this study, we encountered various limitations at different stages of the research. First there was the challenge of scarcity of published resources on the topic of study as this research realized that there was a poverty of knowledge on free movement of persons in the region. The research was also faced with another challenge of lack of adequate finances to carry out the research reaching as many people as possible. This heavily impacted on the movement of the researcher. The other challenge was dealing with governmental bureaucracy who is forbidden from talking to individuals on certain issues citing confidentiality laws and oaths of secrecy. The process of getting government clearance to carry out the research was very long and time consuming. Some of the respondents refused to talk to the interviewer even after being shown all required documentation. The protocol only came into force on the 1st of July 2010; to date this is a very short time to realize any meaningful implementation of its provisions. The process of ratification and the lack of mechanism to verify the compliance of the the new laws is limiting the implementation of the provisions of the protocol. Language barrier; especially from officials from Tanzania most of whom prefer to use Swahili rather than English. Some wondered aloud why the interview was not being done in Swahili.

1.10 Chapter Outline

In chapter one, we capture the problem statement, objectives, hypothesis and literature review to our topic of study hypothesis and methodology. Chapter two looks at the historical and legal foundations and principles of free movements in which we explore the historical origins of free movement as a practice and concept and its legal underpinning. We also analyze the principles guiding free movement of persons. In Chapter three, we discuss the review of legal framework on free movement of persons in East Africa. We focus on development of free movements of persons regulations both before and after independence, the revived East African community and the treaties concerning the community and their inclusion or exclusion of free movement of persons issues and how this have affected both the character and scope of migration. Chapter four covers the implementation of Regulations on free movement in East Africa; we look at aspects such as the Protocol, and Regulations on Free Movement are reviewed; implementation matrix of the regulations, agencies, principles and laws and policies of implementation are also looked at. And lastly in chapter five we give a conclusion of our research in which we highlight on the challenges and limitations of implementation with a view to exposing areas that need consideration in terms of legislation or implementation process itself.

CHAPTER TWO

FOUNDATIONS AND PRINCIPLES OF FREE MOVEMENT OF PERSONS.

2.0 Introduction

This chapter serves to give us a glimpse into the historical and legal foundations of free movement of persons¹ in enabling an understanding of the concept of free movement of persons. The chapter is divided into two broader sections; section on the history of free movements of persons and section on legal foundation of free movement of persons.

Several perspectives have been advanced in support of free movement of persons. For the libertarians², free movement of persons is an exercise of their liberty. They argue that man is inherently born free thus has liberty to choose his life. Among the libertarians are classical writers like Hugo Grotius, Gentillis, Vitoria and contemporarily Abraham Lincoln, Franklin Roosevelt among others. Free movement of persons is an exercise of liberty thus it should be promoted and safeguarded.

The other perspective consists of the liberal egalitarians. These are advocates of liberal laws and life as the way to attaining greater equality among nations and peoples. They argue liberal policies and laws that create equal environment for each ones realization of individual aspirations including free movement of the person as the best. To liberal egalitarians restrictions including laws (immigration laws) are anachronistic to their course. The conception of free trade is part of liberal egalitarian school of thought.

¹ Klein E. 2013: International Law and Freedom of Movement. Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press P 1

² Barry B. and Goodin R.E eds 1992: Free Movement: Ethical Issues in the Transnational Migration of People and Money .The Pennsylvania State University Press. Pennsylvania. P 25, 85, 167,211.see also Schimidt S, Shelley M.C. and Bardes B.A 1999: American Government and Politics Today. Wadsworth Publishing Co. Belmont. P 25,26,238-240,

The other conception of free movement is informed by the perspective of natural law. This is the predominant perspective in this thesis and most international instruments towards realization of free movement of persons. According to this view, free movement is a natural right³, an inherent human right, an inalienable human right, a human urge⁴. The United Nations and its agencies and world governments favour natural law perspective. The basis of natural law is that man is born free and thus free to move around. The right to move is inherent natural human right which cannot be restricted. Vattel, Vitoria, Gentillis, Lauterpacht, and other positive law proponents fall in the natural law group.

The other perspective is that of political realist which constitute the realist perspective to politics and international relations. This view holds that states are sovereign and jealous to share their sovereignty with any group or entity. Thus states have power to admit, expel aliens⁵, confer citizenship, and create stateless persons, among others. Sovereign states restrict free movement of persons at will since they are not under sanction to enforce international conventions they have committed to. States allow free movement only if it is in their self interest or if it advances their self interest.

2.1 Historical Foundation of Free Movement of Persons

An understanding of the historical origin of any subject of study is important for understanding the context in which such study is undergirded. Therefore a study of free movement of persons would not be complete without venturing into its historical origin.

³ Shimidt, Shelley, and Bardes op cit P 37-40

⁴ As quoted in Moses J.W. 2006: International Migration: Globalization's Last Frontier. ZED Books. London. P 35

⁵ Akehurst M. 1987: A Modern Introduction to International Law. London Unwin Hyman. P 88-102.

The historical foundation of free movement can be seen in the perspective of humanity itself. Bohning⁶ a renowned anthropologist sums this urge thus;

“I believe that, anthropologically speaking, migration is an irrepressible human urge. People have always wanted to move to places with more spiritual freedom, greater political liberty or higher standards of living (and the satisfaction of basic needs in their country of origin does not constitute a threshold at which the urge to migrate suddenly vanishes or loses its legitimacy). The more tolerant the receiving state, the more attractive its spiritual freedom and political liberty; the richer it is, the stronger its economic pull. When tolerance and wealth go hand in hand, man-made laws can attempt to regulate migration but they cannot suppress it.”

Freedom of movement is a human urge, it is a human norm and way of life; that human beings intrinsically have a compelling urge to free themselves and follow freedom of whatever kind. People migrate either in search of spiritual freedom to those who reside in religiously repressive countries, political freedom to those who come from dictatorships, or economic freedom. This freedom cannot be restricted or suppressed by erecting immigration barriers in form of laws or policies that curtail this freedom.

All countries the world over cherish freedom of movement as a fundamental human right⁷ and need which should be safeguarded by the community of states. In fact any guarantee to freedom of movement is considered one of the indicators of a free,

⁶ As quoted in Moses J.W. 2006: International Migration: Globalization's Last Frontier.ZED Books. London. P 35

⁷ Universal Declaration of Human Rights Resolution 217A III

democratic, and civilized society⁸. In fact free movement of persons has developed as an international custom⁹ by all states.

To Roseau¹⁰ this freedom can be explained as a social contract of individuals and states. He argues thus “Man is born free, and everywhere he is in chains. One believes him the others’ master, and yet is more slave than they. How did this change come about? I do not know. What can make it legitimate? I believe I can solve this question” (SC 1.1.1).

That Man is born free is indisputable fact. But he is chained by the many restrictions erected by each community of states, groups of individuals through whatever social contract¹¹ they may form to govern their interactions. Immigration laws are a restriction to this inherent freedom as suggested by Roseau. Laws as Roseau and Hobbes argue are not meant to protect neither should there be laws to protect people since inherently people are born free and have the inborn ability to resist such laws or accede to them. That people have a choice to migrate or not, to migrate lawfully or not cannot be regulated by any law as it is dictated by the human urge at play and the particular time.

Because man is born free, he has an irrepressible urge¹² to remain free. He has an urge to protect and maintain that freedom; therefore human beings will always view the law as intending to limit their freedom. Law thus is a necessary evil. It is only useful in good situations but not good on the converse.

⁸ Cohen J. 2010: Roseau: A free Community of Equals. Oxford University Press, Oxford. P10

⁹ Brownie I 1990: Public International Law. Oxford. Oxford University Press P see also Dixon M. 2005: A Textbook on International Law, 5th ed Oxford University Press. London p 29

¹⁰ Cohen J. op cit P 10

¹¹ Roseau J.J.1762: The Social Contract. Bk. Trans Myers H. A. P 240332

¹² Moses J.W op cit P 35

The views of the Hobbes, Pufendorf Locke among others found their expression in the Magna Carta (Great Charter) 1215 in which the right to freedom of movement of people was well proclaimed. According to article 42 of this charter, “It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom: excepting prisoners and outlaws, according to the laws of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above¹³”.

In the United States the congressional enactment of 27th July 1868 declared that the right to expatriation is a natural and inherent right of all people¹⁴ the right of expatriation is part of the broader right to free movement and therefore by this declaration, Congress was declaring the right to free movement to be a natural and inherent right of all people¹⁵. That the right to free movement is natural and inherent is comparable to Bohning’s assertion about a human urge¹⁶ to migrate or intrinsic pull factor¹⁷ as economists would call it.

The Constitution of France in title 4 1791 also referred to the “freedom of everyone to go¹⁸”. That as early as 1791 in France everyone was free to go confirms that the practice of free movement is that old. No restriction was put on departures though entry was restricted. Francisco de Vitoria refers to this as “it was permissible from the

¹³ The Magna Carta (The Constitution of the United Kingdom and Dependent Territories Article 40

¹⁴Schmidt, Shelley, Bardes op cit P 77

¹⁵ Op cit P 77 interpretation 356.1

¹⁶ Moses J.W. op cit p 35

¹⁷ Todaro M.1992: Economics for Developing Countries: An Introduction to Principles, Problems and Policies for Development. Prentice Hall London P143, 165 Se also Crush J. and Tevera D.2010: Zimbabwe Exodus: Crisis, Migration and Survival. SAMP Kingston P52

¹⁸ Plender R op cit P 63

beginning of the world for everyone to travel wheresoever's he would¹⁹". As much as one is free to travel in Vitoria's mnemonic, "the owner of the territory had the right to decide who to admit provided that he considers the aliens reasons for travelling²⁰", the most common and legitimate reason being commerce.

The right to free movement to Vitoria is part of human nature. It is part of human life and practice that human beings travel. Grotius refers to it as "most specific and impeachable axiom of the law of nations²¹". That Grotius see free movement as "specific and unimpeachable" it is specific because it clearly refers to free movement of persons. This free movement is part of the "law of nations²²". By law of nations, Grotius means public international law which is the law governing relations between states.

In East Africa, the history of free movement of persons can be traced to the history of the people of East Africa. This is historically referred to as EA migrations. The peopling of EA is an aspect and exercise of free movement of persons. That the people of EA moved freely into the present day East Africa is a historical fact. The scramble for Africa and east Africa by the colonial powers introduced restrictions to an otherwise free people who notwithstanding their ethno-linguistic divergences were freely moving across the land in disregard of "borders"²³

¹⁹ See *Reflecciones Sobre Idios y el derecho de Guerra* sect.III P 386. Trans. By Bate John P.

²⁰ Vitoria op cit P 386 See also Plender R op cit P 63

²¹ Plender R. op cit P 63, 66

²² Vattel

²³ The use of the term "borders" is rather limited given that at the time these communities were not aware of existence of border as it would be today. Border is thus used in abstract form.

2.2 Legal Foundation of Free Movement of Persons

The legal foundation of free movement of persons is informed by the historical foundation. There is a correlation between history and law as both are influenced by the same circumstances. History has a large influence on the laws enacted in all societies. Legal foundation on free movement can be understood levels namely the global level, the regional level and national levels. The global levels analyses the global instruments informing free movement of persons while at the regional level, regional instruments giving impetus to free movement are explored, national level national laws for or against free movement of persons are explored. These instruments form an important part to individual state perspective on free movement of persons.

2.2.1 Legal foundation at global level

The Universal Declaration of Human Rights²⁴ in response to article 1, 3 of the Charter of the United Nations in article 13 1 and 2 is the primary source of provisions on free movement of persons. The article provides that “Everyone has the right to freedom of movement and residence within the borders of each State...2. Everyone has the right to leave any country, including his own, and to return to his country”. The Declaration though not binding in terms of enforceability sets the stage for free movement rights. The article contemplates freedom of movement within the borders of a state. By everyone, the article implies both citizens and non-citizens. A distinction between non-nationals lawfully in a state and non-nationals unlawfully in any given state is not provided. By referring to “each state”, the article would be meaning that these free movements and

²⁴Universal Declaration of Human Rights art.13.UNGA Resolution 217A III GOAR,3RD Sess, 183 plen.mtg.,art 13 UN Doc.A 810(1948) See also Hunnan H. 1987: The Right to Leave and Return in International Law and Practice. Martinus Nijhoff publishers P22-150

residence will take place across borders. Therefore freedom of movement occurs both within a state borders and without a state borders.

Further the International Convention on Civil and Political Rights²⁵ advances the right to free movement as contemplated in the UDHR thus “...Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence” article 12,1. By everyone, includes both nationals and aliens in equal measure have the liberty to move freely within the territorial boundaries of a state and shall freely choose their residence. In this case, a state will be in abrogation of international law if it admits aliens and institutes restrictive measures as to limit their movement within the state or puts measures aimed at controlling their residence. Laws that prescribe places of residence for aliens are ideally void according to this provision. The right to leave in subsection 2 of this article is express “everyone shall be free to leave any country including his own.

The International Convention on Elimination of All Forms of Racial Discrimination²⁶ also highlights the importance of the right to free movement in international and national law. The purpose of the convention is to stop all forms of racial discrimination including discrimination on the grounds of nationality. Article 5, d (i-iii) and e confirm the rights to free movement within the borders of a state, the right to leave any country including ones own and to return to ones country, and the right to nationality. These rights are the same as found in UDHR, and ICCPR. Subsection e enumerates all social rights to be enjoyed by the human person irrespective of nationality. This

²⁵International Convention on Civil and Political Rights, art 12 adopted on 16 Dec 1966, entered into force on 23 March 1976 G.A res. 2200A XXI. UN Doc. A/6316(1966), 999 U.N.T.S 171

²⁶International Convention on Elimination of All Forms of Racial Discrimination art 5. Adopted by G.A Res.2106 (XX) of 21st Dec 1965, entered into force on 4th Jan 1969

convention is important since discrimination based on country of origin or nationality is an impediment to realization of free movement of persons. Without free movement either internal or external, the dignity of the human person would be undermined. In fact discrimination is anathema to free movement of persons.

Another legal source of free movement of persons is found in the Convention on Protection of Rights of All Migrant Workers and Members of Their Families²⁷. In part III article 8, 1 and 2, the freedom to leave any country and the right to enter ones country of origin respectively are expressly provided. But the state of origin in this convention is disputable. State of origin can mean that country where one came from or the country of nationality/citizenship. For instance anyone moving from country A to B then to C in international migration practice, the country of origin can be considered to be C and B at the same time. The person is a national of country A but resides in B then relocates to C. In such case it is not clear whether country of origin is A, or B since country of origin does not expressly mean country of nationality, it can mean country where one last came from or originated.

The Convention on the Rights of Persons with Disability²⁸, article 18 also refers to free movement. The heading of the article is instructive “liberty of movement and nationality”. Section 1(a, b, c, d) all discuss issues that advance free movement of persons. This issues range from right to acquire and change their nationality article 18, 1, a; possess and use documents of identity or utilize relevant processes such as immigration proceedings, subsection b; free to leave any country including their own, c; and right to

²⁷Convention on Protection of Rights of All Migrant Workers and Members of Their Families article 8 of part iii entered into force 1st July 2003 G.A res. 45/158 UN Doc. A/45/49(1990) see also Perruchoud and Tomolova 2009 op cit P 106

²⁸Convention on the Rights of Persons with Disability art 18 entered into force 3rd May 2008 G.A. res. A/RES/61/106

re-enter their state of origin, d. This convention aims to promote the right of free movement for disabled persons. While the other conventions generally apply to all human persons, there are cases where disabled persons are discriminated against and owing to their status of disability, the whole thought that they also enjoy the same free movement rights is remote and missing.

Convention relating to the Status of Refugees (CSR)²⁹ and the Protocol of 1967³⁰ discuss free movement. Article 26 of the CSR states that “Each contracting State shall accord refugees lawfully in its territory the right to choose a place or residence, and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances³¹”. The right of refugees to freely choose residence is an exercise of their rights to free movement. But these rights are granted to those refugees lawfully resident in the host state. Unlawful refugees are not considered according to this convention. To actualize the right to free movement, contracting states have the mandate to issue identity papers, article 27 and travel documents, article 28 to refugees to enable their lawful, unrestricted residence and free movement.

The realization of the importance of freedom of movement of persons both internal and external has led to efforts towards the drafting of a single comprehensive Migration Bill of Rights³². This is in realization that migration rights are many and spread in various instruments leading to arbitrariness in their application or understanding while at the same time impacting on their enforcement.

²⁹Convention Relating to the Status of Refugees Art.26-28.entered into force on 22 April 1954, G.A res.429(V) of Dec. 1950

³⁰Protocol Relating to the Status Of Refugees U.N G.A res.2198 (XXI) U.N.T.S

³¹ Art 26 op cit

³²International Migrants Bill of Rights *Georgetown immigration law journal* 2010 vol 24 P 404

In article 10 (e and f) of the Migration Bill Of Rights³³, everyone has “The right to liberty of movement within the territory of the host State and free choice of residence, unless the host State initiates a formal removal proceeding in accordance with Article 5... Migrants have a right to identity documents. It shall be unlawful for anyone, other than a duly authorized public official, to confiscate, destroy, or damage identity documents, work permits, or documents authorizing entry, stay, residence, or establishment in the national territory”.

This Migration Bill of Rights clearly promotes free movement of persons. Free movement of persons legally does not mean absence of restrictions and judicious procedures; it means movement within the law and regulations in place in terms of the person’s rights and privileges on mobility. Thus states have instituted various regulations and requirements whose fulfillment enables admission and exit of persons.

The Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live³⁴ also has provisions on free movement of persons

2.2.2. Regional Legal Basis for Free Movement of Persons

Apart from global legal instruments that lay the foundation for free movement of persons, there are various regional instruments that add matter to this discussion. The Africa Charter on Human and Peoples Rights³⁵ which was adopted in Nairobi on 27th June 1981 and entered into force on October the 21 1986 is the African blue print promoting free movement of persons. In fact it can be said to be the African bill of rights.

³³ Art 10 op cit

³⁴ *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*, G.A.res.40/144, annex, 40 U.N GAOR supp.(no 53) at 252, U.N Doc.A/40/53(1985) see also in Peruchoud and Tomolova 2009 op cit P 106

³⁵ *Africa Charter on Human and Peoples Rights* art 12 Entered into force on October the 21 1986

In article 12, 1 “Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. 2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality. 3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions³⁶”.

This article lays the foundation for free movement of persons on the African continent. It is instructive that African states and governments recognize the freedom of movement not only as “an indispensable condition for the free development of a person³⁷” and human norm³⁸, a basic human right³⁹ but also as a prerequisite in African countries strive to unity and integration, economic prosperity and peace. Without free movement of persons there can be no distribution of economic goods, there can be no sharing of knowledge and experiences, there can be peace. Free movement of persons in Africa is at the heart of development of the continent. It is part and parcel of development efforts in this continent. All countries that have achieved significant economic growth and development have strong measures promoting free movement of persons such as will be found in America, European Union among others.

³⁶ Art 12 op cit

³⁷ General Comment No. 27, Para. 1 (1999 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6c76e1b8ee1710e380256824005a10a9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument). See also Peruchoud and Tomolova 2009 op cit P 135-138

³⁸ Satvinder S. Juss 2004: *Free Movement and the World Order*, 16(3) INT’L J. REFUGEE L. P 292

³⁹ See UDHR, ICCPR, CERD AChHR, among others.

The COMESA Treaty⁴⁰ also secures the right to free movement as a fundamental requirement in the realization of its objectives as a sub regional bloc. The treaty in chapter 28, article 164 1-3 states that... “1. The Member States agree to adopt, individually, at bilateral or regional levels the necessary measures in order to achieve progressively the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence by their citizens within the Common Market. 2. The Member States agree to conclude a Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Right of Residence. 3. The Member States agree that the Protocol on the Gradual Relaxation and Eventual Elimination of Visa Requirements within the PTA adopted under the PTA Treaty shall remain in force until such time that a Protocol on the Free Movement of Persons, Labour, Service, Right of Establishment and Residence enters into force. Paragraph 1 call on member states of COMESA to enter agreements to ensure free movement of persons within the region. The free movement of labour, services, right of establishment and residence are dependent on the existence and operationalization of free movement of person’s rights.

In the Treaty Establishing the East Africa Community⁴¹, free movement of persons is enshrined as one of the pillars of integration. The Treaty in article 104, 1, 2 and 3 provides that;“1. The Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community”. This gave way to the Protocol and its Regulations which in the basis of this study.

⁴⁰ The COMESA Treaty art 164.adopted in 1994

⁴¹*Treaty on the Establishment of the East African Community* Art 104 adopted in 1999 and entered into force on the

The Treaty thus lays the foundation for laws promoting free movement of persons in the East African region.

To give effect to the provision of this Treaty, the East African countries proceeded to establish various protocols including the customs union protocol and the Protocol on the Establishment of the East African Community Common Market⁴² which implements article 104 of the East African Community Treaty. This protocol and its regulations on free movement, regulations on residence, right of establishment regulations among others form our case study in this thesis.

2.2.3 Legal Foundation at National Level

The legal foundation of free movement of persons is ideally the national constitutions of respective states and the relevant legislations relating to free movement. This is variously referred to as the immigration laws of the respective states.

The Constitution of Kenya⁴³ article 81(1) also provides for freedom of movement rights. These rights include the right to leave Kenya and the right of Kenyan citizens to enter and remain in and reside anywhere in Kenya. Reading paragraph 3 of this constitution, one gets the feeling that the constitution only provides for the right to reside anywhere in Kenya to Kenyan citizens and not to aliens. Although providing for right of residence of Kenyan citizen, the constitution maybe guided by narrow view that it is meant for Kenyans does not purport to provide for mechanism to provide for residence of aliens. This makes one get the impression that Kenya restrict free residence of aliens in the country.

⁴²Protocol on the Establishment of the East African Community Common Market 2005

⁴³ Government of Kenya 2010: *The Constitution of Kenya 2010, article 81*. Government Press Nairobi

The Kenyan constitutional provisions on free movement are not similar to other regional states. The constitutions of Tanzania in article 172 also provide for free movement for the citizen of the United Republic of Tanzania⁴⁴. This is different from Kenya where this freedom is guaranteed for “every person” The Constitution of Uganda⁴⁵ in article 29 (2) safeguards free movement of Ugandan citizens from misuse. This is similar to Tanzania provision and different from Kenya’s. The same can be found in the Constitution of Rwanda⁴⁶ article 23 which guarantees this right to every Rwandese, article 42 of this constitution extends this right to foreigners lawfully resident in Rwanda. The Rwandan law comes closer to Kenya’s which expressly assures the freedom of movement of every person.

The immigration laws in the region also allow free movement of persons. The Kenya citizenship and immigration act 2011 is one example.

2. 3.0 Principles of Free Movement of Persons

2.3.0.1 The Principle of Sovereign Equality of States

The principle of sovereign equality of states is a customary principle of international law and relations. This principle is recognized in the UN charter as an operating principle for the peaceful existence of states. Ideally, the principle recognizes each country as an equal sovereign entity independent of the other. Sovereign states are independent to the extent that they are not accountable to any other entity.

⁴⁴ *The Constitution of the United Republic of Tanzania* Cap 2 Article 17 See Also Act No 15 Of 1984 Article 6.

⁴⁵ *The Constitution of the Republic of Uganda (Amendment) Act No.11 2005 and No 2 of 2005 Article 29*

⁴⁶ *The Constitution of the Republic of Rwanda adopted On 25 May 2003 Article 23 and 42*

The protocol in article 6, (a) recognizes East African states as independent and equal sovereign entities and authority on matters on immigration thus asserting this principle. This is seen in the Protocol's definition of citizen as a national of member states. By this definition, an east Africa citizen is first a national of an east Africa state; Burundi, Kenya, Rwanda, Tanzania, or Uganda. Belonging (citizenship) to one of these countries bestows one automatically the citizenship of east Africa. The states also are required to make equal contributions for the operation of the community thus confirming that they are equal and sovereign.

2.3.0.2 The Principle of Non-Discrimination

The principle of non discrimination is an important international law principle in the regulation of migrations. This confirms why there are many international instruments against all forms of discrimination. The principle of Non-discrimination demands equal treatment of individuals or groups irrespective of their particular characteristics such as to race, colour nationality, economic status or greed. This is affirmed in article 3, 2, (a and b) of the Protocol and article 6 and 7, 2 and 10, 2 of the Treaty.

The principle of non discrimination is essential for the establishment and maintenance of a community. As to whether the inclusion of non discrimination in regional instruments of east Africa will translate to a substantive policy of non discrimination in practice is subject to debate. The Kenya constitution has settled this debate in cap two article 10, 2 (b) and Cap 4 article 27, 4 and 5 which expressly prohibits discrimination based on whichever ground. This seems to suggest a clear non discrimination policy in public and private undertakings. The inclusion of this principle

in East Africa protocol is to make it compliant with the customary international practice which discourages discrimination.

2.3.0.3 Equality in Treatment of Nationals

By guarding against discrimination, states are therefore committing themselves to ensuring equal treatment of migrants into their territories as human beings without regarding to nationality. This principle operates on the basis that all individuals in similar situations should be treated equally by all states and the law. It implies equality of treatment in opportunity, employment, obligations, remuneration and social security.

Overall, historical and legal bases of free movement of persons enables an understanding of the bases upon which the practice and evidence of free movement of persons can be understood. From antiquity, societies have upheld the sanctity of mobility rights as one of the most basic and rudimentary human rights that every human being is entitled to and which in order to make the right enforceable is recognized in the UDHR and many other global and regional instruments including national laws of various states. Free movement of persons is underpinned by believe that there will not be discrimination of any form to the persons and that such persons enjoy equal treatment as nationals of countries in which they live⁴⁷.

⁴⁷ Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live op cit P 106

CHAPTER THREE
BENCHMARKING E.A.C AGAINST ESTABLISHED EU LEGAL
FRAMEWORKS.

3.0 Introduction

It is paramount to establish how other jurisdictions have handled the challenges resulting from free movement in their legal frameworks in an attempt to establish the solutions to the challenges highlighted in the preceding chapter analysis. No jurisdiction can better be used as a benchmark than the EU. The EU rather has a long history of integration compared to EA including the many instruments concluded within the EU to the extent that a whole jurisprudence on the EU referred to as EU law exists.

3.1. Review of Legal Framework Governing Free Movement of Persons in East Africa

This study is generally about implementation of migration law(s) in East Africa. The conception of a “migration law(s) in East Africa¹” is informed by the existence of the Protocol Establishing East African Community Common Market and its Annexes 1-5 which ideally deal with matters related to migration. It is in this context that this study assumes an existence of migration law(s) in East Africa.

One of the major requirements in the East African Community Treaty for fuller integration is that regional laws and regulations have to be harmonized. The requirement for the harmonization of laws means that whatever laws resulting after harmonization

¹ The term migration law refers to the laws applicable to migration. Migration is the movement of persons from one place (country) to another for various reasons such as commerce, work, asylum vacation among others. Researchers own definition

will not have significant difference from other country's laws. This then makes the resulting laws to have a regional outlook leading to references like "East African laws²" just like the reference "European Union laws³". It is this understanding that leads our study to adopt the title East Africa Migration Laws.

Specifically, this study endeavors to analyze the implementation of the Regulations on Free Movement of Persons of the East African Community Common Market. These regulations will be our focus in this chapter and the subsequent chapters. In this chapter, the focus is to review some of the regional legal instruments to establish their consideration or not of the subject under study and whether these provisions are substantive thus adequate or not. This will be achieved by comparing the EAC law to the already established EU.

3.1.1 The East African Community Treaty

After the collapse of the older East African community in 1977, the urge for integration did not wane among East African leaders. Efforts shifted towards examination of the causes of the collapse and the consequences thereof. A brief escapade into individualism made the regional leaders realize that the future of the region depended on pulling together as opposed to pulling apart. Motivated by globalization and the integration of the European community, the leaders in east Africa had no option but to go the integration way.

² This is a body of laws (treaties and legislation, such as Regulations and Directives), which have direct effect or indirect effect on the laws of East Africa member states Researcher's own definition

³ This body of laws that apply or affect direct or indirect on the laws of EU member states Sources can be treaties, legislations, regulations, declarations among others. Researcher's own definition

This realization led to the 30th day of November, 1993, effort to form an Agreement for the Establishment of a Permanent Tripartite Commission for Co-operation Between the Republic of Kenya, the Republic of Uganda and the United Republic of Tanzania for the establishment of the Permanent Tripartite Commission for Cooperation at Arusha, Tanzania whose mandate was to explore the various areas of cooperation among these countries. The permanent tripartite commission for cooperation agreement was later to be signed by the Heads of state at Arusha on 14th march 1996 and Ambassador Francis Muthaura from Kenya was given the task to head it.

The commission's primary mandate was to come up with a development strategy for the region. In this strategy, common areas of interest were identified and plans to implement development in these areas put in place and executed by all countries in the region. This efforts at cooperation resulted into the signing of the East African Community on 30 November 1999 at Arusha.

This Treaty came into force in 2001. Its objectives are among others; "in pursuance of the provisions of paragraph 1 of this Article, the Partner States undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared⁴".

That the treaty provides for the establishment of a common market is the first step towards expanding the rights to free movement. It should be recognized that free

⁴ East African community Treaty art 5 (2) adopted on 30 Nov. 1999 and entered into force in 2001 P 15

movement is fundamental requirement in the deepening of integration the world over. This is because the unit of integration is actually people and not economics per se. In recognition of this objective, the treaty makes free movement of persons one of its fundamental and operational principle.

The treaty provides that “(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights⁵,”

It is clear from our discussion that free movement of persons rights are actually part of the human rights. By undertaking to ‘promotion and protection of human rights in accordance with the AChHPR, the ember states of east Africa by extension commit themselves to the respect of freedom of movement of peoples as one of the human rights safeguarded by the AChHPR as provided under article 12. The article also refers to “equal opportunities”. This by extension means equal economic opportunities which are also another important human right that has been safeguarded in several instruments including ICCPR, ICESCR.

Another important and express provision for freedom of movement in this Treaty states that “(c) the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology⁶,”

⁵ Article 6 (d) op cit P 17

⁶ Article 7 (c) op cit P 17

The treaty proclaims that there shall be free movement of goods, persons, labour services, capital among others within the community as being a prerequisite to full integration. These provisions were very important in facilitating the drawing of the Protocol Establishing the East African Community Common Market.

Expounding on this operational principle, chapter seventeen of the Treaty sets out parameters for free movement of persons. The chapter is titled “free movement of persons, goods, services, right of establishment and residence”. This is an important acknowledgement of these rights and the important role they are expected to play in the integration of the region. Recognition of these rights translates to their clear implementation since they are provided for by the law. Ratification of this treaty by the parliaments of the member states places an obligation to regional states to enforce and implement them.

Famously called article 104, the treaty provides that “The Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community⁷”. By agreeing to this provision, states therefore bind themselves to ensure that it is actualized. Thus national laws of the respective states should provide for free movement of persons and other freedoms as demanded of them by the protocol. The process of ratification of this treaty by the regional parliaments was a domestication of this provisions thereby making them part of the laws of each Member State.

To realize these freedoms, the treaty proposes a protocol on free movement of persons to be concluded at a time appointed by the council. This protocol was to provide for the specific rights under each category of rights envisaged in the treaty.

⁷ Article 104,1,2, op cit P 87

To achieve free movement of persons certain conditions must be fulfilled as enablers for the enjoyment of the said freedoms. These enablers are among others; easing of procedures at borders, opening and operation of border points, issuance and recognition of travel documents, and review of policies related to employment, education, residence, social security, health and investment among others to make them standardize them as the laws of partner states. This is referred to as the harmonization of laws and policies to be in line with the treaty provisions.

This requirement that laws of member states be aligned to the regional law is a real challenge in any integration initiative. Most countries have different approaches especially to social security which has proved a real headache to states in terms of being difficult to transfer to regional cooperation. States exist basically to provide social services or “public goods⁸” to its citizens and any state that does not do this loses legitimacy.

3.1.2. Protocol Establishing the East African Community Customs Union.

The Customs Union came into being in 2004 after adoption and ratification by the partner states of the EAC. The purpose of the customs union is among others to facilitate free flow of goods and services among member states so as to help realize economic growth and development. The customs union operates on the principles of elimination of trade barriers, harmonization of trade regimes including duty, management of ports and border points among others. The customs union is to integrate trade among member states.

⁸ Taylor J.B. 1998: Economics. Houghton Mifflin Company. Boston 2nd ed. P 370,404 See also Todaro op cit P

3.1.3 Protocol Establishing the East African Community Common Market.

The Protocol Establishing the East African Community Common Market implements articles 76 and 104 of the East African Community Treaty. The Protocol was adopted on 20th November 2009 and came into force the following year on 1st July 2010 after adoption and ratification by the partner states of the East African Community. Being the second stage of the integration process as thought out in the Treaty, the common market comes after the full operationalisation of the Customs Union⁹

Economically; the conception of a common market presupposes that there is freedom of movement of all factors of production across borders. The protocol provides for freedom of movement of goods, persons, labour, services and capital including the rights to establishment and residence. All these freedoms are founded on certain universal principles as outlined in articles 6 and 7 of the Treaty and article 3 of the protocol as; non-discrimination of nationals of partner states; equal treatment of nationals of partner states; transparency and sharing of information. These principles constitute the internationally recognized principles in law.

The objectives of the protocol are among others to;

- a) accelerate economic growth and development of the Partner States through the attainment of the free movement of goods, persons and labour, the rights of establishment and residence and the free movement of services and capital;
- b) Strengthen, coordinate and regulate the economic and trade relations among the Partner States in order to promote accelerated, harmonious and balanced development within the Community;

⁹ Protocol on the Establishment of the East African Customs Union pursuant to Article 75 of the Treaty

- c) Sustain the expansion and integration of economic activities within the Community, the benefit of which shall be equitably distributed among the Partner States;
- d) Promote common understanding and cooperation among the nationals of the Partner States for their economic and social development; and
- e) Enhance research and technological advancement to accelerate economic and social development¹⁰.

These objectives are meant to widen and deepen integration in both economic and social spheres of the nationals of contracting states. To actualize these objectives, partner states undertook to cooperate, integrate and harmonize their policies in areas addressed by the protocol. This was to be an integral part of the community in that it aimed at aligning domestic policies and laws to the regional policies so as to reduce potential areas of conflict including reducing misinterpretation of the provisions of the protocol. The East African legislative Assembly has provided an interpretation act to help reduce cases of different interpretations.

In order to realize free movement of persons in the region, partner states undertook to cooperate in elimination tariff, non-tariff and technical barriers to trade; harmonize and mutually recognize standards and implement a common trade policy for the Community; to ease cross-border movement of persons and eventually adopt an integrated border management system; to remove restrictions on movement of labour, harmonize labour policies, programs, legislation, social services, provide for social security benefits and establish common standards and measures for association of

¹⁰ Article 4 op cit P7,8

workers and employers, establish employment promotion centres and eventually adopt a common employment policy; to remove restrictions on the right of establishment and residence of nationals of other Partner States in their territory in accordance with the provisions of this Protocol; to remove measures that restrict movement of services and service suppliers, harmonize standards to ensure acceptability of services traded; and to eliminate restrictions on free movement of capital; ensure convertibility of currencies; promote investments in capital markets (stock exchange) eventually leading to an integrated financial system¹¹”.

It is noteworthy that immigration procedures constitute some of the notorious NTBs in the region. This is because immigration controls target even small scale traders and the means to evade them are very few compared to large corporations. In order to ease cross border movement of persons and eventually adopt an integrated border management system, the partner states rolled out a project for the construction of One Stop Border Points (OSBP). This project is currently being carried out at Namanga, Malaba, Taveta, Rusumo on the Rwanda- Tanzania border is already operational. Restrictions on free movement of labour is supposed to take place in two ways; the abolition of requirement for a work permit to nationals of the partner states working within the community, and review of the labour policies of the individual states to allow for free movement of labour in all sectors thereby adopting a common employment policy.

The integration of social security systems remains a headache in all integration initiatives given that such social security programmes target large populations which cannot be adequately catered for by a community initiative.

¹¹ Article 5,2 op cit

3.2. The European Union

The example of the EU¹² serves us better in learning how to handle social security in an integrated region. But even as the region may pursue a common social security regime, in most cases states end up running parallel systems so as not to fully surrender their sovereignty to the region since it is only through social security that the face of states is seen.

Free movement of persons is the most fundamental freedom¹³ in any integration project as it undergirds all other freedoms. This can be realized in the subsequent paragraphs in which free movement of services, capital and the right of residence and establishment are part of the agreements on free movement of persons.

The European Union evolved over long time from the beginning from 1946 at the end of the WW II when countries after the war realized the possibility of cooperation in order to facilitate reconstruction of their countries. The EAC on the other hand though attempts to federate the region began in 1920 courtesy of colonial powers, it was not until 1967 that the first formal cooperation in form of a fully fledged community was realized. The EU boasts of several treaties like the treaty of Paris 1951, the treaty of Rome establishing the European Economic Community in 1957 thus setting the stage free movement of persons in the EU. These treaties were all collapsed into one single treaty in 1986 referred to as the Rome treaty.

The treaty of the EU in article 2 identifies one of the objectives of the union as development of a free area in which “free movement of persons is assured in conjunction

¹² Baldoni E, 2003: The Free Movement Of Persons In The European Union: A Legal-Historical Overview. Pioneur Working Paper No 2. 2003.

¹³ Naymar-Metcalf: Free Movement of Workers and EU Enlargement: A Fundamental Principle with Exceptions? Unpublished Paper

with appropriate measures with respect to external border controls, immigration, asylum...¹⁴” article 18 (1) of this treaty recognizes the right of every citizen to “move freely and reside freely within the territory of member states, subject to limitations and conditions laid down by the Treaty¹⁵”. Section 3 of this article deals with provisions on passports, permits identity documents, provision of social security or social protection.

Article 17 of this treaty deals with the issue of union citizenship. Section 1 provides that “Every person holding the nationality of a member state shall be a citizen of the union”. These citizens have their rights and duties well spelled out in the treaty.

These provisions are similar to the provisions contained in the EAC treaty and the Protocol (common market protocol). The Protocol dwells on guaranteeing free movement of persons as one of the pillars of integration and by extension economic development. The Protocol also contemplates an EA citizen as a citizen of partner states. The weakness in this provision is in legal terminology. While the EU use SHALL, the EAC case does not thus leading to a loose view of citizenship of the EAC. In the EAC, citizens are not allotted responsibilities, duties or obligations. This ensures that allegiance in the region remains to the individual states more than the community. This has the effect of weakening the spirit of integration.

Provisions on free movement of persons in the EU are similar to the EAC. Differences arise from measures put in place to facilitate this free movement. For instance provision on permits including the administration of permits is well developed and predictable in the EU. The validity of the permit in the EU is five years while in EAC is dependent on individual state. In Kenya permits are issued for one to three years

¹⁴ Thompson A.M. 2008: Constitutional and Administrative Law 9th ed Oxford University Press P 96-104 see also The Treaty of Rome 25 March 1957 articles 2, 3,17 and 18

¹⁵ *ibid*

renewable. Permanent residence permits are a new development in the EAC borrowed from the EU. Prior these kinds of permits were not being issued by regional states.

The Schengen visa, an EU visa is a good example of measures that are aimed at reducing border procedures and finally opening up the borders. In fact the EU operates a borderless regime. The Schengen visa allows one entry in all the EU member states without necessarily having to obtain another visa into the respective state. Member countries issue these visas as a union visa thus the bearer gains entry in all EU member states. The visas bear the name and initials of the issuing country. This is unlike in the EAC where talks of a single tourist visa have dragged on for so long due to lack of formula for sharing the fees. Persons wishing to visit East Africa are forced to obtain separate visas for each country they wish to visit. The fees charged is also not uniform for instance Americans in Tanzania are charges one hundred dollars while in other countries its fifty dollars. Till recently Pakistani nationals were paying two hundred dollars for entry in Tanzania while in other states in is fifty. Uganda has no referred visa regime whereby all people can get visa on arrival including those holding UN travel documents under convention of April 1951 while other countries have referred visa regime where such persons have to obtain visa before their visit.

Article 3 (1 c) of the EU treaty contemplates the creation of internal market by abolishing all obstacles between member states of the EU to free movement of goods, persons, services and capital. Measures were to be adopted concerning entry and movement of persons internal market. The EU states also undertook to cooperatively coordinate in employment policies of member states so as to ensure harmony. This would go ensuring a fair play ground to those seeking employment in member states. These

provisions are similar to those contained in the EAC Protocol as anticipated by the EA treaty.

These differences show the existing differences and weaknesses between the EU and EAC cooperation initiatives while providing us with a learning platform that can be adopted and domesticated to suit the EAC situation.

CHAPTER FOUR

**PERCEPTIONS ON ADEQUACY AND IMPLEMENTATION OF E.A.C LEGAL
FRAMEWORK ON FREE MOVEMENT**

4.0 Results and Discussion.

This chapter explores the implementation of the regulations on free movement of persons in East Africa. The chapter assesses the implementation of regulations 5, 6, 8 and 9 of the Regulations on Free Movement of Persons of the Common Market Protocol.

4.1 Implementation of Article 104 of the E.A.C Treaty

The E.A.C treaty was adopted at Arusha on and became operational on the Protocol adopted in 2009 implements article 104 of the Treaty.

4.2. Implementation of the Protocol.

The Protocol on the Establishment of the East African Community Common Market was adopted on 20th November 2009 and entered into force in July 2010¹. The implementation of the protocol therefore kicked off the moment the protocol came into force.

Part of the protocol consists of regulations governing various aspects of the Common Market Protocol². These regulations were adopted in various months in 2009 and came into force together with the protocol in 2010. They are annexes I-VI. These annexes implement various provisions of the protocol. Some of the provisions were to be

¹ Protocol on the establishment of the East African Community Market 2010

² Regulations on Free Movement of Persons 2009

implemented immediately from 2010 the time when the protocol became effective whereas other provisions were to be progressive. Provisions of article 16 on free movement of services and free movement of capital were part of the provisions to be progressively implemented.

For instance regulations on free movement of persons in Annex I implements provisions of the Protocol in article 7; free movement of persons, 8; standard identification system, 9; travel documents., article 10 on free movement of workers is implemented by regulations on free movement of workers Annex II that also includes articles 11 and 12. Regulations of rights of residence Annex IV and rights of establishment Annex III implements articles 13 and 14 of the protocol.

The purpose of these regulations is primarily to “ensure that there is uniformity among the Partner States in the implementation of the Articles and that to the extent possible, the process is transparent, accountable, fair, predictable and consistent with the provisions of the Protocol.” These regulations regulate on the scope of application, procedures of acquisition and denial of various permits, procedure of treatment of citizens of East Africa and related issues directly concerning migration.

4.3 Implementation of Regulations on Free Movement of Persons, Regulations 5, 6, 7, 8.

4.3.1 Application

The regulations on free movement of persons applies to the following categories of persons who are citizens of east African Partner states and who may be seeking to move to, enter, stay in, or exit partner states:

- a) Visitors;
 - b) Persons who seek to enter a Partner State for the purpose of medical treatment;
 - c) Persons in transit through the territory of a Partner State;
 - d) Persons who are admitted as students in training establishments in a Partner State;
- and
- e) Persons entering a Partner State for any other lawful purpose other than as a worker or as a self employed person.

The regulations on free movement of workers applies to citizens of partner states who move to, stay in and exit another partner state as workers, spouses of workers and children of workers.

The regulations on right of establishment applies to citizens of partner states who seek to establish themselves in partner states as self-employed persons in the territory of another state and the spouse and children of these person. It also applies to companies and firms seeking to establish in the territory of partner state in accordance with the national laws of the partner state.

The regulations on right to residence applies to citizens of partner states who seek to move to, reside, and exit another partner state as workers, self employed persons and spouses, children and dependants of these categories of persons.

4.3.2 Work and Residence Permits; Annex II Regulation 6, Annex III Regulation 6 and IV Regulation 5, 6

The national laws of all East African states have laws regulations stipulating the requirement for work or residence permit for citizens of East Africa countries wishing to

reside or engage in an economic activity in the respective states. These laws are The Kenya Citizenship and Immigration Act (No. 12 of 2011)³ and the regulations thereof the Kenya Citizenship and Immigration Regulations 2012⁴.

The Uganda Citizenship and Immigration Control Act Cap 66 of August 1999⁵ and Regulation 2004⁶, the Registration of Aliens Regulations 2004⁷, the Passports Regulations are some of the legal instruments that guide the work of immigration department under the Directorate of Immigration and the National Citizenship and Migration Control Board.

The Tanzania Citizenship Act⁸ and The Immigration Act of 1995⁹, The Immigration Regulation 1997¹⁰, The Passport and Travel Documents Act 2002¹¹ And Regulations thereto, the Visa Regulations, the official immigration policy among others.

Constitution of the Republic of Rwanda¹² of 04 June 2003 (O.G. special number of 4 June 2003) article 7 provides for issues of nationality and citizenship under the Rwandese law thus setting the stage from the law no. 04/2011 of 21/03/2011 on immigration and emigration in Rwanda for the purpose of regulation of emigration and immigration.

³ Government of Kenya: The Kenya Citizenry and Immigration Act No. 12 of 2011, Government Press

⁴ Op cit

⁵ Republic of Uganda 2005: The Constitution of the Republic of Uganda amended by the Constitution (Amendment) Act, Act 11/2005 and the Constitution (Amendment) (No.2) Act, 21/2005 Art 15, 1 cap 3. Government Press

⁶ The Uganda Citizenship and Immigration Control Act 1999 Cap 66 Sec, 12 Laws of Uganda

⁷ Republic of Uganda 2004: The Registration of Aliens Regulations 2004

⁸ The Republic of Tanzania 1995: The Tanzania Citizenship Act 1995 cap

⁹ The Republic of Tanzania 1995: The Immigration Act 1995 Cap

¹⁰ The Republic of Tanzania 1997: The Immigration Regulations 1997

¹¹ The Republic or Tanzania 2002: The Tanzania Passport and Travel Documents Act 2002

¹² Republic of Rwanda 2011: New immigration Law No: 04/2011 of 21/03/2011

These laws have been harmonized with the protocol complying with the requirement that laws be amended to comply with the protocol and its regulations though all are still inadequate in addressing immigration issues in the region especially by failing to provide for investors or residents interests.

These national laws were meant to protect domestic labour markets from foreign domination in what was called the “domestication of the economy¹³” under the large philosophy of Africanisation which dominated largely African thinking and policy making in the late 1960s and 1970s.

The Regulations on Free Movement of Workers and Regulations on the Right of Establishment and Residence¹⁴ represent a regional change of mind on matters of protection of domestic labour market. It is a realization by these states of the importance of open economic and social policies guided by the desire for socio-economic and political integration for optimal realization of community benefits and maximization of individual state capabilities through the exploitation of competitive advantage.

The Partner States were expected to harmonize all their labour and social security laws to comply with the Protocol so as to ensure there is unity of purpose in the attainment of community objectives and equitable distribution of the benefits thereof.

The government of Kenya and Rwanda abolished all fees charged to East Africans on acquiring work or residence permits in April 2011. This means East Africans are given permits gratis. Calls for the abolition of permit fees on east Africans has been gaining momentum over time now with both business and government leaders calling on

¹³ Government of Kenya 1965: Sessional Paper No. 10 on African Socialism and its Application to Planning in Kenya. Government Press

¹⁴ Protocol annexes i-iv op cit

EA states to join Rwanda and Kenya in abolishing work permit fees charged on East African.

This year on 19th April 2013¹⁵, the E.A.L.A passed a motion abolishing work permit fees charged on East African. It remains to be seen though whether partner states will embrace the decision of the assembly by implementing the motion through domestication in their national parliaments.

For nationals of the Republic of Rwanda, it is government of Kenya policy that they are free to work in Kenya without a work permit. In addition, they are free to enter Kenya without passports just as Kenyan are allowed to enter Rwanda by use of their national identity cards. This presidential directives have however not been implemented by both governments of Kenya and Rwanda though it shows the desire to attain free movements.

4.3.3. Status of Implementation

The provisions on free movements of workers and rights to establishment and residence are currently being earnestly implemented by the regional governments. Kenya and Rwanda are at advanced stages of this implementation though the republics of Tanzania, Uganda and Burundi were allowed five year grace period which expires in 2015 to allow free movement of workers, capital, rights of residence and establishment.

Despite these reduced procedures, there is still low number of East Africans applying for and leaving on resident permits in the region. The government of Kenya's abolition of permit fees has not enticed East Africans to apply for these permits. Bureaucracy at offices, non-reformist officers, petty self-interests and fear among the

¹⁵ New times newspaper of Rwanda 20th April 2013

applicants compounded by general lack of knowledge still impede implementation of these provisions. The requirement for harmonization of labour and social security laws still lags behind. The requirement for harmonization of permit classes has been completed only that Tanzania, Uganda and Burundi levy fees for issuance of work permits.

For uniformity sake, East African states should abolish the requirement for work permits to its nationals working in partner states so as to ensure consistency in the policy and laws in the region.

4.3.4 Travel Documents Article 9 of the Protocol

The other requirement in the protocol is the harmonization of travel documents. This is aimed at attaining a common standard travel document that can be used by citizens for travels in the region. This provision falls short of declaring the East African passport as the common standard travel document given the challenges in the issuance of this passport.

Talks about using identity cards to enter East African states by East African citizens is frustrated by the fact that Uganda and Tanzania do not issue identity cards to their nationals thus they will be disadvantaged in this area. Efforts by the two countries to begin issuing identity cards are currently slowly gaining importance and soon they will start the project. This will fully implement the regulations on free movement by reducing requirement for travel documents to mere identity cards.

Many East Africans travel using travel documents variously referred to as temporary permits in Kenya, emergency certificate in Tanzania, emergency certificate in Uganda, laissez passé in Rwanda and Burundi.

The Rwanda and Burundi laissez passé are more advanced compared to other East African states in terms of size, security features and quality. They are near to international passports unlike for instance the Kenyan temporary permit which is simply a printing paper. Thus the requirement to harmonize these travel documents is crucial to ensuring free movement of persons and labour by addressing these differences in travel documents to a standard accepted by all the states. Implementation of this requirement still lags behind and states seem not keen to appreciate the importance of uniform travel documents for easing free movement in the region.

The East African passport should therefore be considered the standard travel document in the region. Kenya, Tanzania and Uganda issue East African passports while Burundi and Rwanda do not. It is important that nationals of East Africa recognize this passport by applying for them in large numbers see table 4.4. The immigration procedure on the use of these passports should also be interpreted clearly with intend to promote free movement of persons in the region t thus encourage the use of the passports. For instance being a regional passport, the immigration status endorsed therein should be considered a regional status thus should be recognized in other partner states as valid in their own territories without necessarily having to endorse them again thereby reduce immigration procedures to bearers of the East African passport. The production of the East African passport should be viewed like the Schenghen visa of the European Union

hence guarantee unrestricted entry and exit without going through immigration procedure again¹⁶.

Table 4.4 shows travel documents issued as at 2010/2011 per country.

Table 4.4 Travel Documents issued in 2010/2011.

Type of passport	Burundi	Rwanda	Kenya	Uganda	Tanzania
National passport	15563	29394	142366	No data	46352
East Africa passport	No data	No data	2524	No data	2378
Border pass	32485	135904		No data	No data
Temporary pass	Not issued	Not issued	65786	No data	No data
Diplomatic passport	1459	5300	698	No data	372
Others	No data	No data	90	No data	890

Source: Field data 2013

The data in table 4.4 shows travel documents issued by EA member states to their nationals for travel. Issuance of travel documents is part of the requirement of free movement of persons. Though Uganda did not provide data on various documents issued citing long legal requirements to obtain such data, there were reports that the issuance of the East African passports had been stopped due to technical reasons. The data in table 4.4 above also confirm that East African passports are still inferior to national passports given the quantity of national passports issued by each sampled state. Compared to 142,366 national passports issued by Kenya, only 2524, a mere 0.02 percent for the

¹⁶ Interviews at immigration passport sections see also IOM 2010, Migration report; Burundi, Kenya, Rwanda, Uganda, Tanzania

whole period are east africa passports issued during the period. The case is not so different in Tanzania. This shows the EA passport is not yet popular among EA citizens.

The use of border passes in Rwanda and Burundi can also be said to be a hindrance to the use of East African passport in the two countries, though on the other hand these border passes help to attain the free movement of persons across borders as envisaged by the regulations on free movements.

4.3.5 Procedure of Entry and Exit; Annex I Regulation 5, 6, 8, 9

The immigration procedures are ideally uniform regionally. This follows entry-exit cycle. All travelers are required to declare entry or exit to respective states as a declaration of intent to enter or exit by filling either a DDF/EDF which is legal forms¹⁷. This is a formal request by a traveler to authorities of concerned state to allow entry or exit to the person. The traveler has to declare material information about himself which is checked and compared by the admitting or exiting authorities so as to weigh the merit of entry or exit. Currently these forms are harmonized in line with the requirements of the protocol and its attendant annexes.

4.3.5.0 Visitors Pass and Six Months Stay under Regulation 5, 2.

East Africans do not need entry or exit visas to enter or exit member states' countries, though they are required to obtain visitors pass at the ports of entry which vary in length of stay from one day to six months. Apart from visitors pass, those transiting through the territories of East Africa partner states are required to obtain a transit pass to

¹⁷ I.O.M 2010: Kenya immigration Border Procedures Manual: Guidelines on Policies and Procedures for Immigration Officers, I.O.M Nairobi

facilitate their transit to a third country or to the country of original departure. This is endorsed as KVP/6M/B/H/I/s or KIT/3D respectively in Kenya or VP 6months in Uganda; Tanzania endorse as Allowed six months. This applies to all categories of people save that those wishing to engage in business or work are required to obtain a work permit, while students are required to obtain students passes.

The regulations on free movement of persons recommend that one can be issued with up to six months stay in partner state. This has so far been implemented by Kenya; Tanzania recently started issuing six months while the other countries are yet to comply.

4.3.5.1 Complementary Borders, Regulation 8 (b)

Regional requirements on opening of borders have long been complied with given that this was the practice even before the Protocol. For instance Namanga Kenya and Namanga Tanzania, Busia Kenya and Busia Uganda are examples of complementary borders. Complementary opening of borders facilitates easy exit and entry of persons by providing same and related services at one border point. This enables free movement of persons since it ensures the ease and nearness of the services required by travelers.

The recent regional project in collaboration with the European Union and other partners like the government of Japan on the construction of OSBP is an advancement of the complementary opening of borders and a important to the realization of free movement of persons. The OSBP concept works as a one stop shop for all border services. Instead of two complementary border controls, OSBP prefers a single border. The offices and other infrastructure are shared by the agencies at the border. This means for instance Kenya and Tanzania offices will be shared on one side as well as the other

side. So in immigration, one office host both exit counters from Kenya and entry counters in Tanzania. There is no service on the other side of the border since all services are issued at one point.

OSBP projects are currently under construction in Malaba, Namanga, Taveta, Isebania and Busia. The Rusumo OSBP between Tanzania and Rwanda is complete and operating. The OSBP project complies with the provisions of the Protocol and attendant Regulations on free movement of persons. All this borders are manned round the clock by various agencies at the borders for security and immigration purposes.

4.3.5.2 Border Management Regulation 8 (c-f)

Staffing and equipments at these borders though remains a big challenge. The Table 4.5 below shows the staffing levels and border management information system at selected borders.

Table 4.5 Staffing Levels and Manning at BCPs

Border	No. of staff	No. of shifts	No. officers per shift	BMIS
Namanga, Kenya	17	3	5	PISCES system
Namanga, Tanzania	56	4	13	“
Isebania, Kenya	10	3		“
Sirari, Tanzania	17	4		PIRS
Busia, Kenya	15	3	4	PISCES
Busia, Uganda	20	3	7	“
Malaba, Kenya	12	3	4	PISCES
Malaba, Uganda	18	3	5	“

Source: Field data 2013.

The staff at the borders as shown in table 4.5 is clearly inadequate given the many tasks that should be performed by these officers. Such functions as immigration and emigration, border surveillance and patrols, carrier checks, passenger screening cannot be performed by the few unfacilitated officers. Kenya is badly affected by this situation. This makes it difficult to efficiently man the borders thus compromising on free movement of persons, security of the region and control of illegal movements and trade. This affects both immigration and emigration.

Most of the borders have at least one form of BMIS in form of PISCES or PIRS which helps in identification, security tool and data collection tool.

4.4 Implementing Agencies

The agencies involved in this implementation are; the governments of the East Africa region through the ministries dealing with Immigration, Ministries of Foreign Affairs, Ministries of East Africa Community, Customs Departments of all the Countries, Ministries of Labour, Ministries of Education, State Law Offices or Justice Ministries among others.

Of these agencies the Ministries or Departments of Immigration have a significant and indispensable role to play given their mandates involve control, regulation, facilitation and management of entry and exit of persons including aliens and citizens alike, regulation and control of residence by issuance of permits, passes and the removal of undesirable persons, issuance of travel documents, granting of citizenship to eligible aliens and the collection and management of data and records on migrations. This

designates them as the lead agencies at border. In Kenya, presidential circular no. 1/2008 designates immigration department as the lead agency at all Kenyan borders.

Table 4.6 Implementation matrix of Free Movement of Persons Regulations

Provision	Implementing Agency	Time frame	Status	Remarks/ outcome
Regulations on free movement of persons. Proposed action a) entry/ exit b) six months stay c) student passes d) border management i) border crossing ii) opening and manning borders iii) infrastructure and standards of border management iv) Harmonization of immigration procedures. registration	Immigration departments Immigration/ state law office/ ministries of E.A.C Immigration	Continuous 2011	On going On going	EDF/DDF cards harmonized Six months given to EA nationals by Kenya and Tanzania. Immigration procedures harmonized. Borders manned 24 hrs OSBP construction underway Immigration laws are now harmonized.

Establish a common standard of issuing national identification documents	National bureau of registration/immigration/depts. Of citizen registration	2011	On going	No progress on this item. Challenges arising from individual state preparedness.
Use of valid common standard travel documents	Immigration/departments		On going	Only EA passport is recognized common standard travel document.
Use of machine readable and electronic national identity cards as travel documents.	Immigration department, Registration of persons bureau	2015	After compliance by other states.	No progress.
Free movement of workers. Proposed action A) entry, stay and exit b) work permits c)re-unification and employment	Immigration departments, Ministries of labour, Ministries of foreign affairs and East Africa community, Business community.	2010	on going	Exit and entry greatly made easy. In Kenya work permits issued gratis to EA nationals. Agreement between Kenya and Rwanda to abolish work permits Harmonization of labour and social security laws underway

4.5 Conclusion

4.5.0. The Impact of the Implementation of the Regulations on Migration and Integration

The coming into force in July 2010 of the common market Protocol and the adoption of regulations thereof on free movement of persons and labour have significantly changed the migratory dynamics in the region. Increased movements across borders for business, visits and studies ongoing are attributable to the coming into force and the spirit entrenched in the Protocol especially concerning free movement of persons.

These new trends in migration inflows and outflows of people across the selected BCPs in Kenya, Uganda and Tanzania between July and December 2010 are depicted in table 4.7

Table 4.7 Migratory Inflows and Outflows between 2010 And 2012

Border	Inflows			Outflows		
	June 2010	June 2012	% increase	June 2010	June 2012	% increase
Isebania	50,514	140145	277	59603	149,203	250
Namanga	188,830	279361	157	199443	278,293	140
Busia	448510	538533	120	460877	550,997	120
Malaba	214059	304170	142	108097	198,197	183

Source: Field Data 2013

The data in table 4.7 show an average percentage increase of 170% at all selected BCPs in migratory flows for the period 2010 to 2012 across regional borders. This is the period during which various provisions of the common market protocol were being implemented including provisions on free movement of persons. It can be argued that this increase is courtesy of the Protocol which requires ease of procedures at borders while at the same time putting obligations to member states of the EAC to relax and harmonize their laws touching on citizens of partner states. The common market and by extension the community spirit seems to be growing strong with the implementation of the provisions of the Protocol. It can thus be postulated that were all the provisions fully implemented, the migratory flows would be more than as shown by the statistics.

Harmonization of the border procedures and laws so far done have helped increase these trends. Also the elimination of requirement for visitors pass to East Africans, need for travel documents in East Africa should be done away with and instead identity documents used for travels within the East African regions. This will help to enhance integration and help realize the dream of an East African visa for tourist. It also will attract investors since they are guaranteed freedom of movement of labour.

CHAPTER FIVE

SUMMARY, RECOMMENDATIONS AND CONCLUSION

5.0 Summary

5.1. Summary of Research findings

This research sought to analyze the implementation of the regulations on free movement of persons of the Common Market Protocol in East Africa. The thesis of this study is that the regulations on free movement of persons are inadequate, poorly implemented; there is no coordination and cooperation among the implementing agencies, there is in practice no principle upon which the implementation is based, which cast doubts on the commitment of these agencies to the implementation of this law. This is brought about by the structural weaknesses of the agencies and the weaknesses in the law itself since it addresses itself only to one aspect of migration in the region; citizens/nationals. Also there is the absence of migration policy guiding migration practice in the region thus becoming an obstacle to realization of the benefits of migration.

The study was guided by three objectives viz; To assess the implementation of the Regulations on Free Movement since 2010 and its implications to migration policies and laws

This study found out that the implementation of the Protocol and its regulations is actually in progress. Each member state of the EAC is at different levels and stages of implementation. Those countries that lag behind in implementation have been given until 2015 to ready themselves for fuller implementation like their counterparts. Regulations on free movement of persons have nearly been fully implemented while those on free

movement of workers are in progress. Kenya and Rwanda have fully implemented the regulations on free movement of workers and a larger part of the regulations on free movement of persons. This study found out that the protocol and Regulations thereof have resulted in open door immigration policies in the region signifying a shift from restrictive immigration laws of 1963 to 2000, to the present "open" migration regime which espouses open door policies such as free movement of persons.

To identify the challenges facing the above implementation of the Regulations. This study identified several challenges that hamper the implementation of the protocol and its regulations. These challenges can be said to be institutional, legal and political in nature.

Institutional challenges arise out of the unwillingness of existing institutions mandated with the implementation of the protocol to live up to their mandates. These institutions are either too weak in terms of capacity and organization including resource capacity to carry out various tasks as required by the Protocol. The human resource in these institutions is an obstacle to the implementation given their resistance to implement provisions of the Protocol. There are many institutions with responsibility of implementing various provisions of the Protocol, this also results into overlaps and duplications compounded by supremacy contest among them.

A look at the agencies involved in the implementation confirms this. Given these institutions are all independent of each other, there is missing a coordination mechanism to ensure harmonious implementation and evaluation of the implementation by the various agencies. The Ministry of East African community which was created to function

as a coordinating agency is not properly constituted to respond to this function given the other agencies frustrates this ministry by hiding in their various legal mandates.

This confirms our first hypothesis that; the implementation of the Regulations on free movements is weak, half hearted, ad hoc, and uncoordinated thus resulting in poor policies, weak, unenforceable and restrictive laws and regulations that are an obstacle to integration.

The other challenge is legal in nature. This arises out of either lack of laws to guide the implementation or the existing inadequate law being weak such that its implementation is affected. Weak laws arise out of a lack of enforcement mechanism in the laws, bad law that does not withstand time, and a law that is inferior or perceived to be inferior to national laws. To give the protocol the legal strength it requires.

The role of the EACJ is critical in giving strength to regional agreements and protocols especially in dispute resolutions at regional level. This court should interpret the protocol in a manner that gives it more precedence over domestic laws.

National laws are expected to be harmonized to the protocol. Article 47 of the Protocol requires national laws to be approximated and harmonized to the provisions of the protocol. This elevates the protocol to equal status as national laws even though this should be the superior law on regional and other issues. By failing to expressly give precedence to the protocol, the drafters of the protocol rendered it weak since it is at the mercy of the member states to implement or not to implement. A provision recognizing the Protocol as superior in case of conflict of laws is absent in this Protocol. This confirms our second hypothesis that; there is the lack of clear procedures, principles and

rules guiding the implementation of regional migration laws and regulations in East Africa

To establish whether the Protocol and its Regulations as provided is adequate in addressing immigration issues in the region as a superior law to national immigration laws and how this contributes to the integration project.

This study appreciates the importance of regional approach to immigration and the protocol in its entirety to the realization of free movement of persons in the region. Without free movement, this study shows that there can be no meaningful integration. Free movement of persons and capital is the pillar of any integration project.

The case of the European Union confirms this argument on the importance of free movement of persons to integration endeavor. It is this reality that prompted East African countries to make free movement of persons an integral part of the community and common market project. From this study, and considering the evidence collected during field trips, it was realized that the increased cross movement of persons has had a big influence on the perception of people of the region as a community irrespective of the challenges. Free movement of persons has and continues to play a significant role in deepening integration in East Africa.

The research relied heavily on primary data collected by semi structured interview method by the researcher during interviews with various respondents at selected immigration offices both at head offices and border control points. Secondary data from publications as seen in the literature review was also used for corroboration of the information collected by interviews method.

The respondents were asked several questions in three structures/ categories. There were questions specifically for administration or headquarters, questions for BCPs and questions for the secretariat and Ministry of EAC. All the questions rotated around the following themes:

a) Understanding of the functions, legal sources, management, policies and procedures of the departments of immigration and similarities and differences in practice among East African states

While some of the interviewees showed understanding of their operations, others surprisingly showed little understanding of the same especially the law guiding their work. For instance out of the thirty people interviewed, 10% demonstrated low understanding of the law guiding their operations by not being able to remember which law or Act they work under nor any section of the same law, 30% of the respondents confessed to not even having read their immigration laws! The remaining 60% could only remember the existence of such laws but could not explain further the contents except the offences which they seemed to have crammed fully.

The prevalence of lack of knowledge of this law was higher in Tanzania followed by Kenya, Rwanda, and Uganda respectively. The lack of knowledge of their own law also proved that they know not the neighboring country's laws.

The officers at borders demonstrated a sound understanding of the procedures at the borders, including the procedure of entry and exit. Their data management though was poor and manual demonstrating a big challenge on this aspect. Of those interviewed, 100% demonstrated understanding of the border procedure. The issue of treatment of citizens was also wanting. 80% of the respondents at the borders responded to this

question with lack of knowledge of the citizenship laws in the region. At first, citizens are treated just like other migrants with no preferential treatment given to them. There are no special counters for citizens at all borders, no provision on how to handle them whether exiting or entering save for Tanzania¹ where citizens do not have to fill in the EDF/DDFs when leaving and entering.

b) Understanding of the East Africa Community Protocol, Regulations, and Migration Rules and Procedure

On the East Africa migration law as enshrined in the Protocol, most of the respondents answered negative to their understanding of the Protocol and the Regulations. Out of the forty eight respondents, only 5% showed proper understanding of the Protocol and the Regulations. The prevalence level of understanding also varied on country basis with Kenya showing higher level where six out of ten respondents acknowledged knowledge of the Protocol and its provisions, followed by Tanzania and Uganda, Rwanda and Burundi came last. The respondents were asked whether they had read the protocol and understood the provisions on free movement of people and labour. They were asked whether they knew of the regulations on free movement of persons and workers.

This low understanding of the protocol and its regulations confirms our hypothesis that the implementation of the Regulations on free movements is weak, half hearted, ad hoc, and uncoordinated thus resulting in poor policies, weak, unenforceable and restrictive laws and regulations that are an obstacle to integration.

¹ Goodwill-Gill G.S. 1978: International Law and the Movement of Persons between States: Clarendon Press. Oxford pg 3

There is the lack of clear procedures, principles and rules guiding the implementation of regional migration laws and regulations in East Africa.

c) Implementation of the Protocol: Regulations on Free Movement of Persons, Free Movement of Workers, Right of Residence and Establishment.

Lastly, the respondents were asked whether they were implementing these on free movements of persons, labour, and rights of residence and establishment provisions or not. The respondents were also asked to indicate the extent of the implementation of the protocol. Out of the thirty respondents, 99 percent agreed to the implementation being underway. Out of this figure 20% were of the view that above 50% of the Protocol is being implemented. They cited the Regulations on free movement of persons and workers including regulations on right of residence and right of establishment as implementing this Protocol.

On whether these regulations were actually guiding state practice in the region, the respondents were of the view that this is not given that each state continued to cling on its sovereignty on matters of immigration. 20% of the respondents held that the protocol was not being fully implemented given that only a few provisions of the protocol have so far been implemented. The difficulty in getting consensus was cited by the respondents 60% as an impediment to the implementation of the Protocol. This confirms our hypothesis that there is no organized implementation of the protocol as the international migration law for East Africa.

5.2 Challenges to the Implementation of the Protocol and Regulations on Free Movement.

In summary, this study identified the following challenges to the implementation of the protocol.

- Slow harmonization of national laws on migration, labour and social security to comply with the Protocol's requirement thus making implementation difficult to be undertaken and evaluated.
- Lack of political will to support and enforce the provisions of the Protocol. This arises out of suspicion among member states and different self interests of the member states. This leads to shifting of blames as to who is causing the present lag in the implementation.
- Differential development levels of the partner states where some states are perceived to be economically dominant over other partner staes.
- Lack of full sensitization and involvement of the citizenry in the integration project. The integration was brought to the people as a product and not as a condition or new way of life.
- Lack of enforcement mechanism of the provisions of the protocol, a weakness evident in international law.
- Official bureaucracy from officers implementing the Protocol and unfounded fear among state agencies.
- Trans-border crimes such as human trafficking and smuggling in persons and goods including the infiltration of contraband goods, drugs and psychotropic substances.

- Lack of a common implementation framework which also affects the implementation of the protocol and its monitoring and evaluation.

5.3 Recommendations

This study has been interrogating the implementation of the regulations on free movement of the East African Common Market protocol herein referred to as the protocol. From the study, one goes on to ask how this implementation is being carried out. There is need for implementation mechanism to be put in place to ensure a holistic implementation where all states are at par in the implementation and not to be left at state's will and wish.

Also there is need to device mechanism that can be binding and compelling to partner states obliging them towards the implementation of the protocol. This will be a creative way to overcome slowness of state in implementing some of the provisions given they act independently in a cooperative enterprise like in a protocol. Need to review all harmonized laws and speed up the harmonization. Social security laws also need to be harmonized to bring the citizens of all the states to a social parity.

A revisit of the East Africa passports project is also necessary. Especially this project should have been part of the protocol as the common travel document among member states there by giving it more prestige as opposed to current scenario.

Lastly, reports on implementation need not just be prepared and submitted by states as it is but rather need to be made public through publication in the mass print media showing the actual progress and performance of each partner state so as to educate the public on the implemented provisions, enable avenue for responses from the public

and information as well as its potential to create a hidden force to states to implement the provisions of the protocol given the states will feel obliged to report something new, thus will have to accompany this feeling with substantive actions.

5.3 Conclusion

The findings of this analysis of the implementation of regulations on free movement of persons in East Africa are sobering. They expose the serious lack of understanding and knowledge of the migration law in East Africa, while also exposing the general ignorance of the national migration laws that are supposed to guide migration practice at the nation state level. This kind of ignorance demonstrated by respondents in this research reveals a problem with manpower training and continuous empowerment through seminars by the immigration practitioners.

Owing to this handicap of ably understanding the law upon which they draw their legal power, it is unlikely that the same people if entrusted with the responsibility to implement the regional (regulations on free movement of persons and workers) migration law will ably do implement it. This is because in the first instance to such person that law does not exist. This manpower handicap impedes the implementation of the East Africa migration law to this date.

The aim of the migration law of East Africa contrary to the above findings is among others to facilitate the realization of the rights and freedoms enshrined in the Protocol in a structured, confined and cooperative manner so that member states can equally and maximally benefit from migration within the region in terms of labor

provision such as availing skilled manpower, unskilled cheap labor, conduct of business and maintenance of social ties through visits to relatives and friends.

The motivation of the Protocol was to deepen cooperation for the benefit of member states. The key objective is to “accelerate economic growth and development of the Partner States through the attainment of the free movement of goods, persons and labour, the rights of establishment and residence and the free movement of services and capital”. For these objectives to be realized, regulations on free movement of persons in annex one were developed so as to implement the provision of the Protocol article 7 on free movement of persons. These regulations are purposively to ensure that there is uniformity among the Partner States in the implementation of the Article 7 and that to the extent possible, the process is transparent, accountable, fair, predictable and consistent with the provisions of the Protocol².

Sovereignty in East Africa remains a major obstacle for the realization of the benefits of cooperation. The Treaty of the East Africa Common Market 2005 highlights several areas of cooperation. However it surprisingly leaves out cooperation in migration choosing to put this under the larger theme of social cooperation. It is realized in this study that the failure to clearly acknowledge migration and the benefits thereof including its negative impact is an obstacle at realizing a clear, acceptable migration law for the region. This is made worse by the protocol which further entrenches sovereignty in its definition of east Africa citizen. This recognition of individual state sovereignty is an obstacle to the implementation of the protocol and the regulations on free movement of persons and workers and other rights enshrined in the protocol.

² Supra

To make this law effective, an enforcement mechanism needs to be devised which compels states to commit to the implementation of the protocol. The use of carrot and stick strategy would be advisable in this regard. Incentives should be attached to the implementation of the law. Such incentives as certificate of compliance, and requirement that complied states be accorded certain status within the implementation process. The flip side can include sanctioning those states that have not complied with the implementation of their portion. Such sanctions can include losing certain benefits such as certain seats or votes in the regional meetings, losing certain rights especially regarding such state as not being equal to other complied states. Payment of certain fine can also be used to compel states to comply with the implementation of the said law.

Therefore there is need for cooperation framework for migration to be developed either in form of a regional migration policy framework or the creation of One Stop Border Post which is currently being encouraged and implemented.

For free movement of persons to be effective, predictable and clear so that states benefit from it, there is need to harmonize the laws, policies and procedures of immigration in the region. This harmonization would rather be done in a regional instrument. This can be East Africa citizenship and immigration law, East Africa migration policy framework among other such initiatives. This will require states to surrender some of their sovereignty especially recognizing a progressive definition of citizen to be a person born of an East African. East Africa would then be the territories of Burundi, Kenya, Rwanda, Uganda and Tanzania. Though IGAD has developed a migration policy, east Africa has not developed the same. This is urgently needed to help states regionally to reap the benefits of migration. A policy framework will go a long way

to addressing some of the hitherto unexplored of areas of migration such as migration and development, gender and migration among others.

The issuance of travel documents was found to be an important activity of migration practice for the realization of free movement in the region. This is to ensure that the freedom of movement is realized.

Currently each state issues travel documents on its authority even the regional initiative of an East Africa passport has been abandoned. This is a big blow to the regional immigration law since it has asserted sovereignty and retarded the conception of an East African citizenship.

By one being issued with an East Africa passport would have confirmed the bearer to the status of an East Africa citizen. The most common travel documents are the border passes or the temporary/ emergency travel certificate. These need to be harmonized in terms of issuance, security features and be available at all border points to facilitate easy movement of persons at all times and at all border points.

Finally for the East Africa migration law (free movement of persons) to be effectively implemented there is need to deepen understanding of this law through sensitization of the population and the practitioners and all stakeholders in immigration. This sensitization should go along with sensitization of the people on the protocol which currently is the lowest. The fact that most of the government officials understand not this protocol is a confirmation that even the people understand it not.

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APPENDICES

Appendix I

Constitution of the sample interviewed in this study.

Border point	Country	No. of officers to interview	Total	Number of those interviewed.
Namanga	Kenya	5	5	5
Namanga	Tanzania	5	5	5
Isebania	Kenya	5	5	5
Sirari	Tanzania	5	5	3
Busia	Kenya	4	4	4
Busia	Uganda	4	4	1
Malaba	Kenya	3	3	2
Malaba	Uganda	3	3	1
Nairobi Hqs	Kenya	4	4	4
Arusha regional office	Tanzania	4	4	1
Kampala	Uganda	4	4	0
EAC secretariat	Arusha	2	2	0
Ministries of EAC	Kenya, Uganda, Tanzania	2	2	0
Total sample population		50	50	Total 31

List of People Interviewed

1. Benon Kusemerewa Senior Immigration Officer and Officer in Charge Busia Uganda
2. Hamisi Saidi Chief Immigration Officer, Namanga Kenya
3. Aluoch Caroline Ouma, Immigration Officer One, Namanga Kenya
4. Komen D. I.O.I Namanga Kenya (Deceased)
5. Mwandoro S.I.O Namanga Kenya
6. Abutwalib Harus S.I.O Namanga Tanzania
7. Ngomiya Khadija I.O.I Namanga Tanzania
8. Angela Steven I.O.I Namanga Tanzania
9. Soiyanka C S.I.O Malaba Kenya
10. George I.O.I Malaba Kenya
11. Mr. Chege J.M ADIS Aliens Section, Nyayo House Nairobi
12. Mr. Wanda Dume C.I.O Prosecution Section Nyayo House , Nairobi
13. Mr. Wambilyanga ADIS In Charge Training, Nyayo House Nairobi
14. Mr Wafula Tabu, S.I.O, Nairobi Issue Room.
15. Mr. Njoka E, Ministry of East African Cooperation.
16. Mr. Muga E.B.Ministry of East African Community by email.

No Responses

17. Malaba Uganda C.I.O and Officer in Charge.
18. The East Africa secretariat
19. Directorate of Immigration Uganda
20. Arusha Regional Office Tanzania

Unidentified Interviewees

1. Four officers from Busia Uganda
2. Two officers from Namanga Kenya,
3. Three officers from Namanga Tanzania
4. One officer from Malaba
5. Five officers from Isebania Kenya and
6. Three officers from Sirari Tanzania

Appendix II

SEMI STRUCTURED INTERVIEW REPORT FORMS. INTERVIEW REPORT A HEADQUARTERS

Dear respondent,

My name is Shiraku Mutende, an MA student at the University of Nairobi. As part of requirements for the award of the above degree, am required to submit a thesis on any topic of my choice. For this reason I am undertaking research in the implementation of migration law in East Africa: cases study of regulations on free movement. It is for this purpose that I request your response to a number of questions provided herein under.

This research is for academic purposes only and the information so given will be handled with a lot of confidentiality it deserves. The names of respondents remain anonymous. The responses from this research will not be used for public purposes but your name will be appended on the list of respondents.

Thank for your cooperation.

Preliminaries

Date of interview	
Interviewed by	
Location of interview	
Origin: country	
Section;	
Designation.	

Briefly explain the functions of this department	
Where does this department get its mandate?	
Are there separate legislations about this department	
How does this make your work easy	
How does it make your work difficult	
How are this legislations similar with other east Africa countries	
How are they different	
Do you issue East Africa passports?	
How many on averages?	
Do you understand the law behind this passport	
How is the EA passport making movement easy	
Does this passport enhance the freedoms of movement and other freedoms in the Protocol	
How does this passport advance the idea of EA citizen	

a)Who is an EA citizen b)Is the EA passport an attempt to create an EA law on citizens	
What rights and freedoms should this citizen enjoy	
How will the idea of EA citizen help in the integration project	
There is an EA law on free movement of person regulation, annex one of the protocol. Are you familiar with its contents	
How much does it form part of EA migration law	
To what extent generally would you say such law is substantive	
The provisions in the protocol and regulations on free movements are currently being implemented. What would you comment about this implementation	
Are the agents committed fully to implementation in your view	
What level would you ascribe to implemented provisions	
Comment on the hindrances to this implementation	
How can these hindrances be overcome	

Any other comment/ information relevant to this study

Appendix III

INTERVIEW REPORT B

SIRARI/ISEBANIA NAMANGA x2, BUSIA x2, MALABA x2

To be filled out following interview with field/border officers.

DEAR RESPONDENT,

My name is Shiraku Mutende, an MA student at the University of Nairobi. As part of requirements for the award of the above degree, am required to submit a thesis on any topic of my choice. For this reason I am undertaking research in the implementation of migration law in east Africa: cases study of regulations on free movement. It is for this purpose that I request your response to a number of questions provided herein under.

This research is for academic purposes only and the information so given will be handled with a lot of confidentiality it deserves. The names of respondents remain anonymous. The responses from this research will not be used for public purposes but your name will be appended on the list of respondents.

Thank for your cooperation.

Preliminaries

Date of interview	
Interviewed by	
Location of interview	
Origin: country	
Border	
Designation.	
How long have you worked at this border	
What kind of migrants frequent this border	
What is their (flow) origin and destination generally	
how many cited purpose of entry/departure as;	i. business_____ ii. visit/vacation_____ iii. family reunification_____ iv. residents_____ v. work_____ vi studies_____
what is their common age bracket	
how many	a) male_____ b) female_____

how many between 2010-2013:	i. Tanzanians _____ ii. Ugandans _____ iii. Kenyans _____ iv. Rwandans _____ V Burundians _____
How many had work/resident permits by approximate? Any other temporary work permit?	
how many by estimate use the EA passport how many use temporary permits	
do you issue temporary permits in this station	
how many monthly on average	
Briefly describe the procedure of departure and entry How does it conform to requirement for free movement	
How does it resemble the neighboring country	
Are there differences in practice	
What is common between your practice and the other countries'	
In your station, how do you handle citizens	
Are you guided by any law? Which one (law) and which section?	
How does this law compare with the neighbor state's law	
How do you relate to your colleagues across the border	
Do you discuss about your laws and procedures	
Do you discuss migration issues	
How do you handle the East African citizens Do you consider the regulations on free movement? How?	
do you believe there are EA citizens	
How do you comment on the procedure and laws you use	
Are they universal and uniform	

What would you comment on the existence of an EA migration law	
Are you familiar with EA migration law	
Are you familiar with regulations on freedom of movement as enshrined in the common market protocol	
What would you comment about the implementation of the protocol how do you implement the six month rule	
Are the agents committed fully to implementation in your View?	
what level would you ascribe to implemented provisions	High_____ Average_____ Low_____
Comment on the hindrances to this implementation	
How can these hindrances be overcome	

Any other comment/information relevant to this study

Appendix IV

INTERVIEW REPORT C

EAC secretariat and others

To be filled out following interviews with third parties

DEAR RESPONDENT,

My name is Shiraku Mutende, an MA student at the University of Nairobi. As part of requirements for the award of the above degree, am required to submit a thesis on any topic of my choice. For this reason I am undertaking research in the implementation of migration law in East Africa: cases study of regulations on free movement. It is for this purpose that I request your response to a number of questions provided herein under.

This research is for academic purposes only and the information so given will be handled with a lot of confidentiality it deserves. The names of respondents remain anonymous. The responses from this research will not be used for public purposes but your name will be appended on the list of respondents.

Thank for your cooperation.

Preliminaries

Date of interview	
Interviewed by	
Location of interview	
Origin: country	
Section	
Designation.	
Have you read the EA treaty, How does it promote free movement of persons	
Have you read the protocol How does it promote free movement of persons	
Comment on annex one in relation to free movement of persons	
The treaty of EA identifies several areas of cooperation. What are they	
Is there need to include migration as another area of cooperation	
Cooperation will need agreement by states even in form of a soft law. do you agree	
How is the EA migration law effective in managing migration	
How is the secretariat involved in migration issues in the region	
How is sovereignty of EA states an obstacle to the community involvement in migration management	
Currently there is misinterpretation on the meaning and purpose of the EA passport which is a project of the community. How are you engaging states to solve this anomaly	

what is the community understanding of the law behind the EA passport	
what was the intention of this passport	
do you get reports on how many of these passports are issued by each state	
Do you follow up on whether they are effectively used or not?	
How effective is this passport in advancing the freedoms anticipated in the protocol (such as freedom of movement, residence, and establishment).	
How are these freedoms helpful to the integration project	
To what extend would you say an EA migration law is substantive enough	
What would you comment about this implementation	
Are the agents committed fully to implementation in your view	
what level would you ascribe to implemented provisions	High_____ Average_____ Low_____
Comment on the hindrances to this implementation	
How can these hindrances be overcome	

Any other comment/ information relevant to this study