ADVANCING REGIONAL INTEGRATION: MIGRATION RIGHTS OF CITIZENS IN THE EAST AFRICAN COMMUNITY

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DECLARATION

I, _____**CAROLINE NALULE**_____,

declare that this thesis is my own unaided work. It is submitted in fulfillment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Seeds for the topic of this thesis were sown long before the idea of undertaking a PhD was ever conceived. As I travelled through Europe, I was struck by the free movement regime that was pertaining in the Schengen area and I hoped that the same would happen in my own region, East Africa and eventually Africa as a continent. In the meantime I was carrying on with my work in human rights advocacy, promotion and protection, putting the free movement research idea on the backburner. Eventually I decided to pick it up yet again and do a comprehensive research in the area of *regional integration, migration and human rights*. As broad as the parameters of the research area were, I had to think of a way of narrowing it down and that has been the entire journey of my PhD thesis. I hope it will make much sense for those who read it, whether or not they agree with its basic propositions.

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ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AEC	African Economic Community
AfDB	African Development Bank
AHRLJ	African Human Rights Law Journal
CARICOM	Caribbean Community
CCJ	Caribbean Court of Justice
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CMP	Protocol on the Establishment of the East African Community Common Market
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
COMESA	Common Market for Eastern and Southern Africa
DCIC	Directorate of Citizenship and Immigration Control, Kampala
EAC	East African Community
EACJ	East African Court of Justice
EACSO	East African Common Services Organisation
EALA	East African Legislative Assembly
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice or Court of Justice of the European Union
ECOWAS	Economic Community of West African States
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs
GDP	Gross Domestic Product

HCCS	High Court Civil Suit
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ID	Identity card
IGAD	Inter-Governmental Authority on Development
MEACA	Ministry of East African Community Affairs, Kampala
OECD	Organisation for Economic Co-operation and Development
REC	Regional Economic Community
RTC	Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy
SADC	Southern African Development Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNHCR	United Nations High Commissioner for Refugees
WTO	World Trade Organisation

CHAPTER ONE
REGIONAL INTEGRATION, HUMAN RIGHTS, AND MIGRATION RIGHTS: A GENERAL INTRODUCTION

1.0 Introduction

Regional integration can be said to be a strategy endorsed by many countries, particularly in Africa, with a view to accelerate economic growth and development. Considering that in most cases, regional integration takes the form of economic integration, the two terms tend to be used synonymously. Regional integration was initially perceived of in mainly trade-related terms of tariff-elimination and trade expansion, but as Asante explains, in Africa, it is an economic development issue, partly aimed at improving the bargaining power of African countries in international trade and relations[1].

Besides, it may be the case that African States have embraced regional integration, not only as a panacea for underdevelopment and poverty in Africa, but also as a means of establishing closer links among the peoples and nations of Africa. It has actually been contended that regional integration in Africa is seen as paving way for African unity, both economic and political[2]. Elsewhere it is argued that regional integration in Africa is motivated by political considerations[3]. Moreover since regional integration is primarily driven by economic objectives, to use the words of McCarthy, 'a regional integration arrangement can be seen as a political construct held in place by economic cement'[4]. This seems to be particularly the case with the East African Community (EAC).

The EAC is one of the Regional Economic Communities (RECs) in Africa established not only for the purposes of attaining economic integration among its member states, but to ultimately form a political federation. The seeds of the political federation should therefore be sown and nurtured in the earlier phases of the integration. Asides from the seeds of good governance,

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[1] S.K.B Asante *The Political Economy of Regionalism in Africa: A Decade of the Economic Community of West African States (ECOWAS)* (1986) 12-13.
[2] Ibid at 26-27.
[3] Colin McCarthy 'Is Africa economic integration in need of a paradigm change? Thinking out of the box on African integration' in Anton Bösl, Willie Breytenbach, Trudi Hartzenberg, Colin McCarthy & Klaus Schade (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (2007) vol.7, 11-12.
[4] Ibid.

democracy and rule of law, respect for human rights and fundamental freedoms, for reasons to be explained below, should be integral to the integration process.

It is common knowledge that most African countries, including those in East Africa have flawed democratic, good governance and human rights credentials, which raises questions of their commitment to their human rights undertakings in the various treaties[5]. However, States tend to exhibit better levels of commitment to trade and economic related treaties and agreements such as regional economic integration treaties[6]. Therefore even where regional integration treaties do not expressly incorporate human rights provisions or principles, there is yet another dimension through which human rights principles or a human rights approach can be insinuated into the economic integration process. That is the migration rights dimension. As shall be explained further on, migration rights (that is, free movement of persons including workers, the right of establishment and the right of residence) may be said to bridge the gap between the economic justification and the human rights justification for these rights.

This thesis attempts to identify the rationale for migration rights within the EAC in relation to the Community's political objectives. The thesis analyses the dual conceptuality of migration rights and examines how migration rights in the EAC are being rationalised, interpreted and applied. The main argument propounded in this thesis is that migration rights, though they have developed from a purely economic rationale and perspective, have since morphed into an entirely novel regime which emphasises the human or fundamental rights of citizens of the Community. Thus, considering the nascence of the EAC and its migration rights regime, it would serve the ultimate purposes and objectives of the EAC if its approach to migration rights was more explicitly human rights oriented as opposed to an economic orientation.

This thesis and the arguments raised herein are premised on three key concepts of regional integration, human rights and migration rights. This chapter therefore seeks to explain these concepts and the interplay amongst them. It provides an expository prelude to the subsequent chapters. Furthermore, the chapter explains the significance of this research, outlining its objectives, research questions, hypothesis and research methods applied in the collection of the information and data applied herein. Worth mentioning is that this is basically a legal research,

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[5] On theories of human rights treaties commitment and compliance, see generally Beth Simmons *Mobilizing for Human Rights: International Law in Domestic Politics* (2009).
[6] Ibid at 124.

and though it may use information from other disciplines, it is biasedly legalistic. Furthermore, much as the research recognises the economic underpinnings of regional integration schemes, as the section below illustrates, this thesis does not aim to examine regional integration from the perspective of international economic law or world trade law. Rather it is more of an exploration of the less considered, and at times outrightly dismissed, viewpoint of giving a human rights interpretation to migration rights guaranteed for purposes of economic integration[7]. Hence this thesis makes out the case for a regional economic community advancing its objectives by becoming more human rights oriented in its approach.

1.1 Regional integration: theories and benefits

There seems to be no universally agreed upon definition of 'regional integration'. The definition may vary according to the discipline or the context. In terms of discipline, for instance, economists may not necessarily define 'regional integration' in the same way as political scientists. For example, Mattli, an economist, defines regional integration as 'the voluntary linking in the economic domain of two or more formerly independent states to the extent that authority over key areas of domestic regulation and policy is shifted to the supranational level'[8]. On the other hand, a political scientist may define regional integration as 'the voluntary creation of larger political units involving the self-conscious eschewal of force in relations between participating institutions'[9]. International relations scholars may yet define regional integration as the 'process by which States go beyond the removal of obstacles to interaction between their countries and create a regional space subject to some distinct common rules'[10]. What seems to be the point of divergence among these schools of thought is the driver for integration. Whereas for economists, it is mainly economic objectives that motivate the integration, for political scientists, the motives and goal will be primarily political. Economic

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[7] See for instance Philip Alston 'Resisting the merger and acquisition of human rights by trade law: a reply to Petersmann' (2002) 13 *European Journal of International Law* at 826. This was one of the issues in the extended debate between Alston and Petersmann, more details of which are available at www.ejil.org.

[8] Walter Mattli *The Logic of Regional Integration: Europe and Beyond* (1999) 41.

[9] Ernst Haas 'The study of regional integration?' (1971) 4 cited in Ben Rosamond *Theories of European Integration* (2000) 12. Elsewhere Haas provides a more elaborate definition of regional integration as 'the process whereby political actors in several distinct national settlings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over pre-existing national states. The end result of a process of political integration is a new political community superimposed over the existing ones'- cited in Rosamond, ibid.

[10] Edwards Best & Thomas Christiansen 'Regionalism in international affairs' in John Baylis, Steve Smith & Patricia Owens (eds) *The Globalisation of World Politics: An Introduction to International Relations* (2011) 430.

objectives are viewed by political scientists as a transitional phase that aids or catalyses the attainment of the ultimate goal.

In terms of 'regional integration' varying according to the context, the Mattli definition seems to be rather apt for a regional integration scheme such as the European Union (EU). The EU is so far the most advanced in the sense that member states have created a supranational authority – the European Commission to handle EU affairs, as well as a host of other EU institutions including the European Parliament and the European Court of Justice (ECJ) that ensure member's states adherence to the EU law and spirit. In contrast, RECs in Africa do not yet have powerful supranational institutions, much less institutions with such significant powers as those of the EU. Member States of African RECs still retain sovereignty in most areas. In such circumstances, the definition of regional integration as a "preferential (usually reciprocal) agreement among countries that reduces barriers to economic and non-economic transaction"[11] seems more appropriate.

What appears to be the point of convergence among the various disciplines and contexts is that, regional integration involves two or more countries or States linked either geographically or ideologically or both, which agree to merge certain functions, usually starting with trade and economics. This will thus be the working definition for regional integration in this research.

1.1.1 Regional integration: theories and approaches

There have been a number of theories expounded on regional integration[12], only a few major ones will be highlighted in this section.

Mitrany [13], in what has come to be termed the 'functional approach', advocates for a union of states, be it along territorial or ideological lines, for the sake of maintaining peace. He argues that certain functions of the state should be pooled together among agreeable states and administered by a central authority or agency. Not only would this foster peace among the nations, but that once this is attained, attention would be turned to what he refers to as the 'real

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[11] UNECA *Assessing Regional Integration in Africa* II (2004) 9.
[12]See generally Mattli op cit note 8; Rosamond, op cit note 9; Leon N. Lindberg & Stuart Scheingold (eds) *Regional Integration: Theory and Research* (1971); W Andrew Axline 'Introduction' in Andrew W Axline (ed) *The Political Economy of Regional Cooperation: Comparative Case Studies* (1994).
[13] David Mitrany *A Working Peace System: An Argument for the Functional Development of International Organization* (1943).

tasks', that is, 'the conquest of poverty, and of disease and of ignorance'[14]. According to him, economic issues would only be some of the functions that are pooled together for central and common administration. Peace was necessary for States to concentrate on meeting common needs of the populace. This was thus the driving force for cooperation behind Mitrany's functional theory. His thinking has been said to have been influenced by the dominance of economics and as such he tended to neglect other factors[15].

The neo-functionalist approach which agrees with the basic prepositions of Mitrany's functionalism provides rather different motivations for states integrating. Haas argues that 'the process of community formation is dominated by nationally constituted groups with specific interests and aims; willing and able to adjust their aspirations by turning to supranational means when this course appears profitable'[16]. While according to Mitrany, promotion of the common good drives States to unify or integrate; according to Haas, it is for self-interests of the key players that States choose to integrate. Despite being a political scientist, Haas acknowledged economic groups as being at the forefront of such specific-interest groups that would push for integration. Therefore, both functionalists and neo-functionalists view economic activities as providing the impetus for the desired integration goal. Neo-functionalism theory has been used to explain European integration which is traced back to the establishment of the European Coal and Steel Community (ECSC) in 1952 among previously rival nations (France, Germany, Italy, Belgium, Holland and Luxemburg). The main objective of its establishment was the control of the production of steel and coal that were deemed, as Goormahgtigh refers to them, 'the backbone of any armaments production'[17]. In this way none of the member states could mobilise armaments or its forces without the others knowing, and in that manner wars between the member states could be prevented. Thus economic interests were the basis for promoting peace and further integration in Europe. The ECSC became one of the precursor organisations of the present EU.

Besides the functionalist theories, the federalist theory focuses on the attainment of a political union among separate States[18]. According to federalists, economic integration may occur after

[14] Ibid at 54.
[15] Reginald Harrison *Europe in Question: Theories of Regional International Integration* (1974) 28-29.
[16] Ernst B. Haas *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (1958) xiv.
[17] John Goormahgtigh 'European Coal and Steel Community' (1953) 30 *International Conciliation* at 346.
[18] Harrison op cit note 15 at 43.

political federation. However, the branch of federalists known as evolutionary federalists view economic incrementalism as a leading towards the ultimate goal of federalism[19].

Most regional integration schemes have, however, been aligned to the functionalist and neo-functionalist approaches than the federalist approaches. This is because most of the RECs are geared more towards economic than political integration. As such, they tend to be modelled upon an economic integration model developed by Jacob Viner.

Viner came up with what has been known as a Customs Union model of economic integration[20]. According to this model, the economic integration process follows these stages: first, 'the complete elimination of tariffs as between the member territories'[21] (the creation of a free trade area); and second, 'the establishment of a uniform tariff on imports from outside the union'[22] (creation of a customs union). With the removal of intra-region trade barriers and tariffs, Viner figured that trade-creation would occur leading to increased economic benefits among the integrated countries; while a trade diversion effect would occur against third countries. Whereas Viner's model has been adopted by most RECs, with the EU being the most classic example, it has been argued that this model may not necessarily work in African countries. Gathii argues that the Vinerian model was most suited for the industrial context in which it was developed as opposed to the agrarian context of most countries; and that adopting it in Africa has not always resulted into trade creation or expansion upon lifting of trade barriers as envisaged by Viner mainly because 'majority of African economies have largely similar products without necessarily having comparative cost advantages between them sufficient to overcome this similarity'.[23]

Beyond the customs union, integration may yet proceed to more advances phases. Upon establishment of a customs union, member states or the union may decide to proceed to form a common market, whereby there shall be free movement of factors of production within the member states. This may further lead to a further stage which includes the removal of fiscal

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[19] Ibid at 98-99.
[20] Jacob Viner *The Customs Union Issue* (1950) 5.
[21] Ibid.
[22] Ibid.
[23] James T Gathii *African Regional Trade Agreements as Legal Regimes* (2011) 8. See also Victor Adetula 'The Economic Community of West African States (ECOWAS) and the challenges of integration in West Africa' in Joy Ogwu & Warisu Alli (eds) *ECOWAS: Milestones in Regional Integration* (2009) 19; and Asante op cit note 1 at 11-13.

and monetary barriers thus paving the way for a fiscal and monetary union or an economic union.[24] Some authors[25], and indeed some RECs, have added yet another final phase of integration, that is, where the economic union may lead to formation of a political union or federation.

Most regional integration schemes worldwide have adopted Viner's model of integration and doubtless, they are all driven primarily by economic objectives. Hence regional integration usually tends to be synonymous with economic integration. In fact most of the regional integration agreements, considered as regional trade agreements, fall under the auspices of the World Trade Organisation (WTO), and thus rightly come within the regime of international economic law. In as far as member states of a REC are parties to the WTO, they are bound by their obligations under the WTO, the General Agreement on Trade and Tariffs (GATT), Article XXIV and the General Agreement on Trade in Services (GATS), Article V[26] and others, as the case may be. Considering the great influence of economic law on regional integration, the term Regional Economic Communities (RECs) will be applied to regional integration schemes in as far as economic motives are the predominant drivers for integration.

Advancing through the various stages of integration should be a voluntary and conscious decision of the States involved, as each stage involves ceding more sovereignty to the central authority established for purposes of overseeing the integration. The extent to which States are ready and willing to cede some of their sovereignty will determine not only the end result of the integration, but also the success or failure of the entire venture. Moreover it has been argued that trade and economic related agreements tend to attract more commitment and compliance from States than, say, human rights treaties. This is so because the former contain more tangible incentives, which raise the expectations of higher benefits for States that are parties to such treaties[27]. Regional integration agreements are such that States, particularly in Africa, expect that the benefits of being party thereof will far outweigh the costs of being outside any integration scheme. Consequently African States have embraced regional integration.

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[24] On stages of economic integration, see McCarthy op cit note 3 at 7; Sipho Buthelezi *Regional Integration in Africa: Prospects and Challenges for the 21st Century* (2006); UNECA (2004) op cit note 11 at 10.
[25] UNECA, ibid; Wolfe-Christian Peters *The Quest for an African Economic Community: Regional Integration and its Role in Achieving African Unity* (2010) 58.
[26] According to Article II.2 of the Agreement establishing the WTO Agreement (WTO Agreement), all members are bound by the agreements and associated legal instruments included as annexes thereto. These include the GATT (Annex 1A) and the GATS (Annex 1B).
[27] Simmons op cit note 5 at 118-124.

Although integration in Africa is not exactly aligned to any of the above theories, aspects of some or each of those theories may be relevant for the various integration schemes in Africa.

1.1.2 Regional integration in Africa[28]

The African continent has, since most of its countries gained independence in the latter half of the twentieth century, been grappling with the issue of development, not to disregard that of establishing peace and security in the different countries that constitute the continent. With most of the continent's countries making it on the list of least developed countries[29], there is a crucial justification for exploring and exploiting various ways and means of improving the standard of living of majority of the continent's poor. Underdevelopment in Africa is further fuelled by its disadvantaged position in international trade and the global economy. Given that most African countries are poor and struggling economies, they do not have a fair share of the world market economy, one in which countries are increasingly participating as part of regional blocs[30]. In the attempt to overcome the numerous economic, social and political problems, African countries have embraced regional economic integration, which, it is hoped, should also enable them have an improved advantage and better negotiating position in world trade, economics and politics. The African Union is actually convinced that regional integration is necessary "in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalization"[31].

Consequently, a number of RECs have been formed in Africa bringing the total to about fourteen in 2004[32]. Although these RECs are characterised by multiple and frequently

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[28] The term 'regional' as applied to Africa refers not to the continent but to the various integration schemes existing in various parts of Africa. Some authors refer to them as sub-regions, but the official and popular term used even by the African Union is regional integration or regional economic communities. Therefore this thesis shall use the term 'regional' and not 'sub-regional' in reference to integration schemes in Africa.

[29] Of the 48 least developed countries identified by the United Nations Conference on Trade and Development (UNCTAD), 33 are African countries making it about 61% of the continent's 54 countries. For list of least developed countries, see http://unctad.org/en/pages/aldc/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx accessed on 18 December 2013.

[30] Ademola Oyejide 'Trade policy and regional integration in the development context: emerging patterns issues and lessons for Sub-Saharan Africa' (1998) 7 (Suppl 1) *Journal of African Economies* 138-140.

[31] Preamble to the Constitutive Act of the African Union. The Constitutive Act was adopted in Lomé, Togo on 7 November 2000 and entered into force on 26 May 2001.

[32] These are: the Economic Community of West African States (ECOWAS); the West African Economic and Monetary Union (UEMOA); the Mano River Union (MRU); the Community of Sahel-Saharan States (CEN-SAD); the Economic Community of Central African States (ECCAS); the Central African Economic and Monetary Community (CEMAC); the Economic Community of Great Lakes Countries (CEPGL); the Southern African Development Community (SADC); the Southern African Customs Union (SACU); the Indian Ocean Commission (IOC); the Common Market for Eastern and Southern Africa (COMESA); the East African

overlapping country memberships, which result into duplicity and a strain on a country's scarce resources leading to a call for rationalisation[33], Gathii explains this as flexibility on the part of African countries, which enables them to 'retain their sovereignty and accrue benefits from multiple regimes otherwise not available through sole memberships'[34].

It therefore seems to be the case that African countries are enthusiastically embracing regional integration as a means of attaining accelerated economic growth and development[35]. This is expected to be achieved through some of the expected benefits of regional integration which include: larger markets for local products of small states; trade creation effects; increased competition among producers to the advantage of the consumer; increased investment, both local and foreign; and increased bargaining power, particularly in international trade negotiations.

Actually most writers[36] seem to agree that regionalism is the best alternative African States have got to weather the twin threats of globalisation and marginalisation in world trade. Additionally, some donors may prefer assisting comprehensive regional initiatives rather than deal with similar national projects on a piece-meal basis[37].

Some non-economic benefits have also been tagged to integration and these include: improved co-operation among neighbouring states leading to improved peace and regional security. Peters argues that 'regional integration has the potential to increase democratic convergence'[38] as common democratic standards may need to be applied to all partner states as is the case now with the EU[39].

Community (EAC); the Intergovernmental Authority on Development (IGAD); and the Arab Maghreb Union (UMA)- see UNECA (2004) op cit note 11 at 45.

[33] Ibid at 45-68.

[34] Gathii op cit note 23 at 72.

[35] Treaty Establishing the African Economic Community (AEC Treaty), Art 4.1 para (a). The AEC Treaty was adopted in Abuja, Nigeria on 3 June 1991 and entered into force on 12 May 1994.

[36] UNECA (2004) op cit note 11 at 22-23; Peters op cit note 25 at 37; Mothae Maruping 'Challenges of regional integration in Sub-Saharan Africa: macroeconomic convergence and monetary coordination' in Jan Joost Teunissen & Age Akkerman (eds) *Africa in the World Economy: The National, Regional and International Challenges* (2005) 130. See also Philip O Nying'uro 'The EAC's prospects on the global stage' in Rok Ajulu (ed) *The Making of a Region: The Revival of the East African Community* (2005) 34.

[37] Peters op cit note 25 at 36.

[38] Ibid at 40.

[39] Article 49 of the Treaty on European Union (TEU) requires that States applying to join the EU respect values such as respect for human dignity and human rights, democracy etc as laid out in Article 2 of the TEU.

Much as regional integration in Africa and elsewhere seems to be driven by economics and trade, it often, as a matter of course, leads to integration in other aspects such as infrastructure, environment, social, and political. This is consonant with the neo-functionalist concept of 'spill-over' which has been explained as 'the process whereby a given action, related to a specific goal, creates a situation in which the original goal can be assured only by taking further actions, which in turn create a further condition and need for more action and so forth'[40]. It is therefore necessary not to look at integration from the narrow lens of economics but look at it in a more holistic manner. It is clear from most of the regional integration treaties that states are conscious of this fact and as such the scope of integration envisaged by most RECs goes beyond mere economic objectives[41].

One of the areas in which regional integration can be seen to extend beyond economic objectives is that of democracy, the rule of law and human rights. Peters contends that 'only in regional communities where human and democratic rights are fully acknowledged and observed, will citizens of the member states also support the idea of regional integration'[42]. The discussion that follows not only makes the case for the inclusion of human rights within the economic integration trajectory, but also demonstrates how various RECs have taken cognisance of the significance of human rights and thereby incorporated them by varying degrees within the integration agenda.

1.2 Human rights within the regional economic integration discourse

The regional integration discourse is to a great extent dominated by the economic viewpoint so much so that regional integration is synonymous with economic integration even where the objectives of integration comprise more than the economic aspects. As mentioned above, economic integration falls under the international economic law regime, which tends to be

[40] Definition as provided by Leon Lindberg quoted in Harrison op cit note 15 at 82.
[41] Claudia Mutschler 'Comparative international experiences: Latin America' in Christopher Clapham, Greg Mills, Anna Morner & Elizabeth Sidiropoulos (eds), *Regional Integration in Southern Africa: Comparative International Perspectives* (2001) 164. See also chapter by Christopher Clapham 'The changing world of regional integration in Africa' in same volume at 60. Ebobrah also provides an elaborate explanation of how the spill-over concept may explain the multiple objectives, including emphasis on human rights, of African regional integration initiatives in Solomon T Ebobrah *Legitimacy and Feasibility of Human Rights Realisation through Regional Economic Communities in Africa: The Case of the Economic Community of West African States* (Unpublished LLD Thesis, University of Pretoria, 2009) 67-73.
[42] Peters op cit note 25 at 40. See also Maurice Schiff & Alan Winters *Regional Integration and Development* (2003) 188.

utilitarian or consequentialist in its approach to development[43]. Trade law, in particular, which is at the core of economic law, is based on the efficiency model which aims at improving 'the economic wellbeing of human beings through the facilitation of efficient exchanges'[44]. Hence economic law tends to be more goal-oriented and perhaps less concerned with issues pertaining to human dignity. Accordingly, and by way of example, human beings are taken as objects under international economic law or instruments for the attainment of a desired end. This explains the reference to human beings as factors of production along with other, perhaps more befitting, objects such as goods, capital and services. This outlook of international economic law along with its normative underpinnings sets is at odds or in conflict, in terms of both normative approaches and practical implementation, with international human rights law, a regime of international law that is more concerned with the dignity of the human person[45].

The concept of human rights and fundamental freedoms embodied in international human rights law may be regarded as presenting a parallel development in international law over which there is worldwide and significant coalescence among States. Unlike economic law, human rights law places the human being right at the centre of all activity. The human being is a holder of rights that should be respected and protected by all, most especially by the State, which in turn should ensure their promotion, respect and protection. The main, if not only goal, is the respect of the human dignity and worth of all persons without discrimination. Hence human rights law emphasises how a person should or should not be treated, regardless of consequences[46].

Human rights are regarded as 'one of the most powerful normative concepts'[47] and may be said to be an effective instrument of mobilisation which various publics world over have time and again used against political leadership to behave respectfully towards their citizenry or subjects, as the case may be. Human rights have been universally accepted and recognised as 'a common standard of achievement for all peoples and all nations'[48] and almost all states have pledged to achieve the 'promotion of universal respect for and observance of human rights and

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[43] Frank J Garcia 'The global market and human rights: trading away the human rights principle' (1999) 25 *Brooklyn Journal of International Law* 67-68.
[44] Ibid at 64.
[45] Ibid at 73-76.
[46] Ibid at 71-72.
[47] Simmons, op cit note 5 at 112.
[48] Universal Declaration of Human Rights (UDHR), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) preamble.

fundamental freedoms'[49]. In some cases, States' commitments have gone beyond a mere pledge to comprise a binding legal obligation in instances where states have ratified human rights instruments, be it international or regional. As such human rights should permeate all aspects of a state's undertakings including laws, policies and actions that necessarily extend to international agreements and relations. Owing to the deontological underpinnings and transcendental nature of human rights, their universal acceptance and highly expressed level of commitment by States, and the fact that both economic law and human rights law strive for the wellbeing of the human being, albeit by through different approaches, it is highly imperative that the human rights claims take priority over any other claims[50].

It therefore follows that regional integration arrangements and agreements, much as they are predominantly on trade and economics, should show commitment to the promotion and protection of human rights of individuals and peoples.

Regional integration schemes, however, have tended to develop outside of or in parallel to the human rights regime. This is best exemplified by the development of the European Community which may be taken as the prototype of RECs. It is clear from the history of European integration that human rights did not feature in its earlier treaties, that is, the Treaty establishing the ECSC and the Treaties of Rome,[51] despite the Universal Declaration of Human Rights (UDHR) having been adopted by virtually all states in 1948. This lends credence to the assertion that 'RECs have not been set up primarily to foster human rights but to facilitate a process of economic convergence through closer economic and financial co-operation and harmonisation of policies and programmes'[52].

Over the last century, however, the universality of human rights has gained tremendous acceptance as well as ever-growing significance and awareness. Hence, human rights cannot

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[49] Ibid.
[50] Garcia, op cit note 43 at 72-73.
[51] See Armin Von Bogdandy 'The European Union as a human rights organization? Human rights and the core of the European Union' (2000) 37 *Common Market Law Review* 1307. There were two Treaties of Rome, one establishing the European Economic Community, and other establishing the European Atomic Energy Community. Both were signed on 25 March 1957 and entered into force on 1 January 1958.
[52] Frans Viljoen *International Human Rights Law in Africa* (2007) 495. A similar view can be discerned in the following statement of a judge of the European Court of Justice on the role of the court: "The Court will remain the Court of the internal market… it is not going to be a fundamental rights court…. It would be a terrible disaster if we translate all cases we get here in terms of fundamental rights. It would be a nonsense". Quoted in Sonia Morano-Foadi 'Migration and human rights: The European approach' in Sonia Morano-Foadi & Lucy Vickers (eds) *Fundamental Rights in the EU: A Matter for Two Courts* (2015) 124.

be entirely divorced from the regional integration process. As discussed earlier, the aim of regional integration is acceleration of economic growth and development, ultimately meant to improve the standard of living and meet the common needs of all persons within the region. Human rights standards oblige states to promote the dignity and welfare of individuals, and more specifically, 'to promote social progress and better standards of life in larger freedom'[53]. It can therefore be argued that both concepts (i.e. regional integration and human rights) aim at the same goal[54], the main difference lying in the conceptual approach: what regional integration seeks to attain at a rather macro-level, human rights seek to attain at a basic level. Another way of looking at it is by considering the commitments entailed in regional integration treaties as a means of realising what would otherwise seem like idealistic human rights commitments. There is thus an undeniable intricate connection between economic integration and human rights.

Of late there has been a growing recognition of the link between human rights and development expressed in two major ways, which are relevant to the regional integration process. These can even be taken as defusing any tension, real or apparent, that may exist between economic law and human rights law as earlier discussed.

First is the right to development which obliges states to facilitate the enjoyment of all human rights in all their development initiatives[55]. Regional integration is one of the approaches states adopt, in co-operation with each other, to promote economic development and growth and as such it is imperative that the development process is itself viewed as promoting the right to development. The right to development is one of the rights articulated in the African Charter of Human and Peoples' Rights (ACHPR) and the Treaty Establishing the African Economic Community (AEC Treaty) can be seen as more or less expounding on the commitment of the right as contained in the ACHPR[56]. As Quashigah postulates in reference mainly to the AEC and ECOWAS treaties, the 'economic integration treaties have amplified this right… thus making it more precise and easily tractable'[57]. Nwogu, using the example of ECOWAS

[53] UDHR preamble.
[54] See also E K Quashigah 'Human rights and African economic integration' (1996) 8 *African Society of International and Comparative Law* 215-218; See also Viljoen (2007) op cit note 52 at 496.
[55] Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14 - 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993) Section 1 para 10.
[56] AEC Treaty, Article 3 para (g)
[57] Quashigah op cit note 53 at 217.

illustrates how regional integration can in fact be instrumental in the achievement of human rights, particularly the right to development[58]. She argues that the inclusion of human and peoples' rights as provided in the ACHPR as a fundamental principle of the ECOWAS renders the latter 'a mechanism for the achievement of the West African peoples' right to development largely fashioned in response to the realities of globalization'[59]. Second, human rights and development have been linked through advocacy for the adoption of a human rights approach to development. This approach emphasises that human rights should imbue the entire integration process. Since most States are legally bound by various international human rights instruments to respect human rights, they should be guided by those commitments in all their undertakings, including development schemes undertaken either unilaterally or in jointly with other States. Hence economic integration should adopt the human rights approach. This imperative is partly rooted in Article 28 of the UDHR [60] and the International Covenant on Economic, Social and Cultural Rights (ICESCR), states parties to which are obliged to work individually or in co-operation with others to progressively realise the rights guaranteed therein[61]. This could perhaps be the human rights justification for regional integration.

The significance attached to human rights in the development process has been manifested by the inclusion of human rights in regional integration treaties. At the very least or as a starting point, whichever way one looks at it, they are considered as principles governing the achievement of the REC's objectives. This is the case with most of the RECs in Africa. For instance, human rights are one of the principles on which the African Economic Community (AEC)[62] operates, the Treaty establishing the East African Community (EAC) mentions human rights as both fundamental and operational principles[63], so do the Treaties establishing the Southern African Development Community (SADC)[64], the Inter-Governmental Authority on Development (IGAD)[65], the Common Market for Eastern and Southern Africa (COMESA)[66],

[58] Nneoma Nwogu 'Regional integration as an instrument of human rights: reconceptualizing ECOWAS' (2007) 6 *Journal of Human Rights* 345-360.
[59] Ibid at 348.
[60] Article 28 provides: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.
[61] ICESCR Article 2 (1).
[62] AEC Treaty Article 3 para (g).
[63] Treaty Establishing the East African Community (EAC Treaty) Article 6 para (d) and Article 7.2.
[64] Treaty of the Southern African Development Community Article 4 para (c).
[65] Agreement on the Inter-Governmental Authority on Development Article 6A para (f).
[66] Treaty establishing the Common Market for Eastern and Southern Africa Article 6 para (e).

and the Economic Community of West African States (ECOWAS)[67]. In some instances, however, some RECs provide for specific or thematic human rights issues such as gender and equality, refugees and internally displaced persons, among others. The EU, however, has gone a step further than most African RECs and actually adopted the Charter of Fundamental Rights which is legally binding on all member states.

The difference between the two positions, that is including human rights as principles and adopting a human rights charter, is that in the latter case, human rights are directly actionable and the regional Court has express jurisdiction to adjudicate on them. In cases where human rights are only considered as principles of integration, they are usually not actionable *per se,* but can only be raised if they are directly linked to aspects of the economic integration process. What this usually translates into is that the Community courts will most probably not have direct jurisdiction over human rights issues. In such instances, it will take some ingenuity on the part of the court to deal with matters that raise human rights issues[68], which is the case with the EAC as shall be demonstrated in subsequent chapters.

The human rights-development approach notwithstanding, migration rights as provided within the regional economic integration model provide yet a palpable nexus and intricate link between economic integration and human rights. Not only do migration rights exhibit the interplay between economic integration and human rights (or economic law and human rights law), but they could also be seen as the avenue through which human rights may gain deeper and wider cognisance within the dynamics of regional integration. This thesis argues that a human rights approach to migration rights within regional integration not only transcends the narrow and restrictive economic rationalisation of these rights, but also might probably be more accommodative of the broad objectives of the integrating community.

1.3 Migration rights: definition and historical development

The common market stage of economic integration is marked by the free movement of factors of production which include labour, goods, services and capital within and among the

[67] Treaty of the Economic Community of West African States Article 4 para (g).
[68] Exceptionally, the ECOWAS Court has a dual mandate to serve both as a regional integration court and as a human rights court - Supplementary Protocol A/SP1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol (A/P.1/7/91) Relating to the Community Court of Justice, Jan. 19, 2005, http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf.

integrating States. These are at times referred to as the 'four freedoms' of the common market. Attendant to these freedoms are the rights of residence and establishment, all of which are necessary for the attainment of the objectives of the common or internal market. Consequently, migration primarily for economic reasons becomes a crucial focal issue if not integral to the regional integration process and discourse[69].

Migration is used herein in the broad sense of persons moving from one country to live or work in another. However, within the context of State sovereignty, whereby each State determines its own rules of entry and exit within its borders, migration is not guaranteed. Non-citizens may only enter a State's territory upon being granted permission to do so, otherwise their presence shall be unlawful. By guaranteeing free movement of persons, if only as factors of production, States essentially agree to open up their borders to citizens of other Member States of a regional economic community, thus negating the need to obtain prior permission before entering or exiting another Member State's territory. Arguably regional integration treaties may be said to entail a 'right to migrate'[70]. Moreover this opening up is also extended to other non-human factors of production such as goods and capital, but whose movement may necessarily entail human movement. Nwauche clearly explains that 'the abolition of national restrictions on the movement of people, goods, services and capital in whatever stage of integration, is about the rights of the people. If people of a region have a regional right of residence instead of a national right of residence, their freedom of movement, assembly and association are enhanced'[71].

This quotation manifests at least three things: one, the significance of free movement of persons in economic integration; two, the cross-border or borderless nature of the rights and freedoms emanating from economic integration treaties; and three, the human-rights outlook of the rights that may on their face be regarded as exclusively economic or market freedoms. It is therefore rather apparent that migration in the integration process is much more than just the economic dynamics, as human rights components are intrinsic to it.

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[69] For instance, labour mobility has been referred to as being 'key to regional integration'- Malebakeng Forere 'The relationship between the right of access to education and work, and sub-regional economic integration in Africa' (2011) 11 *African Human Rights Law Journal* 600; also UNECA (2004) op cit note 11 at 59.
[70] A term borrowed from Elspeth Guild *The Legal Elements of European Identity: EU Citizenship and Migration Law* (2004) 83.
[71] Enyinna S Nwauche 'Regional economic communities and human rights in West Africa and the African Arab Countries' in Anton Bösl & Joseph Diescho (eds), *Human Rights in Africa–Legal Perspectives on their Protection and Promotion* (2009) 319.

Regional integration treaties, particularly where a common market is envisaged, will entail guarantees of free movement of persons, including or specifically workers; free movement of goods, services and capital; and the right of residence and the right of establishment. The interest of this thesis, however, is on the free movement of persons, including workers, the rights of residence and establishment; which are collectively referred to herein as 'migration rights'. This is because these rights accrue directly to persons as opposed to other non-human factors of production[72]. The use of the term 'migration rights' is influenced by the dual conceptual nature of the rights, i.e. both the economic and human rights justification, and the fact that within the regional economic context, migration is supposedly pre-empted or facilitated by the prior availability or guarantee of these rights.

The term migration or migration rights, particularly in the context of European integration, is generally understood as referring to third country nationals migrating into the EU. When referring to movement of citizens of the EU within the EU, 'free movement' is the term usually used. This specific usage of the terms 'migration' and 'free movement' within the EU context has been explained thus: '…migrant nationals of the Member States have acquired a right to migrate so substantial as to no longer merit the use of the term 'migration' but instead to become known as free movement of persons'[73]. While this statement may hold true for the EU, it may not necessarily be the same for other RECs as shall be demonstrated in this thesis. For this reason, the term 'migration rights' is considered more appropriate herein. Consequently, in this thesis, the term migration shall be used to refer to the intra-regional movement of nationals of member States of a regional economic community within its territory in pursuance of the objectives of the integration scheme. In other words, the movement of community citizens among the member States that comprise the REC.

1.3.1 Synopsis on historical development of migration rights

Migration, of itself is as old as the history of humankind. Although labour migration provisions may be included in some bilateral agreements among countries, the origins of migration rights, are difficult to trace outside the history of the development of the European Economic Community (EEC). Most of the literature available on migration rights considers them from

[72] Relatedly, where the term 'non-discrimination' is used in this thesis, it shall be referring to persons and not to other factors of production, such as goods, as is usually understood in international trade and economics.
[73] Guild op cit note 70 at 83.

the perspective of European integration. Additionally, the European integration model is more or less a prototype for other integration schemes including those in Africa, and so, the genesis of migration rights within the European context shall serve as a benchmark for the development and evolution of these rights as expressed in regional integration treaties.

Maas traces the origin of the rights of free movement of Europe to the negotiations leading up to the adoption of the ECSC Treaty[74]. According to him, the push for the inclusion of free movement provisions came from the Italian delegation who were concerned about the export of surplus labour within the new Community that was being established. They argued that 'free movement rights for workers constituted a fundamental principle of the Community' and its inclusion was a precondition for Italian participation in the Community[75]. Their efforts were successful leading to the inclusion of Article 69 in the ECSC Treaty, which provided for the removal of restrictions based on nationality in the coal and steel industries upon the employment of workers who are nationals of Member States.

Article 69 was clearly restricted to workers in the coal and steel industries, moreover it was not adequately elaborate. Since its implementation required unanimous agreement and ratification by all six Member States of the ECSC, this only happened in 1957 when the agreement finally took effect. In the meantime, negotiations for a European Economic Community were underway. Maas explains that the free movement provisions in the ECSC Treaty, coupled with an already existing *de facto* common market in labour existing among the Benelux countries since the end of the Second World War laid the foundations for the inclusion of broader free movement of labour provisions in the European Economic Community (EEC) Treaty that was concluded in 1957[76].

Article 48 of the EEC Treaty provided for the rights of workers who are nationals of a Member State to accept offers of employment actually made in another member State, to move freely and stay in the territory of Member States for the purpose of employment, and to remain in the territory of a Member State after employment has ceased.

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[74] Willem Maas 'The genesis of European rights' (2005) 43 *Journal of Common Market Studies* 1009-1025.
[75] Ibid at 1012.
[76] Ibid at 1019.

European scholars[77] seem agreed on the assertion that the rights of citizens of the EU, of which migration rights are central, have their roots in the provisions of the free movement of workers provisions contained in the earlier Treaties (both the ECSC and EEC Treaties) establishing the European Community. It is these provisions that were later expanded and extended to all persons or citizens of the EU so as to become rights of EU citizens. This evolution has been mainly accredited to the significant role of the European Court of Justice in its expansive interpretation and application of the Treaty provisions[78].

From this historical perspective, it is clear that rights of free movement of persons have really evolved from the free movement of workers as a factor of production in the economic process. The right of residence was necessary for both migrant workers and service providers; while the right of establishment needed to be guaranteed for self-employed persons and professionals wishing to set up business or practice in another Member State. Hence the guarantee of migration rights was and is still deemed instrumental to economic integration.

In Africa, most RECs have been modelled on the European Community, hence where migration rights are included, it is mainly to facilitate the free movement of factors of production and the attainment of a common market. This is definitely the case with the AEC Treaty[79], the ECOWAS Treaty, and the EAC Treaty to an extent, as shall be discussed further on in the thesis.

Although in the case of the EAC, during the early years of establishment and operation of the first EAC (1967-1977) there was free movement of labour among the EAC countries of Kenya, Tanzania and Uganda, migration rights were never articulated in the founding Treaty. This probably suggests that labour migration in Africa, and in East Africa in particular, has not always been approached from a rights perspective. Hence it may not be appropriate to talk of migration rights during that era and that any study of migration rights in Africa should commence from the point when they have been articulated in hard or soft law, which is what this thesis intends to do. Accordingly, the concept of migration rights as applied in this thesis

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[77] Ibid. See also Emiliana Baldoni 'The free movement of persons in the European Union: a legal-historical perspective' 2003 *Pioneur Working Paper No. 3*; Siofra O'Leary *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (1996) 17; Guild op cit note 70 at 51; Elizabeth Meehan *Citizenship and the European Community* (1993) 17.
[78] August Reinisch *Essential Questions in EU Law* (2012) 68.
[79] AEC Treaty Article 43.

is transplanted, basing on the historical development provided, rather than a home-grown concept. The concept of migration rights shall be discussed in greater detail in chapter two.

At this juncture, it is important distinguish between migration rights that are the subject of this thesis, and the rights of migrant workers as provided under the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (CMW). The latter instrument provides a comprehensive catalogue of rights that States parties guarantee to all migrant workers and members of their families, extending such protection to irregular or non-documented migrants as well. Article 1 para 2 of the CMW is clear that it applies during the entire migration process including the preparatory, departure and transit stages for persons who are to be engaged or are engaged or have been engaged in a remunerated activity in a State other than the one of which they are nationals[80]. While the CMW is of much significance to persons who exercise their migration rights within a REC, that is, if the member states of the REC have ratified the CMW, migration rights in themselves are not the subject of the CMW. As argued earlier, migration rights provide the impetus to migrate within the context of regional integration. Migration rights would probably constitute the right to enter another country, albeit for specified reasons, assuming that such a right were recognised under human rights law. Unfortunately, that is not the case. Hence, migration rights, which are an aspect of regional integration are a precursor to rights covered under the CMW. This is so because the existence of the former sets in motion the conditions that would render one a migrant worker if they exercised their migration rights within a REC. Due to this underlying difference between the two sets of rights, this thesis specifically focuses on migration rights as herein defined, and not the rights of migrant workers as covered under the CMW.

1.4 Scope of the research

The focal REC for this research shall be the EAC established in 2000 by the Treaty Establishing the East African Community Treaty (EAC Treaty) that was signed by the Heads of States of the EAC countries in 1999. At the time of establishment of the EAC, there were three Partner States; Kenya, Tanzania and Uganda. These have since 2007, been joined by Burundi and Rwanda.

[80] See also CMW, Article 2 para 1 definition of a migrant worker.

The United Nations Economic Commission for Africa (UNECA) has referred to the EAC as 'one of the most dynamic regions in terms of integration' having 'achieved a great deal since its reconstitution in 1999'.[81] Gathii, too, agrees that the EAC is the 'most advanced regional trade agreement in the continent since no other… has moved from a customs union to a common market'[82]. The fact that the EAC is the only REC in Africa that has officially established a common market, the economic integration stage in which migration rights are central, and appears to be set on advancing its integration objectives, makes it the most appropriate case study for this research. Further details of the EAC, its background, establishment, structures and objectives will be discussed in chapter three.

In this thesis, references and discussions of other RECs such as the EU, the ECOWAS, and the Caribbean Community (CARICOM) are only mainly for purposes of comparison and contrast, or drawing lessons for the EAC. Moreover with regard to the EU, the development and evolution of its migration rights regime has great influence upon, and in some ways defines the migration rights framework as applied in various RECs including the EAC, as shall be explained in chapter two. Given the prototypical role of the EU, the thesis thus tends to substantially draw references from it, in as far as they are applicable and relevant to the EAC.

The research looks at the migration rights regime within the EAC as articulated under Community law, particularly the EAC Treaty and the Protocol establishing the EAC Common Market (hereinafter 'Common Market Protocol' or 'CMP'), and its regulations. For purposes of assessing the implementation of the Community law with regard to migration rights, it shall be necessary to examine laws and practices within the various EAC Partner States. This assessment shall be discussed in chapter six. However, although there are five Partner State, the research only looks at implementation in four Partner States: Kenya, Rwanda, Tanzania and Uganda. Burundi was left out mainly due to language barriers. Burundi is still mainly Francophone, which occasioned an impediment for the researcher.

The research focuses on citizens of the EAC member states or community citizens who wish to voluntarily migrate from one member state to another within the EAC migration rights framework. The research, therefore excludes refugees and asylum-seekers, victims of human

[81] UNECA, *Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade* (2010) 22.
[82] Gathii, op cit note 23 at 188.

trafficking and other forced or involuntary migration. Although illegal migrants are not specifically targeted, the research may include some situations where a member state declares a community citizen illegal. The concept of community citizenship or community citizens, who are indeed the beneficiaries of migration rights, shall be explored further in chapter two.

1.5 Significance of the research

A substantial amount of literature exists about regional integration, even regional integration in Africa, but most of the work is from an economic and trade viewpoint or economic law perspective[83]. This explains the different theories of economic integration, the various models, the benefits, prospects, challenges, achievements and shortcomings of RECs, from an economic perspective. From a purely trade-related angle, there is literature on trade liberalisation in Africa (GATT Article XXIV)[84], particularly liberalisation of trade in services (GATS Article V and Mode 4)[85], but it hardly touches upon the rights dimension of the integration process.

There is also substantial literature on regional integration from a political science and international relations perspective. Much as these explain the various dimensions of regional integration or provide valuable insight in to the progress of specific integration schemes in Africa[86], there seems to be a scholarly gap regarding migration rights within the specific integration schemes, in Africa specifically. Generally speaking, the available literature from the political science or international relations schools barely delves into the relationship between regional integration and human rights nor the significance of migration rights thereto.

As discussed above, human rights have increasingly become incorporated into the regional integration process and trajectory, although it is still a work in progress, particularly in Africa. This trend is also notable in the discourse on regional integration which is moving from an

[83]See especially UNECA (2004) op cit note 11; UNECA (2010) op cit note 81; Bösl et al op cit note 3; Daniel Bach(ed) *Regionalisation in Africa: Integration and Disintegration* (1999); Maruping op cit note 36.
[84] See for instance Oyejide op cit note 30; Christopher M Dent 'The rise of the new free trade agreement (FTA) era? Implications for regional and global economic systems' in Bösl et al op cit note 3 at 44-67; Peter Hilpold 'Regional integration according to Article XXIV GATT- between law and politics' (2003) 7 *Max Planck Yearbook of UN Law* 219-260.
[85] Joy Kategekwa *Opening Markets for Foreign Skills: How Can the WTO Help? Lessons from the EU and Uganda's Regional Services Deals* (2014).
[86] See especially Asante op cit note 1; Ajulu op cit note 36; Aja Akpuru-Aja 'The politics of regional integration and development in Africa: issues, limitations and prospects' in Obioma Iheduru (ed) *Contending Issues in African Development: Advances, Challenges and the Future* (2001) 277-292; Peters op cit note 25.

economic-centric one to a more holistic one with attempts to place human rights, if not at the centre, then in the vanguard. While this effort seems to have considerably advanced in the EU, taking into account the highly remarkable role played by the European Court of Justice, in Africa it is slowly and steadily developing.

In recent times, there seems to be a steady increase in scholarly literature emphasising the regional integration-human rights nexus, with specific focus on Africa[87]. Viljoen looks at human rights promotion and protection at regional and sub-regional levels in Africa, giving an appraisal of inclusion of human rights and level of protection accorded within the different RECs recognised by the AU.[88] His work is a well-researched and informative analysis of human rights law in Africa, but it does not provide an in-depth study of human rights within any particular REC, nor is its focus on migration rights. Ruppel[89] also makes a strong case for the significance of incorporating human rights in regional integration and goes on to show how this has been done in East and Southern Africa. Nwauche, too, adopts a similar approach to Ruppel's to assess application of human rights in the RECs in West Africa and the African Arab countries[90].Whereas they look at the enforcement mechanisms in place in the various RECs and how they function, they do not engage in examining and analysing the jurisprudence. Swart, however, does examine some of the human rights jurisprudence of select regional courts while looking at the role sub-regional courts play in the protection of human rights[91]. Ebobrah looks at the regional integration-human rights nexus rather deeply as he justifies RECs involvement in the field of human rights as being both legitimate and feasible[92]. His thesis however looks general at the regional integration-human rights discourse. In light of the foregoing, it seems rather evident that there is a conspicuous scholarly gap in the area of migration rights or free movement of persons within any of the African regional integration

[87] See for instance, Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi (eds) *Human Rights and International Trade* (2005); Emilie M Hafner-Burton 'Trading human rights: how preferential trade agreements influence government repression' (2005) *International Organization* 593-629; Clair Gammage 'Protecting human rights in the context of free trade? The case of the SADC group Economic Partnership Agreement' (2014) 20 *European Law Journal* 779-792.
[88] Viljoen (2007) op cit note 52.
[89] Oliver C Ruppel 'Regional economic communities and human rights in East and Southern Africa' in Bösl & Diescho op cit note 71 at 279.
[90] Nwauche op cit note 71.
[91] Mia Swart 'Alternative fora for human rights protection? An evaluation of the human rights mandates of the African sub-regional courts' (2013) 3 *TSAR* 437-452.
[92] Ebobrah op cit note 41.

schemes, either at the Community level or at the point of Partner State implementation[93]. By extension there is hardly any literature that intensively or extensively examines the human rights dimension of the economic freedoms guaranteed under the regional integration treaties.

Nonetheless there are some works that have come quite close to looking into migration rights of EAC citizens. Forere looks at the rights to work and education within several RECs, including the EAC. She argues that these are 'the integral rights to sub-regional economic integration if RECs are to achieve the goal to raise the standard of living of their community'[94]. While she acknowledges the importance of labour mobility, her focus is not specifically on migration rights within the RECs that she examines. Reading her article, one of the questions that comes to mind is: how would community citizens enjoy the rights to work and education without an effective migration rights regime? The latter is needed before the former can be effectively enjoyed. Admittedly though, work and education often are the reasons that prompt migration, and as shall be argued in this thesis, harmonisation and modification of national laws, policies and practices, including those to do with work and education, so as to bring them in compliance with Community law, adds substance to community citizens' migration rights.

Musonda has reviewed migration legislation, policies and practices in East Africa[95] and assessed them in accordance with international labour standards. Some of her findings were that the immigration laws of all the three states restricted rather than encouraged labour mobility; in some instances, the laws and policies of these states failed to take into account their international human rights obligations; and that all three countries faced a number of migration challenges.[96] Her research, however, was not done from the perspective of regional integration and nor from the migration rights framework. Her focus was on assessing compliance with international labour standards. Musonda's work is quite significantly relevant and offers a springboard for the present research when it comes to assessing national legislation and practices with regards to EAC migrant citizens. This thesis will, in part look at migration laws and practices within the EAC countries and assess them in accordance with the provisions

[93] A study on the freedom of movement of persons, goods, services and capital in Africa was commissioned by the Centre of Citizens' Participation on the African Union, a non-governmental organisation based in Addis Ababa. The report which expectedly should provide more up-to-date factual information relevant for this research, was scheduled to be launched in January 2014, but by the end of 2015 there were no updates provided on the report. See http://ccpau.org/?p=1130 accessed on 2 January 2016.
[94] Forere op cit note 69.
[95] Flora M Musonda 'Migration legislation in East Africa' 2006 *International Migration Papers No. 82*.
[96] Ibid ix-x.

of the EAC Treaty and the Common Market Protocol. In some aspects, this thesis partly builds upon Musonda's work.

As regards the protection and enforcement of migration rights- a function usually of the courts and administrative or other quasi-judicial tribunals- there is a dearth of literature. Gathii has written comprehensively about the East African Court of Justice (EACJ) and some of its outstanding jurisprudence[97], but not the aspect of migration rights. Actually there is barely any publication that examines how both the regional court and national courts have applied and enforced EAC citizens' migration rights despite the existence of some decided cases in the various jurisdictions.

Helfer examines the adjudication of the *hybrid right of free movement* in various regional courts in Africa [98] (emphasis added). His article is of great significance in two major aspects: firstly, it looks in part at how the EACJ has adjudicated upon the free movement of persons, examining its relevant jurisprudence. His work substantially relates to the discussion of the EACJ's approach towards migration rights that shall be discussed in chapter five of this thesis. Secondly, he articulates the 'hybridity' or what has been referred to herein as the dual conceptual nature of migration rights. Although he refers to it only with respect to the free movement of persons, it is a term that applies equally to all migration rights as shall be demonstrated in chapter two. Implicitly though, Helfer, in fact touches upon the rationalisation of migration rights in Africa.

Be that as it may, from a theoretical perspective, there seems to be no study that has looked into the rationale for migration rights in Africa. This is partly what this thesis attempts to do for the EAC in particular.

In terms of significance of this research therefore, it attempts to fill in the theoretical gap of discerning the rationale of migration rights within the EAC, especially given their hybridity. It attempts to do so through an examination of the Community law as well as the EACJ's jurisprudence in order to discern its interpretation and approach to migration rights. Finally the thesis looks at the implementation of the EAC migration rights framework within the various

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[97] See, for instance, Gathii op cit note 23 at 268-279.
[98] Laurence Helfer 'Sub-regional courts in Africa: litigating the hybrid right to free movement' *iCourts Working Paper Series, No. 32, 2015* available at http://jura.ku.dk/icourts/working-papers/.

Partner States. The purposes of this shall be to ascertain whether migration rights within the various Partner States are unravelling in a manner envisaged under the EAC law; and whether national laws and practices are in consonance with Community law. It is hoped that what pertains within the Partner States will provide indications for the rationale of migration rights within the Partner States and whether it is in accordance with the perceived rationale at the Community level. The findings should then support the hypothesis for this research as explained hereunder.

Despite the proliferation of regional integration schemes in Africa and various studies undertaken on them, migration rights in Africa seems to be one of the understudied subjects in all relevant academic disciplines. This thesis shall, hopefully, lay the groundwork for further studies, research and publications in this area of study.

1.6 Hypothesis and main arguments of the research

Economic objectives could be said to be the primary drivers for EAC integration, but the fact that the EAC aims to ultimately establish a political federation casts into a different light the migration rights provisions contained in the EAC Treaty. Hence, and arguably, it is no more mere free movement of factors of production in a purely economic sense, but rather an entirely novel regime of migration rights of citizens of the Community. That being the case, the approach to migration rights within the EAC should promote and holistically advance the objectives of the EAC in their entirety.

The thesis posits that community citizenship is largely premised on migration rights. Hence, migration rights are considerably decisive in providing the impetus for the nurturing and consolidation of a robust community citizenship within the envisaged EAC political federation.

The discussion so far has touched upon the hybridity or dual conceptual basis of migration rights. While it may be for purely economic objectives that migration rights accrue; and that they are applied in that respect, the human rights rationale for these rights is likewise indisputable. While acknowledging the economic justification for migration rights, it shall be argued that in order for migration rights to be effectively meaningful for all EAC citizens as the region advances towards a political federation, a human-rights oriented approach should be adopted in the interpretation, application and implementation of these rights. It would thus require a paradigm-shift from an economic orientation to a human rights orientation; a paradigm-shift that should be driven by the regional court, the East African Court of Justice

(EACJ), vested with the power to interpret and apply Community law. Drawing from the example of the ECJ, this research therefore assumes that the EACJ, which has got a mandate similar to the ECJ, is in position to define and shape the law and practice regarding migration rights within the EAC.

The EAC common market has officially been in existence since 2009, although some aspects of migration rights, specifically the free movement of persons, were already being implemented. It is therefore expected that considerable progress is being made in respect to conforming relevant national laws, policies and practices to EAC law in order to effect full realisation of migration rights. The research shall establish that conformity with the dictates of the EAC migration rights regime is more visible in formal and bureaucratic aspects than in the substantive aspects of the rights. This shall form one of the bases for the recommendation for a paradigm-shift in the rationalisation, interpretation and application of migration rights for EAC citizens, both in the economic and political phases of the integration process.

It has also been claimed that States tend to commit to and comply more with treaties upon which the benefits far outweigh the costs, which is usually the case with trade and economic related treaties as opposed to human rights treaties[99]. Owing to the hybridity of migration rights, this thesis posits that they provide the intersection between regional integration and human rights. As such, if States fulfil their obligations with regard to migration rights in the context of economic integration, it might possibly produce a spin-off in relation to States' human rights obligations, even if it might only initially be with regard to that State's migration rights obligations. To borrow from the neo-functionalist expression, human rights compliance within the context of migration rights might result into a 'spill-over' of human rights compliance in other aspects as well. Hence the argument for a more human-rights oriented approach to migration.

1.7 Research objectives and questions

The main objectives of the present research are: first, to analyse the concept of migration rights and thereafter examine their rationalisation within the EAC. Is it in a purely economic sense or

[99] Simmons op cit notes 5 & 25.

has a human rights approach been adopted in the interpretation and application of these rights in the EAC?

Second, is to broadly assess the implementation and enforcement of migration rights within the EAC Partner States and thus ascertain whether the rationalisation and interpretation of migration rights at the national level is oriented towards human rights.

The thesis aimed at answering the following questions:

i. What are migration rights as applied in the context of regional integration? What is their rationale or justification and conceptual basis? Can migration rights be said to be human rights? And related to the concept of migration rights, who are the beneficiaries of these rights?
ii. How are migration rights rationalised, interpreted and applied within the EAC, that is, both at the Community level and at the national level? Does the present approach to migration rights promote the objectives of the EAC?

1.8 Methodology and research methods

The research used mainly qualitative methods. It was primarily a legal doctrinal research, although information and data from other disciplines was of great import- gathered mainly through a desk review of available and relevant literature. The legal doctrinal research adopted hermeneutic, explanatory and evaluative approaches in the examination of legal documents including international and regional treaties, protocols, regulations and declarations; national policies and laws, and the jurisprudence emanating from both regional and national bodies.

The research also relied on comparative legal analysis in defining and explaining key concepts such as migration rights and community citizenship. For this purpose, Comparison is made with RECs which provide for migration rights, namely the EU and ECOWAS. Besides, jurisprudence from the ECJ and Caribbean Court of Justice (CCJ) is used in comparing and contrasting approaches of the regional courts to migration rights, and the differences in impact of the court decisions arising from their preferred interpretative approaches. The research seeks to draw some lessons from the EU regime for the promotion and protection of migration rights

of EU citizens and how this may be of relevance to the EAC[100]. The EU is so far the most advanced regional community (including in developing a rich jurisprudence on migration rights of community citizens) and although the historical and cultural issues propelling European integration are in their specificities not necessarily the same as for East Africa, intelligent lessons can be derived from that experience as a guide.

It was anticipated that interviews might have to be conducted in some circumstances, although they were not the primary method of data collection. Accordingly ethics clearance was obtained to conduct interviews in the selected four EAC countries, should the need arise. It was only possible to carry out interviews with a couple of government officials in Uganda. These were conducted mainly for purposes of ascertaining the current policies and practices being implemented to promote migration rights in conformity with EAC law. Interviews proved advantageous in as far as it was possible to obtain some information on what may be pertaining in other EAC countries. Unfortunately, due to time constraints, costs and disparate convoluted bureaucratic research clearance procedures, it was not possible to conduct interviews in the other EAC countries. Consequently most of the information on the laws, policies and practices in other EAC countries was derived from information obtainable from relevant government websites.

1.8.1 Limitations of the methodology and the research

There were quite a number of limitations with the research, some of which have already been pointed out. These include: assessing implementation in four out of the five EAC Partner States. Any information on Burundi contained in this thesis was included because it was available in English, and from a reliable source.

Access to information proved to be a big challenge. Information on public documents is not easily available to the public. Even in the concerned government department, important information such as ministerial orders, policies etc. are not readily available. Although there is important information that can be obtained from government websites, which was done in this case, such information may not be up-to-date. Furthermore, the volume of information varies

[100] The East African Court of Justice also acknowledges that the ECJ is the prototype upon which it (the EACJ) is modelled- see *Attorney General of the Republic of Uganda & another v Omar Awadh &* others, EACJ Appeal No. 2 of 2012 para 53. It therefore frequently refers to the ECJ's jurisprudence as persuasive or supporting authority.

from country to country and from department to department. In some instances, there is just bare information, yet in others, one can find some substantial information and data.

EAC integration is one of the areas where many developments are happening and one needs to always keep track. However, it was found that although practices are being implemented to comply with Community laws, the enabling laws or regulations are not readily available or accessible. Although interviews might perhaps have been one way of obtaining up-to-date information, which was done for Uganda, it was not always possible to carry them out as planned for reasons explained above. Even where they were possible, information was availed orally and it was not possible to get updated documentation such as amending regulations even from the concerned ministry itself.

The thesis thus relies on the laws, regulations and policies available as the updated versions on the relevant government websites as on the date of access. Where the law does appear to be at variance with the practice, mention has been made of it. The challenge on lack of updated information, however, mainly affected the information contained in chapter six and as such one of the recommendations is for EAC Partner States to amend their laws and make such information readily and easily available to and accessible by the public.

The thesis does not really go in depth in assessing the implementation of migration rights in the various EAC States. A comprehensive study would require an empirical assessment of laws, policies and practices pertaining to each of the migration rights in each of the EAC Partner States. What this thesis does is to more or less lay the ground for further research in this area. Although it attempts to do an empirical assessment of the laws in place, it does not look at the entirety of all the relevant laws, especially when it comes to the right of establishment. A more comprehensive and extensive research would thus be necessary in order to reliably determine the degree of implementation and enjoyment of each of the migration rights in each of the Partner States. Hence this thesis attempts to serve as a seminal exposition on the rationale, interpretation and application of the concept of migration rights within the context of regional integration in Africa, specifically within the EAC. Hopefully, the findings of this research in relation to migration rights within the Partner States, are significant in ascertaining the prevailing rationale for migration rights, thus providing the necessary evidence for the key arguments and recommendations of this thesis.

1.9 Chapter lay-out

Chapter two examines the concept of migration rights. It analyses the dual conceptual basis or hybridity of migration rights, providing both the economic and human rights rationales. It further explains the concept of 'community citizen' the beneficiaries of migration rights, drawing out the differences between community citizenship and nation-state citizenship. Considering that community citizenship has its basis in migration rights, it tends to be much more circumscribed in scope. This however raises the question whether community citizenship as presently understood or defined would suffice for a politically federated EAC.

Chapter three provides an overview of the EAC as the focal REC of this thesis. It traces the development of the EAC from the old EAC to the new EAC, highlighting progressive developments in the current EAC. These developments which includes a recognition of human rights as fundamental principles of the EAC provides the basis for the argument for a human-rights orientation to migration rights.

Chapter four entails an analysis of the EAC Treaty and the Common Market Protocol provisions on migration rights, noting that the provisions, in some instances and with regard to some of the rights, tend to focus more on the formalities of implementation rather than on the substance of the rights.

Chapter five examines the EACJ's interpretative approach and how this influences the rationalisation of migration rights in the EAC. While acknowledging the challenging, or even constraining circumstances under which the court is operating, it is argued that the EACJ needs to expansively interpret the Treaty provisions, favouring a human rights orientation, in order to positively influence the development of the EAC migration rights regime.

Chapter six examines the status of migration rights within the EAC Partner States. It involves an analysis of national laws, practices and as well as relevant case law. The purpose of this chapter is to determine whether national laws and practices are in conformity with community law, and thus to ascertain the predominant rationale in the implementation of migration rights at the national level.

Chapter seven is the concluding chapter in which the findings of the research are assessed in light of its objectives. It concludes that the predominantly economic rationalisation of and approach to migration rights within the EAC may not be quite appropriate for advancing its

objectives towards a political federation. Hence a reorientation towards a human rights approach might be more befitting. The chapter also makes recommendations for further research studies arising from the present thesis.

CHAPTER TWO
MIGRATION RIGHTS AND CITIZENSHIP IN THE CONTEXT OF REGIONAL INTEGRATION

2.0 Introduction

Under the regional economic integration model, one of the aspects that member States of a Regional Economic Community (REC) usually agree upon is the opening up of their territorial spaces for each other's nationals. This is usually done with the objective of creating a single or common market in which there is free movement of factors of production. It is within this context that nationals of the member States of the REC will be facilitated to move 'freely' within the States of the Community. In most cases, the key targets of free movement provisions will be workers and persons exercising an economic activity. Nonetheless, and as shall be explained in this chapter, the free movement provisions in most regional integration treaties apply to all nationals of member States. These provisions serve as a premise for the discussion and understanding of migration rights of community citizens in this thesis. The historical development of migration rights, presented in the previous chapter, strongly casts migration rights as an ineluctable product of economic integration. This account seems not to lay any particular emphasis on the human rights underpinnings of migration rights, yet upon further analysis, migration rights are characteristically hybrid rights. They have a dual conceptual basis.

This chapter discusses the conceptual duality of migration rights, and on that basis examines the content of each of the migration rights. The chapter also recognises that migration rights do not exist in abstract, which leads to a discussion on the concept of community citizenship, for community citizens are the holders of these rights. The key argument herein is that over time, the economic approach to migration rights seems to be increasingly subsumed by a human rights orientation, particularly when it comes to judicial interpretation of these rights. In spite of this development, migration rights of community citizens cannot as yet be put on exactly the same footing with cognate rights guaranteed to the nationals or citizens of a State.

2.1 Conceptual underpinnings of migration rights

The free movement of persons has aptly been referred to as a hybrid legal right protected both under economic integration treaties as well as under human rights treaties[1]. The notion of hybridity, which could also be applied to the other migration rights, underscores the mixed rationales and concepts underlying these rights. More specifically: the economic rationale and the human rights rationale. For this reason, migration rights have in some instances been referred to as 'market freedoms' distinct from 'rights of citizens' in the context of the EU[2]; or 'economic freedoms' as distinct from 'human rights' in the African context[3]. Consequently, migration rights (free movement of persons/workers, rights of residence and establishment) within the economic or trade context will be categorised together with the free movement of goods, capital and services[4]. The following discussion focusses on expounding on the duality of migration rights and the justification for each rationale, without necessarily arguing for which rationale holds sway in a given regional context.

2.1.1 The economic rationale

The free movement of workers (and/or persons), the right of residence and the right of establishment form the core of rights that are accorded to persons within a REC, mainly for the purpose of establishing a common market. The common market phase of regional economic integration requires that all obstacles to the free movement of factors of production within the economic community be removed. Member states of the REC, are required to facilitate and achieve the free movement of labour, capital, goods and services within the region to areas where they enjoy a comparative advantage and efficiency. This, it is believed, would lead to better services and products due to competition; services would be moved where they are most required, businesses would be able to take advantage of lower production costs in particular

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[1] Laurence Helfer 'Sub-regional courts in Africa: litigating the hybrid right to free movement' *iCourts Working Paper Series, No. 32, 2015* available at http://jura.ku.dk/icourts/working-papers/. Although his work is specific to free movement within African RECs, the notion of hybridity holds true for migration rights generally.

[2] Francis G Jacobs 'Citizenship of the European Union- a legal analysis' (2007) 13 *European Law Journal* 595, 598-599, 604; also Emiliana Baldoni 'The free movement of persons in the European Union: a legal-historical perspective' 2003 *Pioneur Working Paper No. 3*.

[3] Enyinna S Nwauche 'The ECOWAS Community Court of Justice and the horizontal application of human rights' (2013) 13 *AHRLJ* 31.

[4] The term' four freedoms' is common when referring to the free movement of labour, capital, goods and services. See for instance: Catherine Barnard *The Substantive Law of the EU: the Four Freedoms* (2010); Peter Oliver & Wulf-Henning Roth 'The internal market and the four freedoms' (2004) 41 *Common Market Law Review* 407-441; Sybe A de Vries 'Balancing fundamental rights with economic freedoms according to the European Court of Justice' (2013) 9 *Utrecht Law Review* 169-192.

areas, and generally, this would lead to enhanced trade benefits and economic development. The concept of liberalisation of trade and services captures the ethos of the WTO as laid down in the agreement establishing the WTO[5], the GATT, and the GATS which covers some of the aspects covered in this thesis from a purely trade-related perspective. With regard to migration rights, although not referred to as such in WTO terminology, the GATS lays down a general rule to the effect that WTO Member States that are parties to a labour market integration agreement should exempt citizens of states that are parties to that agreement from requirements concerning residency and work permits[6]. And so, by abolishing visa and work or residence permits for citizens of EAC, the Partner States would not only be abiding by the Community law, but would also be complying with international trade law. Additionally, the GATS lays down rules concerning movement of natural persons trading in services[7], an aspect that is reflected in the provisions governing the right of establishment under regional integration, as shall be further discussed shortly. The foregoing explanation more or less provides the basis for the economic rationale for migration rights.

Persons moving in this context are regarded as an economic instrument (labour) that would enhance the economic benefits of a company, an industry, a country and region as a whole. It therefore makes sense to ensure that free movement of labour, the right of persons to reside freely in the areas where they work or set up business, and the right of persons to set up businesses in countries other than their own are legally protected and guaranteed. This explains why most regional integration treaties provide for these rights, sometimes to the exclusion of any other rights[8]. For instance, the East African Community Common Market Protocol (CMP) provides for the following rights: the free movement of labour and services, the rights of residence and establishment[9]. Additionally, it provides for the general free movement of persons. More will be said about this further on. The ECOWAS Treaty recognises the rights of entry, residence and establishment, which rights are to be recognised by Member States in their territories in accordance with the provisions of the relevant Protocols[10]. The Caribbean

[5] Agreement establishing the World Trade Organisation, 1994, preamble.
[6] GATS Article V bis on labour markets integration agreements.
[7] GATS Mode 4, Annex on movement of natural persons supplying services under the Agreement.
[8] The treaties also provide for the free movement of capital, goods and services, but for purposes of this work, the examples provided are generally limited to the free movement of persons and/or labour, the rights of residence and establishment.
[9] EAC Treaty Article 104; and EAC CMP Article 2.4.
[10] ECOWAS Treaty Article 59.1.

Community makes provision for the right of establishment and the free movement of community nationals.[11] The EU provides for the right to free movement and residence for Union citizens, as well as the right of establishment. Rather exceptionally, it also provides for other rights of EU citizens including the right to vote and to stand as candidates in elections to the European Parliament and in Municipal elections in their Member States of residence under the same conditions as nationals of that State; the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; and the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language[12].

From the array of rights that pertain in the various REC Treaties, it is clear that migration rights are a common denominator, mainly because they are deemed necessary for the attainment of the community's economic objectives, specifically opening up the internal market for better trade considered an antecedent to improved economic well-being and development. Even in cases where additional rights are guaranteed, specifically in the EU, it has been argued that despite the move of the EU from the 'European Economic Community toward a broader European Union, the priority is, as in the past, to complete as soon as possible the internal market and to assure the conditions of its efficiency. The other dimensions, that is the cultural, social and political aspects are still mainly conceived as supporting measures intended to facilitate the realization of the central economic and monetary goals'[13].

As such migration rights tend to be more of benefit to persons who are economically active than those who are not; or rather they seem to be inherently biased towards the economically active. This could explain why even where free movement provisions apply to all persons, as in the EAC, the ECOWAS and the Caribbean, such provisions will be elaborated in the context of the Common Market framework. Within the EU, for example, persons not economically

[11] Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy (RTC) Articles 32-33, 45-46,
[12] Treaty on the Functioning of the European Union (consolidated version), (TFEU) Article 20.2. The Treaty is available at http://europa.eu/eu-law/decision-making/treaties/index_en.htm.
[13] Marco Martiniello 'Citizenship in the European Union' in T Alexander Aleinikoff & Douglas Klusmeyer (eds) *From Migrants to Citizens: Membership in a Changing World* (2000) 351.

active are required to prove sufficiency of financial resources and health insurance before they can exercise their rights to free movement and residence in Member States other than their own[14]. This condition is meant to avert a situation where persons become an economic burden on the social assistance systems of the host Member State[15]. There is a further proposition that the conditions discourage 'benefit tourism' or 'free-riding'[16] by nationals of one EU Member State in another where the social and welfare benefits may be better. In other words, migration, and the exercise of migration rights thereof, should be geared towards boosting economic productivity, growth and development, and not meant to become a bane on a State's economy. Such conditions as to financial sufficiency, therefore, lend credence to the economic rationale of migration rights.

The historical development of migration rights demonstrates that the beneficiaries of these rights have been extended over time. First, accruing to workers and business persons, then to members of their families, and finally to all nationals of the Member States of the EU. Within the ECOWAS and the EAC, although the rights apply to all community citizens, they are mainly exercised by workers and business persons, as shall be illustrated in subsequent chapters in the context of the EAC. Hence the extension of migration rights to encompass all nationals of Member States of a regional community has more or less evolved from the migration of workers[17]. It can thus be argued that the economic rationale provides both scaffold and springboard for migration rights as they might be perceived today.

Moreover, and quite paradoxically, the right to free movement and residence, as well as the right to establish do not have their origins as such in economics. These rights were *a priori* provided for under human rights law, although these provisions tended to be directed more towards nationals or citizens of a State. What the migration rights regime under RECs,

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[14] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ LI58/77 Article 7 (1)(b).
[15] Ibid.
[16]Armand de Mestral & Jan Winter 'Mobility rights in the European Union and Canada' (2001) 46 *McGill Law Journal* 1001. This point is further underscored by the ECJ in its judgement in Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECR at paras 76 & 78. The court expressly denounces the practice of 'economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence'- para 78.
[17] Elizabeth Meehan *Citizenship and the European Community* (1993) 17.

supposedly does to an extent, is to extend the scope of persons to whom these rights are guaranteed as well as the geographical scope in which these rights are protected. Rights that were initially guaranteed to only nationals are, by agreement, extended to nationals of other States across all the States in a given REC. Nevertheless, the human rights rationale for these rights is in no way subverted.

2.1.2 The human rights rationale

The human rights rationale, unlike the economic rationale that views individuals in terms of economic instruments or factors of production, emphasises the inherent dignity of a human being. In other words, rights accrue to one by virtue of his or her being human, and not necessarily by virtue of what one does. The human rights approach implies that rights have a transcendental character as well as universal applicability to all individuals indiscriminately.

Migration, and in particular, the right to free movement, has been recognised as 'an indispensable condition for the free development of a person'[18]; a 'liberty that individuals need instrumentally in order to satisfy basic needs and achieve important goals'[19]. More precisely, migration rights have been considered to be 'intrinsically valuable for many people who may enjoy geographic movement as an expression of individual liberty or as a collective way of life'[20]. In this case, the undertaking of an economic activity would not be a pre-condition for the exercise or enjoyment of migration rights.

A number of human rights instruments, both at the international and regional levels[21], provide for the right to free movement and residence, as well as the right to establish (a component of the human right to work). The content of these rights shall be explained in detail in the

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[18] *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, adopted at the 67th Session of the Human Rights Committee, on 2 November 1999 para 1.
[19] Rainer Bauböck 'Citizenship and free movement' in Rogers M. Smith (ed) *Citizenship, Borders, and Human Needs* (2011) 357.
[20] Ibid.
[21] Universal Declaration of Human Rights (UDHR) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); International Covenant on Civil and Political Rights (ICCPR) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; International Covenant on Economic, Social and Cultural Rights (ICESCR) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) G.A res. 45/158 of 18 December 1990; African Charter on Human and Peoples' Rights (1981) (ACHPR); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); American Convention on Human Rights (ACHR), to mention but a few.

immediately ensuing section. Important to note though, is that most States have domesticated the human rights treaties and more or less replicated the rights therein in their Constitutions and national laws. The universality of human rights has been emphasised under international law, whereby a State Party is obliged to ensure the covenanted rights to 'all individuals within its territory and subject to its jurisdiction, irrespective of reciprocity, and irrespective of his or her nationality'[22]. The implication of this is that aliens or foreigners, once in the territory of a State that has ratified and domesticated the various relevant human rights instruments, enjoy all the rights and freedoms guaranteed to nationals, without discrimination. The only exceptions will be the exercise of rights pertaining to political participation that are a preserve of nationals; and where there is a lawful and objective justification for restricting their enjoyment of rights as aliens. This transcendence of human rights across borders is what has been referred to as 'postnational citizenship'[23], and of which community citizenship provides a compelling example. From this perspective, it can be argued that the human rights rationale for migration rights clearly subsumes or overrides the economic rationale since one's rights would still be protected whether or not they are engaged in an economic activity.

In interpreting migration rights, the human rights rationale has not been totally lost on the Courts of the Economic Communities. The ECJ has noted that 'international treaties for the protection of human rights on which the Member States have collaborated, or of which they are signatories, can supply guidelines which should be followed within the framework of Community law'[24]. In fact, in the *Gebhard* case, the ECJ went further to refer to migration rights of EU citizens as 'fundamental freedoms'[25]. This has given rise to the averment that by referring to them as such, the Court has granted them 'a similar status to that of fundamental rights in national constitutions'[26]. Indeed, in the Charter of Fundamental Rights, it is provided

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[22] *CCPR General Comment No. 15: The Position of Aliens under the Covenant,* adopted at the 27th Session of the Human Rights Committee, on 11 April 1986 para 1. This statement is, however, made in the context of the ICCPR.
[23] Yasemin N Soysal *Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994) 140-141.
[24] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1975] ECR 985, para 13. Article 6.3. of the Treaty on European Union (TEU) (consolidated version) provides in similar vein that 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.
[25] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 para 37.
[26] Miguel P Maduro 'Striking the elusive balance between economic freedom and social rights in the EU' in Philip Alston (ed) *The EU and Human Rights* (1999) 452. The debate on the relationship between market freedoms and human rights is inconclusive and various scholars hold various views as presented in Philip Alston

that '[I]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'[27]. This provision cannot be said to exclude citizens' rights to free movement and residence as reiterated in Article 45 of the Charter.

Within the ECOWAS and EAC Courts, cases involving the right to free movement will usually allege double-barrelled violations of free movement; the one aspect under the economic integration law, and the other under human rights law. Despite having been set up to handle matters of regional economic integration, the courts have had to deal with the duality of migration rights, and made decisions that in part may be said to acknowledge migration rights as human rights[28]. Particularly for the EAC, the Draft Bill of Rights actually re-enacts migration rights as human rights and fundamental freedoms[29].

Furthermore, the human rights overtones of migration rights become all the more conspicuous in the application of the principle of non-discrimination or equality of treatment; and the application of limitations or restrictions on these rights. The way in which courts have dealt with non-discrimination and application of restrictions, draws substantially from the human rights interpretation. This shall become clearer in the ensuing sections which examine and the content of each of the migration rights in turn, and the general principle of non-discrimination and the limitations and conditions that apply to all migration rights.

The following sections therefore aim to examine migration rights, emphasising their conceptual duality and the interplay within the two rationales in practice. The discussion is not so much for purposes of demonstrating that different outcomes might be reached by rigidly adhering to

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'Resisting the merger and acquisition of human rights by trade law: a reply to Petersmann' (2002) 13 *European Journal of International Law* at 825.

[27] Charter of Fundamental Rights of the European Union Article 52.1. This Charter is legally binding according to the Declaration concerning the Charter of Fundamental Rights of the European Union annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

[28] See case before ECOWAS Court *Femi Falana & another v The Republic of Benin & others*, ECW/CCJ/APP/10/07; before the EAC Court *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda*, EACJ Reference No. 5 of 2011. See also Helfer op cit note 1.

[29] EAC Draft Bill of Rights Article 12. The Draft Bill is available at http://federation.eac.int/index.php?option=com_docman&task=doc_download&gid=147&Itemid=136

a particular rationale for migration rights, but rather to demonstrate that the normative content of these rights is largely in concord, regardless of the underlying rationale. Additionally, despite the conceptual duality the human rights rationale may be seen as greatly influencing migration rights in some respects, which has led to a gradual blurring of any subsisting distinctions in the application of the two rationales.

2.2 The right to free movement

According to regional integration theory, it is at the phase of the common market that member States of a REC are required to open up their borders for each other's nationals to move freely in and out of each other's territory. The emphasis or priority here would be on nationals of member states moving within the region for trade or economic-related purposes. However, what now seems to be the trend in most RECs, including those that have not yet established a common market, is that the all nationals of member states of the REC can exercise the right to free movement in all member states. This is the case with the ECOWAS, COMESA, SADC and the CARICOM. The reasons as to why none of these RECs have advanced further in the integration or consolidation of free movement regulations are varying. For instance, COMESA is still only at the customs union stage, and even then most of its member states are yet to implement their obligations thereunder[30]. This has inevitably led to time lag in the progression of the integration phases. Inevitably affected is the protocol on free movement of persons, labour, services and the right of establishment and residence which, though concluded in 2001, is yet to come into force[31]. With regard to SADC, the Facilitation of Movement Protocol has not yet received the two-thirds ratifications required for it to come into force. Reasons for low ratification range from lack of funding and technical expertise to operationalise it, to lack of political will and commitment by member states[32]. Despite these setbacks, what is of importance is that the member states in each of these RECs have principally agreed to free movement and they have taken some initial steps in this regard, specifically granting free movement of each other's citizens, albeit for a restricted time.

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[30] COMESA *Key Issues in Regional Integration: Volume III* (2014) at 3 available at http://www.comesa.int/wp-content/uploads/2016/06/Key-Issues-on-intergration-III.pdf, accessed on 13 May 2017.
[31] Ibid at 5.
[32] Adrian Kitimbo 'Is it time for open borders in Southern Africa? The case for free labour movement in SADC' 2014 *Brenthurst Discussion Paper 4/2014* at 9-10.

Where the right to free movement of persons is guaranteed, nationals of member States no longer require a visa or other entry permit in order to enter and stay in another member State. All that a national of one member State needs to get into the territory of another member State is a valid passport or identity card to prove that they are indeed a national of a member State[33]. In this regard, States need to recognise each other's documents and dispositions of nationality. The ECJ has within the context of community law, reiterated the international law position that 'it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality'[34]. States should recognise each other's nationals regardless of how that nationality was acquired[35].

When States agree to free movement of persons, they are agreeing not merely to the 'opening or shutting [of] gates, but of changing the working of a complex system of machinery'[36]. What this implies is that States should actually change those national laws and policies that would necessarily hinder free movement of community citizens, contrary to Community law[37]. In the context of meeting the objectives of the common market, States are required to remove all barriers and obstacles that would inhibit the free movement of workers or labour within the Community, which in most cases calls for harmonisation of not only immigration laws, but

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[33] For the EU see - European Commission *Freedom to Move and Live in Europe: A Guide to your Rights as an EU Citizen* (2013) 10-11; for the EAC see EAC CMP Articles 7.2 (a) & (b), 8- 9; for ECOWAS see Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment, Article 3. All these documents and Protocols refer to the abolition of visa requirements and the only need for a community citizen to present a valid passport or ID.

[34] Case C-369/90 *Micheletti and others v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239 para 10. The international law position was well enunciated by the International Court of Justice in the *Nottebohm Case (second phase)*, Judgement of April 6th, 1955, I.C.J. Reports 1955, at 20 & 23.

[35] Ibid. See also Case C-200/02 *Kunquian Catherine Zhu, Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925. In this case, the ECJ rejected the respondent's argument that the applicants, who were nationals of a non-Member State, had taken advantage of Ireland's *jus soli* citizenship acquisition rules and given birth to their child there who then became a community citizen. The ECJ upheld the rule of international law and the UK was bound to recognise the nationality conferred by Ireland on the applicants' child.

[36] Chandran Kukathas 'Expatriatism: the theory and practice of open borders' in Smith (ed) op cit note 19 at 327.

[37] This is a point that has been underscored in a number of cases brought before the ECJ. For example in Case C-378/97 *Florus Ariël Wijsenbeek* [1999] ECR I-6207, para 40 in which the ECJ agreed with the Advocate General's opinion that the obligation of Member States to abolish controls of persons at the internal frontiers of the Community presupposes the harmonisation of the laws of the Member States governing the crossing of the external borders of the Community, immigration, the grant of visas…. In Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others* [1995] ECR I-4921 para 96, the ECJ held that: 'Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned'.

also labour laws, taxation laws, and other related legislation[38]. For purposes of meeting the objectives of regional integration, the opening up of borders for nationals of member States of the Community implies that they are free to enter and exit the territory of any member State without any laws or administrative controls to prevent them from doing so[39]. This has to a large extent been attained in the EU, but the same cannot be said for most of the other RECs that provide for free movement of nationals.

The purpose for which one purports to exercise one's right to free movement within a REC will matter and as such vary the conditions under which that right may be exercised, if at all. In economic integration treaties that extend the right to free movement to all nationals of member States, the right of free movement of workers and business persons will usually be provided for separately. The conditions that apply to both category of persons and the formal requirements they have to fulfil may be different in each case. For instance within the EU, non-economically active persons wishing to exercise their right to free movement need to have sufficient resources and health insurance, a condition that, for obvious reasons, does not apply to workers and service-providers.

Furthermore, the free movement regime under regional integration treaties is not totally devoid of formalities. Persons still have to go through necessary border and administrative controls. In African RECs, and of particular concern, the EAC, entry permits still have to be issued to nationals of other member States before they can enter another Partner State. Within the EU, nationals of other member States staying in a host member State for more than three months have to obtain a registration certificate from the relevant authorities[40]. What these formalities signify is that free movement within RECs, is really not quite as free as when compared to free movement within one's own State. The possible explanation for this is that States still wish to exercise control and demonstrate sovereignty over issues of migration, even where they have

[38] *Bosman* case ibid para 94, where the ECJ emphasises that 'provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State'. This was reiterated in Case C-224/02 *Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I-5763, paras 31 & 35. The ECJ agreed with the Advocate General's opinion that a national rule leading to the withholding of less from one's pension if he resides in that State than if he resides in another Member State, might deter him from moving to take up such residence.

[39] See Bauböck 'Citizenship and free movement' op cit note 19 at 350.

[40] Directive 2004/38/EC op cit note 14, Article 8 (1-3).

supposedly opened up their borders. Yet another explanation could be that free movement under the auspices of regional integration is still largely influenced by the economic rationale and has not yet fully crossed into the political realm in which case it may be viewed purely from a human rights perspective. Moreover even from an economic law perspective with regard to free movement of labour, the GATS requires that labour market integration agreements exempt citizens of parties to those agreements from requirements concerning residency and work permits[41]. However, this may not be the case in practice as shall be illustrated later in chapter six. This difference between international commitments and domestic or regional tendencies is mainly attributed to the 'non-willingness of WTO Members to subject their domestic policies to the GATS'[42], and opting instead to retain their sovereign powers to being the 'final determinants of who enters their markets, for what reason, for how long and on what terms'[43].

The human rights dimension of the right to free movement tends to be more localised; the right to free movement is directed more towards intra-State movement than movement across State borders. International human rights law provides for the right to free movement, which is typically enjoyed by citizens of a State and persons who are lawfully in the territory of that State to freely move within that State. In fact what is protected under international human rights law[44] is: *i)* the right to move freely and to choose one's place of residence within the territory of a State in which one is lawfully in; *ii)* freedom to leave any country, including one's own; and *iii)* the right to enter into or return to one's country[45]. This provision is replicated in the African Charter on Human and Peoples' Rights (ACHPR)[46]. Interpreting this provision, the African Commission on Human and Peoples' Rights (hereinafter 'the African Commission') has re-affirmed the importance of the freedom of movement as 'a fundamental right of individuals within States' but particularly emphasised the right of a *citizen* of a State to leave

[41] GATS Article V bis.
[42] Joy Kategekwa *Opening Markets for Foreign Skills: How Can the WTO Help? Lessons from the EU and Uganda's Regional Services Deals* (2014) 45.
[43] Ibid.
[44] ICCPR Articles 12.1, 12.2, 12.3; UDHR Article 13.
[45] The Human Rights Committee established under the ICCPR has reiterated the position that 'The Covenant does not recognize the right of aliens to enter or reside in the territory of a State Party. It is in principle a matter for the State to decide who it will admit to its territory'- see *CCPR General Comment No. 15: The Position of Aliens* supra note 22 para 5. The CMW in Article 8 also recognises the rights of migrant workers and members of their families to leave any country, including their own, and to enter and remain in their State of origin. In Article 39, it further recognises the right to free movement and residence of migrant workers and their families.
[46] ACHPR Articles 12.1. & 12.2.

and return to their State at any time, and also 'to travel to, reside in and/or work in any part of the State the citizen wishes, without interference from the State'[47]. With regard to inter-State movement, what human rights law provides for is the right to emigrate and not the right to immigrate[48]. While one has the right to leave one's State, there is no concomitant right for one to enter another State. This is where regional integration law goes further than international human rights by providing for the right to migrate, even though this usually tends to be circumscribed as earlier on discussed.

Usually in exercise of one's freedom of movement in a State, although a national is required to have an identification document which additionally may be used to authorise movement, one will hardly be subjected to formalities when moving from one part of the State to another[49]. One should move freely in and to any part of the country without having to fulfil any prior conditions, and without obtaining permission from State authorities to do so. National laws that require citizens or lawful residents to obtain permission when moving from one part of a country to another, have been frowned upon as being inconsistent with human rights law[50]. International human rights law therefore demands that any obstacles to one's free movement, be they administrative, bureaucratic or otherwise be removed for as long as one is a citizen or lawfully resident in that State. But then again, freedom of movement is not absolute and States may impose lawful and reasonable restrictions upon it. These shall be looked at subsequently.

Under international human rights law, free movement is, therefore, only guaranteed in a State in which one is either a citizen or lawfully resident. The notion of lawful residence presupposes that one has been granted permission by the relevant authorities to enter and stay or reside in that State, and to that extent, aliens or foreigners are guaranteed freedom of movement. Hence, foreign nationals do not have the right to move freely from one State to another, unless they obtain prior permission in the form of visas or entry permits. By mutual agreement between States, visa exemptions may apply to each other's nationals.

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[47]Communication Nos. 279/03, 296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, para 187.
[48] Antoine Pécoud & Paul de Guchteniere 'International migration, border controls and human rights: assessing the relevance of a right to mobility' (2006) 21 *Journal of Borderlands Studies* 75.
[49] There are some States which may require their nationals to obtain some sort of authorisation when moving intra-State.
[50] *CCPR General Comment No. 27* supra note 18 para 17.

Member States of a REC, by guaranteeing the right to free movement to each other nationals, in effect, extend the right to free movement as guaranteed to their nationals to nationals of other member States without discrimination[51]. In order for this to be done, States should remove all physical, legal, administrative and other policy barriers that would in any way inhibit this free movement by community citizens. Arguably, the economic rationale seems to be subsumed into the human rights rationale, where free movement is exercised without discrimination. However, the reality is that among most RECs, border points will still exist and will have to be crossed by nationals of other member States, unlike in the State territory where borders may not necessarily exist and movement therein is freer. Furthermore, under regional integration treaties, further conditions or restrictions may be applied to persons seeking to exercise free movement within the Community, than may be applicable to nationals of a State exercising free movement within the territory of their State.

2.3 The right of residence

The right to free movement is virtually incomplete without the right of residence, since persons hardly ever make circular non-stop movements without staying in another place even if for only a limited amount of time. Consequently, the right to free movement always goes hand in hand with the right to reside in another place or country other than one's own[52]. Although these rights are fused under international human rights law, the same may not always hold true under regional integration treaties. For instance in the case of the EAC, the right of residence is delineated as concomitant with the free movement of workers and the right of establishment. This tends to suggest that it is guaranteed only to economically active community citizens. Moreover, just like the free movement of persons, the normative content of the right of residence, whether under regional integration treaties or human rights treaties, is not that dissimilar.

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[51] Elspeth Guild *The Legal Elements of European Identity: EU Citizenship and Migration Law* (2004) 44.
[52] See, for example: UDHR Article 13.1; ICCPR Article 12.1; ACHPR Article 12.1; TFEU Article 20.2 (a); ECOWAS Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment Article 2; and EAC Treaty Article 104. One of the few exceptions is the Schengen Agreement whose objective is the removal of border controls for persons travelling within the European Schengen zone, but it does not 'address the ability of nationals of the Schengen States or other States to reside or work in another Schengen State'- Ulf Bernitz & Hedvig L Bernitz 'Human rights and European identity: the debate about European citizenship' in Alston (ed) op cit note 26 at 522.

Within the regional integration framework, to borrow from the language of the European Commission, the right of residence may be defined as the right to settle anywhere within the territory of the Community[53]. This right of citizens has been upheld on numerous occasions by the ECJ asserting that by virtue of their rights conferred by Treaty, EU citizens are entitled to reside in another Member State merely on grounds of their citizenship and without the need to be economically active[54].

It follows that if the right to free movement is extended to all persons in the Community, whether or not economically active, so should the right to reside in the territory of another member State. Although this is explicitly the case with the EU, similar logic may be extended to the EAC and ECOWAS. This could explain why, say, within the EAC and ECOWAS, the right to reside, though not expressly spelt out in the same vein as the right to free movement of persons, it is presumed incidental to it. As such the relevant provisions within the EAC and ECOWAS treaties may not expressly provide for 'the right to move and reside freely', but will provide for free movement which entitles a community citizen to stay in the territory of any of the member States for a specified period of time. The right of residence is thereby implied within the right to free movement.

The definition provided above for the right of residence, though defined within the EU framework, might be adapted for other RECs, but only with regard to the substance of it. As to how the right will be executed, each regional Community has got its unique rules and regulations, which set out conditions and limitations pertaining to the right.

Within the EU, for example, EU citizens can exercise the right to reside freely in another Member State for a period of up to three months. Upon the expiry of this period, should the individuals wish to extend their stay, they must register with the relevant authorities and obtain a registration certificate[55]. This requirement may, however, be waived by some EU countries should they so wish[56]. What is of importance though is that residence permits have been

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[53] See European Commission *Freedom to Move and Live in Europe* op cit note 33 at 4.
[54] Jacobs op cit note 2 at 607. See also *Zhu, Chen* case supra note 35 para 26; Case C-413/99 *Baumbast, R v Secretary of State for the Home Department* [2002] ECR I-7091 para 84.
[55] Directive 2004/38/EC, op cit note 14 Article 8 (1-3). Under Article 16 (1) of the Directive, citizens who have stayed in a host Member State for a continuous period of five years enjoy the right of permanent residence, should they wish to take it up.
[56] European Commission *Freedom to Move and Live in Europe*, op cit note 33 at 17.

abolished for EU citizens, and the registration certificate, which is really for purposes of States keeping track of population movements[57], is not required for workers, self-employed persons and providers of services.

Community citizens in the ECOWAS have a right to freely stay in a member State other than their own for a period of three months, upon expiry of which they must obtain permission from the appropriate national authority for an extension of their stay[58]. The law, however specifically provides that the right of residence is to be granted by Member States to community citizens who are within a Member State's territory for the purpose of seeking and carrying out income earning employment[59]. Once in a host State, an ECOWAS citizen should obtain an ECOWAS residence card or a residence permit[60].

Within the EAC, a community citizen, other than a worker or self-employed person, only requires a pass issued by the immigration officers upon entry. The pass entitles the holder to stay in the territory of a Partner State for a period of six months, subject to renewal[61]. Besides, the right of residence is explicitly guaranteed for workers and self-employed persons and their dependants. These will be granted a work and residence permit as the case may be[62].

Within the Caribbean Community, although the Treaty makes provision for free movement of persons, the right of residence is not spelt out anywhere[63]. This could be that the right of residence is considered as implicit in the right to free movement.

It is quite evident within the EAC and ECOWAS that the right of residence, as expressly laid down in the respective legal provisions, is only specifically guaranteed to economically active community citizens. For other citizens, it is more or less implied in their right to free movement. The conditions set upon the right of residence in each of the RECs tend to present it in a quite

[57] Case C-524/06 *Heinz Huber v Bundesrepublik Deutschland* ECR [2008] ECR I-9705 para 63.
[58] ECOWAS Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment Article 3.
[59] ECOWAS Supplementary Protocol A/SP/.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment Article 2.
[60] Ibid Articles 5-6.
[61] EAC Common Market (Free Movement of Persons) Regulations, Annex I to the CMP regulation 3.
[62] EAC Common Market (Right of Residence) Regulations, Annex IV to the CMP 4 & 6.1.
[63] See Revised Treaty of Chaguaramas (RTC) op cit note 11.

different light from how it is articulated under human rights law. Human rights law regards the right of residence as complementary to free movement. Hence, it provides for the right to 'freedom of movement and residence within the borders of each State'[64]. The right to reside is not attached to one's economic activity, but is rather of general application provided one is lawfully within a State. Interpreting this right, together with freedom of movement, the Human Rights Committee (HRC) has explained that the right should be freely exercised by any person lawfully in the State; he or she should not be compelled to reside in any particular area or territory of the State to which they have moved[65]. Besides, foreign nationals should not be accorded treatment different from that of nationals when it comes to choosing residence. Where this is done, it should be justifiable on grounds of national security, public order, public health or morals, and the protection of the rights of others[66].

The right of residence from a human rights perspective presents a couple of contrasts with the economic approach, in some material aspects. Firstly, there seem to be less inhibitions and conditions to free residence from a human rights perspective. Under the human rights regime, less attention is given to procedural formalities and conditions upon which one may exercise and enjoy one's right of residence. Under regional integration, the right of residence may only be exercised upon fulfilment of set formal conditions, which may vary from REC to REC. Secondly, while the right to freely reside in a State under human rights law is only dependant on one's lawful status in that State, a number of regional integration treaties tend to show a preference for economically active persons upon whom the right of residence is specially conferred. In fact where the community law does not indicate otherwise, it may be presumed that one's right of residence ceases upon one's termination of work or business in the host member State. Where one opts to stay on where the economic activity has ceased, they may have to fulfil conditions that apply to other community citizens who are not economically active.

Whereas all nationals of member States of a REC may enjoy a generic right of residence in other member States; at a technical or even more substantive level, workers and business

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[64] UDHR Article 13.1; ICCPR Article 12.1; and ACHPR Article 12.1.
[65] See *CCPR General Comment No. 27* supra note 18 para 7- The right to reside 'precludes preventing the entry or stay of persons in a defined part of the territory'.
[66] UDHR Article 29.2; ICCPR Article 12.3; ACHPR Article 12.2. The same is emphasised in *CCPR General Comment No. 27* para 4.

persons may be subject to less conditions and restrictions as to their right of residence. Nonetheless, from the human rights viewpoint, once all persons whether workers or not are lawfully within the territory of a State, they should be able to enjoy all rights indiscriminately.

2.4 The right of establishment

The right of establishment, unlike the right to free movement and residence, can be said to be exclusively enunciated in economic integration treaties[67]. The right generally applies to self-employed persons who wish to set themselves up in a State other than their own. This much can be discerned from the various regional integration treaties that provide for this right.

Within ECOWAS, the right of establishment is defined as 'the right granted to a citizen who is a national of one Member State to settle or establish in another Member State other than his State of origin, and to have access to economic activities, to carry out these activities as well as to set up and manage enterprises and, in particular companies, under conditions defined by the legislation of the host Member State for its own nationals'[68]. Under EAC law, the right of establishment entitles self-employed persons to take up and pursue economic activities and set up and manage economic undertakings in the territory of a Partner State other than their own[69]. Both the ECOWAS and EAC definitions are not dissimilar from that contained in the EU Treaty which provides that '[f]reedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings....'[70]

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[67] Within the international trade law framework, the GATS provides for liberalisation of trade in services through four main modes: (1) cross-border supply; (2) consumption abroad; (3) commercial presence (a service supplier of one State establishes a territorial presence in another member state) and; (4) presence of natural persons (persons of one member state enter the territory of another to supply services). Of particular relevance are modes 3 and 4 which, in ways, relate to the right of establishment, but the emphasis of the GATS is on Member States' commitments regarding the most favoured nation treatment (Article II), transparency (Article III), market access (Article XVI), and national treatment or non-discrimination (Article XVII). Mode 4, which would be of more interest to this thesis, has been criticised as covering 'a stricter and much narrower scope' when considered in the larger framework of labour mobility- see Kategekwa op cit note 42 at 47. Consequently, the right of establishment within regional integration treaties contains much more substance than any GATS related provisions. For this reason, and the fact that within the GATS the relevant provisions do not talk of 'rights' as such, the GATS is not of much relevance to the discussion on the right of establishment in this thesis.
[68] ECOWAS Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment Article 1.
[69] EAC CMP Article 13.2. This right is applicable to both natural and legal persons- see EAC Common Market (Right of Establishment) Regulations, Annex III to the CMP regulation 4.
[70] TFEU Article 49.

The right of establishment is not only limited to natural persons, but also applies to legal persons[71]. This emphasis is clear in the text of most treaties, but it has also been well articulated by the ECJ in the following terms:

> Freedom of establishment, which Article 49 TFEU grants to European Union nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected. It entails, in accordance with Article 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency[72].

The ECJ has further explained that the right of establishment involves having a permanent and continuous presence in the host Member State, which allows a 'community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom'[73]. This is to distinguish this right from that of a mere service provider who does not have to be present in the host State[74]. Service providers may benefit from the provisions on free movement of services if they do not intend to set themselves up in another member State.

Much as the right of establishment may appear to be more about facilitating nationals of member States to set up business in any of the member States of the regional community with relative ease, the gist of it appears to be the principle of non-discrimination. Persons exercising their right of establishment should not be treated differently from nationals of the host member State, as they are in exactly the same situation[75]. Different kinds of treatment between nationals

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[71] As explained in chapter one, Section 1.3, this research is restricted to natural persons. Where necessary, examples and cases on rights of companies to establish themselves may be used for purposes of illustration or where issues raised apply equally to both natural and legal persons.

[72] Case C-39/13 *Inspecteur van de Belastingdienst/Noord/kantoor Groningen v SCA Group Holding BV (C-39/13), X AG and Others v Inspecteur van de Belastingdienst Amsterdam (C-40/13) and Inspecteur van de Belastingdienst Holland-Noord/kantoor Zaandam v MSA International Holdings BV and MSA Nederland BV (C-41/13)* para 20.

[73] *Gebhard* case supra note 25 para 25.

[74] For further discussion on the difference between the right of establishment and the right to provide services under EU law, see Alina Kaczorowska *European Union Law* (2009) 657-659.

[75] Ibid 668. TFEU Article 49 is also specific that freedom of establishment is to be exercised *under the conditions laid down for its own nationals* by the law of the country where the establishment is effected.

and non-nationals are prohibited, save where there are lawful and objective justifications. In the *Gebhard* case, the ECJ emphasised that the 'taking up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability'[76]. What is most important is that these apply to both nationals and non-nationals alike. Member States are thus required to remove all national measures that may inhibit nationals of other member States to set up business in their territories, including discriminatory measures. They may also have to harmonise laws pertaining to investment, professional and academic qualifications, taxation, registration and licencing, among others so as not to disproportionately disadvantage nationals of other member States. However, just like the other migration rights, lawful conditions and restrictions may apply to the right of establishment. For instance, one may have to prove sufficiency of capital, proof of necessary academic and professional qualifications before they can establish themselves in another country.

As mentioned earlier on, the right of establishment may appear to be in a quite separate category from the right to free movement and residence. It, more than can be said for the other two rights, seems to be more embedded in economic integration law framework. In other words, there is a stronger case for it to be regarded as an economic or market freedom, separate from human rights, than the other two rights. This is well-illustrated within the framework of the EU Treaty wherein the right of establishment is not considered under citizens' rights, but falls exclusively under the part on 'Union policies and internal actions'[77]. Furthermore it is a right that is provided for almost only under regional integration treaties. Would this therefore mean that it is devoid of a human rights rationale? Alternatively, is the right of establishment incapable of being articulated in human rights terms?

International human rights law does not contain the words 'right of establishment' as such. What is provided for is the general right to work, of which the right of establishment can be

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(Emphasis added). EAC CMP Article 13.2 similarly provides that for purposes of the right of establishment, 'the Partner States shall ensure non-discrimination of the nationals of the other Partner States based on their nationalities'.

[76] *Gebhard* case supra note 25 para 35.

[77] TFEU Part IV (Articles 45-66) deals with 'Free movement of persons, services and capital', as opposed to TFEU Part II (Articles 18-25) which deals with 'Non-discrimination and citizenship of the Union'.

said to be a component. The International Covenant on Economic, Social and Cultural Rights (ICESCR) may perhaps be the most comprehensive in enunciating the right to work which includes, the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'[78]. In essence, a person exercising his or her right to establishment is promoting his or her right to work or gain a living.

This interconnection between the right to work and the right of establishment has been well-captured in the EU Charter of Fundamental Rights which guarantees the right of every Union citizen to 'seek employment, to work, to exercise the right of establishment and to provide services in any Member State'[79]. But even before the EU Charter came into force, the ECJ had long considered the right of establishment as a fundamental freedom in correlation with the right to freely move and reside[80]. Additionally, the principle of non-discrimination and equal treatment squarely applies to the right to establishment as it does to the right to freely move and reside.

The only point of departure between the right to work as provided for under human rights law and the right of establishment under regional integration is more or less geographical. The right of establishment contains a cross-border element, which if it were lacking, one could be covered under the national provisions on the right to work. There is no denying though that the right of establishment has possibly been recognised and articulated as such only as a result of regional economic integration.

The foregoing discussion whilst focusing on the content and scope of each of the migration rights, has revealed at least two major common threads that run through all these rights. These are: i) the principle of non-discrimination or equality of treatment; and ii) conditions and restrictions.

[78] ICESCR Article 6.1. This article elaborates upon UDHR Article 23.1 which also provides for the right to work.
[79] Charter of Fundamental Rights of the European Union Article 15.2.
[80] Case C-19/92, *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663 paras 16 & 28; Case-115/78 *Knoors v Staatssecretaris voor Economische Zaken* [1979] ECR 399 para 20; *Gebhard* case supra note 25.

2.5 Non-discrimination or equality of treatment

The principle of non-discrimination or equality of treatment underlies all migration rights. The emphasis of non-discrimination under regional integration treaties is that nationals of other member States should not be treated different from nationals of a host member State in aspects of free movement[81], residence and establishment. For such treatment to be discriminatory, it should disproportionately place one at a disadvantage simply on the basis of one's nationality. Hence, a non-national would be placed at a disadvantage compared to a national of a member State, which would be inimical to the integration objectives. The definition of discrimination within a regional integration context has been well articulated by the Caribbean Court in stating that:

> Discrimination in the context of Caribbean Community law occurs where, within the scope of application of the Treaty, the facts of the case disclose treatment that is worse or less favourable than is accorded to a person whose circumstances are similar to those of the complainant except for their and the complainant's nationality, with no objective and reasonable justification for the difference in treatment.[82]

The above definition more or less sums up how discrimination is understood in all RECs. Moreover, discrimination has been identified as manifesting itself in two ways: direct (overt); and indirect (covert). In the case of direct discrimination, individuals in the same situation are accorded different treatment. For example where different set of rules, say pertaining to residence or establishment, apply between nationals and non-nationals. In a case where a French national was detained and deported from the Netherlands, partly because he had failed to produce an ID to prove his nationality, the ECJ ruled that a law in the Netherlands which by application required that nationals of other EU Member States residing in the Netherlands, for the purposes provided for in the Treaty, must always be in possession of proof of identity, while the same was not required of Netherlands nationals, amounted to discrimination as prohibited by the Treaty[83]. In yet another example within the EAC, a Kenyan national who formed part

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[81] Under Community law, non-discrimination will also be applied in the context of free movement of goods, capital and services. Hence, under economic law, it is not applied only in as far as it refers to persons.
[82] *Shanique Myrie v The State of Barbados*, [2013] CCJ 3 (OJ) para 84.
[83] Case C-215/03 *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie* [2005] ECR I-1215 para 31-32. Similarly, in its decision in *Heinz Huber* supra note 57 para 80, the ECJ held that 'the difference in treatment of nationals and Union citizens that arises by virtue of the systematic processing of personal data relating only to Union citizens who are not nationals of the Member State concerned for the purposes of fighting crime

of a Kenyan delegation to Uganda was singled out and denied entry into Uganda with no reasons being proffered. The EACJ found such action by the Ugandan authorities to be discriminatory[84].

Explaining the principle of non-discrimination or equal treatment, the ECJ has on numerous occasions upheld as settled law that 'the principle of equal treatment prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result'[85].

Indirect discrimination will occur where persons in different situations are accorded the same or similar treatment. Nationals and non-nationals may, in a particular member State, be subject to the same rules and regulations in some instances, but in effect such rules or regulations place the non-nationals at a disadvantage. For instance, a case was brought before the ECJ challenging the decision of the Italian government to conclude data-processing agreements with only those companies in which all or majority shares were in public or state ownership[86]. Such laws were deemed to be discriminatory and an inhibition of the freedom of establishment. The Italian government contended that the laws did not discriminate on grounds of nationality, hence it was not in breach of Community law. The Court, in agreement with the applicant found that there were no companies from other member States in which all or majority of the shares were in Italian public ownership and as such the Italian law indirectly discriminated against companies from other member States.

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constitutes discrimination…'. In Case C-274/96 *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7637 para 16, the ECJ held that 'the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a State on the same footing as its nationals'. Hence, the conduct of criminal proceedings in a language the accused did not understand amounted to discrimination.

[84] *Samuel Mukira Mohochi* case supra note 28. For a more detailed discussion of the case see chapter five Section 5.2 below.

[85] See Case C-258/04 *Office National de l'Emploi v Ioannis Ioannidis* [2005] ECR I-8275 para 26; Case C-367/11 *Déborah Prete v Office national de l'emploi* [2012] ECR 0000 para 29; Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613 para 31.

[86] Case-3/88 *Commission of the European Communities v Italian Republic* [1989] ECR 4035. See also *Ioannidis* case ibid. In this case, Mr Ioannidis, a Greek national residing in Belgium was denied a tide-over allowance while seeking employment in Belgium, where he had just obtained a graduate diploma after three years of study, for the sole reason that he had not completed his secondary education in Belgium. The ECJ found this law to be discriminatory and placing Union citizens who are non-nationals of Belgium at a disadvantage.

Member States should thus desist from implementing and remove any measures that tend to discriminate against or accord unequal treatment between their nationals and nationals of other member States. Nevertheless, there are exceptions in which States may accord different treatment or "lawfully discriminate". Difference in treatment may be justified if 'it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provision'[87]. The case of *Sotgiu v Deutsche Bundespost*[88] serves as a good illustration. In this case, the applicant, an Italian worker in Germany challenged a German regulation which allowed for a higher separation allowance to be paid to German nationals who were employed away from their home in Germany, than what was paid to non-German nationals employed in Germany away from their homes in their country of origin. The ECJ took cognisance that 'criteria such as place of origin or residence of a worker may, according to circumstances, be tantamount, as regards their practical effect, to discrimination on the grounds of nationality, such as is prohibited by the Treaty'. However, it found that the difference in treatment was justified because for workers whose home was within Germany, payment of the separation allowance was only temporary and was bound up with an obligation to transfer the residence to the place of employment, whilst the same allowance was paid for an indefinite period and was not bound up with any such obligation in the case of workers whose residence was abroad, whatever their nationality.

Yet another example of justification may arise where a State may adopt measures to prevent reverse discrimination. This occurs where a State treats the nationals of other Member States more favourably than its own[89], a situation that may not be strange among economic communities. In the circumstances, it may be justified to put in place some disparate measures in favour of its own citizens.

The principle of non-discrimination as applied in regional integration law without doubt substantially borrows from international law, specifically human rights law. This is a fact

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[87] See *Déborah Prete* case supra note 85 paras 29-32; *Garcia Avello* case supra note 85 para 31.
[88] Case C-152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 153.
[89] Jacobs op cit note 2 at 598. This situation has at some point caused concern within the EAC where some Ugandans felt that foreigners were given preferential treatment when it came to business and investment matters. See especially Sallie S Kayunga 'Deepening political integration of the EAC countries: the Uganda case' in Ahmed Mohiddin (ed) *Deepening Regional Integration of the East African Community* (2005) 186-187.

acknowledged by regional courts in their application of the principle to various cases[90]. The ECJ has particularly been credited for taking advantage of 'a well-recognised fundamental right', that is equality in treatment or non-discrimination, in developing its jurisprudence on migration and citizens' rights in the EU[91]. Arguably, it is in the application of the principle of non-discrimination where human rights law has had a more profound influence on economic law; and where any delineation of migration rights either as strictly economic freedoms or human rights becomes heavily blurred.

Provisions on non-discrimination permeate all international and regional human rights instruments[92]. Accordingly, non-discrimination or equality of treatment has been described as a 'basic and general principle relating to the protection of human rights'[93]. This principle has been defined by the HRC 'to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'[94]. The dichotomy of discrimination into direct and indirect has long been recognised and established under human rights law[95].

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[90] For instance in *Shanique Myrie* case supra note 82 para 84, the CCJ in assessing the allegation of discrimination acknowledged that '[g]iven the apparent lack of any specific rules in this (see Article 7.2 RTC), the Court must address this claim from the standpoint of relevant principles of international law'.

[91] Eleanor Sharpston 'Citizenship and fundamental rights- Pandora's box or a natural step towards maturity?' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds) *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (2012) 250. Margaritis makes a similar claim when she states that the principle of non-discrimination or equality contained in the EEC Treaty 'set the basis for further development of the level of fundamental rights protection in Europe, even though expressed on a basic, inadequate level and in accordance with economic principles'- Konstantinos Margaritis 'Fundamental rights in the EEC Treaty and within Community freedoms' 2013 *CES Working Papers*, Issue 1 available at www.ceeol.com.

[92] To mention but a few: UDHR, ICCPR, ICESCR, ECHR, ACHPR, ACHR.

[93] *Human Rights Committee, General Comment 18, Non-discrimination* (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) para 1.

[94] Ibid para 7.

[95] In particular, the definition of discrimination contained in the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD) 1968, captures both direct and indirect discrimination. Herein, racial discrimination is defined as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'- Article 1, ICERD. A similar definition is contained in Article 1 of the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW). The Committee on Economic, Social and Cultural Rights clearly explains this dichotomy in its General Comment on Non-discrimination- Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights* (article 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009) para 10.

In contrast to regional integration law that places emphasis on nationality as a ground of discrimination, human rights law, for obvious reasons, identifies a much wider range of grounds, of which nationality is just but one. This, however, ceases to be of consequence due to the pervasiveness of human rights generally and the application of the principle of non-discrimination in particular[96]. The jurisprudence of the ECJ reveals that even within an economic community, the Court has had to enforce provisions on non-discrimination on grounds beyond nationality, such as age, sex, race etc. In fact the EU Charter on Fundamental Freedoms more or less reiterates the grounds mentioned under international human rights law treaties[97]. This effectively and expressly expands the grounds upon which discrimination is prohibited under EU law.

Within the African RECs, both the ECOWAS and EAC laws incorporate the ACHPR, which may be directly applied within the area of operation of the respective community laws. The African Commission has adopted the international human rights provisions on non-discrimination. It has identified discrimination as occurring where: 'a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; and c) if there is no proportionality between the aim sought and the means employed'[98]. Hence the prohibited grounds of discrimination as well as the application of the principle of non-discrimination under the ACHPR has direct effect within both ECOWAS and EAC law. The application of the principle of non-discrimination within the regional integration framework may thus have both an economic and human rights rationale, but it is clear in this case that the later rationale clearly supersedes and instructs the former.

Much as non-discrimination may be an overarching principle, there are instances where discrimination may be permitted. Human rights law allows for differentiation in treatment 'if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'[99]. 'This partly recognises the fact that

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[96] ICCPR Article 2 and ICESCR Article 2.2. See also CESCR, *General Comment No. 20*, ibid para 7.
[97] EU Charter on Fundamental Freedoms Article 21(1).
[98] Communication No. 313/05 *Kenneth Good v Republic of Botswana* paras 219, 222.
[99] *HRC General Comment 18* supra note 93 para 13. The CESCR also states in more or less the same terms that 'differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the

'affirmative action' or 'positive discrimination' may be undertaken by States in favour of disadvantaged groups in order to attain some level of equality. This notion may not exactly be applicable within the economic law framework. Nonetheless, the point of consensus under both human rights law and economic or regional integration law is that discrimination may be permitted where there are legitimate and objective reasons for doing so. What may be considered as a legitimate and objective justification for non-discrimination may vary from case to case. Of importance is that the requirements of objectivity, legitimacy and proportionality are met. This test is equivalent to that applied to limitations or restrictions and conditions to migration rights.

2.6 Conditions and limitations on migration rights

One common characteristic of all migration rights is that they are not absolute, but are subject to such conditions and limitations or restrictions as may be imposed by the Community Treaty and laws made in compliance thereto. There are two elements to be considered here, that is, conditions and limitations.

A condition, as used in this sense, is a requirement that should be met or satisfied before one can exercise one's migration rights[100]. In other words, without meeting the set condition, the right may not accrue. The conditions attached to the exercise of migration rights may vary from REC to REC. For example, and as mentioned earlier, the right of EU citizens to freely reside within the territory of the EU for a period longer than three months, can only be enjoyed by those who are not economically active if they can prove that they have sufficient financial resources and a comprehensive insurance cover so as not to become a burden on the host country's social assistance system[101]. In contrast, proof of sufficiency of funds is not expressly provided for in the ECOWAS and EAC treaties, but may be a legal requirement in specific circumstances under the various national laws as will be demonstrated in chapter six below when discussing the laws and practices within EAC Partner States. With regard to the right of establishment, one of the obvious conditions is proof of sufficiency of capital, and relevant

purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects'- CESCR *General Comment No. 20* supra note 95 para 13.

[100] This definition is derived from the definition of 'condition precedent' that is to say, it 'must occur before a right accrues'- available at legal-dictionary.thefreedictionary.com accessed on 16 May 2017.

[101] EU Directive 2004/38/EC op cit note 14 Article 10. See also European Commission *Freedom to Move and Live in Europe* op cit note 33 at 16.

academic of professional qualifications, where necessary. The conditions, however, need to be reasonable and applicable equally throughout the Community. Suffice to note that most, if not all, conditions pertaining to migration rights within RECs are mainly justifiable on economic grounds. This is not only a reflection of the economic underpinnings of the rights, but also of the economic reality pertaining in the various member States of the REC.

Community laws also recognise that migration rights may be limited or restricted on grounds of public policy, public security and public health[102]. Unlike conditions, which pre-exist the accrual of the right, limitations or restrictions apply in the course of the exercise of one's right. The imposition of limitations should be the exception rather than the norm. As such, the Courts, specifically the ECJ which has a wider jurisprudence, have generally opted for a strict approach to a State's application of limitations[103]. Referring specifically to the ground of public policy, the Court has held that 'its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community'[104]. In other words, the application of limitations should always be subjected to Community oversight. The Court went further to lay down the rule that 'restrictions cannot be imposed on the right of a national of any Member State to enter the territory of another Member State, to stay there and to move within it unless his presence or conduct constitutes a genuine and sufficiently serious threat to public policy'[105]. This exemplifies the strictness with which the Court will address the application of limitations. The aim is to ensure that in all circumstances, one's rights are upheld and not entirely negated by the application of the limitation by the State.

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[102] TFEU Article 20.2 refers to citizens' rights to be enjoyed 'subject to the duties provided for in the Treaties'; TFEU Article 21.1 provides for the right to move and reside freely 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. TFEU Article 49 provides for the freedom of establishment to be exercised 'subject to the provisions of the Chapter relating to capital'. EAC CMP Article 7.5 provides for limitations on the free movement of persons on the grounds of public policy, public security and public health. There are similar provisions on free movement of workers in Article 10.11 and on the right of establishment in Article 13.8. Limitations on the right of residence in ECOWAS are justifiable on grounds of public order, public security and public health- Supplementary Protocol A/SP/.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment Article 3; there is a similar provision on the right of establishment contained in ECOWAS Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment Article 4.3.

[103] Case C-50/06 *Commission of the European Communities v Kingdom of the Netherlands* [2007] ECR I-04383 para 42; Case-36/75 *Roland Rutili v Ministre de l'intérieur* [1975] ECR 1219 para 27.

[104] Although this was enunciated by the ECJ, it is equally applicable in other RECs. In the *Shanique Myrie* case supra note 82 para 68, the CCJ made a similar observation. In the case of the EAC, relevant regulations require a Partner State imposing limitations on any of the migration rights to notify other Partner States and the Secretary General of the EAC.

[105] *Rutili* case supra note 103 para 28.

In order to ensure that States do not overstep their power and authority when imposing limitations on rights under Community law, the ECJ lay down criteria upon which limitations may be scrutinised if they are to be considered justifiable. In the *Gebhard* case, the court laid down the position as follows:

> national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it[106].

Although in imposing limitations States usually look only to their own interests, by applying the above criteria they should be in a better position to make objective decisions. Any restrictive measure or derogation from any of the migration rights, be it in the interest of public policy, public security or public health can only be justified if it 'were based on the objective considerations independent of the nationality of the persons concerned and were proportionate to the legitimate aim of the national provisions'[107]. This test is or ought to be applied in all instances where States implement measures or actions that derogate from any of the migration rights, including the fundamental principle of non-discrimination. This test, moreover, more or less adapts the human rights test applicable to limitations to or derogations from rights guaranteed under international law.

Human rights law, too, recognises that human rights and freedoms are not absolute and may be subject to limitations or restrictions[108]. The right to free movement and residence is no exception and reasonable limitations may be imposed on its exercise for the protection of national security, public order, public health or morals and the rights and freedoms of others. Moreover permissible limitations that may be imposed on these rights 'must not nullify the principle of liberty of movement'[109]. The HRC has been quite emphatic in stating that

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[106] *Gebhard* case supra note 25 para 37.
[107] *Deborah Prete* case supra note 85 para 32. The same emphasis is made in Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191 para 36; *Criminal proceedings against Horst Otto Bickel* supra note 83 para 27; *Ioannidis* case supra note 85 para 29. See also Case C-303/12 *Guido Imfeld and Nathalie Garcet v État Belge* [2013] ECR 0000 para 64.
[108] UDHR Article 29.2. There are however, a set of rights considered non-derogable and these include freedom from slavery; freedom from torture, and right to a fair hearing- See ICCPR Article 4.2.
[109] CCPR *General Comment No. 27* supra note 18 para 2.

restrictions 'must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed'[110]. In accordance thereto, courts will usually broadly interpret the right while strictly construing any limitations that may be imposed.

The HRC has laid down criteria upon which limitations to the rights of free movement and residence will be assessed, if they are to be considered permissible or justifiable. Accordingly, the restrictive measure must be provided by law; it must be necessary in a democratic society for the protection of national security, public order, public health or morals; it must be consistent with all other rights in the Covenant; and it must be proportionate to the interest to be protected[111]. These criteria may have been enunciated with specific reference to civil and political rights, but they apply equally to all human rights[112].

Limitations and restrictions on migration rights present yet another point of convergence between the economic and the human rights rationales. In fact it seems that the limitations as applied under regional integration law substantially borrow from or adopt the human rights language and interpretation. This can be seen mainly in two areas. First, the grounds upon which restrictions on migration rights may be permissible, that is public policy, public order and public health, under regional integration law mirror those enumerated under human rights law. Second, in assessing whether the imposition of limitations is justified in each particular case, Community courts have espoused the human rights law approach of strictly and narrowly construing the limitation while broadly construing the right. In so doing, the court ensures that the essence of the right is preserved and not entirely negated by the limitation imposed. As such the test or criteria of legitimacy, objectivity, appropriateness and proportionality of the measures adopted as limitations on fundamental rights are applied with virtually equal consistency under both community law and international human rights law.

In construing the justification of limitations under community law, divergences with human rights law might be seen in what is considered justifiable in a particular case. Under regional

[110] Ibid para 13.
[111] Ibid paras 11 & 14.
[112] The Committee on Economic, Social and Cultural Rights has adopted them in virtually the same terms- see above note 99.

integration law, which is predominantly influenced by economic law, restrictive measures imposed by any member State may be considered justifiable if they are meant to protect the economic or other interests of the State and do not detrimentally affect the interests of the common market or economic Community[113]. This could explain why despite the concept of community citizenship, regional integration law still recognises that nationals of other member States may be denied entry or deported from any member State. Hence regional integration law seeks to strike a balance between national interests and Community interests, the individual is not necessarily at the centre.

Human rights law, on the other hand, strives to strike a balance between the rights of the individual and the rights of others. Its main aim is to promote and preserve the inherent dignity of a human being in all circumstances. Consequently the extent to which human rights law protects an individual's migration rights is comparatively broader than the migration rights guarantees under regional integration law. Some examples that illustrate this point may be found within the jurisprudence of the African Commission on Human and Peoples' Rights which has articulated the right to protection from displacement and deportation without due process as being violations of the right to free movement and residence[114]. Furthermore, human rights law additionally provides for the right to leave and return to one's country, which is aimed at preventing statelessness. This right is in cognisance of the notions of State sovereignty to control its borders, among others, as well as the concept of nationality and citizenship. Under regional integration law, it is not that the right to leave and return to one's country is done away with, but rather that the exercise of that right is made easier and subject to less formalities and

[113] The ECJ has actually been criticised for 'granting too high a role to merely economic interests and economic efficiency and for neglecting the significance of social policy choices as a limitation to the exercise of economic freedoms'- Wolfgang Weiss 'The EU human rights regime post Lisbon: turning the CJEU into a human rights court?' in Sonia Morano-Foadi & Lucy Vickers (eds) *Fundamental Rights in the EU: A Matter for Two Courts* (2015) 72.

[114] Communication Nos. 279/03, 296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*; Communication No. 227/99 *Democratic Republic of Congo (DRC) v Burundi, Rwanda and Uganda*; Communication Nos. 54/91-61/91-96/93-98/93-164/97_196/97-210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-Droit, Association Mauritanienne des Droits de l'Homme v Mauritania* (*Malawi African Association v. Mauritania*). On deportations, the following cases are of relevance: Communication No. 97/93_14AR *John K. Modise v Botswana*; Communication No. 292/04 *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola* (*Esmaila Connateh v Angola*); Communication No. 159/96 *Union Interafricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, RADDHO, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v Angola* (*Union Interafricaine v Angola*); Communication No. 71/92 *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v Zambia* (*RADDHO v Zambia*).

restrictions. Additionally and by way of example, within the EU, the ECJ has in effect decided that 'national measures which deprive an individual of his or her status of citizen of the Union and thereby the rights attaching to that status, fall within the scope of application of the Treaty provisions on EU citizenship'[115]. As argued by Eleanor Sharpston, the ECJ has been able to come to this conclusion by applying fundamental rights thinking to EU citizens' right to freely move and reside, 'so as to produce a result that would not have been arrived at under the classic economic free movement rights'[116]. Hence the human rights approach has been incrementally applied to migration rights within the EU leading to significant outcomes that enhance protection of the rights of EU citizens. As such the lines between the economic rationale and the human rights rationale for migration rights seem to become increasingly blurred.

The foregoing discussion has focussed on examining migration rights, their normative content and scope of application. Moreover, there is an issue that needs further elucidation: the issue of the beneficiaries of migration rights. To whom do migration rights accrue within a REC? Furthermore, besides the question of accrual, whom do migration rights benefit? The discussion above has applied and hinted at such terms as 'nationals of member States' or 'community citizens' without further explanation. It is therefore worthwhile to look further at who exactly the beneficiaries of migration rights are since rights do not exist in abstract. The following section briefly discusses the concept of citizenship and how it may be applied in regional communities, in an attempt to establish its significance and any implications to the migration rights discourse among regional economic communities.

2.7 Defining community citizenship

A number of regional integration treaties, albeit with different formulations, define or allude to what this research refers to as 'community citizen'. By way of illustration, the Treaties of the EU, ECOWAS, EAC and CARICOM shall be used as guide in understanding and defining what is meant by 'community citizen'.

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[115] Koen Lenaerts 'The court's outer and inner selves: exploring the external and internal legitimacy of the European Court of Justice' in Maurice Adams et al (eds) *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (2013) 48. The author herein was referring to the combined effect of the ECJ's rulings in C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-1177; and C-135/08 *Janko Rottman v Freistaat Bayern* [2010] ECR I-1449.
[116] Sharpston op cit note 91 at 254.

'Community citizen' is a term that gained popularity with the advancement of the European Community (EC)[117]. It was used by scholars as a collective term for citizens of the European Community as constituted by the various member States then. However, none of the EC Treaties defined nor applied it. It was not until the adoption of the EU treaty that the term 'citizen of the Union' was articulated and defined within the legal framework of the EU. According to the Treaty on European Union (TEU), 'every person holding the nationality of a Member State shall be a citizen of the Union', and 'citizenship of the Union shall be additional to and not replace national citizenship'[118]. Referring to this provision, the ECJ has declared citizenship of the Union to be 'the fundamental status of nationals of the Member States'[119], a status that the Court has steadfastly defended in its efforts to safeguard and enhance the rights of citizens of the EU.

As regards the ECOWAS Treaty, it actually uses the term 'community citizen', which is defined to mean 'any national of Member States who satisfy the conditions stipulated in the Protocol defining Community citizenship'[120]. The said Protocol goes on to quite expansively define a citizen of the Community to include: a national by birth of a Member State; a national by descent of a Member State; a child adopted by a citizen of a Member State; and a naturalised person of a Member State[121]. Suffice to note, the Protocol disregards dual nationality involving a non-Member State, and for one to become a community citizen, one must renounce the nationality of the non- Member State. It further sets conditions for acquisition of community membership by naturalised persons of Member States. These include: renunciation of any non-Member State nationality; having permanently resided in a Member State for a continuous period of fifteen years; and if the grant of Community citizenship would not jeopardise the fundamental interests of one or more Member States[122].

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[117] Siofra O'Leary *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (1996) 17-21.
[118] Treaty on the European Union, 1992 Article 8.1, as consolidated in TFEU Article 20.1 available at http://europa.eu/eu-law/decision-making/treaties/index_en.htm.
[119] *Rottman* case supra note 115 para 43; Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193 para 31; *Baumbast* case supra note 54 para 82.
[120] ECOWAS Treaty Article 1.
[121] ECOWAS Protocol A/P.3/5/82 Relating to the Definition of Community Citizen Article 1 available at http://www.comm.ecowas.int/sec/index.php?id=ap030582&lang=en accessed in August 2014.
[122] Ibid.

Unlike the EU citizenship which accrues automatically upon one being a national of a Member State, and leaves much within the discretion or sovereignty of each State, the ECOWAS Treaty seems to require a lot more before one can be recognised as a community citizen. The ECOWAS model does not seem to recognise naturalisation processes in Member States that do not conform to its own. Consequently, community citizenship is not automatic for a naturalised national of a Member State unless he or she complies with the requirements of the ECOWAS protocol. Unfortunately, issues on ECOWAS citizenship seem not to have been brought up for adjudication and so it is hard to tell whether ECOWAS States are applying these provisions or whether they do not deem them as impinging on their sovereignty quite more than they would have liked to cede.

With regards to the EAC, 'community citizen' is not explicitly defined as under the EU or ECOWAS Treaties. The Common Market Protocol defines 'citizen' to mean 'a national of a Partner State recognised under the law governing citizenship in the Partner State'[123]. The EACJ in interpreting the Treaty and Protocol in this regard has held that '[T]he Treaty also defines persons, formerly foreign nationals as between the individual EAC States prior to entry into force of the Treaty, as *nationals or citizens of Partner States*'[124]. Plausibly, the concept of 'community citizen' in the EAC is more implied than express. This argument shall be developed further in chapter four.

Similar to the EAC, the Caribbean Community (CARICOM) does not expressly define 'community citizen', although it uses the term 'community nationals' in relation to establishment, services, capital and movement[125]. What the Treaty defines is 'national of a member State' if such person: (i) is a citizen of that State; (ii) has a connection with that State of a kind which entitles him to be regarded as belonging to or, if it be so expressed, as being a native or resident of the State for the purposes of the laws thereof relating to immigration; or (iii) is a company or other legal entity constituted in the Member State in conformity with the laws thereof and which that State regards as belonging to it…[126]. This definition can be said to imply who is understood as a community citizen within CARICOM.

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[123] CMP Article 1.
[124] *Samuel Mukira v Attorney General of Uganda* supra note 28 para 48.
[125] Revised Treaty of Chaguaramas supra note 11 chapter 3.
[126] Ibid Article 32.5 para (a).

From the above definitions, community citizen may be understood as a national of a member State of a REC, as expressly or impliedly recognised by the REC in its constitutive Treaties. This is the sense in which this term shall be used in this research.

2.7.1 Community citizenship as distinguished from nation-state citizenship

There are some idiosyncrasies of community citizenship that need highlighting and which necessarily set it apart from nation-state citizenship. First and foremost, the concept of community citizenship has really developed as a result of regional economic integration, quite distinct from nation-state citizenship which is more or less a socio-political circumstance. In order to illustrate this point, it is worthwhile to briefly look at the meaning of citizenship or use of the word 'citizen' as applied in international law.

The concept of citizenship or nationality[127] has had varying meanings over time, in some cases being exclusionary on grounds such as sex, age and property ownership[128]. In modern times, the concept of citizenship is intricately linked to that of the modern nation-State[129], the origins of which are usually traced back to the Treaty of Westphalia of 1648[130]. This Treaty lay down the international law principle of state sovereignty in which each State should take charge of its domestic affairs without interference from other States. As such, one of the tenets of state sovereignty is that it is for each 'State to lay down the rules governing the grant of its nationality'[131]. Elaborating further on this point and in effect providing an international law perspective on the concept of citizenship or nationality, the International Court of Justice (ICJ) has stated:

> According to the practice of states, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence

[127] In international law, and in fact most legal literature, the words 'citizen' and 'national'; or 'citizenship' and 'nationality' are used synonymously. In this work, although both words may be used interchangeably, reference to 'national' shall specifically refer to a national or citizen of a specific nation State as distinguished from a citizen of a regional community.
[128] Meehan op cit note 17 at 17. She notes specially that 'the citizen, literally the inhabitant of a citadel and then a city, was originally a person who enjoyed the full rights of membership of a city-State'. She then goes on to explain the various definitions of citizenship in different societies.
[129] David Jacobson *Rights across Borders: Immigration and the Decline of Citizenship* (1996) 7.
[130] See David Harvey *Cosmopolitanism and the Geographies of Freedom* (2009) 172; also Bauböck 'Citizenship and free movement' op cit note 19 at 345.
[131] *Nottebohm case* supra note 34.

> of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the state conferring nationality than with that of any other state[132].

The above legal exegesis, coupled with some scholarly definitions of citizenship[133], lend credence to the following working definition of citizenship: a civil status involving mutual acknowledgement of belongingness between an individual and a State. This status is conferred usually in three recognised ways: i) by circumstance of birth *(jus soli)*, where one is born on the territory of the State; ii) by descent *(jus sanguinis)* –having parents that are citizens; iii) by naturalisation as set out and determined by the laws of each State. These are more or less the well-recognised modes of acquiring citizenship or the means through which a country identifies and defines its citizens.

Contrasted with the notion of community citizenship, nation-state citizenship or nationality can therefore be said as arising from a legally recognised socio-geo-political circumstance that creates that genuine link between the individual and the State. Community citizenship, on the other hand, is a creation of Treaty within a regional integration model in which States agree to confer certain rights and freedoms to citizens of other member States of the region or Community. It is therefore arguable that the difference between the two types of citizenship is one of *recognition* and *conferment*. In the case of nation-state citizenship, citizens are *recognised* as such, while in the case of community citizenship, rights are *conferred* upon nationals of other member States.

The second point to note and which flows from the first is that community citizenship is not a 'stand-alone' individual status as one would say of nation-state citizenship. Community citizenship is derivative of or is complementary to nation-state citizenship. This much can be discerned from the language of the Treaties which provide for community citizenship, as

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[132] Ibid.

[133] Bauböck defines citizenship as a 'relation between individuals and States' explaining further on that 'the international political system divides populations into groups of citizenships in a similar way that it divides the earth into State territories'- Rainer Bauböck *Transnational Citizenship: Membership and Rights in International Migration* (1994) 23, 31. Soysal similarly explains that 'citizenship entails a territorial relationship between the individual and the State. It postulates well-defined, exclusionary boundaries and state jurisdictions over the national population within those boundaries'- Soysal op cit note 23 at 140-141.

illustrated in the immediately preceding section. One can only be a community citizen if they are a national or citizen of a Member State of a regional community that endorses this status.

Furthermore and in accordance with the social contract theory, it may be argued that community citizenship, unlike nation-state citizenship, is not a real citizenship on the basis that there is no direct contractual relationship between the individual and the Community. This is in as far as the people or community citizens usually do not directly have a say in the establishment of the Community. The decision to join such a Community and subject the State to its laws is usually undertaken at a government's discretion. It is therefore governments that have that direct contract or link with the Community. However, as Meehan argues, the social contract could be implied considering, firstly, that the Community was established by elected governments that acted on behalf of their peoples; and secondly that 'the legal order of the Community confers rights and imposes duties, not only on governments, but also on individuals'; which rights and duties transcend individual nation-states[134]. Nonetheless, what is clearly discernible from these arguments is the position that the relationship that exists between the community and the individual is through its State which, along with other States, confer by treaty, rights and obligations to the citizens of the Community[135]. This leads to the third and final point of distinction.

Citizenship, in order for it to be considered complete, needs to be both formal and substantive. Martiniello explains the distinction between 'formal' and 'substantive' citizenship thus:

> The former refers to a formal link between an individual belonging to a nation-state, which is juridically sanctioned by the possession of an identity card or passport of that state. The latter refers to the bundle of civil, political, social, and also cultural rights enjoyed by an individual, traditionally by virtue of her or his belonging to the national community. It also refers to the participation of the individual in the management of the public affairs of a given national and political community[136].

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[134] Meehan op cit note 17 at 34.

[135] Hall refers to community citizenship as a '*de jure* category of Union citizenship which is created by Community law and whose personal scope is referred by Community law to the nationality laws of the Member State'- see Stephen Hall *Nationality, Migration Rights and Citizenship of the Union* (1995) 9. La Torre explains European citizenship as 'not a primary or original status but something supplementary or derived'. See Massimo La Torre 'Citizenship and European democracy: European constitution and the Treaty of Lisbon' in Patrick Birkinshaw & Mike Varney (eds) *The European Union Legal Order after Lisbon* (2010) 203.

[136] Martiniello op cit note 13 at 345. See also Bauböck *Transnational Citizenship* op cit note 133 at 26. In *Re Nottebohm* supra note 34, the ICJ was similarly of the view that '[n]ationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the state

This explanation makes it clear that simply belonging to a particular State by virtue of birth, descent or naturalisation, what Castles and Davidson refer to as 'becoming a citizen'[137], is not in itself sufficient cause for celebration of belongingness to a State. It is only when accompanied by the entire range of civil, political, economic, social and cultural rights, as well as duties and obligations to that State ('being a citizen'[138]) that one may consider oneself a full citizen of a State. The range of rights available to citizens as well as their duties and obligations to the State is what will distinguish citizens from non-citizens or aliens.

Under both national and international law, citizens have the full benefit of the entire gamut of rights guaranteed under human rights law, save where lawful restrictions apply. Non-citizens or aliens, as explained earlier on in the chapter, will normally enjoy most rights in equal or less measure as citizens except rights pertaining to political participation or any other that a State may reserve specially for its citizens[139].

In contrast, the rights of community citizens, as illustrated earlier on, are quite circumscribed and narrow in range. Even then the specific rights conferred on community citizens will vary from REC to REC. Consequently Castles has referred to community citizenship as 'quasi-citizenship'[140] because 'it confers significant rights on the nationals of one Member State living in another, but these fall short of full citizenship, especially with regard to political participation'[141]. Speaking of the range of rights for community citizens, migration rights happen to be the common denominator among all RECs.

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in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the state'.

[137] Stephen Castles & Alastair Davidson *Citizenship and Migration: Globalization and the Politics of Belonging* (2000) 84.

[138] Ibid.

[139] T Alexander Aleinikoff 'Between principles and politics: U.S. citizenship policy' in Aleinikoff & Klusmeyer (2000) op cit note 13 at 119; John McCormick *Understanding the European Union: A Concise Introduction* (1999) 161-162. See also Kay Hailbronner 'Nationality' in T Alexander Aleinikoff & Vincent Chetail (eds) *Migration and International Legal Norms* (2003) 75. Reservations are permitted under international law, including human rights law- See Article 19, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

[140] Castles & Davidson op cit note 137 at 85. Martiniello, too, refers to European citizenship as 'nothing more than a functional semi-citizenship as opposed to a substantive citizenship'- Martiniello op cit note 13 at 353.

[141] Castles & Davidson op cit note 137 at 98.

2.7.2 Community citizenship and the significance of migration rights

As explained at the beginning of this chapter, migration rights are causally linked to the notion of community citizenship, as contemporarily understood. The concept of community citizenship has developed from the right of free movement of workers, services and goods as some of the factors of production whose mobility is necessary to attain an economic community's objectives, specifically that of a common or single market. Conversely, migration rights could be considered the pivotal constituents of community citizenship. As illustrated in the preceding sections, they are the only rights common to all RECs, and as such can be said to be the defining element of community citizenship.

Although migration rights and any other attendant rights should accrue to all nationals of member States of a REC, it has been argued with particular reference to the EU that only the small minority of mobile EU citizens can take advantage of most EU citizenship rights and exercise EU citizenship in their daily life'[142]. This argument, of course can be applied to all RECs, as indeed rights of community citizenship are most beneficial to only mobile citizens. This essentially narrows down the scope of persons that may enjoy these rights. This presents yet another point of departure from human rights which, in contrast, are not conditioned upon any event- in this case, cross-border movement. Accordingly it has been usually the case that migration rights do not accrue in purely internal situations; there should necessarily be a cross-border element. This, however seems to be changing as demonstrated by ECJ case law that has recently applied EU citizens' rights to seemingly internal situations on the basis that an EU citizen should not be deprived of 'the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen'[143]. Additionally, national measures should not have the effect of 'impeding the exercise of his rights of free movement and residence within the territory of the Member States'[144]. This suggests that a community citizen's rights will be protected even for those immobile citizens if State measures or actions would have the effect of deterring them from exercising those rights. Within the EAC, the Community court

[142] Martiniello op cit note 13 at 367.
[143] C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-3375 para 56.
[144] Ibid. See also *Ruiz Zambrano* case supra note 115.

found a violation where the State agents, without following lawful procedures, had prohibited a Burundian national from leaving the country[145].

The fact that community citizens' rights might be seen as benefitting only mobile citizens serves to underscore the significance of migration rights to the community citizenship. It therefore seems quite apt to describe migration rights as the linchpin of community citizenship. Without migration rights, community citizenship, as understood today, would probably not be.

2.8 Chapter conclusion

Migration rights are the basic rights that will be conferred under any regional integration treaty and they lie at the core of community citizenship. Despite their predominantly economic origins rooted in the free movement of workers under economic integration treaties, migration rights have an equally underlying human rights rationale. The chapter has discussed the dual rationality and conceptualisation of migration rights leading to the conclusion that the human rights rationale seems to have gained prevalence over the economic rationale over the years. This has in some cases blurred the distinction between migration rights as economic or market freedoms, and migration rights as human rights, an assertion best illustrated by the case law of the ECJ[146].

Nevertheless, there are several aspects in which migration rights of community citizens are at variance with associated human rights of nationals of a State. In other words, free movement of community citizens as provided among member States of a REC, may not be quite as free as movement of nationals within their territory of their own State. For instance, citizens of other member States may be subjected to formalities and administrative procedures, including getting entry permits into a host State. These conditions do not apply to nationals of a State exercising their right to free movement and residence within their own State. Furthermore community citizens are not entirely protected from denial of entry or deportations, where there is a lawful justification. On the other hand, nationals of a State are guaranteed their right to

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[145] *East Africa Law Society v The Attorney General of the Republic of Burundi and another*, EACJ Reference No. 1 of 2014.

[146] This argument is best captured in the following statement: 'In combination with generous ECJ case law, intra-European free movement soon transcended pure economic conceptualisations and turned the fundamental rights into the nucleus of 'social citizenship'- David Thym 'Towards 'real' citizenship? The judicial construction of Union citizenship and its limits' in Adams et al (eds) *Judging Europe's Judges* op cit note 115 at 161. See also Sharpston op cit note 91 at 245-271.

leave and return to their home State. Furthermore they are protected from measures that would render them stateless. Consequently, the human rights approach to migration offers more robust protection than an economic approach to citizens' rights under regional communities.

Yet another dimension to this argument lies within the broader discourse on regional integration and state sovereignty. It is apparent that States within a REC only surrender some, and not all, of their sovereign powers. Clearly the area of citizenship and migration control in most RECs still falls largely within the realm of state sovereignty, as exemplified by the very limited scope of rights that are conferred upon community citizens. Nevertheless, by conferring migration rights to nationals of other member States, a State cedes some of its sovereign powers. The fact still remains, however, that a member State of a regional community much as it may recognise some rights of community citizens, such as migration rights, bringing them almost at par with its nationals, it does not or may never recognise such community citizens as its own nationals and thus unreservedly accord them all the rights that pertain to its nationals. Even under international human rights law which recognises the universality of human rights, distinctions between nationals and aliens and the rights that pertain to either are well-acknowledged.

Consequently, while migration rights as provided for in regional integration treaties may not be human rights, strictly speaking and may be more of economic freedoms, the manner in which Community courts have interpreted them, has incrementally blurred the lines between the two rationales. This may be truer on a normative interpretative level rather than on the side of practical application. So while the appropriate question to be asked is not necessarily whether or not migration rights are human rights, but rather whether their interpretation and application follows more an economic approach or a human rights approach. The answer to this issue tends to vary from REC to REC.

CHAPTER THREE
THE EAST AFRICAN COMMUNITY: AN OVERVIEW

3.0 Introduction

The East African Community (EAC) is one of the eight RECs recognised by the African Union as one of the building blocks for the anticipated African Economic Community. The EAC currently comprises five Partner States: Burundi, Kenya, Rwanda, Tanzania and Uganda[1]. Altogether its geographical coverage is estimated at 1,817.7 thousand square kilometres with an estimated total population of 143.5 million[2]. Established in 1999, the EAC envisages integration through four major stages: a Customs Union, a Common Market, a Monetary Union, and ultimately, a Political Federation. Presently it is at the common market stage, although the next stage has been initiated with the signing of the EAC Protocol on the establishment of the EAC Monetary Union on 30 November 2013.

The chapter provides a brief historical background of the EAC, the focal REC, a comparison of the old EAC with the new EAC, whilst pointing out key normative progressive developments in the current set-up. The chapter shall mainly present the context in which migration rights are to be effectuated and thus lay the groundwork for an argument of a progressive interpretation and application of migration rights.

As discussed herein, the EAC has evolved from a singly trade-integration-focussed REC of the 1960s that was predominantly driven by the political heads, to a relatively more participatory and people-centred REC with far-reaching and comprehensive objectives and goals. Hence any ensuing examination of migration rights within the EAC should consider the multifarious and broad-based objectives, as well as its far-reaching goals.

3.1 The EAC: A brief on the geo-political and socio-economic contexts

The EAC is comprised of three landlocked countries, Burundi, Rwanda and Uganda, which stand to benefit greatly from integration with the other two coastal Partner States, Kenya and Tanzania. Although the landlocked countries also happen to be the countries with the smaller

[1] In March 2016, the Republic of South Sudan was admitted into the EAC, although it is still embroiled in a civil conflict. Another probable candidate for admission is the Federal Republic of Somalia. See EAC Secretary-General's (SG) New Year Message '2013 has come to a close, and 2014 beckons' 31 December 2013, available at http://www.sg.eac.int/.

[2] EAC Secretariat, *East African Community Facts and Figures- 2014* (2014) 13 & 16.

surface area, with Rwanda and Burundi being among the smallest countries in Africa, they inversely have a higher population density. Table 1 below shows a breakdown of estimates of surface area, population size and population density of each of the EAC countries, arranged in order of highest to least population density.

Table 1

Country	**Surface Area (in square kilometres)***	**Estimated Population size in millions****	**Estimated population density (persons per square kilometre)*****
Rwanda	263,000	10.9	434.0
Burundi	278,000	9.7	373.5
Uganda	2,416,000	34.7	173.0
Kenya	5,827,000	43.0	74.0
Tanzania	9,393,000	47.2	53.5

*Area includes water bodies. Source: EAC Secretariat, *East African Community Facts and Figures, 2015* available at http://www.eac.int/statistics/index.php?option=com_docman&Itemid=153.
**Source: EAC Secretariat, *EAC Facts and Figures, 2015*, ibid.
*** Source: Ibid.

Despite the relatively high population figures in each of these countries, all EAC states rank in the low human development bracket according to the *Human Development Reports*[3]. With an average score of 0.4804[4], EAC countries still rank relatively low in areas of education, health and income. Apparently, an estimated average of 67.5% of the total population in East Africa live in multi-dimensional poverty[5]. It is therefore not surprising that the World Bank ranks most of the EAC countries as low-income countries, save for Kenya which is ranked as a lower middle income country[6].

In terms of economy, the current Gross Domestic Product (GDP) stands at an estimated $147.5 billion[7], with agriculture as the highest income earning activity contributing 23.7% of the GDP.

[3] United Nations Development Programme (UNDP), *Human Development Report 2014* (2014) available at hdr.undp.org.
[4] Ibid, Kenya had the highest Human Development Index (HDI) of 0.535, which is above the average of 0.493 for low HDI countries, while Burundi had the least HDI of 0.389.
[5] Ibid, Kenya has the least percentage (48.19%) of its population living in multi-dimensional poverty, while on the lower end of the scale is Burundi with a whopping 81.81% of its population living in multi-dimensional poverty.
[6] Information available at http://data.worldbank.org/country accessed on 21 May 2017.
[7] Information available at http://www.eac.int/index.php?option=com_content&view=article&id=169&Itemid=157 accessed on 21 November 2015.

Trade and repairs, manufacturing and construction are the next biggest contributors to the Community's GDP at 9.9%, 8.2% and 8% respectively[8]. The private sector is the biggest employer with most of the working population being engaged in agriculture[9]. It therefore follows that levels of industrialisation within the EAC are still rather low. Nevertheless, there has been an increase in intra-regional trade[10] as well as a steady increase in economic growth in most of the EAC countries[11]. Moreover, the region still has to overcome a number of challenges in order to attain substantial economic growth and development. The common challenges include[12]: high production costs; inadequate infrastructure, including transport and energy; unemployment, under-employment, skills-gaps; relatively high population growth; and low or no value addition to raw materials produced; just to mention a few.

On the political front, the peace and security situation in the most recent years has been relatively stable. Tanzania holds pride of place as one of the peaceful and stable countries in the region and in Africa since it gained independence. Kenya, seems to have relatively stabilised after the 2007 post-election violence and the promulgation of its new Constitution in 2010. However, it still faces some security challenges, namely terrorist attacks from the Somali Al-Shabaab group, as well as relatively higher crime rate[13]. Rwanda has enjoyed increasing peace and stability since the 1994 genocide and the political environment seems to have positively impacted on the country's economic potential as it has the highest ranking in the *Ease of Doing Business Index*[14] among the EAC countries. Uganda, too has enjoyed relative peace and stability in the last decade although it is not totally free from ethnic tensions and conflicts as well as the Al-Shabaab threat. Burundi's peace and security situation had been quite contained since it held its first democratic elections in 2005, but it has since taken a

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[8] EAC Secretariat *EAC Facts and Figures 2015* (2015) 31.
[9] Apparently, three quarters of the Tanzanian population are employed in the agriculture sector; while 82% of Uganda's workforce is in the agriculture, fisheries and forestry sector- African Development Bank (AfDB) et al *African Economic Outlook 2014: East Africa* (2014)154 &170, available at http://www.africaneconomicoutlook.org accessed on 20 November 2015. The World Bank estimates that 90% of Burundi's population is employed in subsistence agriculture- World Bank, *World Bank Country Report 2014* available at www.worldbank.org accessed on 20 November 2015.
[10] EAC Secretariat *EAC Facts and Figures 2015*, 55-56; EAC Secretariat *Status of Elimination of Non-Tariff Barriers in the East African Community, Volume 8- December 2014* (2014) 16.
[11] Nikoloz Gigineishvili, Paolo Mauro, Ke Wang 'How solid is economic growth in the East African Community?' 2014 *International Monetary Fund Working Paper WP/14/150* at 1-4 available at https://www.imf.org/ accessed on 21 May 2017.
[12] AfDB op cit note 9.
[13] Ibid at 88- The report notes that although 'the State is able to protect the lives and property of its citizens, urban areas and parts of the countryside are crime-infested'- a view it does not hold for other EAC States.
[14] Available at http://data.worldbank.org/indicator/IC.BUS.EASE.XQ/countries?display=default accessed on 21 November 2015.

downturn, escalating into a full-blown conflict in 2015 after its President insisted on standing for and eventually gaining a third-term in office.

The EAC States are made up of ethnically-diverse communities, and save for Tanzania which seems to have managed to control ethnic divisions, the other EAC countries have been arenas for ethnic-related conflicts. The most recent cases being the 1994 genocide in Rwanda; the recurring Burundi conflict; the 20-year war that occurred in Northern Uganda ending in the first decade of the 21st century; and the post-election violence in Kenya which brought out underlying ethnic tensions. Arguably, ethnic tensions (which may be fused with land dispute issues) seem to be at the heart of most conflicts, at least the deadliest ones, within the EAC countries. Ethnicity and tribalism which may in some cases, if not most, shape politics within the EAC, is a powder keg that has got the potential of spontaneously altering the peace and security situation in any of the EAC countries and the Community as a whole.

Additionally, the EAC as a whole is positioned in a conflict-prone zone surrounded by countries with on-going, and in some cases protracted conflicts as in the Democratic Republic of Congo, Somalia, and South Sudan. This has resulted in EAC countries playing host to a large number of refugees, some of whom are truly, community citizens. Most of the refugees tend to be settled in refugee camps or settlements and this may have an adverse impact on the migration rights of those who happen to be community citizens. The issue of refugees and asylum-seekers, however, broad, detailed and engaging as it is, falls outside the scope of this thesis.

As far as democracy, human rights and good governance are concerned, the EAC countries present quite an interesting and varied picture[15]. While they all hold regular elections, there are usually concerns as to whether they are free and fair. Tanzania still holds the lead in being the most democratic EAC country, especially when it comes to electoral democracy. Kenya seems to be on a progressive trend especially after the promulgation of its 2010 Constitution. In

[15] According to the *Ibrahim Index of African Governance, 2015* Rwanda ranked highest with an overall score of 60.7%, followed by Kenya with 58.8%; Tanzania, Uganda and Burundi scored 56.7%, 54.6% and 48.5% respectively. Moreover, the positions of each country shift and vary in each of the four categories assessed, ie safety and rule of law; participation and human rights; sustainable economic opportunity; and human development. With particular emphasis on the rule of law and human rights indices, the EAC countries scored as follows: Rule of law- Kenya (67.8%); Tanzania (57.8%); Rwanda (54.8%); Uganda (53.3%), and Burundi (42.1%). Human rights- Tanzania (64.1%); Kenya (63.3%); Uganda (57.2%); Burundi (50.3%); and Rwanda (46.3%). Details available at http://www.moibrahimfoundation.org/iiag/data-portal/ accessed on 22 November 2015.

Uganda, presidential term limits were lifted although regular presidential elections are still held. Rwanda seems to be following the same trend, while in Burundi, a third-term bid by its President sparked off the on-going conflict. In some of the EAC countries, there is deemed to be low checks on powers of government or the executive, which implies that in some of these countries the executive or presidency wields substantial power[16], with minimal checks by other arms of government or civil society.

When it comes to respect for human rights and fundamental freedoms, the scale is as varied as is the context. All the countries have a Bill of Rights enshrined in their respective national Constitutions and have also established National Human Rights Institutions to promote and monitor human rights observance at the national level. However, most of the EAC countries score below average ratings when it comes to human rights and fundamental freedoms[17]. Moreover, when it comes to socio-economic rights, considering that the EAC is made up of developing countries, they all face similar challenges in fulfilling their obligations under the ICESCR. None of the EAC countries is a welfare state and there are hardly any social benefits or grants in any of the States. Although there are social security and health insurance schemes, if they do not operate privately, the commonly cater for those involved in formal employment, excluding majority of the population.

The one big challenge that most EAC states face is that of corruption. All EAC countries rank below average, with Rwanda having the least perception of corruption compared to other EAC countries[18].

This rather broad and general overview of the EAC serves more as an introduction to the region and the countries that have agreed to form a regional community of sorts in attempt to overcome the many socio-economic and development challenges that they may not be able to overcome

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[16] For example, according to the World Justice Project's *Rule of Law Index 2015*, under the 'constraints on government powers' category, Kenya scores 0.56, Tanzania scores 0.53, both a little above the average 0.5; while Uganda scores a below average 0.39. Note that the rankings are on a scale of 0 (lowest) to 1 (highest). For more information see http://data.worldjusticeproject.org/ accessed on 22 November 2015.

[17] According to the Freedom House *Freedom in the World 2015 Report*, while Tanzania and Kenya are rated 'partly free', Uganda, Rwanda and Burundi are rated 'not free'- available at https://freedomhouse.org/report/freedom-world-2015/table-country-ratings accessed on 22 November 2015. According to the *World Justice Project Report 2015*, Tanzania scored highest among the EAC countries with an average 0.51, followed by Kenya with 0.49, while Uganda was rated at 0.39. Rwanda and Burundi were not included in the study.

[18] See *Corruption Perceptions Index 2014* available at http://www.transparency.org/cpi2014/results accessed on 22 November 2015.

each on its own. Moreover, integration attempts within the EAC date back to colonial times as the following section illustrates.

3.2 Background to the EAC

The current EAC is more or less a re-establishment of an older model that was established in 1967 but collapsed in 1977. The old EAC comprised of only three countries: Kenya, Tanzania and Uganda which were all British territories with distinctive administrative set-ups[19]. Economic co-operation among these countries is said to have begun way back in 1917 when Kenya and Uganda formed a Customs Union which Tanganyika (mainland Tanzania as it was then called) joined ten years later[20]. In 1948, the Governors of the three territories established the East African High Commission which, among other things, operated a customs union, a common currency and common services such as transport, communications, research and education[21]. At the start of the 1960s when independence loomed for most African countries, and the British were relinquishing their hold on their colonies, the East African High Commission was transferred into the hands of Africans and in 1961 it transformed into the East African Common Services Organisation (EACSO). The common services administered under EACSO included the East African Railways and Harbours; the East African Posts and Telecommunications; the East African Customs and Excise Department; the East African Income Tax Departments; the Court of Appeal for Eastern Africa; East African Literature Bureau, to mention but some[22]. At the time, the level of integration among the three East African countries seemed to be quite advanced in some aspects. Comparing the EAC to the EEC then, Nye noted that in aspects such as the common currency, common tariff, labour and capital mobility, the East Africans were more integrated than the Europeans were[23]. Indeed, at the time, the three East African Countries were seriously considering establishing a political

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[19] Kenya was administered as a British colony; Uganda as a British Protectorate; while Tanzania having been initially colonised by Germany became a British mandated territory after Germany's defeat in World War I.
[20] See John Oucho 'Prospects of free movement in the East African Community' (2013) 3 *Regions and Cohesion* 104-105; Edward Best & Thomas Christiansen 'Regionalism in international affairs' in John Baylis, Steve Smith & Patricia Owens (eds) *The Globalisation of World Politics: An Introduction to International Relations* (2011) 435.
[21] Oucho ibid at 105.
[22] Other common services included the East African Directorate of Civil Aviation; the East African Meteorological Department; the Treasury; the Secretariat; and several East African Research Departments. See Africanization Commission, *Report of the Africanization of the Public Services of the East African Common Services Organization under the Chairmanship of J. O. Udoji'* (1963) 3 & 91.
[23] Joseph S Nye 'The extent and viability of East African Co-operation' in Collin Leys & Peter Robson (eds) *Federation in East Africa: Opportunities and Problems* (1965) 41-42.

federation[24]. Apparently the idea did not pan out[25] as the three Governments instead formed an East African Community, which was established by the Treaty for East African Co-operation signed on 6 June 1967 (hereinafter 'the 1967 Treaty'). The main objective of this Community was to strengthen industrial, commercial and other ties and common services through the establishment of a common market as an integral part of the Community[26].

The next decade proved to be a very trying one for the newly established Community leading eventually to its collapse. Hazlewood observes, rather interestingly, that '[I]t is, in fact, possible to interpret the establishment of the Community not as a stride forward in cooperation but as a stage in a process of disintegration'[27]. He attributes this to the fact that by the time of establishing the EAC there was less cohesion among the Partner States. The common currency, for instance, had been abandoned and nationalistic interests among these newly independent States had taken sway. Accordingly, he argues that there was no singular factor that could be blamed for the eventual collapse of the EAC, but rather it was a result of 'so many interacting influences and issues'[28]. These included, firstly, the uneven distribution of benefits, or rather the perception of it, with Kenya enjoying the lion's share at the expense of Tanzania and Uganda. Notwithstanding the fact that by the time of signing the Treaty, Kenya was more economically developed than the other two States, the Treaty measures meant to address this proved to be inadequate[29]. Secondly, there was a difference in political-economic ideologies pursued within the region: Kenya and Uganda were capitalist, while Tanzania was a socialist state. Tanzania's political interest increasingly became focussed to the south and not with its East African neighbours. Thirdly, the political leadership, who were the main forces behind the integration, failed to get along, with relations deeply souring among all the leaders. Hazlewood's assessment of the fall of the EAC seems inclined to the view that, but for the lack of political will, a fact equally admitted in the preamble of the new EAC Treaty, most of the factors leading to the EAC's collapse might have been dealt with, hence averting the

[24] The Federation Declaration was issued on 5 June 1963 as a pledge by the Government leaders of the three countries to form a political federation for East Africa. Papers on a conference held in 1964 to discuss East African Federation are published in Leys & Robson ibid.
[25] Arthur Hazlewood 'The end of the East African Community: what are the lessons for regional integration schemes?' (1979) 18 *Journal of Common Market* Studies 42.
[26] Treaty for East African Co-operation 1967 (The 1967 Treaty) preamble para 10 & Article 2.
[27] Hazlewood op cit note 25 at 42. See also Reginald Herbold Green 'The East African Community: a valediction forbidding mourning' (1978) 8 *African Review* 1-27; D A K Mbogoro 'The East African Community: an economic analysis of the integration scheme' (1978) 8 *African Review* 54-76.
[28] Hazlewood ibid at 43.
[29] Ibid at 44 & 53-54.

catastrophe[30]. Although to a great extent agreeing with Hazlewood, Mugomba attaches much importance to the ideological differences between mainly Kenya and Tanzania (with Uganda being too absorbed in its internal problems to play a neutralising or mediatory role), as being much more instrumental in the EAC's collapse[31]. With due regard to the multifarious factors and influences, it is quite certain that the relations among the Partner States took a downturn, leading to the dissolution of the EAC in 1977, when the Community and its corporations ceased to perform their functions[32].

Despite the dissolution, there was probably still nostalgia for co-operation among the East African States. In 1984[33], representatives of the three governments met in Arusha to sign the East African Community Mediation Agreement for the division of assets and liabilities of the former EAC. Thereupon, it was agreed that the three States would 'explore and identify further areas for future co-operation and [to] work out concrete arrangements for such co-operation'[34].

After a sixteen-year hiatus and in pursuance of the 1984 Mediation Agreement, the leaders of the three East African countries met in 1993 and established the East African Co-operation, with the aim of re-establishing closer co-operation and ties amongst themselves. This was an intermediary arrangement set up 'to explore areas of future co-operation and to make concrete arrangements for such co-operation'[35]. Subsequently in 1996, the East African Secretariat was set-up, which then handled the process that eventually culminated in the re-establishment of the EAC[36]. In November 1999, the Heads of State of Kenya, Tanzania and Uganda signed the

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[30] Ibid at 55.

[31] Agrippah T Mugomba 'Regional organisations and African underdevelopment: the collapse of the East African Community' (1978) 16 *The Journal of Modern African Studies* 261-272.

[32] Most authors on the EAC and its collapse, dwell more on the causative factors and not in explaining the form or legal character of the dissolution. There's even scantier information from EAC official sources that are accessible via the website such as the current EAC Treaty. Nonetheless, it has been suggested that there was no negotiated end to the Community, but it rather disintegrated gradually.-Information available at http://www.worldhistory.biz/sundries/31706-east-african-community-the-1967-1977.html last accessed on 18 November 2015. The EAC Treaty of 1967 was officially abrogated by the East African Community Mediation Agreement (Article 16) signed in Arusha on 14 May 1984.

[33] The seven-year lapse could probably be explained by the fact that the political situation at the time left little room for negotiations regarding the EAC. For example there was frequent change of governments in Uganda during that seven-year period which possibly hindered negotiations concerning the erstwhile EAC. Political stability in Uganda was restored after 1986, which might be one of the explanations to why no action was taken by EAC leaders until 1993. At that time too, Tanzania was re-building itself economically after abandoning its socialist ideals in 1985.

[34] EAC Mediation Agreement Article 14.2.

[35] See http://www.eac.int/index.php?option=com_content&view=article&id=44&Itemid=54#

[36] The preamble to the EAC Treaty gives a synopsis of the process of re-establishing the EAC. Although the process for establishing the Secretariat was initiated in 1994 with the signing of the Protocol on the Establishment of a Secretariat for the Permanent Tripartite Commission for Co-operation between Uganda,

Treaty Establishing the East African Community (EAC Treaty) and it came into force in July 2000, upon ratification by all the Partner States. In June 2007, Burundi and Rwanda acceded to the EAC Treaty, and upon ratification became members on 1 July 2007.

3.3 EAC integration under the EAC Treaty, 2000

According to the EAC Treaty, there are about four major discernible factors that impelled the re-establishment of the EAC. These are: the 'close historical, commercial, industrial, cultural and other ties'[37] shared by the Partner States; the desire to coordinate 'economic, social, cultural, security and political issues'[38]; the desire to enhance regional economic development[39]; and the 'desire to foster and to promote greater awareness of the shared interests of the peoples of the Partner States'[40].

Analysing the drivers for EAC integration, Baregu identifies *affection* and *gain* as the major imperatives. By *affection*, he refers to 'a situation where countries come into an integration arrangement because they have a lot in common and feel some bonds of affection'[41]. This *affective* imperative is evident in the EAC Treaty's preambular references to the historical and cultural ties, and the aspiration to foster and promote greater awareness of the shared interests of the East African peoples[42]. With regard to the *gain* imperative, Baregu explains it as the economic motivations for integration which emphasise the welfare gains from trade[43]. Actually, the EAC Treaty largely manifests economic motivations as being dominant drivers for integration. This can be seen, firstly from several of the objectives of the Community which emphasise economic development[44]. Secondly, the phases of integration outlined in the Treaty

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Kenya and Tanzania, the Secretariat became operative in 1996. In 1997, the Secretariat for the Tripartite Commission was directed by the three Heads of State to commence negotiations on upgrading the Agreement establishing the Tripartite Commission into a Treaty, hence the current EAC Treaty. See also Dani W Nabudere 'The fast-tracking of federation and constitutionalism in East Africa' available at http://federation.eac.int/index.php?option=com_docman&task=doc_details&gid=162&Itemid=70 last accessed 18 November 2015; Korwa G Adar 'East African Community' in Giovanni Finizio, Lucio Levi & Nicola Vallinoto (eds) *International Democracy Report* (2011).

[37] EAC Treaty preamble para 1; Article 5.3 para (d) of the EAC Treaty likewise mentions as one of the objectives of the Community 'the strengthening and consolidation of the long standing political, economic, social, cultural and traditional ties and associations between the peoples of the Partner States'.

[38] EAC Treaty preamble para 15. This is further elaborated in the objectives of the Community as provided in Article 5 EAC Treaty.

[39] EAC Treaty preamble para 11; also Article 5.2, 5.3 paras (a), (b) & (g).

[40] EAC Treaty preamble para 12.

[41] Mwesiga Baregu 'The federation of East Africa and the imperatives of political unity in Africa' in Rok Ajulu (ed) *A Region in Transition: Towards a New Integration Agenda in East Africa* (2010) 49.

[42] EAC Treaty preamble paras 1 & 12.

[43] Ibid.

[44] EAC Treaty Article 5.2 & 5.3 paras (a) & (b) are particularly specific to economic aims.

follow the classic neo-functionalist approach to integration[45]. In accordance thereto, the milestones in regional integration are, in sequence, a Free Trade Area, a Customs Union, a Common Market, a Monetary Union, and finally, if agreed upon, a Political Federation. True to this approach, the EAC aims to establish a Customs Union (which is operative); a Common Market (now operative); a Monetary Union; and ultimately a Political Federation[46]. The emphasis placed on economic co-operation and development, and the fact that milestones for various levels of integration are largely economic, proves the predominance and primacy of economic imperatives for EAC integration. Of additional importance is the fact that the EAC Treaty has been notified to the WTO and is considered a plurilateral treaty under the WTO arrangement[47]. This may provide further evidence of the predominance of economic objectives of the EAC, as this proves that the Treaty falls within and is governed by the international economic law and trade law regime.

Baregu further postulates that *threat*[48], which could be occasioned by factors internal among the region or external ones, should be a significant imperative for EAC integration. However, it is not expressly mentioned anywhere in the EAC Treaty. This could mean that the threat imperative was not one of the major driving factors for the EAC, although at the time African countries had identified globalisation as a threat and economic integration as one of the ways of overcoming it[49]. In support of this position, Wanyande emphatically argues that 'East African countries appear to be convinced that the most effective political response to the potential threats of globalisation and international terrorism is to integrate'[50]. He is, however, quick to add that the threat imperative within the EAC in no way displaces the significance of the economic motives[51]. True indeed that the EAC Treaty does not mention the need to protect Partner States from real or potential threats, however some allusions are made to the threat of globalisation. In paragraph eleven of the preamble, the Partner States take cognisance of 'the

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[45] See discussion in chapter one section 1.1.1.
[46] EAC Treaty preamble para 15 & Article 5.2. Although the functionalist integration approach usually begins with the establishment of a free trade area, by the time the EAC Treaty was signed, all three original Partner States were then members of the COMESA free trade area. It was therefore deemed appropriate to start the EAC at the next stage, i.e. the Customs Union.
[47] The EAC Treaty was notified to the WTO on 9 October 2000 under the Enabling Clause of the GATT, while the Common Market Protocol was notified on 1 August 2010 under GATS Article V.
[48] Baregu op cit note 41 at 50.
[49] *Constitutive Act of the African Union*, adopted by the thirty-sixth ordinary session of the Assembly of Heads of State and Government, 11 July, 2000 – preamble paras 5 & 6.
[50] Peter Wanyande 'The role of the East African Legislative Assembly' in Rok Ajulu (ed) *The Making of a Region: The Revival of the East African Community* (2005) 64.
[51] Ibid.

developments in the world economy as contained in the Marrakesh Agreement Establishing the World Trade Organisation, 1995'. This could, in one way, imply that the EAC countries are aware of the trade liberalisation and globalisation effects of the world trading system which may place them in a vulnerable economic position. Paragraph sixteen of the preamble further takes note of the role of the EAC in the realisation of the African Economic Community, whose objectives include promoting 'the socio-economic development of Africa and to face more effectively the challenges posed by globalization'[52]. It is, therefore, arguable that nuances of the *threat* imperative are apparent in the EAC Treaty. This is further augmented by the significance the Partner States attach to the promotion of peace, security, stability and good neighbourliness within and among the region[53]. To sum up this discussion, the imperatives for the EAC integration, to borrow Baregu's terms, are, arguably, *affection, gain and threat*. There is no gainsaying, however, that the economic or *gain* imperative is apparently the overriding one[54].

Baregu chastises the EAC States for not learning from history. He opines that '[A]s if no lessons have been learned from the collapse of the Community twenty-five years ago, the treaty adopts a gradualist and largely functionalist approach and thus *does not differ fundamentally from the earlier efforts*'[55] (emphasis added). Much as this criticism may be partly true as regards the gradualist and functionalist approach, the current EAC Treaty does in fact contain several significant and fundamental initiatives which definitely create a point of departure from the old EAC.

The following section discusses these initiatives or new developments in the EAC Treaty which, if adhered to, could be the key to the success of the current EAC integration efforts.

3.4 Key Developments in the EAC Treaty

3.4.1 Broad-based Community objectives and principles

The objectives of the new EAC are quite broader and more far-reaching than the objectives of the old EAC. The latter was, without doubt, narrowly focused on trade and economic

[52] Constitutive Act of the African Union preamble para 6.
[53] EAC Treaty Article 5.3 para (f), Article 6 paras (b) (d) & (e), Article 11.3, Article 123-125 which generally provide for the promotion of peace, security and stability within the region and among Partner States.
[54] In a study commissioned by the EAC Secretariat, it was observed that the EAC is an organisation 'primarily concerned with economic issues'- EAC Secretariat 'Study on the establishment of an East African Community Common Market' Final Report submitted by M.A. Consulting Group (August 2007) 45.
[55] Baregu op cit note 41 at 52.

development of the Partner States. The preamble to the 1967 Treaty emphasised the desire of the Partner States to strengthen commercial and industrial ties, through long-term removal of trade restrictions and the establishment of a common market[56]. In tandem, virtually all the aims of the Community were trade and economic related, geared towards attaining a common market[57]. It is thus arguable that the old EAC was solely driven by purely economic motives, with a singleness of purpose geared towards trade integration.

As discussed in the previous section, the drivers for the new EAC are manifold. Although the economic motive is still predominant, it is clearly not the sole objective. This is reflected in the many areas in which strengthened co-operation is envisaged. These include economic, social, cultural and political fields, research and technology, defence, security, legal and judicial affairs[58]. Additionally, asides from three objectives that are specifically economic, other objectives include: protection of the natural environment through sustainable use of natural resources; strengthening political, social, economic, cultural and traditional ties of the peoples of Partner States; gender mainstreaming; promotion of peace, security and stability; and strengthening partnerships with the private sector and civil society[59].

Furthermore, the Treaty also includes principles that shall govern the achievement of the objectives, an aspect that was entirely absent in the 1967 Treaty. The principles of the EAC are divided into fundamental and operational principles. The fundamental principles are laid down in Article 6 of the EAC Treaty as follows:

a) mutual trust, political will and sovereign equality*;*
b) peaceful co-existence and good neighbourliness;
c) peaceful settlement of disputes;
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 *[sic]* rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;
e) equitable distribution of benefits; and

[56] The 1967 Treaty preamble paras 6-10.
[57] Only two out of seven aims of the Community were not overtly economic in nature. These had to do with the inauguration of a common agricultural policy, and the operation of common services- Article 2.2 paras (c) & (g) respectively.
[58] EAC Treaty preamble para 15 & Article 5.1.
[59] EAC Treaty Articles 5.2 & 5.3.

f) co-operation for mutual benefit.

The operational principles provided for in Article 7 of the EAC Treaty include: people-centred and market-driven co-operation; provision by the Partner States of an adequate and enabling environment; establishment of an export-oriented economy; the principle of subsidiarity; the principle of variable geometry; the equitable distribution of benefits; the principle of complementarity; and the principle of asymmetry.

In one of its landmark decisions, the East African Court of Justice ruled on the importance of the fundamental principles thus:

> [T]hese principles are foundational, core and indispensable to the success of the integration agenda, and were intended to be strictly observed. Partner States are not to merely aspire to achieve their observance, they are to observe them as a matter of Treaty obligation. In our view, all the six principles in the Article were each carefully thought out, negotiated, appropriately weighted, individualized and crafted the way they are for a particular effect. Integration depends on each of them singly and collectively[60].

In accordance therewith, the Court has in a number of cases grounded its decisions in the principles of the EAC Treaty, as overarching and prevailing over other subject-specific Treaty provisions[61]. The overall effect of the totality of the objectives and principles of the EAC and the importance the Court has attached to them, is an indication that this time round the EAC aims at a deeper and more holistic integration than was the case previously. This leads us to the second key development.

3.4.2 Advanced stages of integration

A perusal of the 1967 Treaty reveals that the EAC's primary aim was the establishment of a common market. Hence its focus was almost entirely on what was deemed necessary to attain that end. Consequently, a substantial part of the 1967 Treaty deals with the removal of restrictions to free movement of goods, and trade in general, which would ultimately lead to the common market which was an integral part of the EAC[62]. All efforts seemed to veer towards

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[60] *Samuel Mukira Mohochi v Attorney General of Uganda*, EACJ Reference No. 5 of 2011 para 36.
[61] This can be seen in the EACJ's decision in *James Katabazi and 21 others v Secretary General of the East African Community & Attorney General of the Republic of Uganda* EACJ Reference No. 1 of 2007 and subsequent rule of law and human rights cases (see discussion in chapter five), where the Court relied on the provisions of the EAC Treaty Articles 6 and 7 to justify its adjudication in a case that involved human rights allegations, over which it has no express jurisdiction.
[62] The1967 Treaty preamble paras 6-10; Parts II & III (Articles 5-42) of the 1967 Treaty were solely dedicated to the common market.

the common market, no more, no less[63]. There were no delineated progressive stages of integration as those in the current EAC Treaty, ie a customs union, a common market, a monetary union; and ultimately a political federation.

Under the current dispensation, the EAC seems to be in for the long haul. In August 2004, the EAC Summit of the Heads of State, concerned about the slow pace of integration, instituted a committee to examine ways of fast-tracking the political federation. The committee, known as the Wako committee after its chairman, after a relatively wide consultative process, presented its report in November 2004. One of the recommendations that the committee made was that the EAC should adopt an 'overlap and parallel approach'. This involves the 'overlapping of the four stages of integration to allow the undertaking of parallel activities at each stage'[64]. Accordingly, on 2 March 2004, the Protocol for the Establishment of the East African Community Customs Union was signed and became operational on 1 January 2005. After a five-year transitional period, the fully-fledged EAC customs union entered into force. On 20 November 2009, the EAC Heads of State signed the Protocol for the Establishment of EAC Common Market (Common Market Protocol) and it entered into force on 1 July 2010. Although the EAC has not yet become a fully-fledged common market, the attainment of which is still a work in progress, on 30 November 2013 the five EAC Head of States signed the Protocol on the establishment of the EAC Monetary Union. The monetary union is to be realised progressively

The Wako committee report also included a timeline for the attainment of the EAC's milestones and it was envisaged that elections and swearing-in of the EAC federal president and parliament would take place in 2013. This has been criticised as being too ambitious[65], and it has indeed proven to be so. Although the political federation still appears to be the EAC's ultimate goal, at a meeting of the Summit of the Heads of State held in Kampala in November 2013, most of the leaders seemed satisfied with delaying the idea for a while[66].

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[63] Although the 1967 Treaty was to be reviewed after fifteen years, which might have been an opportunity to deepen integration, the EAC did not survive that long.

[64] EAC Secretariat, *Report of the Committee on Fast Tracking East African Federation* (November 2004) para 320; available at http://federation.eac.int/index.php?option=com_docman&task=cat_view&gid=100&Itemid=136

[65] Thomas N Kibua & Arne Tostensen *Fast-tracking East African Integration: Assessing the Feasibility of a Political Federation by 2010* (2005) 14; Korwa G Adar 'Fast tracking East African political federation: the role and limitations of the East African Legislative Assembly' (2008) 37 *Africa Insight* 85.

[66] Sadab Kitatta Kaaya 'EAC- Kagame, Kenyatta snub Museveni on political federation' *The Observer* 4 December 2013.

It is worth noting and quite promising that more than a decade after its revival, the EAC seems to be going strong, more than can be said of the old EAC which never survived the decade. Furthermore, the EAC has entered into a tripartite arrangement with COMESA and SADC to establish a free trade area. The Tripartite Free Trade Area was officially launched on 10 June 2015. This process is, among others, seen as advancing the AU's objectives of accelerating economic integration through the establishment of a continental Free Trade Area and eventually the African Economic Community[67]. This integration of RECs could also in part solve the problem of overlapping country memberships that is prevalent among African RECs.

3.4.3 Institutions of the EAC

Article 3 of the 1967 Treaty provided for the following institutions of the Community: the East African Authority (which comprised of the three Heads of State); the East African Legislative Assembly; the East African Ministers; the Common Market Council; the Common Market Tribunal; the Communications Council; the Finance Council; the Economic Consultative and Planning Council; and the Research and Social Council. These institutions were assisted by a central secretariat (Article 3.3, 1967 Treaty). The Court of Appeal for East Africa (hereinafter 'Court of Appeal'), although it was provided for under the Treaty, its status was not quite clear. It was not listed among the institutions of the Community provided for in Article 3, but was provided for in Articles 80-81 under Part IV of the Treaty which dealt with 'The Functions of the East African Community and its Institutions'. Its jurisdiction was restricted to hearing appeals from the courts of Partner States as permitted by law in the Partner States. Presumably then, the institutions that were listed in Article 3 were the key institutions that were purposely set up to further the objectives of the Common Market. Their functions, just like the objectives of the Treaty were thus restricted to the promotion of trade and economic co-operation among the Partner States. It is worth noting, however, that some of these institutions never became fully functional. For example, Viljoen reports that although by 1970 two cases had been referred to the Common Market Tribunal, these were never heard since the Tribunal was never fully constituted[68].

[67] For more information, see COMESA *Key Issues in Regional Integration: Volume III* (2014) at 3 available at http://www.comesa.int/wp-content/uploads/2016/06/Key-Issues-on-intergration-III.pdf, 1-2 & 129-130 accessed on 13 May 2017.
[68] Frans Viljoen *The Realisation of Human Rights in Africa through Intergovernmental Institutions* (1997) 363.

The institutional order under the new EAC is quite different and reflects in part the broad-based nature of its objectives. Article 9 of the EAC Treaty provides for the organs and institutions of the Community. The organs of the Community provided for in Article 9.1 are: the Summit (of Heads of State); the Council (of Ministers); the Coordination Committee; Sectoral Committees; the East African Legislative Assembly (EALA); the East African Court of Justice (EACJ); the Secretariat; and such other organs as may be established by the Summit. Article 9.2 provides for the institutions of the Community as such bodies, departments and services as may be established by the Summit. Arguably, the institutional set-up of the current EAC is more or less a rationalisation for a more robust and holistic integration than was previously the case. Needless to say, there are some shortcomings and weaknesses in the nature of the establishment, powers and functions of some of these institutions, some of which are briefly pointed out in the ensuing sub-section.

3.4.4 Democratic features of the EAC

The old EAC was being driven by the political heads at the time, which is why when they could no longer talk to each other, the entire establishment crumbled. The narrow focus of the EAC on regional trade did not seem to help matters in other spheres, such as the political and social, which were equally if not more crucial at the time. In short, the old EAC suffered a democracy deficiency, one of the reasons that contributed to its collapse[69]. The people of East Africa had no say in the affairs of the Community, or if they had, it was negligible. The Legislative Assembly which would ordinarily be a representative body of the people was not democratically elected. Members of the Legislative Assembly were the three East African Ministers and their Deputies; the Secretary-General and Counsel to the Community; and twenty seven members appointed by the Partner States, each in accordance with its own procedure[70]. Additionally, the institutional-set-up of the old EAC did not embody the principle of separation of powers, one of the key tenets of democracy. The functional institutions of the EAC then were ostensibly representative of the executive. The Legislative Assembly, by nature of its composition, could hardly be said to be independent. The Court of Appeal for East Africa did not have any jurisdiction over community matters, but only served as the highest appellate

[69] EAC Treaty preamble para 4 mentions the 'lack of strong participation of the private sector and civil society in the co-operation activities' as one of the reasons for the collapse of the old EAC.
[70] The 1967 Treaty Articles 56 & 57.

court for all the East African countries. Even then, its jurisdiction over matters it could hear was restricted to criminal and civil matters[71].

One of the progressive features of the new EAC is the desire to be more people-centred. In this regard, one of the objectives of the EAC is 'the enhancement and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development'[72]. In keeping with this and other objectives, is the EAC's fundamental principle on 'good governance including adherence to the principles of democracy, the rule of law…'[73], and the operational principle of 'people-centred and market-driven co-operation'[74]. The EAC has tried to adhere to these principles. For instance, the Wako committee carried out national consultations to garner peoples' views on fast tracking the political federation and in pursuance to one of its recommendations, National Consultative Committees were established[75]. Nevertheless, the Wako committee has been criticised for failing to emphasise the role of the peoples of East Africa in the political federation- the envisaged process does not provide a link between the East Africans and political federation. What the report recommends rather is still much more an elite-driven process[76]. The criticism, notwithstanding, there is comparatively more visible participation, involvement and engagement by and with civil society actors, and most notably the business community which enjoys 'observer status' with the EAC[77].

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[71] Viljoen (1997) op cit note 68 at 366.
[72] EAC Treaty Article 5.3 para (g).
[73] EAC Treaty Article 6 para (d).
[74] EAC Treaty Article 7.1 (a). Articles 127-128 set our detailed provisions on the private sector and civil society. Article 127 provides for the 'creation of an enabling environment for the private sector and civil society'; Article 128 provides for 'strengthening the private sector'; and Article 129 provides for 'co-operation among business organisations and professional bodies'.
[75] See *Report of the Committee on Fast Tracking the East African Federation: Appendices I-XVIII* (January 2005) available at http://www.federation.eac.int/index.php?option=com_docman&task=cat_view&gid=100&Itemid=136 It lists persons and institutions consulted by the Committee. EAC *The East African Political Federation: Addressing East Africans' Fears, Concerns and Challenges and Consolidating Its Pillars* (2010). For a discussion on the role of the private sector and civil society, see Kasaija P Apuuli 'Assessment of institutional development in the East African Community (EAC): 2001-2009' in Ajulu (2010) op cit note 41 at 120-121.
[76] Adar (2008) op cit note 65 at 91-92.
[77] See James Gathii 'Variation in the use of sub-regional integration courts between business and human rights actors: the case of the East African Court of Justice' (2016) 79 *Law and Contemporary Problems* 42; Karen J Alter, James T Gathii & Lawrence Helfer 'Backlash against international courts in West, East and Southern Africa: causes and consequences' (2016) 27 *European Journal of International Law* 321-324.

Furthermore, under the new EAC, members of the EALA are elected, and not appointed, by the National Assembly of each Partner State[78]. Although this is an improvement from the old EAC, the way EALA members are elected still falls short of democratic standards[79] and has in fact led to a number of court cases. In several of these cases, the EACJ has found national rules to be in violation of Article 50.1 of the EAC Treaty[80].

Another aspect in which democratic principles have been entrenched is in the separation of powers among the key organs of the EAC. The three organs of government are all represented: the executive consists of the Summit of Heads of State and Council of Ministers; the legislative arm is the East African Legislative Assembly; while the judicial arm is the East African Court of Justice[81]. The EACJ has a clear mandate of applying and interpreting the Treaty and in so doing has upheld the principle of separation of powers within the Community[82]. These developments notwithstanding, organs of the Community have occasionally been criticised for not functioning independently[83]. Regardless, the key point here is that the EAC Treaty has entrenched democracy and rule of law safeguards that were not a part of the old EAC Treaty and which if adhered to, provide a strong basis for consolidating democracy within the region.

3.4.5. Inclusion of human rights principles

The 1967 neither mentioned nor alluded to human rights and fundamental principles. This could be explained by the fact that it was focused almost entirely on economic and trade-related issues. Besides, human rights advocacy had not yet taken root on the continent on the scale that is has presently. As such individual governments were more concerned about independence

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[78] EAC Treaty Article 50.1 provides: 'The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine'.

[79] Apuuli op cit note 75 at 110-111.

[80] *Prof. Peter Anyang' Nyong'o and Others v Attorney General of Kenya and Others*, EACJ, Reference 1 of 2006 & Appeal No. 1 of 2009; *Abdu Katuntu v Attorney General of Uganda,* EACJ, Reference No. 5 of 2012; *Antony Calist Komu v The Attorney General of the United Republic of Tanzania,* EACJ, Reference No. 7 of 2012.

[81] EAC Treaty Article 23 which provides for the EACJ as the 'judicial body' with jurisdiction to 'ensure the adherence to law in the interpretation and application and compliance with this Treaty'.

[82] *Calist Mwatela, Lydia Wanyoto Mutende, Isaac Abraham Sepetu v East African Community* EACJ Reference No. 1 of 2005 at 20. In this case, the EACJ upheld the independence of the EALA as the 'representative organ in the Community set up to enhance a people centred co-operation' and its independence needed to be preserved. As such it was not bound by decisions of the Council of Ministers. The Court went on to conclude that the 'decisions of the Council have no place in areas of jurisdiction of the Summit, Court and the Assembly'.

[83] Apuuli op cit note 75 at 121.

and self-determination, and least concerned about the promotion and protection of human rights. Within the EAC, this was clearly illustrated by the restrictions placed by the Partner States on the Court of Appeal's jurisdiction over human rights issues. Viljoen notes that although the Constitutions of Kenya and Uganda, at the time, included a Bill of Rights, the Court of Appeal was excluded from handling such matters. For Tanzania, its Constitution did not have a Bill of Rights, but even then, the Court of Appeal was 'excluded from hearing any appeal concerning its interpretation'[84]. Consequently, human rights issues were outside the purview of the EAC and confined to the domain of individual Partner States.

Under the current EAC Treaty, human rights have been recognised as being fundamental to the attainment of the objectives of the Community. Hence the fundamental principle on good governance includes 'the recognition, promotion and protection of human and peoples *[sic]* rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'[85]. This is further reinforced by the undertaking of Partner States, as one of the operational principles of the EAC, to adhere to the 'maintenance of universally accepted standards of human rights'[86]. Quite noteworthy too, is the inclusion of gender-equality provisions that aim at empowering and promoting the rights of women[87].

The relatively more vibrant civil society has made sure that governments are kept accountable for their human rights and rule of law obligations. The evidence of this is partly in the number of cases brought before the EACJ by civil society actors challenging government actions that appear to be in transgression of the EAC Treaty principles on good governance, human rights and rule of law.

In its interpretation of the Treaty, the EACJ has concluded that the EAC Treaty is not a human rights Treaty, but rather it 'governs trade matters as the objective of co-operation among Partner States'[88]. This bolsters the argument on economic drivers being quite predominant in the EAC. However, the position of human rights in the EAC Treaty is not entirely lost on the EACJ. It has noted that '[t]hough the EAC Treaty is bereft of a chapter on Human Rights, nonetheless,

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[84] Viljoen op cit note 68 at 364-365.
[85] EAC Treaty Article 6 para (d).
[86] EAC Treaty Article 7.2.
[87] EAC Treaty Article 5.3 para (e), Article 6 (d); and the entire chapter 22 (Articles 121-122) provides for 'Enhancing the Role of Women in Socio-economic Development'.
[88] *Attorney General of the Republic of Uganda & Attorney General of the Republic of Kenya vs Omar Awadh and 6 others*, EACJ Appeal No. 2 of 2012 para 48.

it contains the hint of such rights in a number of its provisions'[89]. The hint referred to here would necessarily include the human rights references in both the fundamental and operational principles of the EAC. Considering its view on the principles of the EAC as discussed above[90], the Court has gone on to ensure that Partner States adhere to these principles. Even though it does not have jurisdiction over human rights matters *per se*[91], a fact it is very much conscious of, the EACJ has declared that 'it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation'[92]. Thus it has on occasion found Partner States in breach of their human rights treaty obligations contained in Articles 6 para (d) and 7.2 of the EAC Treaty. The role and jurisprudence of the EACJ shall be explored in more depth in chapter five.

The fact that the Treaty does not confer the EACJ with jurisdiction over human rights issues possibly suggests reluctance on the part of EAC Partner States' to prioritise human rights issues. Although there is room for the EACJ to attain jurisdiction at a later stage this has not yet materialised. A draft Protocol to extend the EACJ's jurisdiction to human rights matters was initiated in 2007, but efforts appear to have stalled. This hesitation by the EAC Partner States is indeed reminiscent of the attitude the Partner States had towards the old Court of Appeal hearing human rights cases. As the situation stands, it is the EACJ that is doing a very commendable job, despite its limitations, and this in itself is a remarkable milestone.

Meanwhile in 2010, the National Human Rights Institutions of EAC Partner States, in a bid to strengthen human rights promotion in the region, adopted a draft Bill of Rights which is meant to be a human rights standard-setting document for the region. Despite it being a very comprehensive document, there is not much progress that has been made towards adopting it as one of the key regional instruments. This could be further evidence of reluctance on part of the EAC States to accept the essential role of human rights promotion and protection within the EAC.

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[89] *The Attorney General of the Republic of Rwanda vs Plaxeda Rugumba,* EACJ Appeal No. 1 of 2012 para 24.
[90] See *Mukira Mohochi* case supra note 60.
[91] EAC Treaty Article 27.2 provides that the EACJ 'The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date'. Such jurisdiction is yet to be provided.
[92] *James Katabazi* case supra note 61 at 16.

3.4.6 Elaborate provisions on migration rights

When compared to the old EAC Treaty, the new EAC Treaty can be said to have introduced a migration rights regime that was virtually absent in the former Treaty. Despite the considerable movement of labour and workers during the old EAC era, the 1967 Treaty focussed primarily on the free movement of goods. There was almost no mention of the free movement of other factors of production[93]. Migration rights, even and rather absurdly, the free movement of labour, were essentially not provided for in the Treaty. The only attempt to provide for free movement of a specific group of persons was in reference to 'persons employed in the service of the Community, the Corporations or the Bank' to be 'accorded such immunities from immigration restrictions or alien registration'[94]. Considering the full gamut of rights and freedoms characteristic of the common market, and particularly migration rights, the 1967 Treaty was substantially lacking in this aspect.

The new EAC Treaty, true to its comprehensiveness, provides for the free movement of factors of production. Additionally, the Common Market Protocol contains elaborate provisions on the free movement of persons, including workers; the rights of residence and establishment, and free movement of other factors of production as shall be seen in the next chapter.

3.5 The EAC and community citizenship

What may not have changed much between the old EAC regime and the current one is the notion of community citizenship. Although the term 'East Africans' has been much in usage even with reference to the old EAC regime, the concept of citizenship was never adopted in the 1967 Treaty. Considering the objectives of the old EAC, it is plausible that the erstwhile Treaty never envisaged, let alone embraced the concept of community citizenship. This could also partly be explained by the fact that it was in actual sense a 'Treaty for East African Co-operation' and as such supranationality was never its objective. Its focus on trade integration was too narrow to allow for such a broad concept as community citizenship. The term 'citizen' was not defined in the 1967 Treaty and the only mention made thereto was with reference to a

[93] A M R Ramolefe & A J G M Sanders 'The structural pattern of African regionalism' (1972) 5 *The Comparative and International Law Journal of Southern Africa* 171.
[94] Ibid at 175; see also the 1967 Treaty Article 3.4 para (b).

'citizen of a Partner State'[95]. If anything, the meaning attached to 'citizen' under the 1967 Treaty was unambiguously with regard to the ordinary nation-state citizenship.

The current EAC Treaty does not define the term 'citizen' although it makes reference to 'national of a Partner State', which is actually reminiscent of the old Treaty. From this viewpoint, it seems like nothing much has changed under the current order. However, as shall be argued in the next chapter, the current EAC dispensation favours to a greater degree the adoption of the concept of community citizenship, more so as integration deepens and advances closer to the phase of a political federation.

3.6 Chapter conclusion

The chapter has provided some insights into the historical, geo-political and socio-economic context of the EAC, dwelling upon some of the unique and more progressive features in its current constitutional framework. Despite the many challenges it faces with regards to economic, political and social dynamics, the EAC has made significant strides, particularly with the EAC Treaty which is more comprehensive, broad-based and far-reaching.

There is no gainsaying that EAC integration is mainly driven by economic objectives. This is further evidenced by the fact that the EAC Treaty is considered a regional trade agreement registered with the WTO. It is therefore appropriate in some, if not most, circumstances to consider it as falling absolutely under the international economic and trade law regime. This would however be an incomplete and narrow categorisation of the EAC whose objectives go beyond trade and economic integration. From the above discussion, it is clear that the EAC Treaty is no mere trade agreement, but serves as a constitutional document for the EAC. Asides from its broad objectives and principles, it creates a regional organisation with a governance structure based on the principle of separation of powers, in imitation of what pertains in national jurisdictions. It is the constitutional instrument that lays the ground for the envisaged political federation, the ultimate objective of the EAC. Consequently, the democratic values, including the rule of law and human rights, which constitute some of the fundamental and operational principles of the EAC, become highly significant in its integration process.

[95] The 1967 Treaty Articles 3.4 para (b), 57.2 & 83 which contain a reference to 'citizen' speak specifically of a 'citizen of a Partner State'.

Within this context, migration rights have received a significant amount of attention. This development may perhaps be a recognition of their centrality in the economic integration trajectory or common market phase; or perhaps the EAC States have awakened to the fact that migration rights are one way of propelling the achievement of its integration objectives on all levels, that is, social, economic, cultural, and political[96]. In any case, the EAC's objectives and the general tone of the Treaty may be seen to set a context that capitalises on the hybridity of migration rights. The following chapter entails a detailed discussion of the EAC regime on migration rights as elaborated in relevant EAC law.

[96] Owing to the primarily legal-doctrinal methodological approach of this research, it does not delve into the reasons for an elaborate provision on migration rights within the EAC framework.

CHAPTER FOUR
ANALYSING THE EAC MIGRATION RIGHTS REGIME: THE EAC TREATY AND COMMON MARKET PROTOCOL

4.0 Introduction

The EAC Treaty provides for the free movement of factors of production, including the free movement of persons, labour, services and the rights of establishment and residence. These are in turn elaborated upon in the Common Market Protocol (CMP), the most authoritative instrument on migration rights in the EAC. This chapter presents provisions of migration rights under EAC law and the obligations imposed on the Partner States to ensure that these rights are enjoyed by all the intended beneficiaries, for the realisation of the Community's objectives. The provisions as presented in the CMP seem to focus more on formal procedures rather than the substantive elements of the rights, which might be an indication of the nascence of the EAC and the migration rights regime as a whole.

The chapter also highlights the ambiguity in the definition of 'citizen' as defined and applied by the EAC law. It is argued that the concept of 'community citizen' in the EAC is implied rather than explicit and that there is need for the Community law to be specific and comprehensive in defining a 'community citizen'. This would be more in consonance with its ultimate objective of establishing a political federation.

Finally the chapter discusses some inherent shortcomings within the EAC migration rights regime and the community citizenship concept, in which they fail to reflect some of the realities within the region. These shortcomings are merely highlighted, but would necessarily benefit from further research.

4.1 Migration rights in the EAC Treaty

One of the operational principles of the EAC, necessary for the attainment of its objectives is '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 technology'[1]. The free movement of goods, labour, capital and other factors of production is, of course, a *sine qua non* for a common market, one of the four phases of EAC integration. The establishment

[1] EAC Treaty Article 7.1 para (c).

of the EAC common market is provided for under Article 76.1 which emphatically stipulates that within the common market, 'there shall be free movement of labour, goods, services, capital, and the right of establishment'. Suffice to note that this Article comes under the chapter of the EAC Treaty entitled 'Co-operation in Trade Liberalisation and Development', which is basically centred on trade related aspects of integration. This placement emphasises the EAC common market as a key phase of economic integration aimed at bolstering trade among the Partner States. Hence, what Article 76.1 provides for is the free movement of factors of production, in a purely economic sense. Therefore, the provisions of Article 76.1 are narrower than the operational objective, which although still trade and economic focussed, envisages, in a broader sense, free movement of persons, information and technology in addition to the Article 76.1 factors of production. It is a reasonably compelling argument that the EAC common market aims at enhancing trade and/or economic integration which is only but one aspect of EAC integration, and so the free movement provisions under Article 76 are essentially 'market freedoms'. Moreover, Article 76.1 does introduce the right of establishment, although it makes no mention of the right of residence.

Article 76.1 notwithstanding, the EAC Treaty in chapter seventeen specifically provides for 'Free Movement of Persons, Labour, Services, Right of Establishment and Residence'. Specifically, Article 104 lays the foundation for migration rights provisions within the EAC legal framework. When compared to Article 76.1, the provisions of Article 104 are much broader, more comprehensive and more reflective of the broad objectives of the EAC Treaty.

Article 104.1 provides:

> [T]he 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.

In order to ensure the realisation of the stated migration rights, Article 104.3 provides for some of the measures that the Partner States should put in place and these include: easing border crossing by citizens of the Partner States; maintaining common standard travel documents for their citizens; effecting reciprocal opening of border posts, maintaining common employment policies, programmes and legislation, among others.

Despite these implementation provisions of Article 104, it fails to specifically mention the harmonisation of (im)migration laws which is necessary for establishing a uniform EAC free movement of persons regime. Instead, and much in tune with Article 76, it emphasises more

the harmonisation of the labour related aspect of migration rights. However, for purposes of this research, which is not specifically on free movement of labour, free movement of workers shall be discussed together with free movement of persons, save for instances where a separate discussion of either is deemed appropriate.

Both Articles 76 and 104 envisage the conclusion, respectively, of a Protocol on the Common Market[2], and a Protocol on the Free Movement of Persons, Labour, Services and the Right of Establishment and Residence[3], to give effect to their provisions. The EAC Protocol Establishing the Common Market (hereinafter, the Common Market Protocol or CMP) is presently in force, and it incorporates the requirements of the latter Protocol hence negating its need. It is actually explained in the preamble of the Common Market Protocol that the EAC Council of Ministers decided to conclude one protocol covering the provisions of both Articles 76 and 104 of the EAC Treaty[4]. Consequently, the main objective of the EAC common market is the 'realisation of accelerated economic growth and development through the attainment of the free movement of goods, persons, labour, the rights of establishment and residence, the free movement of services and capital'[5]. The Common Market Protocol is thus the core EAC instrument that details out the specificities of migration rights in the EAC. Suffice to note that the CMP, owing to its provisions on the free movement of services[6] and to some extent the right of establishment, is notified with the WTO under GATS Article V.7(a)[7] as an agreement liberalising trade in services. However, since the free movement of services does not exactly fall into the thesis definition of migration rights, a discussion on this aspect of economic and trade law lies outside the scope of this thesis.

[2] EAC Treaty EAC Treaty Article 76.4.
[3] EAC Treaty Article 104.2.
[4] CMP preamble para. 4. The long title of the Protocol likewise notes that the Protocol is 'made pursuant to Articles 76 and 104 of the Treaty'.
[5] Ibid para 6.
[6] CMP Articles 16-23.
[7] The Article provides for notification of regional trade agreements to the Council for Trade in Services. This notification is also an obligation under the CMP Article 56.2. Important to note is that with respect to the provisions on free movement of services as laid down in the CMP, the latter borrows heavily from the GATS provisions. For an elaborate discussion on how the CMP incorporates the GATS see WTO 'Factual presentation: economic integration agreement East African Community Common Market (services)' *Report by the EAC Secretariat to the WTO Committee on Regional Trade Agreements* available at rtais.wto.org, accessed on 24 April 2017.

4.2 Migration rights under the EAC Common Market Protocol (CMP)

Article 2.4 of the CMP lists the gist of the Protocol as including provisions on: the free movement of persons, the free movement of labour, the right of establishment and the right of residence. For the attainment of these freedoms and rights, Article 5.2 provides for measures to be undertaken by the Partner States. These measures which elaborate upon those enumerated in Article 104.3 of the EAC Treaty include: i) easing cross-border movement of persons and eventually adopting an integrated border management system; ii) removing restrictions on movement of labour, harmonising labour policies, programmes, laws, social services, providing social security benefits and establishing common standards and measures for association of workers and employers, establishing employment promotion centres and adopting a common employment policy, and; iii) removing restrictions on the right of establishment and residence of nationals of other Partner States in their territory[8].

With regard to migration rights, the CMP specially provides for them and the obligations of Partner States under various Articles as follows: free movement of persons (Articles 7-9); free movement of workers (Articles 10-12); right of establishment (Article 13); and right of residence (Article 14). The implementation of each of these freedoms and rights is provided for in respective regulations that are annexed to the CMP. The CMP and its annexes form an integral part of the EAC Treaty[9]. The presentation that follows is of each of the various migration rights as provided for in the CMP and the respective regulations.

4.2.1 Free movement of persons

Article 7 of the CMP provides for the free movement of persons who are nationals of Partner States within the EAC. The free movement of persons within the EAC is based on the principle of non-discrimination[10] whereby nationals of other Partner States should enjoy the right to free movement in a host Partner State on equal standing with its nationals. Consequently, EAC Partner States are obliged to ensure free entry of each other's nationals into their respective territories without a visa; to ensure their free movement within the State and to allow them to stay on the territory of the State for the period stipulated; and to allow them free exit without

[8] CMP Article 5.2 paras (b-d).
[9] EAC Treaty Article 151.4; CMP Article 1 defines Treaty to mean the EAC Treaty and any annexes and protocols thereto, while Article 52 specifically provides that annexes to the CMP are an integral part of the CMP.
[10] CMP Article 7.2 and Article 3.2 para (a) provide for the principle of non-discrimination within the EAC on grounds of nationality.

restriction[11]. Restrictions on the free movement of persons may only be applied by a Partner State on grounds of public policy, public security or public health[12].

For purposes of ensuring uniformity of implementation of the provisions of Article 7 among the Partner States, regulations on the free movement of persons were passed[13]. These regulations apply to nationals of a Partner State who travel to another Partner State for purposes of visiting, seeking medical treatment, transiting, study and any other lawful purpose other than as a worker or self-employed person[14]. Citizens moving in between Partner States are required to use legally designated entry and exit points and also to comply with the established immigration procedures of a Partner State[15]. At such designated entry or exit points, a citizen is required to produce a valid 'common standard travel document or a national identity card (ID)', and to 'declare all information required for entry or exit'[16]. Once this is complied with, the citizen shall be issued with a pass to enter and stay on the territory of the host Partner State for a period of up to six months[17]. This period may be extended upon application by the citizen with justification for a longer stay[18].

The regulations do not spell out the specific or detailed measures that all of the Partner States must implement to actualise the free movement of persons, but they provide guidelines of generalised areas of action in accordance with Article 104.3 of the EAC Treaty and Article 5.2 of the CMP. These include: easing of border crossing for citizens of the Partner State; reciprocal opening of border posts; manning of border posts for twenty four hours; the necessary infrastructure and standards for border management; and harmonisation of immigration procedures[19]. Although the regulations mention the need to harmonise immigration procedures, it does not mention harmonisation of immigration laws of Partner States. This could partly be due to the fact that regulation of migration is one of the contentious areas in which States retain significant control and may not readily cede their sovereignty, not even for integration purposes.

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[11] Ibid Article 7.2.
[12] CMP Article 7.5.
[13] The East African Community Common Market (Free Movement of Persons) Regulations, Annex I to the CMP.
[14] Ibid regulation 4 paras (a-e).
[15] Ibid regulation 5.1.
[16] Ibid regulation 5.2 paras (a-b).
[17] Ibid regulation 5.3.
[18] Ibid regulations 5.4 & 5.5.
[19] Ibid regulation 8.

It is also worth noting that the regulations do not provide for denial or cancellation of passes as the regulations on other migration rights do. Probably because, the passes are for a short term compared to the passes and permits issued under the other migration rights provisions.

As regards implementing the provisions of free movement of persons within the EAC, the visa requirements for citizens of the Community were abolished in all the Partner States. One only requires a valid national passport to travel within the EAC. Of recent, the Governments of Kenya, Rwanda and Uganda have accepted the use of valid national IDs in lieu of passports as valid travel documents by their nationals moving in between these Partner States. The Government of Tanzania has categorically refused to recognise national IDs as valid travel documents, while the Government of Burundi is also still quite hesitant.

Furthermore, in the spirit of facilitating free movement of persons, an East African Passport was officially launched in 1999. Every national of an EAC Partner State is entitled to the EAC passport upon application and payment of a fee of ten US dollars ($10)[20]. The EAC passport is not yet widely used throughout the Community. This could be due to the fact that it is used in parallel with national passports which have international recognition and yet the EAC passport is only recognised within the EAC[21]. Hence national passports are more valuable than the EAC passport. Additionally, the recognition of national IDs as travel documents might prove to be more convenient and thus further discourage citizens from acquiring an EAC passport.

Travel documents aside, citizens of EAC countries are also required to fill in immigration forms at the border posts, just like any other foreigners entering and exiting any of the EAC Partner States. These immigration forms have been harmonised throughout the Community.

Upon close scrutiny, it seems like the provisions on free movement of persons as laid down in the CMP are more concerned about harmonising and easing formalities at the border posts, and not so much as granting free movement as may be understood in the sense of intra-state free movement. In other words, save for less requirements when entering another Partner State, EAC citizens still have to go through virtually the same procedures as other foreigners. Hence, movement of EAC citizens within the EAC cannot be said to be exactly free as it is still subject

[20] http://eac.int/travel/index.php?option=com_content&view=article&id=112-eapassport&catid=42-travelling-in-ea&Itemid=78. The fees too are bound to change with the adoption of an e-passport- http://www.theeastafrican.co.ke/news/EAC-to-start-issuing-electronic-passport/-/2558/2398648/-/q76opa/-/index.html accessed on 11 December 2015.
[21] Plans for the EAC passport to be internationally recognised are still underway.

to some regulation and bureaucratic procedures. When compared to, say, free movement of EU citizens within the Schengen area, the term 'free' movement within the EAC might seem like a misnomer.

Furthermore, free movement of persons (other than workers and self-employed persons) is technically not correlated with the right of residence in the EAC legal framework. Citizens of the EAC who move to another Partner State for purposes other than work or business as self-employed persons may stay on the territory of the host Partner State for up to six months and are not entitled to residence permits, but passes. This analysis shall be expounded upon under the section on the 'right of residence'.

In effect, what free movement of persons within the EAC entails is the right of citizens of Partner States to freely enter, stay and move in the territory of the host Partner State, and to freely exit the territory of any Partner State, subject to the administrative and immigration procedures of the host State. Compared to international human rights law, the EAC free movement of persons regime attempts to extend the guarantee of free movement, previously a preserve of only nationals of a State, to all citizens of the EAC Partner States. But then again, not exactly to the same extent, since border posts and immigration procedures are still significant under EAC law and yet they would be considered as barriers to free movement under international human rights law, if they were to be applied within a State territory. Consequently, EAC law may be said to guarantee EAC citizens protection from arbitrary denial of entry and exit as well as costly migration costs, but does not exactly attempt to protect them against administrative and bureaucratic immigration procedures as EAC citizens. Hence, they may still be denied entry or deported in the course of exercising their freedom of movement under Community law as illustrated in the *Mukira Muhochi* case (see below, chapter five). In the event of this happening, Community law then serves to augment the international human rights law position of one having a right to emigrate but not to immigrate.

4.2.1.1 Free movement of workers

In addition to the provisions on free movement of persons, the EAC Treaty and the CMP specifically provide for the free movement of workers who are nationals of Partner States within the EAC. A worker is defined in Article 1 of the CMP as 'a person who performs services for and under the direction of another person in return for remuneration'. Article 10 of the CMP emphasises non-discrimination of nationals of Partner States in relation to

employment, remuneration and other conditions of work and employment[22]. Key among the provisions on the movement of workers are the guarantees to 'move freely within the territories of the Partner States', and to 'stay on the territory of a Partner State for the purpose of employment'[23]. Workers are also entitled to labour protection without discrimination on grounds of nationality, and so the rights to freedom of association and collective bargaining, the right to social security, among others, apply equally to nationals of other Partner States and nationals of the host Partner State[24]. The CMP also provides for the right of a worker to be accompanied by a spouse and a child, who may also be entitled to be employed or engage in any economic activity as self-employed persons[25]. Hence, the worker's right to free movement is in effect extended to his or her spouse and children.

Free movement of workers is subject to restrictions on grounds of public policy, public security or public health[26]. There is a further restriction on employment of nationals of other Partner States in the public service of the host Partner State save for where the national laws of a Partner State permit[27].

In order to realise the free movement of workers, the Partner States are obliged: i) not to apply national laws or administrative procedures whose effect is to deny citizens of other Partner States employment that has been offered[28]; ii) to harmonise their labour laws, policies and programmes in order to facilitate the free movement of labour[29], and iii) to harmonise their national social security policies, laws and systems to provide for self-employed persons who are citizens of other Partner States[30].

The regulations on free movement of workers[31] aim to ensure uniform implementation among Partner States of the provisions of Article 10 of the CMP[32]. A citizen moving to work in another EAC Partner State is required to present a passport or national ID as well as a contract of

[22] CMP Article 10.2.
[23] CMP Article 10.3.
[24] CMP Article 10.3 paras (e-f), Article 10.7 and Article 10.9.
[25] CMP Article 10.5.
[26] CMP Article 10.11.
[27] CMP Article 10.10.
[28] CMP Article 10.9.
[29] CMP Article 12.1.
[30] CMP Article 12.2.
[31] The East African Community Common Market (Free Movement of Workers) Regulations, Annex II to the CMP.
[32] Ibid regulation 2.

employment, and any other information that may be required at the immigration point[33]. The worker is then issued a pass valid for six months pending application for and issuance of a work permit which must be applied for within fifteen days of arrival in the host Partner State[34]. Where the applicant's employment is for a period not exceeding ninety days, the applicant will only be issued a special pass[35]. For employment exceeding ninety days, the applicant, upon meeting all requirements, shall be issued with a work permit valid for an initial period of two years renewable, but the duration of the work permit should not exceed the duration of the contract of employment[36].

The spouse and child of the worker only need to present a valid travel document and any other information required at the immigration point, upon which they are issued with a six-month pass. The spouse and child should apply for a dependant pass, which if issued shall be in accordance with the duration of the worker's work permit[37]. Should the spouse or child of the worker obtain employment in the host Partner State, they too should apply for their own work permit[38].

The regulations provide for the denial and the cancellation of a work permit. In the case of a denial, the affected worker may appeal the decision according to the Partner State's laws. Where the worker does not appeal or where the appeal is rejected, he or she and his or her family will have to leave the country[39]. In the case of permit cancellation, the worker is given thirty days, depending on the reason of cancellation, either to regularise his or her status, or to leave the country[40].

The regulations additionally oblige Partner States to avail information on job vacancies; provide equal treatment in employment to all citizens of the Community, and ensure that their rights are equally upheld[41].

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[33] Ibid regulation 5.2.
[34] Ibid regulations 5.4 & 6.1. Under regulation 6.3 a person already in the territory of a Partner State may secure employment in which case he or she is required to apply for a work permit within fifteen days of securing employment.
[35] Ibid regulations 6.4 & 6.5.
[36] Ibid regulations 6.7 & 6.8.
[37] Ibid regulations 5.5 & 9.1.
[38] Ibid regulation 9.2.
[39] Ibid regulation 7.
[40] Ibid regulation 8.
[41] Ibid regulations 12 & 13.

As discussed in chapter two of this thesis, for purposes of realising the aspirations of the Community law with regard to free movement of workers it is important that all laws that promote the free movement of labour such as the labour laws, taxation laws, social security etc. are harmonised[42]. In this regard, the CMP and the regulations on the free movement of workers aim to ensure such harmony and uniformity. As to whether the EAC Partner States are actually fulfilling their obligations or making considerable efforts to conform their laws, policies and practices to these norms is a matter warranting further exploration[43].

Overall, the provisions on the free movement of workers under the EAC framework are more detailed and elaborate compared to those on the free movement of persons. Apparently provisions on free movement of workers go beyond prescription of uniform migration formalities to more substantive guarantees of equal treatment of migrant workers and members of their families. The possible implication could be that economically active EAC citizens enjoy better migration rights guarantees than those that are not economically active- an indication of the predominance of the economic rationale for migration rights in the EAC.

4.2.2 Right of establishment

The right of establishment is provided for in Article 13 of the CMP. This right applies to both natural and legal persons (corporations and firms), as discussed earlier in chapter two. The right of establishment entitles a 'national of a Partner State to take up and pursue economic activities as a self-employed person, and to set up and manage economic undertakings in the territory of another Partner State'[44]. Such self-employed persons are also entitled to join the social security scheme of a host Partner State in accordance with its laws[45], as well as to join professional or trade organisations on equal footing with nationals of the host Partner State[46]. The right of establishment is also in accordance to GATS Mode 4 on movement of natural persons

[42]Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others* [1995] ECR I-4921 para 94; Case C-224/02 *Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I-5763 paras 31 & 35.

[43]This research shall not go into such detail as the immensity of the work on free movement of workers can only be adequately covered in a separate research. For more on labour legislation among EAC countries, see paper by Flora M Musonda 'Migration legislation in East Africa' 2006 *International Migration Papers 82*.

[44] CMP Article 13.3 para (a).

[45] CMP Article 13.3 para (b).

[46] EAC Regulations on the right of establishment regulation 12, see below note 48.

supplying services. Hence the relevant CMP provisions have to comply with the EAC Partner States' GATS commitments[47].

According to the regulations on the right of establishment[48], a national of a Partner State seeking to enter another Partner State as a self-employed person only need present a valid passport or national ID and declare all information required at the point of entry[49]. Just like any other East African exercising his or her freedom of movement. Following this, he or she and any accompanying members of their family shall be issued a six-month pass[50] pending issuance of a work permit which must be applied for within thirty days from the date of entry[51]. The application for the work permit must be supported by, *inter alia*, proof of licence or any other permission necessary for the purpose of the establishment; proof of sufficient capital and other resources for the purpose of establishment; and proof that the applicant is engaged in the activity for which he or she has been licensed or given authority for[52]. The applicant may then be issued with a work permit equal in duration to the licence or permission granted for the establishment[53].

Similar provisions apply with regard to the denial and cancellation of the work permit[54] as those discussed above under the regulations on the free movement of workers.

The right of establishment is to be realised progressively in accordance with the schedule of the progressive liberalisation of services[55]. The EAC Council of Ministers is, however, responsible for overseeing the removal of restrictions to the right of establishment in all Partner States[56]. It is also responsible for approving the harmonised classification of work permits, forms, fees and procedures, both for the right of establishment and the right of residence[57].

Since 2009 when the CMP and its regulations came into force, there does not seem to be much progress made in implementing them. The liberalisation of services and realisation of other

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[47] A detailed presentation on how the EAC complies with the relevant GATS commitments can be found in WTO 'Factual Presentation' op cit note 7 at 8-15.
[48] The East African Community Common Market (Right of Establishment) Regulations, Annex III to the CMP.
[49] Ibid regulation 5.2.
[50] Ibid regulations 5.3 & 5.4.
[51] Ibid regulation 6.1.
[52] Ibid regulation 6.4.
[53] Ibid regulations 6.5 & 6.9.
[54] Ibid regulations 7 & 8.
[55] Ibid regulation 10.1. The East African Community Common Market Schedule of Commitments on the Progressive Liberalisation of Services is Annex V to the CMP.
[56] Ibid regulations 10.3- 10.6.
[57] Ibid regulation 6.10. Also regulation 6.5, EAC Regulations on the right of residence.

aspects of the right of establishment seem to be taking a rather slow course. One commentator dissatisfied with the progress of implementing these provisions of the CMP observed that:

> … nationals of EAC partner states are still subjected to lengthy and often frustrating procedures of acquiring work permits. The five partner states (Burundi, Kenya, Rwanda, Tanzania, and Uganda) still have different policies and procedures of acquiring work permits. The classification structure, application documents and fees required are all different. This has further complicated the administration of work permits and further prevented East Africans from enjoying the benefits of a common market[58].

By November 2014, at a meeting of the Sectoral Council of Ministers responsible for EAC Affairs and Planning, it was still noted that the provisions on work and residence permits for citizens of the Community had not yet been harmonised as envisaged[59]. What pertains in the various EAC countries shall be further explored in chapter six below.

The overriding principle in the implementation of the right of establishment is that of non-discrimination on grounds of nationality[60], or equality of treatment. Hence, nationals of other Partner States who wish to engage in business as self-employed persons should be accorded equal treatment as nationals of the host Partner State as they are exactly in the same situation[61]. States are therefore obliged to remove all legal and administrative obstacles to the right of establishment[62], more so if they have an unjustified discriminatory effect against nationals of other Partner States. Differences in treatment will only be justified where there are lawful and objective justifications[63].

Article 13.10 of the CMP provides that '[t]he provisions of this Protocol shall not prejudice the application of national laws and administrative procedure and practices providing for special treatment for third parties accorded by individual Partner States on grounds of public policy, public security or public health'. The provision seems to suggest that differential treatment on the basis of nationality is acceptable if it is justified under the specified grounds (public policy, public security or public health). If this is the case, such differential treatment among citizens of the EAC would fall squarely within the 'lawful and objective justification criteria' applicable

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[58] Andrew Luzze 'EAC states should harmonise work permits' *Daily Monitor* 2 July 2014.
[59] Gahiji 'EAC legal team urged to harmonise regional work, residence permit rule' *News of Rwanda* 4 November 2014.
[60] CMP Article 13.2.
[61] See discussion in chapter two section 2.4 above.
[62] CMP Article 13.11; regulations 10.2, 10.3 & 10.4 EAC Regulations on the right of establishment.
[63] See Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

to the right of establishment. What is, however, more confusing is the reference in Article 13.10 to 'third parties'. Under Article 1 of the CMP, 'third parties' are defined as 'foreign countries or persons'. Whether the term 'foreign' is in relation to the Community as a whole, or to the individual Partner States, it is not quite clear. An almost similar provision with regard to the right of residence refers to 'citizens of the other Partner States'[64] and not 'third parties'. It would therefore seem that the intention of Article 13.10 was to make provision for special treatment of citizens of other Partner States and not third parties in the sense of persons from outside the Community. An interpretation which deems 'third parties' as those foreign to the EAC might render Article 13.10 either quite absurd or rather misplaced, unless it is used in a sense that takes cognisance of the most favoured nation principle under GATS Article V. This is one of the provisions that would greatly benefit from judicial interpretation.

On the whole, the provisions on the right of establishment under the CMP seem to capture the gist of the normative content of the right as discussed in chapter two. What remains to be seen is whether EAC citizens are actually benefitting from these provisions in the various Partner States. This shall be explored subsequently in chapter six.

4.2.3 Right of residence

Article 14 of the CMP provides for the right of residence. Under the CMP, the right of residence is available only to citizens of other Partner States who are workers or self-employed persons, and their spouses, children or dependants[65]. All such persons who meet these requirements shall be issued with a residence permit[66].

The regulations on the right of residence[67] once more emphasise the categories of persons to which they apply, that is, a worker, a self-employed person, and their spouse, child or dependant[68]. A work permit is therefore one of the required documents that should support a residence permit application[69]. Similarly, an applicant for a dependant pass (the spouse, child or dependant) must present, *inter alia*, a copy of the work permit or residence permit of the worker or self-employed person' and 'a document proving the relationship with the worker or

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[64] CMP Article 14.6 on the right of residence provides: 'The provisions of this Article shall not affect any provisions of national laws, administrative procedures and practices of a Partner State which would be more favourable to citizens of the other Partner States'.
[65] CMP Articles 14.1 & 14.2; regulation 4, EAC Regulations on the right of residence.
[66] CMP Article 14.3.
[67] The East African Community Common Market (Right of Residence) Regulations, Annex IV to the CMP.
[68] Ibid regulations 5.1, 6.2 & 8.
[69] Ibid regulation 6.3.

self-employed person'[70]. The duration of the residence permit or dependant pass is determined by the duration of the work permit[71]. The renewal of a residence permit is, therefore, subject to the renewal of the work permit[72].

The CMP recognises that Partner States may, in accordance with their national laws and procedures, provide more favourable treatment to citizens of other Partner States[73]. One possible interpretation of this is that a Partner State may extend the scope of persons to whom they may avail the right of residence. Hence, the right of residence for EAC citizens, other than workers, self-employed persons and members of their families, is not exactly regulated by Community law, but is at each State's discretion. Likewise, the decision to grant permanent residence is solely within the remit of the individual Partner States[74].

The right of residence is also subject to limitations on grounds of public policy, public security or public health[75]. Where any of these grounds is applied, the affected persons will be expelled from the host Partner State[76]. A person may also be expelled if he or she breaches or fails to fulfil the conditions of the resident permit[77]. On the other hand, a person (including members of his or her family) shall be deported where he or she has been denied a permit and any resulting appeal has been rejected; where a permit or dependant pass has been cancelled; and where the affected person or persons have failed to leave the territory of the host State within the time specified by the competent authority[78].

It has been noted that the right of residence, under international human rights law, goes hand in hand with the right to free movement. EU law similarly recognises the right of residence as correlative to the free movement of persons. The right of residence under regional integration is understood to mean the right to settle anywhere within the territory of the Community. In the EAC, the right of residence apparently does not apply to all citizens of the Community. It is only those citizens of other Partner States who have been granted work permits, either as workers or self-employed persons, that are guaranteed the right of residence in the Community.

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[70] Ibid regulation 8.3 paras (b-c).
[71] Ibid regulations 7.1 & 7.2.
[72] Ibid regulation 7.6.
[73] CMP Article 14. 6.
[74] CMP Article 14.7.
[75] CMP Article 14.4.
[76] EAC Regulations on the right of residence regulation 11.1 para (a).
[77] Ibid regulation 11.1 para (b).
[78] Ibid regulation 12.

This could explain why in the sequential articulation of migration rights in the CMP and its annexes, the right of residence comes after the right of establishment and not after the free movement of persons as is usually the norm.

Comparing the right of residence in the EAC and in the EU, it is apparent that the scope of application of the EAC right of residence is more restrictive than in the EU where the right of residence applies to all citizens of the Union without the need for them to be economically active[79]. The EU law, however only grants such an unconditional right of residence to any EU citizen staying on the territory of another Member State for a period not longer than three months. For those EU citizens who are not economically active but wish to stay longer than three months, they must register for a registration certificate, which shall be granted upon proof that they have sufficient financial resources and comprehensive sickness insurance cover. In contrast, the EAC provides for a longer pass: citizens of other Partner States may stay on the territory of a host Partner State for a period not longer than six months, and such pass may be renewed where justifiable. Additionally, there is no requirement for non-economically active EAC citizens to prove sufficient funds or sickness insurance cover whilst exercising their freedom of movement within the Community.

The six-month pass issued to citizens of other EAC Partner States entitles them to *stay on* the territory of the host Partner State for that duration. This could be interpreted to mean that a right of residence is implicit within the six-month pass for EAC citizens who are neither workers nor self-employed persons nor members of their families, should they wish to stay for that long. This interpretation is even more plausible under human rights law, which underlies the EAC Treaty as one of its fundamental and operational principles. Therefore, while the right of residence of workers, self-employed persons and members of their families is expressly guaranteed in the CMP, that of EAC citizens that are not economically active is implied within their right to free movement. In any case the CMP gives Partner States leeway to implement national measures that may be more favourable to citizens of other Partner States[80]. It would therefore be worth looking into if any of the various Partner States issues residence permits

[79] Case C-200/02 *Kunquian Catherine Zhu, Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925; Case C-413/99 *Baumbast, R v Secretary of State for the Home Department* [2002] ECR I-7091 para 84.
[80] CMP Article 14.6.

(instead of six-month passes) to EAC citizens who are not economically active, and if so, under what conditions such permits may be granted.

4.3 Non-discrimination

Non-discrimination on grounds of nationality is one of the principles of the EAC common market[81]. There are a number of provisions of the CMP which emphasise this principle[82]. In fact the principle cuts across all the migration rights discussed above, save for the right of residence where there is no singular express provision guaranteeing non-discrimination. A possible explanation for this could be that the right of residence applies to persons who already benefit from the provisions on free movement of workers and the right of establishment. Non-discrimination for such persons would thus already be guaranteed in either category.

Moreover, the CMP is guided by the fundamental and operational principles stipulated in Articles 6 and 7 of the EAC Treaty. As these principles take into cognisance the African Charter on Human and Peoples' Rights (ACHPR) and 'other universally accepted standards of human rights'[83], the principle of non-discrimination as regards migration rights should be interpreted and applied in accordance thereto.

4.4 Limitations and conditions

All migration rights under the EAC regime are subject to limitations. The free movement of persons and workers, the right of establishment and the right of residence may all be limited on grounds of public policy, public security or public health. Whenever a Partner State imposes any of these limitations, it should notify other Partner States[84]. This provision, which immediately follows the limitation clause on all migration rights in the CMP, can be said to act as a check on what might be a Partner State's unilateral arbitrary and high-handed actions that would go against the spirit of the Treaty. In fact, the EACJ has held that the provision creates an obligation on a Partner State imposing a limitation to notify other Partner States accordingly, otherwise the Partner State would be in breach of its Treaty obligations[85].

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[81] CMP Article 3.2 para (a).
[82] Examples of provisions of the CMP that emphasise non-discrimination: Articles 7.2, 10.2, 10.3 para (c), 10.7, 13.2, 13.5, 13.6 and 13.11 para (e).
[83] EAC Treaty Articles 6 para (d) and 7.2 respectively.
[84] CMP Articles 7.6, 10.12, 13.8 & 14.5.
[85] *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda*, EACJ Reference No. 5 of 2011 paras 113-116.

The regulations on migration rights also require that citizens of other Partner States 'comply with the established migration procedures'[86] of the host Partner State. This provision not only confirms the sovereignty of each of the Partner States over migration matters, but it assumes that all Partner States have conformed their migration procedures to Community law requirements. For as long as the national procedures and laws referred to in the CMP are not brought into conformity with Community law nor harmonised among the Partner States, they may constitute a restriction on the migration rights of community citizens. This was clearly illustrated in the *Mukira Muhochi* case, which shall be discussed in detail in the next chapter.

Article 54 of the CMP, moreover, provides for the right of redress where one's rights and liberties as provided for in the Protocol have been infringed. Hence, a Partner States application of limitations may be challenged either in the national courts or in the EACJ.

Before delving into an in-depth analysis of the jurisprudence of the EACJ on migration rights, one of the pertinent issues that begs discussion is determining who the subjects of the migration rights in the EAC are. Although in the preceding discussions, the term 'community citizens' has been used, the EAC laws hardly use this term. The formulation favoured in the texts of the EAC laws is 'citizen or national of a Partner State'. Considering that the framers of the Treaty and its Protocols took such care to avoid using the term 'community citizen' or 'citizen of the Community', say as used in the EU law or even the ECOWAS law', does this mean that the concept of community citizen does not apply in the EAC? This may appear more like a mere technicality but it is an issue of crucial significance to migration rights.

4.5 Citizens of Partner States or community citizens? Nationalism versus community in the EAC

The EAC Treaty, the CMP and its annexes prefer to refer to the subject of migration rights as 'citizen or national of a Partner State'. In fact the term citizen under Article 1 of the CMP is defined to mean 'a national of a Partner State'. Accordingly, virtually all the provisions in the Treaty and the CMP wherever the word 'citizen' appears, it is qualified as 'citizen of the Partner State' or 'citizen of other Partner States'[87], as the case may be. The only exception in the CMP

[86] EAC Regulations on free movement of persons, regulation 5.1; Regulations on the free movement of workers regulation 5.1; Regulations on the right of establishment regulation 5.1.
[87] For example, EAC Treaty Article 104.1 & 104.3 paras (a & b) refer to Partner States and their citizens or citizens of the Partner States; CMP Articles 7.1, 7.2, 7.3, 8, 10, 12.2, 14 & 39 contain the phrase 'citizen of the [other] Partner State'.

seems to be Article 50.4 where the word 'citizen' is used in a way that is not so specific. Paragraph (b) of the Article provides for an annual review by the Council which shall 'include an assessment of the results achieved in the realisation and enjoyment of the freedoms and rights of citizens guaranteed under this Protocol'. Herein, 'citizen' could be understood in the broader sense of 'community citizens' (refer to discussion in chapter two) or it might be interpreted in a narrow and nationalistic sense denoted in the CMP definition of 'nationals of a Partner State'.

The definition and application of the word 'citizen' in the EAC's key instruments could suggest some hesitation on the part of the EAC States to fully embrace 'community citizenship' and all it entails. To this extent it could be argued that the new EAC has indeed inherited the nationalistic tendencies that were prevalent in the old EAC. However, the context of the EAC has changed and when one critically analyses the EAC instruments, and even looks beyond them, there is an undeniable reference to and understanding of the concept of EAC citizens or community citizens.

The definition of 'citizen' itself, as provided in the CMP could be interpreted as emphasising the derivative nature of community citizenship. That is to say that a 'community citizen' should be and is in fact a citizen or national of a Partner State. Conversely stated, a citizen or national of a Partner State is a community citizen. Going by this interpretation, the EAC definition of 'citizen' is in a way comparable with the EU Treaty which recognises every person holding the nationality of a Member State as a citizen of the Union. The only difference lies in the fact that in the EU instruments the phrase 'citizen of the union' is expressly used in various relevant provisions, which is not the case with the EAC instruments.

Moreover, reading the definition of 'citizen' in light of the objectives of the EAC Treaty favours the broader interpretation of community citizen. Two main objectives particularly stand out: first, the desire to strengthen social, cultural and traditional ties in order to promote a people-centred development; and second, the ultimate establishment of a political federation. While the first objective seems to presume some kind of bond among the East African peoples, a bond similar to that referred to in *Re Nottebohm*[88], the possibility of a federation justifies

[88] *Nottebohm case (second phase)*, Judgement of April 6th, 1955, I.C.J. Reports 1955. Refer to chapter 2 above section 2.7.1.

further the former objective, making the notion of a 'community citizen' more plausible than not.

The objectives and aspirations expressed in the EAC Treaty are further bolstered by other evidence which supports the applicability of this concept within the EAC. The EAC passport, for instance, could be said to provide *prima facie* evidence of EAC citizenship. At the very least, it demonstrates that there is a two-tiered citizenship within the EAC, that is the national citizenship validated by a national passport, and community citizenship validated by the EAC passport, although the latter is determined by the former.

Furthermore and despite of the absence of the term in virtually all EAC legal instruments, the pervasive use of the words 'East Africans', 'East African citizens' and even 'community citizens' renders them common parlance within East Africa. These terms are used in several documents emanating from the EAC secretariat[89], by a number of authors[90], but most notable of all is the EAC Draft Bill of Human Rights. In addition to using the term 'East Africans' in a couple of provisions[91], the Draft Bill provides for duties of individuals among which are: preserving and strengthening the national independence and territorial integrity of East Africa; preserving and strengthening social and regional solidarity in East Africa; and paying taxes imposed by law in the interest of the Community[92]. As discussed in chapter two, citizenship must be both formal or nominal and substantive. Substantive in the sense that one is a member of a polity in which one's status is defined by one's rights and obligations[93]. By providing for both rights and duties of citizens, the EAC Draft Bill of Rights, although not yet an official document of the Community and hence has no binding power, buttresses the applicability and

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[89] For example, *The EAC Development Strategy (2011/12-2015/16*) makes numerous references to 'East African People' or 'East Africans'- pp. 27, 30, 35, 37, 48 & 53. On p. 69 mention is particularly made of an 'East African citizenry'. The *Report of the Committee on Fast-tracking East African Federation (Wako committee report)* (2004) paras 62, 65 & 206 similarly make references to 'East Africans', 'citizens of East Africa', or 'people of East Africa'. The Secretary General's speeches usually contain the term 'East Africans'- see http://www.sg.eac.int/.

[90] For example, John Oucho 'Prospects of free movement in the East African Community' (2013) 3 *Regions and Cohesion* 116; Deng K Biong, 'Sub-regional legal instruments on international migrants' rights and their implementation mechanisms: the case of the East African Community' (2010) 39 *Africa Insight* 149-163; Korwa Gombe Adar 'Fast-tracking federation: a problematic dynamic?' in Rok Ajulu (ed) *A Region in Transition: Towards a New Integration Agenda in East Africa* (2010) 74-78; Kituo Cha Katiba *Citizenship and Identity Struggles in East Africa: Towards More Inclusive Policies and Practices* (2005) as cited in Oucho at 116 &121.

[91] The EAC Draft Bill of Rights Article 13.2 provides: 'All East Africans shall have the right and the opportunity to take part in the conduct of public affairs of the Community….' In similar vein Article 38.1 provides: 'All East Africans have the right to participate in the affairs of the Community….'

[92] EAC Draft Bill of Rights Article 43.4 paras (d-f).

[93] See chapter two section 2.7.1 above.

reality of a 'community citizen' in the EAC as the subject of the rights guaranteed under Community law.

The EACJ has not specifically addressed the concept of 'community citizen' as an issue arising in any of the cases before it. When referring to the subjects of the Treaty rights, the court usually sticks to the Treaty formulation of 'citizen of a Partner State'[94], save in one case where it actually used the term 'community citizens' to collectively refer to nationals of EAC Partner States[95]. While adjudicating on the limitation clause contained in Article 30.2 of the EAC Treaty, the EACJ juxtaposed the applicant's personal interest to prosecute his case with the interest of other 'citizens of the East African Community' to ensure legal certainty. It concluded that the importance of Article 30.2 was 'to balance the interest of the individual complainant against the collective interests of all the other *community citizens'* [96](emphasis added). It can thus be said that although not officially decided upon by the Court, the concept of community citizens or EAC citizens is one of which the court is consciously, or perhaps sub-consciously aware.

Bearing in mind the correlation between migration rights and community citizenship, the guarantee of these rights within the EAC presumably leads to the conclusion that the subjects of these rights are community citizens, and that any reference to 'citizen' as used in the Treaty should have a communalistic rather than a narrow nationalistic import. In fact, in a rather astonishing turn, the regulations on the free movement of workers provide for the obligation of Partner States to 'facilitate access to employment opportunities by *the citizens of the Community*'[97] (emphasis added). This rather unique provision presents a clear departure from the strikingly ubiquitous 'citizen(s) of a Partner State' formulation contained in the EAC Treaty and the CMP.

In light of the above arguments, it is highly probable that the definition of 'citizen' contained in the CMP could be interpreted in more than one way. One being the narrow nationalistic sense, and the other to mean 'community citizen'. However, if the narrow sense were adhered to, then the letter of the law would be at odds with the broader objectives and spirit of the Community. This discussion has in essence asserted that the subjects of migration rights within

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[94] *Mukira Mohochi* case supra note 85.
[95] *Attorney General of the Republic of Uganda and Attorney General of the Republic of Kenya v Omar Awadh and 6 Others*, EACJ, Appeal No. 2 of 2012.
[96] Ibid paras 51-52.
[97] EAC Regulations on the free movement of workers regulation 12.1.

the EAC are indeed community citizens, a term which though not admitted nor expressly used within the text of the Community law, is very much inferred. Such inference can aptly be summed up by the following observation by the EACJ:

> 'The Treaty also defines persons, formerly foreign nationals as between the individual EAC states prior to entry into force of the Treaty, as *nationals or citizens of Partner States,**(see: Article 1 of the Protocol)*** The Treaty accorded these persons wide ranging, preferential and superior treatment and rights in terms of movement, establishment, residence and working within the Partner States'[98].

4.6 EAC citizenship and migration rights: shortcomings and some practical dilemmas

In order to enjoy the migration rights under the EAC common market, one has to be a citizen or national of a Partner State. In most of the East African countries, the definition of 'citizen' or 'national' tends to be ethnocentric[99], whether overtly or in a nuanced manner. For instance, the Constitution of Uganda provides in its Article 10 for citizenship by birth for every person born in Uganda 'one of whose parents or grandparents is or was a member of any of the indigenous communities existing and residing within the borders of Uganda as at the first day of February 1926'. It goes on to provide that every person one of whose parents was a citizen by birth may also acquire citizenship by birth[100]. The law on nationality in Burundi, recognises nationality by birth where one's father is Burundian by nationality. This is regardless of whether one is born in or outside Burundi. A Burundian mother may pass on nationality to an illegitimate child or a child that has been repudiated by his or her father[101]. The Constitution of Kenya, in Article 13.2 provides that 'citizenship may be acquired by birth or registration',

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[98] *Mukira Mohochi* case supra note 85 para 48.
[99] Bronwen Manby *Struggles for Citizenship in Africa* (2009) 30-31; See also Francis Deng 'Ethnic marginalization as statelessness: lessons from the Great Lakes Region of Africa' in T Alexander Aleinikoff & Douglas Klusmeyer (eds) *Citizenship Today: Global Perspectives and Practices* (2001) 184, 189. He argues that citizenship in Africa is 'predicated on elements of ethnic and cultural affiliation', with the "tribe" as the salient element. Both Deng and Bronwen seem to agree that African concepts of citizenship are ethnocentric which may result into exclusion of some groups or communities that are not recognised as indigenous ethnic groups of that particular State. The role of ethnicity has been expounded upon in a working paper by the present author: Caroline Nalule 'The concept of community citizenship in the East African Community: the role of ethnicity' (A paper presented at a conference organised by the East African School of Diplomacy, Governance and International Studies at Uganda Martyrs' University Nkozi 15 April 2015).
[100] The Constitution of the Republic of Uganda, 1995 as amended.
[101] Loi No 1/013 du 18 juillet 2000 portant réforme du code de la nationalité, Laws of Burundi Section 3.

however, citizenship by birth does not necessarily mean *jus soli*- born on the soil, but rather that either one of one's parents is a citizen[102]. The Rwandan definition of citizenship too has undertones of ethnocentrism, but it could be said to be remedial as well: Article 7 provides for nationality by origin, that is, Rwandan origin- probably in attempt to restore the status of those Rwandans in exile who had previously been deprived of their nationality, hence the mention of specific dates between 1959 and 1994[103]. Of all the East African countries, Tanzania's definition of 'citizen' seems to be more inclusive, without nuances of ethnicity or emphasis on descent. Hence it might be seen as exceptional. The Tanzania law provides that citizenship may be acquired by birth by everyone born in Tanzania, but either of that person's parents should be a citizen[104].

The implications of an ethnocentric definition of citizenship is that persons who fall outside the legally recognised ethnic groups shall not be accepted or recognised as nationals or citizens regardless of how long they or their generations have been on the territory of that particular State. This results into statelessness.

The United Nations High Commissioner for Refugees (UNHCR) has highlighted some causes of statelessness as including: conflict of nationality laws which may affect children born abroad, especially where such laws emphasise *jus sanguinis* transmission of nationality; gender and ethnic discrimination; and administrative obstacles which usually take the form of bureaucratic procedures and official discrimination[105]. Although the number of stateless persons in East Africa is not known, the mentioned causes of statelessness are widespread in the region leading to a high probability that there is a considerable number of stateless persons and groups. For example the Nubians in Kenya were for a long time not recognised as nationals, a matter that was presented before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). The Committee found in favour of the Nubian children and recommended that the Kenyan government take all necessary measures to ensure that children of Nubian descent that were otherwise stateless acquired Kenyan nationality[106].

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[102] The Constitution of Kenya, 2010, Article 14.1 & 14.2.
[103] The Constitution of the Republic of Rwanda, 2003.
[104] The Tanzania Citizenship Act, 1995 Sections 5 & 6.
[105] UNHCR, *The State of the World's Refugees: In Search of Solidarity, 2012* 15-16, available at http://www.refworld.org/docid/5100fec32.html.accessed on 29 October 2015.
[106] ACERWC Communication No. 002/09, *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya*.

The East African countries also host a number of refugees some of whom originate from among the Partner States themselves. For instance Tanzania hosts refugees from Burundi, Burundi hosts refugees from Rwanda and vice versa[107]. A number of refugees of Rwandan origin have settled in other Partner States for a long period of time; some of these especially their children may not have citizenship either of the host State or the State of origin (although the Constitution of Rwanda seeks to remedy this). This presents a dilemma regarding the EAC definition of 'citizen', which rather than alleviate the problem only perpetuates it. Such persons are for all intents and purposes East Africans, their origin is indisputably an East African Partner State, but since they lack national citizenship they cannot be recognised as community citizens. Therefore they cannot exercise their migration rights despite belonging to the Community. This is one area that the EAC needs to address as it seeks to consolidate regionalism and establish a political federation.

Other groups of peoples that are of concern are the cross-border communities and the nomadic pastoralist communities within East Africa. The EAC 'citizen' definition may not necessarily adversely affect people belonging to cross-border communities if they are recognised as nationals of the Partner States where they belong. In fact regional integration might actually provide a solution to this colonial injustice. The migration rights regime under the CMP might, however, affect them. For the cross-border communities, national borders have never really existed. As Biong explains, these groups of people 'continue to maintain their historical identities in-tact and thus do not necessarily respect states' boundaries. They informally move across these boundaries at will, with a view to carrying out family businesses with their kin and kiths *[sic]*, who, as a result of the accident of political history, happen to be at the colonial wrong side of the border'[108]. The EAC free movement of persons provisions can be said to have formalised what was prior to informal, or to have legalised what was previously illegal. But this formalisation and regulation might not be seen in the same way as the affected communities. It might have bureaucratised or even made complex what was hitherto an easy-come-easy-go affair among these communities. Whether or not this is the case remains to be seen.

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[107] UNHCR, 2014 UNHCR Country Operations Profiles for Burundi, Rwanda and Tanzania available at http://www.unhcr.org/pages/49e45a6c6.html accessed on 29 October 2015.
[108] Biong op cit note 90 at 150. See also Oloka-Onyango, J. 'Who owns the East African Community?' a paper presented at a DENIVA Public Dialogue on the East African Community, held at Kampala, November 2005 cited in Biong 152-153.

Nomadic pastoralists exist in almost all EAC countries[109]. It is not exactly clear how the EAC migration rights regime deals with this special group of peoples. They are definitely not covered under the free movement of workers' provisions since they are not moving for purposes of employment. Neither are they covered by the right of establishment nor right of residence provisions since they are not setting up businesses nor seeking residence permits. They are also not moving goods, capitals or services to be covered under other common market provisions. They might probably be considered under the free movement of persons, but perhaps not! The regulations on the free movement of persons are quite clear as to whom they apply: visitors, students, those seeking medical treatment, those in transit, and those entering for any other lawful purpose. Would nomadic pastoralists qualify as persons entering for a lawful purpose? Probably not! Nomadic pastoralism as a way of life is characterised by movement or migration by groups in search of pasture for their livestock[110].The EAC instruments are silent on this issue and it is therefore hard to find where exactly these groups fit within the EAC migration rights regime. The EAC needs to find some solutions on how to accommodate the right to free movement of nomadic pastoralists within its laws, regulations and policies.

In light of the above discussion, migration rights within the EAC cannot yet be said to be applicable to all persons in the EAC, in the same way that 'community citizens' may not quite apply to all peoples of the East Africa. These can be deemed as technical flaws inherent in the Treaty and CMP, but which can be remedied to make the concept of community citizen all the more inclusive, and migration rights being applicable to all community citizens.

4.7 Chapter conclusion

Having looked at migration rights as provided for under EAC law, it remains unclear what their rationale is. On the face of it, it may seem quite obvious that their rationale and possible justification is essentially economic. This is so because, firstly, the CMP is the authoritative EAC document with regard to migration rights, giving the impression that migration rights of citizens of the EAC are tethered to the common market. Secondly, both the EAC Treaty and

[109] Examples of nomadic pastoralist groups include: the Karimojong of Uganda, the Pokot of Kenya, and the Barbaig in Tanzania.

[110] AU, *Policy Framework for Pastoralism in Africa: Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities* (2010) 4, available at http://www.achpr.org/instruments/policy-framework-pastoralism/ accessed on 31 October 2015.

CMP are registered with the WTO as regional trade agreements under the GATT and GATS (for purposes of this thesis, the GATS is of more relevance). This would imply that they fall under the realm of international economic law, which they do, but only in part[111]. The GATS only deals with trade in services (which includes labour integration agreements), but these are just some of the aspects of migration rights as discussed above. Hence the economic law coverage of migration rights is restricted. Even then, economic law focuses mainly on the liberalisation aspect of trade in services and not at the substance of the rights. Hence EAC law provides more substance to the rights than could probably be found under the GATS.

If the EAC were a purely an economic integration project, it would make perfect sense for the migration rights to have a purely economic rationale. But since it is not, then the placement of all migration rights in the CMP could be delimiting. The placement of migration rights, in particular the free movement of persons and the right of residence, in the CMP not only narrows their applicability, but also suggests that their existence is dependent on the EAC common market. Should the common market fail or the CMP be abrogated, these rights might also cease to be. This suggestion, however, would be incongruous with the Community objectives of 'strengthening and consolidation of the long standing political, economic, social, cultural and traditional ties and associations between the peoples of the Partner States', and the establishment of a political federation[112].

The EAC Draft Bill of Rights, though not yet adopted, provides an insight into what would be a more comprehensive and far-reaching approach to migration rights within the EAC. Article 12 of the Draft Bill provides for the right of every person: 'to move freely throughout East Africa and to reside and conduct business in any part of East Africa; to enter, leave and return to, East Africa; and to a passport or other travel document'. This provision fits more into the wide-ranging objectives of the EAC – migration rights are presented as fundamental rights and freedoms of all persons in the Community, and more specifically, all citizens of the Community. When juxtaposed with the CMP provisions on migration rights, Article 12 of the Draft Bill of Rights goes beyond the economic rationale of migration rights as presented in the

[111] The EAC Treaty only mentions the WTO in its preamble to the effect that the EAC takes cognisance of the developments in the world economy as contained in the WTO agreement. However in Article 130.1 the Partner States undertake to honour their commitments in international organisations of which they are members. This includes the WTO, of which all EAC Partner States are members. Accordingly, the CMP in part incorporates the relevant provisions of the GATS in its provisions on free movement of services. See also above note 7 of this chapter.

[112] EAC Treaty Article 5.

CMP, and is much more reflective of citizens' rights in the context of a polity- in this case the envisaged EAC political federation.

Furthermore, the current definition of 'citizen' provided under EAC law is not only ambiguous, but also equivocal, in spite of the clear objectives of the Community. Thus, the EAC needs to adopt an unequivocal definition of 'community citizen', which is also comprehensive enough to reflect the reality of the various peoples that make up the EAC. In this sense, regionalism must be seen to transcend over nationalism, and this is what the EAC law should reflect in order to lay a sound normative foundation for the political federation.

It has also been noted that the migration rights provisions are focussed more on formalities than the substantive aspects of the rights. This is especially so with the provisions on free movement of persons which seem to regulate movement of EAC citizens rather than ensure free movement. A comparison was made between the EAC and the EU where movement of EU citizens is relatively freer. However, the circumstances pertaining to each region should be appreciated. In contrast to the EU, the EAC is relatively nascent; it is a less developed region with various peace and security concerns which may necessitate a more cautious approach. It is also less technologically developed, hence monitoring movement may be problematic. Nevertheless EAC citizens need to benefit more from the substance than the formalities of migration rights.

The next chapter attempts to examine and analyse how the EACJ, the judicial organ of the EAC, has interpreted and applied migration rights. Has it confined itself to applying these rights in a purely economic sense or has it adopted a human rights approach in its interpretation and application of migration rights?

CHAPTER FIVE
THE INTERPRETATION AND RATIONALISATION OF MIGRATION RIGHTS IN THE EAC: THE ROLE OF THE EAST AFRICAN COURT OF JUSTICE[1]

5.0 Introduction

This chapter follows up on the discussion from the previous chapter and seeks to analyse the interpretation and unfolding ideological conceptualisation of migration rights within the EAC, with particular attention to the role that is being prominently assumed by the East African Court of Justice (EACJ or 'the Court'). The chapter shall therefore examine jurisprudence of the EACJ, against the background of its jurisdictional confines, in order to assess how migration rights in the EAC are being rationalised. Are these rights perceived in a purely economic sense or as fundamental rights and freedoms of EAC citizens? Has the EACJ adopted a human rights approach with regard to migration rights or does it view them as purely 'economic or 'market freedoms'?

The EACJ's jurisprudence on migration rights is quite sparse. By end of 2014, it had only adjudicated one case, on the merits, that discusses aspects of migration rights of EAC citizens. That is the case of *Samuel Mukira Mohochi v The Attorney General of Uganda*[2]. This case which shall be discussed in detail in a separate section in this chapter does not touch upon all migration rights. The case only discusses the free movement of community citizens, but it nonetheless canvasses several other issues such as non-discrimination, a Partner State's sovereignty in managing migration as against its obligations under Community law; application of limitations on migration rights, and precedence of Community law over national law. The case is a landmark and it provides an indication on how the EACJ might view migration rights (free movement of persons, right of residence and rights of establishment) generally. It is argued herein that while the rationale for these rights in the EAC may not be a

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[1] A substantial part of this chapter has been re-written as an article, which has been accepted for publication and will appear in a revised form in *Journal of African Law* published by Cambridge University Press- Caroline Nalule 'Defining the scope of free movement of citizens in the East African Community: The East African Court of Justice and its interpretive approach' accepted for publication in *Journal of African Law*.

[2] *Mukira Mohochi* case, EACJ Reference No. 5 of 2011- see below section 5.2. There are a couple of other cases that touch on free movement, but these were not dealt with in substance. *Mbugua Mureithi wa Nyambura v The Attorney General of the Republic of Uganda and the Attorney General of the Republic of Kenya,* EACJ Reference No. 11 of 2011, a case that raised similar issues as those of the *Mukira Mohochi* case was dismissed on the grounds that it was filed outside the two-month limitation period. In *East African Law Society v The Attorney General of the Republic of Burundi,* EACJ Reference No. 1 of 2014, the issue was whether or not a ban prohibiting a Burundian citizen travelling out of his country had been issued in accordance with the laid down procedure. Hence it was more of a procedural than a substantive issue.

purely economic one, at the same time it is not one grounded in human rights. Rather the EACJ has devised a neutral ground that does not expressly endorse either of the rationales. Instead it perceives of migration rights as Treaty-guaranteed rights without much rationalisation on their theoretical basis.

Any court, in interpreting the law, may avail itself to a number of interpretative approaches or techniques. Conway[3] identifies several which include: i) the textual or literal meaning, which is based on the ordinary or technical meaning of the words; ii) teleological or purposive, which looks at the object and purpose of the legal instrument; and iii) historical or originalist, which looks at the intention of the framers[4]. Within these approaches, judges may in varying proportions rely on formal reasons (based on authoritative sources of law such as the Constitutions, Statutes, precedents on statutory interpretation, general principles of law etc.), and substantive reasons (based on moral, economic, social and political content and arguments)[5]. One of the contentions in this chapter is that the EACJ's interpretative approach is preponderantly textual based on formal reasons, to which end the term 'textual-formalism' shall be applied herein. Moreover, the use of the term 'formalism' has also been associated with judicial-restraint or caution as opposed to judicial activism or pragmatism[6]. In a formalist model, courts tend to strictly uphold the separation of powers, viewing their role as 'merely being to discern and apply -the "intent" of the legislature'[7]. Hence the courts tend to do less gap-filling in the exercise of restraint or caution. Accordingly, the use of the term 'textual-formalism' shall also connote judicial restraint or caution on the part of the EACJ. The textual-formalism approach could, *inter alia,* be due to the jurisdictional limits of the EACJ.

It is also argued that in the EAC, migration rights are definitely the linchpin of community citizenship, and that the latter concept may more or less be defined by the former. Hence, the role of the EACJ as well as national courts is critical for ensuring effective compliance with and protection of migration rights of citizens in the EAC.

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[3] Gerard Conway *The Limits of Legal Reasoning and the European Court of Justice* (2012) 19-21.
[4] There are other interpretation techniques he identifies such as consequentialist reasoning, evolutionary or innovative interpretation, and first versus second order justification.
[5] Robert Summers & Michele Taruffo 'Interpretation and comparative analysis' in D Neil MacCormick & Robert Summers (eds) *Interpreting Statutes: A Comparative Study* (1991) 498-499.
[6] Richard Posner 'Legal formalism, legal realism, and the interpretation of statutes and the constitution' (1986-87) 37 *Case Western Law Reserve Law Review* 180-181.
[7] William Eskridge 'Dynamic statutory interpretation' (1987) 135 *University of Pennsylvania Law Review* 1489-1490.

5.1 The East African Court of Justice (EACJ)

The EACJ is established under Article 9 of the EAC Treaty as one of the organs of the Community. Under Article 9.4, the EACJ, just like all the other organs and institutions of the EAC is mandated to act within the limits of the powers conferred by the Treaty. Accordingly, chapter eight of the Treaty provides for the EACJ, its role; composition, appointment, tenure and removal of judges; jurisdiction, powers and mandate, among others. The role of the Court is stipulated as ensuring the 'adherence to law in the interpretation and application of and compliance with' the Treaty[8]. In interpreting this provision, the EACJ has asserted itself as 'the final authoritative forum in matters of interpretation and application of the Treaty'[9]; and that despite any concurrent jurisdiction that the Treaty may confer on other Community or national institutions, the EACJ still remains with 'jurisdiction over disputes arising out of the interpretation and application of the Treaty which… includes the Annexes and Protocols thereto'[10].

A reference with regards to matters pertaining to the interpretation and application of the Treaty can thus be made to the EACJ by: a Partner State against another Partner State or organ or institution of the Community[11]; the Secretary-General against a Partner State that has failed to fulfil its Treaty obligations[12]; any legal or natural person who is a resident in a Partner State against a Partner State or institution of the Community that has acted in breach of the Treaty[13]. The Court is therefore widely accessible by various parties provided it is a matter that is within its jurisdiction. It needs to be stressed that although accessibility by applicants may be wide, the Court may only entertain cases that are against a Partner State, an organ or institution of the Community. The Court has rejected the application of the doctrine of direct horizontal effect[14].

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[8] EAC Treaty Article 23.
[9] *The East African Law Society v The Secretary General of the East African Community*, EACJ Reference No. 1 of 2011 p. 24.
[10] Ibid. The applicants in the case were challenging the validity of amendments made to the Treaty as well as dispute resolution provisions of the Customs Union Protocol and the Common Market Protocol, which they alleged ousted the jurisdiction of the EACJ.
[11] EAC Treaty Article 28.
[12] EAC Treaty Article 29. In *Hon. Sitenda Sebalu v The Secretary General of the East African Community; the Attorney General of the Republic of Uganda & 2 others*, EACJ Reference No.1 of 2010 (*Sitenda Sebalu I*) - the Secretary General was found to have failed to fulfil his obligations in invoking the powers vested in him under Article 29 to ensure that the Protocol on the Court's extended jurisdiction is concluded.
[13] EAC Treaty Article 30.
[14] This point was clearly determined in *Modern Holdings (EA) Limited v Kenya Ports Authority*, EACJ Reference No. 1 of 2008 in which the Court held that it had no jurisdiction to entertain the reference since the

The Court also handles disputes between the Community and its employees[15], as well as arbitration matters for which the Court is expressly designated as the arbiter in the agreement between the contracting parties[16]. Furthermore, national courts or tribunals, while adjudicating matters which may concern the interpretation or application of the Treaty may refer the relevant issues or questions to the EACJ to provide a preliminary ruling[17]. Under Article 36, the Summit, the Council or a Partner State may request for an advisory opinion from the Court regarding a question of law arising from the Treaty[18].

5.1.1 Jurisdiction of the court

The jurisdiction of the EACJ has been one of the frequently contested issues in several cases before the EACJ. The contestation has been over two major aspects: the first one regards the EACJ's exclusive jurisdiction over the interpretation and application of the EAC Treaty, and the second one is with regard to its jurisdiction over human rights matters. As a result, the Court has on many occasions had to interpret the exercise of its jurisdiction as provided for in the Treaty, in particular, Article 27. Before the Treaty was amended in 2006 and 2007, Article 27 expressly provided that:

1) The Court shall initially have jurisdiction over the interpretation and application of this Treaty.
2) The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.

The first aspect of contestation of the EACJ's jurisdiction arose as a result of amendments to the EAC Treaty which affected the Court's jurisdiction. These amendments were made

respondent was not an institution of the Community, hence 'not one of the respondents envisaged under Article 30 of the Treaty'.

[15] EAC Treaty Article 31.

[16] EAC Treaty Article 32.

[17] EAC Treaty Article 34.

[18] As at end of December 2015, the Court had only handled two advisory opinions: *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion* EACJ, Application No.1 of 2008; and *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion made pursuant to Articles 14 (4) And 36 of the Treaty for the Establishment of the East African Community and Rule 75 (4) of the East African Court Of Justice Rules Of Procedure, 2013*, Request for an Advisory Opinion No. 1 of 2015.

subsequent to the case of *Peter Anyang' Nyong'o & others v The Attorney General of Kenya & others*[19], which so provoked the EAC political organs to strike back at the Court.

In 2006, a reference in which the applicants, led by Peter Anyang' Nyong'o, were challenging the elections of Kenyan representatives to the East African Legislative Assembly (EALA), was brought before the Court. The Court found that the manner in which the Kenyan representatives had been 'elected' was rather 'fictitious' and in violation of the EAC Treaty. The Court also reiterated its supremacy over national courts in matters of interpretation and application of the Treaty[20]. However, what really incensed the EAC political organs was the interim ruling that had been handed down earlier, in which the Court barred the EAC from recognising the Kenyan representatives until it had decided the case on its merits[21]. This decision did not go down well with the Kenyan government and the EAC Council of Ministers, who considered the Court to be overstepping its jurisdiction[22]. As a backlash to the Court, they proceeded to make amendments to the EAC Treaty.

A number of provisions in chapter eight of the EAC Treaty were affected by the amendments. First, under Article 23, the Court was split into two divisions: the First Instance Division and the Appellate Division[23]. Secondly, under Article 27.1 a proviso was added which excludes the Court's interpretational jurisdiction from 'the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States'. Thirdly, Article 30.3 was also inserted which excluded the jurisdiction of the Court over matters which have been reserved under the Treaty to an institution of the Partner States.

In a reference before the EACJ in which these amendments were challenged, the applicant argued that the amendments to Article 27.1 and 30.3 grant concurrent jurisdiction to the organs and institutions of the Partner States hence taking away the original jurisdiction of the EACJ

[19] EACJ Reference No. 1 of 2006. The appellate division of the EACJ upheld the decision of the lower division- see *Attorney General of Kenya v Peter Anyang' Nyong'o & others*, EACJ Appeal No. 1 of 2009.
[20] Ibid.
[21] See *Anyang' Nyong'o* case, EACJ Reference No. 1 of 2006 ruling of the court delivered on 27 November 2006 available at http://www.saflii.org/ea/cases/EACJ/2006/3.pdf, accessed on 5 June 2017.
[22] For a further discussion on the *Peter Anyang' Nyong'o* case and the ensuing backlash, see especially James Gathii 'Mission creep or a search for relevance: the East African Court of Justice's human rights strategy' (2013) 24 *Duke Journal of Comparative and International Law* 265-271; and Karen J Alter, James T Gathii and Laurence Helfer 'Backlash against international courts in West, East and Southern Africa: causes and consequences' (2016) 27 *European Journal of International Law* 300-306.
[23] Initially there was only one Court with no divisions.

with regard to the interpretation of the Treaty[24]. These provisions, it was contended, could be seen as clipping the Court's jurisdiction and at most, ousting it, since matters that would have been handled by the EACJ by virtue of its Treaty mandate, would now be handled national organs and institutions.

With regard to the proviso in Article 27.1 the Court found that while prior to the amendments, the jurisdiction of the Court was 'wide and unlimited'; it was now limited. Furthermore, the proviso was not only vague but was also inconsistent with the Treaty since it conferred jurisdiction on organs of Partner States which were not defined by the Treaty[25]. The Court therefore held that although the impugned amendments (Articles 27.1 and 30.3) did not take away or oust the jurisdiction of the EACJ, they undermined its supremacy/ jurisdiction over the interpretation of the Treaty[26]. Having so declared, the Court advised that the amendments be revisited. This has not yet been effected.

The set-backs to the Court's jurisdiction were further manifested in both the Customs Union Protocol[27] and the Common Market Protocol (CMP) whose provisions were subsequently challenged. With regards to the CMP, Article 54.2 (b) provides that Partner States guarantee, in accordance with their Constitutions, national laws and administrative procedures that, 'the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress'.

In a couple of cases before the Court[28], it was contended by the applicants that this provision, too, ousted the jurisdiction of the EACJ, with regards to rights under the CMP (including migration rights), in favour of national courts. In both cases, the Court, in essence, ruled that this provision did not oust the jurisdiction of the Court to interpret and apply the Treaty, its Protocols and Annexes[29], but rather set up alternative dispute resolution mechanisms which are 'unlikely to have any adverse bearing on the Court's discharge of its functions as provided for under … the Treaty'[30].

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[24] *The East African Centre for Trade Policy and Law v The Secretary General of the EAC*, EACJ Reference No. 9 of 2012 para 32.
[25] Ibid paras 55-56.
[26] Ibid paras 58-59, 68.
[27] Article 24 of the Customs Union Protocol establishes the Committee on Trade Remedies and confers upon it the jurisdiction to settle disputes in accordance with the Customs Union Regulations.
[28] *East African Centre for Trade Policy and Law* supra note 24; *The East African Law Society* supra note 9.
[29] *The East African Law Society* ibid at 30-31.
[30] *The East African Centre for Trade Policy and Law* case supra note 24 paras 79-82.

In light of the foregoing, it is deducible that the effect of the Treaty amendments and the redress mechanism under the CMP is that the EACJ might end up not handling many cases of migration rights. They might instead be channelled to national courts which, owing to a perceived lack of judicial independence, may not always uphold citizens' rights[31]. This could also possibly lead to lack of uniformity in interpretation and application of Community law on migration rights[32], unless the national courts make use of Article 34 of the Treaty and seek the EACJ's ruling on interpretation of the Treaty. This avenue, moreover, seems not to be popular as yet[33].

Besides the EACJ's exclusive jurisdiction, the second aspect in which the EACJ's jurisdiction has been challenged is with regard to Article 27.2 which provides for its extended jurisdiction over human rights matters, among others[34].

Article 27.2 of the Treaty is clear that the Court's human rights jurisdiction shall be operationalised by a protocol at a subsequent date. This protocol has not yet been concluded, leading the Court to find this inaction to be in contravention of the Treaty[35]. Failure to extend the Court's jurisdiction has not, however, prevented applicants from referring matters involving allegations of human rights violations to the Court, which has in turn had to clarify its position.

In the landmark case of *James Katabazi and Others v Secretary General of the EAC and the Attorney General of Uganda*[36] the applicants challenged their re-arrest and subsequent detention by the government of Uganda's security forces immediately after the High Court had

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[31] Gathii 'Mission creep' op cit note 22 at 272 & 293.

[32] This point was argued in both *The East African Law Society* case supra note 9, and the *East African Centre for Trade Policy and Law* case supra note 24. In the former case, Court concurred with the applicant and opined that '[i]f interpretation and application of the Treaty were to be out-sourced to national judicial, administrative and legislative institutions, however competent, to interpret as they see fit, in accordance with national institutions and laws, then the Community would have on its hands a real possibility of multiple interpretations of similar provisions of the Treaty which, in our view, would present a real risk to the integration process'. In the latter case, Court expressed similar sentiments- see para 62.

[33] The first and only preliminary reference by the end of 2015 was made in that same year by the Ugandan High Court on the question of national courts' jurisdiction to interpret the Treaty.

[34] In *Sitenda Sebalu I* supra note 12, the EACJ made a finding that the delay to extend the Court's jurisdiction as provided in Article 27.2 of the Treaty, was in contravention of the principles of good governance as provided in the Treaty. It was further concerned that the Republic of Uganda, in delaying to submit comments on the draft Protocol, was indefinitely holding back the process of extending the EACJ's jurisdiction. Gathii 'Mission creep' op cit note 22 at 263 footnote 79, reaches the following conclusion: 'The point here is that the EAC's Council of Ministers has not supported and in fact has formally opposed extending the jurisdiction of the EACJ to include human rights or in fact jurisdiction over the Customs Protocol and the Common Market Protocol'. In November 2013, at the 15th Ordinary Summit of the Heads of State, it was decided that the issue of the EACJ's extended jurisdiction over human rights should be handled with the African Union. See para. 16 of the Communique at http://eac.int/index.php?option=com_content&view=article&id=130&Itemid=131, accessed on 5 November 2015.

[35] *Sitenda Sebalu I* ibid.

[36] EACJ Reference No. 1 of 2007.

granted them bail. They alleged that the government of Uganda had violated their human rights and as such had breached its obligations under Articles 6, 7 and 8 of the EAC Treaty. The respondents challenged the Court's jurisdiction to entertain the reference on the ground that it involved human rights matters for which the Court did not yet have jurisdiction. The Court agreed with the respondents that indeed it did not have jurisdiction to 'adjudicate on disputes involving violation of human rights *per se'*[37]. However, bearing in mind the provisions of Article 6 para (d) and 7.2 of the Treaty, which explicitly mention human rights as principles of the Community; and Article 8.1 para (c) which enjoins Partner States to abstain from jeopardising the implementation of the provisions of the Treaty, the Court made the following decision:

> While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation[38].

With this precedent, the EACJ thus made its position clear with regards to dealing with cases that raise human rights concerns and it has indeed gone ahead to adjudicate upon many such cases[39]. Following its precedent, in several of these cases it has found Partner States to be in breach, not of their human rights obligations as such, but rather in breach of their Treaty obligations under Articles 6 para (d) and 7.2 of the Treaty ie, part of the fundamental and operational principles of the EAC. In a subsequent case[40], the Appellate Division of the Court elucidated the rationale used by the Court in coming up with its decision in the *Katabazi* case, hence justifying the Court's basis for exercising jurisdiction over human rights matters in spite of Article 27.2. The Court stated:

> The significance and genius of the **Katabazi case** is not so much in the Court`s famous refusal "not to abdicate" its jurisdiction. Rather, it was the Court`s ability to find and supply, through interpretation of the Treaty, the source and basis for the Court`s jurisdiction in the circumstances of the case then before the Court. To this end, the Court in the **Katabazi case** proceeded to probe, to examine and to asses *(sic)* at great length

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[37] Ibid at 15.
[38] Ibid.
[39] About 30% or more of the cases decided on merits by the EACJ concern issues of fundamental and operational principles of the EAC Treaty, which include human rights protection. See also James Gathii 'Variation in the use of sub-regional integration courts between business and human rights actors: the case of the East African Court of Justice' (2016) 79 *Law and Contemporary Problems* 41& 59.
[40] *Attorney General of the Republic of Kenya v Independent Medical Legal Unit*, EACJ Appeal No. 1 of 2011 (hereinafter 'the *IMLU* case').

> and in great depth the source that allowed the Court to claim and exercise jurisdiction in the matter[41].

The Court, in this case went on to show exactly why it cannot completely abdicate from determining matters involving human rights issues by establishing the nexus between human rights and the EAC Treaty. It stated that:

> The respective Partner States' responsibilities to their citizens and residents have, through those states voluntary entry into the EAC Treaty, been scripted, transformed and fossilised into the several objectives, principles and obligations now stipulated in, among others, Articles 5, 6 and 7 of the Treaty, the breach of which by any Partner State, gives rise to an infringement of the Treaty. It is that alleged infringement which, through interpretation of the Treaty… constitutes the cause of action in a reference[42].

It is now a moot point in cases where allegations of human rights are raised that the Court will necessarily establish a nexus between the facts alleged and the Treaty provisions alleged to have been violated before it makes its decision. In most cases alleging human rights violations the Court has actually found such nexus *vide* Articles 6 para (d) and 7.2 of the Treaty[43].

5.1.1.1 Analysing EACJ's jurisdiction over human rights matters

One of the issues that has been debated upon and which is also clear from the contestations before the EACJ regarding its jurisdiction, is whether the EACJ (or any other regional court for that matter) should be concerned with human rights matters instead of confining itself to integration issues. Considering that human rights have been incorporated into the regional integration agenda by being explicitly mentioned as objectives and/or principles of the REC, it

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[41] Ibid at 10. The Court in this case overturned the decision of the lower Division on the grounds that the lower Court had not supplied substantive reasons establishing its legal foundation for its jurisdiction in the reference. It had just used the precedent of the *Katabazi* case without further evaluation. Furthermore, the case had been filed outside the two-month limitation period prescribed by the Treaty and on this basis, the Court held in favour of the Appellants.

[42] Ibid at 12. This was reiterated in *The Attorney General the Republic of Rwanda v Plaxeda Rugumba,* EACJ Appeal No. 1 of 2012 para 27.

[43] For instance, *Attorney General of the Republic of Uganda & another v Omar Awadh &* others, EACJ Appeal No. 2 of 2012; *The Attorney General of Rwanda v Plaxeda Rugumba* case ibid; *the IMLU* case supra note 40; *Hilaire Ndayizamba v The Attorney General of Burundi & The Secretary General of the EAC*, EACJ Reference No. 3 of 2012; *Democratic Party v The Secretary General of the EAC & others*, EACJ Reference No. 2 of 2012; *Sitenda Sebalu I*, supra note 12. Although in some of these cases the Court dismissed the applicants' claims on other grounds, on the issue of jurisdiction it held that it did have jurisdiction although the allegations raised involved human rights issues.

becomes difficult to sustain the argument that regional courts should steer clear of human rights matters[44]. This is what the EACJ has demonstrated with regard to its contestable jurisdiction over human rights matters. Commenting on the Court's position, Possi is of the view that the EACJ lacks an explicit human rights jurisdiction, but this has not prevented it from interpreting provisions of the EAC Treaty, including references to human rights norms[45]. He seems to suggest that the human rights jurisdiction of the EACJ is implicit. This is in contrast to some scholars who hold the view that the EACJ is overstepping its mandate[46]. Gathii, a renowned scholar on regional courts in Africa, views the EACJ's stance as judicial activism, which is *inter alia* filling in a void left by unsatisfactory human rights redress mechanisms in the national jurisdictions of the Partner States[47]. He further propounds that by taking this decision on human rights matters, the EACJ has not only asserted its independence from the executive and legislative organs of the EAC, but in fact '[r]ather than serving as a tribunal to resolve trade disputes as envisaged by its original designers, the EACJ has evolved… into a Court to hold member governments accountable for violations of human rights'[48]. Despite this assertion, it shall shortly be argued that the Court still proceeds with much caution with regards to human rights matters, and that even its so-called activism was only possible because of express Treaty provisions that could support the Court's entertainment of cases involving human rights claims.

As the Court observed in *Sitenda Sebalu I*, the EACJ's explicit lack of jurisdiction over human rights matters is obviously adversely affecting the Community's integration process. This is so because, the EAC is envisaging a more holistic integration of which the principle of good governance, which includes promotion and protection of human rights, is fundamental to the process. It has been argued[49], and quite persuasively, that this failure to extend the Court's

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[44] See also Solomon T Ebobrah *Legitimacy and Feasibility of Human Rights Realisation through Regional Economic Communities in Africa: The Case of the Economic Community of West African States* (Unpublished LLD Thesis, University of Pretoria, 2009) 79-83. One of the compelling arguments that he puts forth, in justifying African RECs involvement in human rights matters, is that since members of the RECs were also members of the OAU (now AU) they were required to respect the principles of the OAU-based ACHPR. This positions RECs as building blocks for the ACHPR as well.

[45] Ally Possi 'The East African Court of Justice: towards effective protection of human rights in the East African Community' (2013) 17 *Max Planck Yearbook of United Nations Law Online*.

[46] Lucyline N Murungi & Jacqui Gallinneti 'The role of sub-regional courts in the African human rights system' (2010) 7 *Sur International Journal on Human Rights* available at http://www.surjournal.org/eng/conteudos/getArtigo13.php?artigo=13,artigo_06.htm, accessed on 10 November 2015.

[47] Gathii 'Mission creep' op cit note 22 at 250-251.

[48] Ibid at 250.

[49] Ibid at 252; Possi op cit note 45 at 18; In *Sitenda Sebalu I* supra note 12, the Court interpreted the failure to conclude the protocol extending the Court's jurisdiction as a 'hidden agenda' on the part of a Partner State to hold back the process indefinitely.

jurisdiction illustrates resistance by Partner States to promote and protect human rights, not only in the Community but also in their national jurisdictions. Conversely put, the failure of Partner States to promote and protect human rights in their own domestic jurisdictions is manifesting itself at the Community level, and thus negatively impacting on the integration process. Further evidence of this resistance is the failure, in some cases, to enforce the decisions of the Court[50]. This in turn adversely affects the Court's effectiveness as the organ established to ensure adherence to the Treaty.

As this previous section has shown generally for the EAC, although the Court lacks express jurisdiction over human rights matters, the coming into force of the CMP may provide an opportunity for the Court. The CMP, which the Court has jurisdiction to interpret and apply, provides for migration rights and this could be an avenue through which the Court might directly assert jurisdiction over specific human rights matters. This, however, depends on how the Court is rationalising migration rights in the Treaty, and whether in so doing it is adopting a human rights approach. This calls for an examination of the Court's position which thus far can be discerned from the case of *Samuel Mukira Mohochi*.

5.2 Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda[51]

This is so far the only case that deals with migration rights, particularly the free movement of persons, that the EACJ has decided on the merits. The brief facts of the case are as follows.

The applicant, Samuel Mukira Mohochi, a Kenyan citizen, was part of a fourteen-member delegation that travelled to Uganda on 13th April 2011 to meet the Chief Justice of Uganda. On arrival at the airport in Uganda, the applicant was denied entry while his colleagues had no problem going through. The applicant was thereafter served with a copy of a "Notice to Return or Convey Prohibited Immigrant". Later on, after a six-hour wait at the airport, he was put on a Nairobi-bound flight and returned to Kenya. The applicant brought the reference before the

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[50] In the *Sitenda Sebalu I* the Court ordered that quick action be taken by the EAC to conclude the Protocol to operationalise the Court's extended jurisdiction as envisaged under Article 27 of the Treaty. One year on the Court's order had not been enforced, leading to a follow-up reference. In *Hon. Sitenda Sebalu v The Secretary General of the EAC*, EACJ Reference No. 8 of 2012 *(Sitenda Sebalu II),* the applicant contended that failure of the EAC to implement the Court's decision to extend the Court's jurisdiction amounted to contempt of Court and infringement of the Treaty. In a rather ambiguous decision, the Court agreed with the argument that the EAC had acted in contempt of its decision. However, in what may be viewed as a retraction, it held that the role of determining the Court's jurisdiction was for the Council of Ministers and the Court could not dictate to the Council how to perform its functions. In other words, Court seemed to disregard its order to extend its jurisdiction 'quickly', and left it to the Council to do it in its own time.

[51] EACJ Reference No. 5 of 2011.

EACJ alleging that the actions of the Ugandan immigration officials (for which the Attorney General was sued in his representative capacity) violated Articles 6 para (d) and 7.2 of the EAC Treaty, as well as Article 7 of the CMP (which provides for the free movement of persons within the EAC). He further alleged violation of his fundamental rights and freedoms including discrimination, freedom from arbitrary arrest and detention, the right to a fair and just administrative action, right to information, and freedom of movement, among other rights guaranteed in the African Charter on Human and Peoples' Rights (ACHPR). In response, the respondent denied violation of the EAC Treaty or the CMP, and argued that the applicant was denied entry in accordance with the limitation clause embodied in Article 7.5 of the CMP. Specifically, that the applicant was denied entry on grounds of public security, and that the Treaty did not take away Uganda's sovereignty to deny entry to persons who are nationals of Partner States. It was further contended that the EACJ lacked jurisdiction to hear the case as it raised human rights matters and that the Court could not enforce the provisions of the ACHPR that were alleged to have been violated.

The key issues that the Court had to determine included:

i). Whether the Treaty and the CMP take away the sovereignty of Uganda to deny entry to unwanted persons who are citizens of Partner States of the EAC.

ii). Whether the actions of the Ugandan immigration officials were in conformity with Articles 6 para (d) and 7.2 of the Treaty.

iii). Whether the actions of the Republic of Uganda were in conformity with Article 104 of the EAC Treaty[52] and Article 7.6 of the CMP.

Upon deciding that the matters raised by the applicant were issues of interpretation and application of the Treaty and hence under the Court's jurisdiction as provided in Article 27.1 of the Treaty, the Court gave its decision on the merits. With regards to issue i), the Court held that, 'Uganda's sovereignty to deny entry to persons who are citizens of Partner States was not taken away by the Treaty and the Protocol, but the exercise thereof can only be valid if it is

[52] EAC Treaty Article 104 provides for the Partner States' commitment to promote '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 Article of the Treaty is elaborated in the CMP and its Annexes- see previous chapter.

done in strict compliance with the requirements of Articles 104 of the Treaty and Articles 7 and 54.2 of the Protocol'[53].

In its findings on issue ii), the Court considered the following alleged actions committed by the Republic of Uganda against the applicant: the denial of entry, alleged discrimination, declaration of prohibited immigrant, alleged detention and the subsequent return to Kenya. All these actions were committed without informing the applicant of his alleged misconduct nor was he accorded an opportunity to be heard. The Court found that these actions of the respondent's officials were illegal, and not only in violation of the EAC Treaty and the CMP, but also of national law, ie the Ugandan Citizenship and Immigration Control Act, which the immigration officials claimed to have applied. Court came to the conclusion that 'the Applicant's return to Kenya was unjustified, high-handed and was procured through unlawful means'[54] since the applicant was never given reasons for such treatment nor accorded the opportunity for a fair hearing before his removal. It was accordingly decided that 'the actions and decisions to declare the Applicant a prohibited immigrant, deny him entry into Uganda, detain him and return him to Kenya were illegal, unjustified, unlawful and inconsistent with transparency, accountability, rule of law, and universally accepted standards of human rights and, therefore, in violation of his rights and Uganda's obligations under Articles 6 (d) and 7 (2) of the Treaty and Articles 7 (2) and 54 (2) of the Protocol'[55].

It was thus found for issue iii) that the actions of the respondent State 'were in violation of the freedom of movement of the Applicant which is among the foundational principles of the Common Market… the same actions are in violation of Article 104 of the Treaty'[56]. Furthermore the respondent had failed to adduce any evidence to justify imposing a limitation on the applicant's freedom of movement as provided under Article 7.5 of the CMP. The Court also held that the respondent had failed to discharge its burden of proving that it had notified other Partner States of imposing such limitation as required by Article 7.6 of the CMP. Hence the respondent was in violation of Article 7 of the CMP[57].

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[53] *Mukira Mohochi* supra note 51 para 56.
[54] Ibid para 109.
[55] Ibid para 110.
[56] Ibid para 112.
[57] Ibid paras 115-116, 130.

The case was therefore decided in favour of the applicant. The respondent was largely found to be in breach of its Treaty obligations.

The issues raised in this case are not only applicable to Uganda, but to all the EAC Partner States, a fact that the Court noted in its *obiter dictum* by remarking that these were issues of 'regional concern'[58]. Furthermore, although the key issue raised in the case was with regard to free movement of persons (community citizens), a number of points were made that could apply equally to other migration rights.

The ensuing discussion raises four points of analysis regarding the case, that might help in rationalising migration rights in the EAC as interpreted by the EACJ.

5.2.1. Precedence of Community law over national law

One of the respondent's arguments was that Uganda as a sovereign state had the discretion to decide whom to allow or deny entry regardless of whether they are East African citizens or not. The respondent particularly sought to rely on regulation 5.1 of the Regulations on free movement of persons which provides that EAC citizens who seek entry in or exit from a Partner State must do so in accordance with established immigration procedures and national laws. Whereas the Court did not deeply delve into the meaning of this provision, probably because it was not explicitly identified as an issue, it found that the EAC Treaty and its protocols and annexes had the force of law in Uganda *vide* the East African Community Act, 2002, Laws of Uganda. Hence the Treaty, its protocols and annexes 'became directly enforceable within the country and took precedence over national law that was in conflict with them. Existing legal provisions became qualified and started to be applicable only to the extent that they were consistent with the Treaty and the Protocol'[59]. What this suggests is that regulation 5.1 and other similar regulations which provide for the application of national laws and immigration procedures of Partner States, should not be read as elevating national law over Community law on matters that have been agreed upon by the Partner States. Such matters necessarily include migration rights and as such the Community law should supersede national laws. In other words, national laws and immigration procedures should be in harmony with and reflect the provisions of Community law. Thus regulation 5.1 should be read as conforming to and

[58] Ibid para 125.
[59] Ibid para 50.

effecting the general provisions on free movement of community citizens within the EAC in accordance with Article 104 of the Treaty and Article 7 of the CMP.

The EACJ was thus affirming the principle of direct application of Community law even to other migration rights including the free movement of workers, the right of establishment and the right of residence. It is clear that should matters arise with regard to violation of any of these rights, the EACJ will not hesitate to castigate any Partner State whose application of EAC citizen's migration rights is at variance with the Treaty or the CMP. As such the EACJ can be seen as championing harmonious and uniform application of Community law, hence asserting itself as an indispensable organ and agent for successful realisation of the objectives of EAC integration. Thus the way it rationalises migration rights is crucial for forming a sense of uniformity in the approach that the Partner States may adopt towards these rights.

5.2.2. The EACJ's approach in interpreting migration rights: 'rights' in which sense?

During submissions, the respondent contended that the applicant's allegations were human rights matters over which the EACJ had no jurisdiction. This was in response to the applicant's claims that not only did the respondent's actions violate his freedom of movement as an EAC citizen, but that they also violated several of his fundamental rights and freedoms as guaranteed under the ACHPR. The applicant's contention was that by violating his rights, the respondent State was in breach of its obligations under Articles 6 para (d), 7.2 and 104 of the EAC Treaty, and Article 7 of the CMP. Counsel further made the point that the rights created in Article 7 of the CMP were 'subjective rights to which citizens of the East African Community are entitled in their individual capacities and those rights are enforceable vide the Court's jurisdiction under… the Treaty and *it matters not whether those rights are said to be 'human rights' or rights by whatever lexicon*'[60] (emphasis added).

This latter argument by counsel for the applicant indicates that there is some confusion on the conceptual basis of migration rights in the EAC. Is it human rights, economic or otherwise? The Court agreed with the respondent that it did not have jurisdiction over human rights matters, and further emphasised that the 'EAC Treaty is neither a Human Rights Convention or a Human Rights Treaty… but rather a Treaty to govern the widening and deepening of, inter alia, the political, economic, social, cultural, research, technology, defence, security, legal and

[60] Ibid para 24.

judicial co-operation between the Partner States'[61]. With this statement the Court opted for the safe textual interpretation- it simply stated the case as it is reiterating the provisions of the EAC Treaty. Apparently, it did not emphasise the human rights nuances in the Treaty and noted that there are no provisions in the Treaty, the Protocol and Annexes designated as 'the human rights provisions'[62]. It, however, recognised the fact that human rights are part of the fundamental principles of the Community on which the integration of the EAC depends[63]. Had the Court chosen to aver that the rights alleged were indeed human rights, it might have been faced with the dilemma of lack of jurisdiction, which might explain why it opted to tread cautiously.

The Court therefore followed the precedent in the *James Katabazi* case in reaching its decision to adjudicate upon the matter. Its strategy was not to adjudicate the matter as one alleging human rights violations *per se,* but rather as one to do with violation of the Treaty provisions. As to whether the rights alleged to have been violated were human rights or otherwise, the Court decided that the provisions in the Treaty and Protocols 'are provisions of the Treaty, plain and simple. The object and scope of which is reflected in the titles and sub-titles of the chapters and articles therein'[64]. Consequently, the Court determined that the applicant's cause of action was 'the alleged infringement of a Partner State's Treaty obligations which we find to be a matter which lies outside the province of human rights'[65]. Hence, the Court opted not to designate as 'human rights' the rights provided for within the Treaty, but rather as 'Treaty-guaranteed rights'[66]. It actually commented on all migration rights noting that '[t]he Treaty accorded these persons wide ranging, preferential and superior treatment and *rights in terms of movement, establishment, residence and working within Partner States*'[67] (emphasis added). It further on stresses that the applicant's freedom of movement and right to redress are 'hallowed rights guaranteed by the Treaty'[68].

The Court can therefore be said to have adopted a fool-proof and neutral approach to rationalising migration rights within the EAC. Further evidence of the Court's stance of restricting itself to the Treaty provisions can be seen in the manner in which it handled the issue

[61] Ibid para 28.
[62] Ibid para 29.
[63] Ibid para 36.
[64] Ibid para 29.
[65] Ibid para 30.
[66] Ibid paras 79, 80, 107 make references to 'rights guaranteed by Treaty'.
[67] Ibid para 48.
[68] Ibid para 76.

of applying a limitation on the applicant's freedom of movement. The respondent argued that the immigration officials had denied the applicant entry into Uganda as it was in the 'security interests of the people of East Africa'[69], hence the limitation clause provided for in Article 7.5 of the CMP[70] was applied. Court, however, dismissed this argument since other than simply making the averment, no proof was provided that the applicant was indeed a security threat. Laying down a rather subjective test, the Court held that a 'Partner State before imposing a limitation on an individual would have to satisfy itself that the measure is merited in each particular case'[71]. Apparently the respondent state had failed this test and so Article 7.5 was not applicable. Furthermore, the respondent State had failed to comply with Article 7.6 of the CMP by not notifying other Partner States of the limitation it claimed to have imposed on the applicant. This was considered as a further breach by the respondent State of its obligations under the CMP.

Worth noting with Court's handling of this issue of applying limitations on the applicant's free movement, is that it simply evaluated the evidence in terms of the Treaty provisions. It did not look beyond the Treaty provisions to reach its findings. In other words, it did not use the objective criteria for evaluating applicability of limitations, that is, lawfulness of a measure, non-discrimination, proportionality and objectivity as stipulated under human rights law, or even as propounded in the *Gebhard* case[72].

The position taken by the EACJ might probably be explained by the fact that the respondent did not provide any facts upon which to apply the criteria[73]; and having found that the respondent's actions were unlawful, it might have considered it unnecessary to borrow from the criteria used by the ECJ or in human rights law. Another probable explanation could be that since the Court was not treating the violations as human rights violations *per se* but as violation of Treaty-guaranteed rights, it was obvious that it would restrict itself to the express provisions of the Treaty and evaluate the facts in accordance thereto. One might infer from this that the provisions of the Treaty are self-sufficient and it is not always necessary to look beyond or

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[69] Ibid para 65.
[70] CMP Article 7.5 is to the effect that free movement of EAC citizens can be restricted on grounds of public policy, public security or public health.
[71] *Mukira Mohochi* supra note 51 para 115.
[72] The *Gebhard* case deals with the EU Community law and the criteria it sets out is not so dissimilar to that under human rights law. See discussion in chapter two section 2.6.
[73] In several parts of the judgment, the Court reproached the respondent's counsel for failing to disclose even to the Court what it was exactly that the immigration officials had against the applicant- *Mukira Mohochi* case paras 73, 78, 96.

outside the Treaty for other authorities. It might also be inferred that the Court is actually treading with caution by ensuring that it comes up with a fool-proof position with regards its jurisdiction. The Court's reasons notwithstanding, the test it laid down is highly subjective. While leaving much room for Partner States' to use their discretion, it does not provide objective criteria to guide the application of limitations to migration rights.

What seems to emerge from the Court's position, is that it does not exactly treat migration rights as purely economic freedoms. But neither does it regard them as distinctly human rights. It prefers to adopt the textual interpretational approach whereby it views the free movement of persons and indeed other migration rights within the EAC context as flowing from the Treaty. Hence the use of the term 'Treaty-guaranteed rights'. Moreover this textualism is not only evident in the *Mukira Mohochi* case, but seems to be a favoured approach of the Court in a number of cases before it, as the subsection below illustrates.

5.2.3 The EACJ and textual-formalism[74]

As explained in the introductory section of this chapter, textual-formalism[75] is a term that has been adopted to describe the EACJ's interpretative approach. Textual-formalism refers to the Court's preference for textual and narrow interpretation coupled with apparent exercise of restraint or caution.

Looking at some of the key cases decided by the EACJ, it appears that the Court has favoured the textual approach above any other and will readily reject any argument that is not supported by the express provisions of the Treaty. A characteristic that seems to run through almost all EACJ judgements is the court's emphasis on defining terms. There are rather tautological and discursive arguments on meanings of words, and as it happened in the *Mohochi* case, some issues, for instance regarding the unlawful detention of the applicant, are decided basing on the ordinary or technical meaning of the key word. Although other non-textual approaches may be considered, in the final analysis, it is the textual approach that is usually overly predominant and decisive. Moreover in some cases where an expansive reading of the Treaty provision might have been possible, the Court has opted for the narrower interpretation in strict accordance with the text of the Treaty. The illustrative cases below will be discussed under broad subject-matter headings.

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[74] For further discussion see Caroline Nalule 'Defining the scope of free movement' op cit note 1.
[75] I credit my supervisor Professor Klaaren for suggesting usage of the term 'textual-formalism'.

Time limits: Before the Treaty was amended in 2006/07, there was no limit placed on time within which natural or legal persons could file cases before the EACJ. This changed with the introduction of Article 30.2 which provides for a considerably short period of two months within which natural and legal persons can file cases before the Court. The Court has strictly adhered to this time-limit arguing that it is for purposes of legal certainty, which requires a '*strict application of the time limit'*[76]. Hence, it has even rejected the argument on 'continuing violation', commonly acceptable in human rights matters, conclusively stating that 'there was nothing in the *express language'* (emphasis added) of the Article that suggests that continuing violations were exempted from the two-month limit. In a statement more telling of its overly cautious and restrained stance, the Court held that 'nowhere does the Treaty provide any power to the court to extend, to condone, to waive, or to modify the prescribed time limit for any reason'[77]. The court seems to have effectively shut out any other argument that would allow for any flexibility or even expansive reading of this particular provision despite arguments that the two-month limit is unfair and unreasonable on individual litigants in a region with comparatively low levels of transparency and access to information. The Appellate Division thereby reversed the more expansive and purposive reading by the First Instance Division that had allowed for continuing violations under Article 30.2[78], thus setting a precedent that has since been followed in subsequent cases. This has led to several cases not being heard on merits, including one that touched on free movement of persons, almost similar to the *Mohochi* case[79].

Principle of horizontal direct effect: The EACJ's decision on what might have been an establishment of the principle of horizontal direct effect further supports the argument that textualism is the court's favoured approach. In what could have been an opportunity for the EACJ to extend its authority to national public bodies and private companies, the Court held that it had no jurisdiction over matters brought by natural or legal persons, in which the respondent was neither a Partner State nor an institution of the EAC[80]. The court was not at all convinced with the contention that the respondent was a public body in a Partner State, carrying out services that come within the auspices of Community law. It thus rejected the invitation to

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[76] *The Attorney General of Uganda and another v Omar Awadh and others* supra note 43.
[77] Ibid paras 49 & 59.
[78] Ibid para 60.
[79] *Mbugua Mureithi v The Attorney General of Uganda* supra note 2; *Hilaire Ndayizamba v Attorney General of Burundi* supra note 43; *Georges Ruhara v The Attorney General of Burundi*, EACJ Reference No. 4 of 2014.
[80] *Modern Holdings (EA) Limited v Kenya Ports Authority* supra note 14. The Court emphasised this position further in *Alcon International Limited v Standard Chartered Bank of Uganda and 2 others,* EACJ Reference No. 6 of 2010.

read the Treaty purposively and apply the principle of horizontal effect. This shows a clear divergence in approach between the ECJ and the EACJ. Whereas the ECJ was unrestrained in laying down the principle of horizontal direct effect, extending it even to private bodies that would be obliged under community law[81], the EACJ refrained from applying it to public bodies that carry out services regulated by Community law. It has actually been argued that by this decision, the EACJ 'shot itself in the foot' thereby alienating the business community [82] that would have been likely litigants on matters to do with the CMP and economic and trade integration in general.

Remedies: The EAC Treaty is not specific on the remedies that the EACJ may offer. The Court has interpreted its remedial powers as being restricted to making 'declarations of illegality of the impugned acts'[83], and orders as to costs. Any other orders, the Court has deemed to be beyond its jurisdiction to make[84]. In one particular decision, the Court remarked that the particular case, like many others before it, was not grounded in tort or contract and so it could not make an award as to damages[85]. According to the EACJ, its jurisdiction to grant such remedies is excluded by the joint effect of Articles 23, 27 and 30 of the EAC Treaty. Moreover, a close reading of these Articles cannot, *prima facie*, be seen as restricting the court's array of remedies. The EACJ's textualism can be contrasted with the ECJ's expansive and teleological reading of its powers. The latter Court, even though, it could not find an express provision on extensive remedial powers, established the principle of state liability in which a Member State of the EC could be liable to pay damages[86]. One might argue that the ECJ, unlike the EACJ, was addressing a national court which could then see to the application and enforcement of the

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[81] C-36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo* [1974] ECR 1405 para 18. In its teleological manner, the court reasons that the objectives of the community 'would be compromised if the abolition of barriers of national origin could be neutralized by obstacles imposed by organizations which do not come under public law'.

[82]John Eudes Ruhangisa, 'The East African Court of Justice: ten years of operation'- A paper presented at the sensitisation workshop on the role of the EACJ in the EAC integration (Kampala 1-2 November 2011) 29-30. Gathii 'Variation' op cit note 39 at 53.

[83] *Sitenda Sebalu I* supra note 12.

[84] In *Hilaire Ndiyazamba* supra note 43 para 34, the Court declined to make orders that the applicant be allowed to enjoy his freedom and should be released immediately, on the basis that it lacked the jurisdiction to grant such prayers. See also *Venant Masenge v The Attorney General of the Republic of Burundi*, EACJ Reference No. 9 of 2012.

[85] *Timothy Alvin Kahoho v The Secretary General of the EAC,* EACJ Appeal No. 2 of 2013 para 83.

[86] Joined Cases C-6/90 & 9/90 *Andrea Francovich and others v Italy*, [1991] ECR I-5357 para 35. The ECJ held that 'the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty', although there was no express Treaty provision to that effect.

principle. From this perspective, the situations of the EACJ and ECJ may not be comparable, but one would be missing the key point which is, the principle that was established for purposes of enhancing Community law. To further the argument, the Caribbean Court of Justice (CCJ) which is in a more or less similar position as the EACJ could present a more appropriate comparison. In a case, almost similar in facts to the *Mukira Mohochi* case, the CCJ was able to not only set a more objective test for application of limitations on free movement of community citizens, but also went ahead to award damages to the applicant, even in the absence of an express Treaty provision to that effect[87]. The Court was able to award compensatory damages to the applicant having endorsed the principle of state liability in one of its earlier decisions[88]. The CCJ's interpretational approach, which like the ECJ's has tended to be more teleological, serves to illustrate the contrasting approach of the EACJ which may stand out as being rigidly textual.

The above examples have served to bolster the argument that the EACJ has got a proclivity for a narrow textual interpretational approach. It is actually seen as exercising extreme caution or restraint, probably in order not to upset the Partner States or other organs and institutions of the Community. This is a lesson it may have learnt from the post *Peter Nyong'o* case backlash[89].

To return to the court's approach in interpreting migration rights, whether or not the Court's rationale would have been different had it been endowed with jurisdiction over human rights, remains a matter for debate. More so had the EAC Draft Bill of rights been enacted into law, the interpretation of migration rights in the EAC could possibly be altered. This is so because under the Draft Bill of Rights, migration rights are provided for as human rights[90]. Although at the moment this is merely speculative, the Court's position could probably be altered since

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[87] *Shanique Myrie v The State of Barbados,* [2013] CCJ 3 (OJ) paras 93-100. The applicant in this case was a Jamaican citizen who was denied entry into Barbados and deported back to her home country on the alleged ground that she had been untruthful about her host in Barbados. The CCJ awarded her damages for breach of the right to travel within the Community without harassment or the imposition of impediments. The harassment she was subjected to included a humiliating cavity search, and overnight detention in a cell prior to her expulsion from Barbados.

[88] Ibid para. 94 The Court relied on its earlier decision in *TCL v Guyana* [2009] CCJ 5 (OJ) in which it acknowledged lack of express Treaty provisions on sanctions for breach of the Treaty, but applied the principle of state liability as enunciated in *Francovich v Italy*. The CCJ reasoned that 'the new Single Market based on the rule of law implies the remedy of compensation where rights which enure to individuals and private entities under the Treaty are infringed by a Member State'- para 24. It then went on to give the conditions under which compensation may be granted, and these were applied in deciding to award damages in the *Shanique Myrie* case.

[89] Alter, Gathii & Helfer 'Backlash' op cit note 22.

[90] EAC Draft Bill of Rights Article 12. See also discussion in previous chapter section 4.7.

reading the EAC Treaty, the CMP and its annexes in conjunction with the EAC Bill of Rights, if enacted as it is, would favour more a human rights-oriented interpretation. However, even with the current status quo, is their room for the EACJ to rationalise migration rights as human rights?

5.2.4 The case for a more human rights-oriented approach to migration rights in the EAC

One of the issues raised by the applicant in the *Mukira Mohochi* case, that is worth discussing, was the allegation that the respondent State had violated his fundamental rights and freedoms 'against discrimination, freedom from arbitrary arrest and detention, the right to a fair and just administrative action, the right to information and freedoms of assembly, association and movement guaranteed by Articles 2, 6, 7, 9, 10, 11 and 12 of the Charter'[91] (i.e. the ACHPR). Probably due to treading cautiously over jurisdictional matters, the Court did not delve specifically and extensively into these allegations, as may be the African Commission on Human and Peoples' Rights or a national Court or tribunal might have done. The moment it decided that its jurisdiction was limited to interpretation and application of the EAC Treaty, it avoided overstepping that jurisdiction which might have been the case had it adjudicated on the applicant's allegations that specifically raised issues of the ACHPR. The court rather made sweeping references to the ACHPR, holding that as the applicant was 'singled out of a delegation, declared a prohibited immigrant, denied entry, returned to Kenya without being furnished with reasons why and without being heard in his defence was clearly at variance with and in violation of Uganda's obligation to adhere to the rule of law, accountability, transparency as well as the recognition and protection of human rights in accordance with the Charter, as provided under Articles 6 (d) and 7 (2) of the Treaty and 7 (2) of the Protocol'[92]. In concluding thus, the Court seemed to be following the precedent of the Appellate Division in the *IMLU* case[93] in which it provided the basis for the Court's handling of matters that involve human rights. In that case it stated that the Court should find and supply 'the cause of action flowing from the Treaty (that is different and distinct from violations of human rights)

[91] *Mukira Mohochi* case para 9 (iv).
[92] Ibid para 84. This is reiterated in para 110.
[93] *IMLU* case supra note 40.

on which to peg the Court's jurisdiction… [and which provides] the legal linkage and basis for this Court's jurisdiction… separate and distinct from human rights violations'[94].

As mentioned in the previous chapter, asides from human rights being some of the fundamental principles of the EAC Treaty, the formulation of migration rights within the CMP has strong human rights overtones. A case can therefore be made for a human-rights oriented interpretation to migration rights.

First and foremost, the Court has acknowledged that the EAC Treaty through 'bereft of a Chapter on Human Rights,… contains the hint of such rights in a number of its provisions'[95]. The Court does not however proceed to point out the provisions with such hints, but Articles 6 para (d) and 7.2 would definitely be among them. Considering that the Draft EAC Bill of rights perceives of migration rights as human rights, then it could be argued that the provisions on migration rights in the EAC Treaty and the CMP are 'hints' of such human rights provisions. This is more so considering that these rights have corollary provisions under international human rights law and thus might easily be interpreted in a similar, if not the same, manner. The *Mukira Mohochi* case presented an opportunity for the Court to demonstrate this co-relation, but the opportunity was entirely missed as the Court did not delve into it. Had it done so, it might have found express jurisdiction to handle human rights matters to a limited extent, that is, migration rights- as these have been elaborated in the Treaty, whose interpretation and application is certainly within its jurisdiction.

Secondly, the provisions of the EAC Treaty, specifically Article 6 para (d) mentions the fundamental objective that Partner States shall recognise, promote human and peoples' rights *in accordance with the provisions of the African Charter on Human and Peoples' Rights*. How then would the Court be able to find indisputably that an act or measure of a Partner State has infringed that provision without evaluating it against the provisions of the ACHPR? In exercising its jurisdiction, it can be strongly argued that Article 6 para (d) of the Treaty actually invites the Court to determine whether an act or measure taken by a Partner State is in accordance with the provisions of the ACHPR. In this case, Court would have to look into the provisions of the ACHPR, make a finding thereof, before it can determine whether a Partner State has violated its obligations under Article 6 para (d) of the EAC Treaty. As such the Court

[94] Ibid at 10-11, this was also reiterated in *Plaxeda Rugumba* supra note 42 para 24.
[95] Ibid para 24.

in the *Mukira Mohochi* case should have considered each of the allegations made by the applicant as against the provisions of the ACHPR. It would then have made a finding on the applicant's fundamental human rights and freedoms (as guaranteed by the ACHPR) that had been violated and then concluded with its finding that the respondent State had actually violated Article 6 para (d) and 7.2 of the EAC Treaty. However, the Court has, in this regard, opted to narrowly construe its jurisdiction by ruling that it 'cannot purport to operate outside the framework of the Treaty and usurp the powers of other organs created for the enforcement of obligations created by other instruments including the African Charter and Protocol'[96]. It should be noted though that when the Court made this statement, the facts it was basing on were quite different. In that case, the applicant alleged that the Partner States of the EAC (apart from Tanzania) had failed to make declarations in acceptance of the competence of the African Court of Human and Peoples' Rights in line with the Protocol to the ACHPR establishing the African Court, and that this failure amounted to infringement of various provisions of the EAC Treaty[97]. This is quite distinct from where one alleges that a Partner State has violated one's rights and freedoms guaranteed by the ACHPR. This is because of the express provisions of Article 6 para (d) of the EAC Treaty. In such an instance, it should be incumbent for the Court to evaluate the facts in accordance with the ACHPR before making its decisions on whether or not Article 6 para (d) has been infringed. This was actually the position taken by the Appellate Division in a decision that overturned that of the First Instance Division[98]. It is arguable, therefore, that the Court could choose to interpret migration rights as human rights guaranteed by the Treaty or at the very least accord them a human rights interpretation even without the extended jurisdiction.

Hence, if the Court could show the co-relation between migration rights or 'Treaty-guaranteed rights' and human rights; as well as optimally exploit the avenue provided in Article 6 para (d), it achieves two things: one is a human rights approach to migration rights within the EAC; and second, exercise jurisdiction over such rights without necessarily awaiting a Protocol to extend its jurisdiction over human rights matters. This is because, it already has the jurisdiction over matters of migration rights under the EAC Treaty and its Protocols and Annexes. Hence an interpretation of migration rights from a human rights viewpoint would be a way for the Court

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[96] *Democratic Party v The Secretary General of the EAC* supra note 43 para 59.
[97] Ibid.
[98] *Democratic Party v The Secretary General of the EAC & others*, EACJ Appeal No. 1 of 2014. Court held that the EACJ does have jurisdiction to interpret the Charter in the context of the EAC Treaty.

to incrementally yet tactfully overcome the jurisdictional hurdle. In other words the text of the EAC Treaty and the CMP offers a sufficient avenue through which the EACJ, whilst adhering to textual-formalism, may still be in position to provide a more expansive and far-reaching interpretation and rationale for migration rights within the EAC.

5.3 Chapter conclusion

The EACJ's interpretational approach, at last, after the *Peter Nyong'o* case and the ensuing backlash, is largely textual. The Court, in exercising much caution and restraint, will in most cases reject an argument or interpretation that is not supported by the express text or literal meaning of the text of the Treaty. This approach is clearly manifest in the way it has interpreted migration rights as Treaty-based. In interpreting and conceptualising migration rights in the EAC, the Court has not completely endorsed them as purely economic freedoms, and has also, in a way, avoided a human rights interpretation, probably because of its lack of explicit jurisdiction over human rights matters. Although the Court makes the distinction between Treaty-guaranteed rights and human rights, this is usually made when it is seeking to justify its jurisdiction to handle matters that involve or raise human rights violations. It has not made the distinction for the mere purpose of establishing the rationale or conceptual basis of migration rights in the EAC. It should be noted, though, that in terms of rationalising migration rights, the Court has not exactly decided against a human rights approach. Hence, the Court's position on migration rights and their conceptual basis might be altered if the Court's jurisdiction could be extended to cover human right matters. This could only be done in a gradual and incremental way as the community integration further advances, but only if the Court is willing to make the shift from textual-formalism.

The *Mukira Mohochi* case, which so far is the landmark case on migration rights, and freedom of movement of persons in particular, canvassed a number of issues that show the importance attached to migration rights and also demonstrate that migration rights in the EAC, are undoubtedly, the linchpin of community citizenship- a citizenship that clearly goes beyond the economic rationale for integration. It should be noted that Mr. Mukira Mohochi was exercising his freedom of movement as an EAC citizen and not in the economic sense- he was not moving any factors of production nor was he a factor of production on the move. This illustrates that free movement of community citizens within the EAC goes beyond the economic objectives of integration. It also goes to prove that migration rights in the EAC are not exclusively the preserve of the business community, which can be seen as eschewing the EACJ, to a large

extent[99]. Hence providing for these rights under the CMP, which ideally aims at promoting economic objectives of integration, might actually be delimiting not only their application, but also their interpretation. In the Court's decision, it referred to the freedom of movement as being 'among the foundational principles of the Common Market'[100], but elsewhere it also noted that violating this freedom was a threat to the integration process[101] in general. Hence the Court recognises the importance of migration rights to the integration process in a holistic sense. This position might have been further fortified had the Court opted for a human rights interpretation of these rights. The Court's limited jurisdiction might have had an influence on the Court's prevailing interpretation and rationalisation of migration rights in the EAC.

The Court's jurisdiction is further affected by Article 54.2 of the CMP which provides for the right to redress through national courts and tribunals for persons whose rights under the Protocol have been violated. This provision might have had the effect of reducing the number of cases on migration rights that are referred to the EACJ. Consequently, this provision read together with the other amendments that affect the jurisdiction of the EACJ render it necessary to explore and assess the implementation of Community law and objectives with regard to migration rights in the domestic jurisdictions of the EAC Partner States.

[99] Gathii 'Variation' op cit note 39.
[100] *Mukira Mohochi* case, supra note 51 para 112.
[101] Ibid para 76.

CHAPTER SIX
ASSESSING EAC PARTNER STATES' COMPLIANCE WITH THE EAC MIGRATION RIGHTS REGIME: ANALYSIS OF NATIONAL LAWS AND PRACTICES

6.0 Introduction

The successful implementation of the EAC Treaty and the realisation of its objectives is a responsibility that rests greatly on the Partner States. Accordingly, Article 8 of the EAC Treaty obligates Partner States to, *inter alia*, 'plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community', as well as the implementation of its provisions[1]. Yet more precisely, the Treaty expressly requires of Partner States to 'abstain from measures likely to jeopardise the achievement of the objectives or the implementation of the Treaty provisions'[2]. Therefore, in order to assess the level of compliance with the EAC's objectives and provisions on migration rights, it is necessary for one to examine what pertains in each of the Partner States and assess whether or not this is in compliance with the Treaty and the Common Market Protocol (CMP). This is the aim of this chapter.

The chapter shall present an analysis on how each of the selected Partner States makes provision, both in law and practice, for the free movement of persons, the right of residence and the right of establishment; and assess the extent to which these have been conformed to Community law and as such harmonised with each other. Suffice to note that migration rights have so many aspects to them, particularly, the right of establishment, but what is presented herein is not exhaustive and is only for purposes of illustration on the status of implementation. The issues discussed herein, admittedly, may merely scratch the surface, but can nevertheless be used to make some assessment on the level of compliance with Community law. An examination of some of the relevant jurisprudence from the national courts, scanty though it may be, will provide an indication of whether national courts are championing the objectives of the Community. This will in effect be an assessment of the extent to which national courts are promoting and protecting migration rights of community citizens within the respective Partner States.

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[1] EAC Treaty Article 8.1 para (a).
[2] Ibid Article 8.1 para (c).

A 2006 report on migration legislation in East Africa found that there was still much to be done in all the three Partner States (Kenya, Tanzania and Uganda as they then were) in terms of harmonising migration laws, improving or even enacting new ones[3]. This study, moreover, was done before the coming into force of the CMP and its regulations, which clearly outline the measures to be taken by the Partner States with regard to the free movement of persons, right of residence, right of establishment and other Treaty rights. It is argued in this chapter that individual Partner States, albeit to varying degrees, have made some progress towards promoting these migration rights. Even then, there is apparently a higher degree of compliance with, say, the free movement of persons than with the right of establishment for instance. Moreover as the chapter shall demonstrate, there is more that still needs to be done in terms of harmonising laws, improving or enacting new laws in order for the migration rights of EAC citizens to be effectively guaranteed. It is also contended that although under Community law, States are expected to cede some aspects of their sovereignty in matters to do with migration rights of community citizens, they still retain it to a great extent[4], which adversely impacts on the integration process of the EAC. This, it is argued, might be as a consequence of some of the compromises that had to be made whilst negotiating the CMP. As such, what is reflected at the national level might be a pointer to shortcomings inherent in the entire EAC migration rights regime.

The chapter shall be presented under the headings of each of the migration rights, that is freedom of movement of persons, right of residence, and right of establishment. Moreover, it is necessary, first of all, to explain how each of the selected Partner States incorporates Community law into the domestic system. This too shall further enlighten on the position of migration rights of EAC citizens within each State's domestic legal regime.

6.1 The status of EAC Law in the Partner States

The Constitutions of most, if not all, EAC Partner States do not contain specific provisions on the East African Community. Some, however, contain general provisions on international and regional agreements or treaties, which may be used to determine the status of Community law in that specific country. The Constitution of Uganda in its National Objectives and Directive

[3] Flora M Musonda 'Migration legislation in East Africa' 2006 *International Migration Papers No. 82* 42.
[4] As demonstrated in the *Mukira Mohochi*, EACJ Ref. No. 5 of 2011 discussed in previous chapter section 5.2.

Principles of State Policy, provides for the participation of Uganda in international and regional organisations that stand for peace and the progress of humanity. The Republic of Uganda also undertakes to 'promote regional and Pan African cultural, economic, and political cooperation and integration'[5]. Uganda's involvement in the EAC is thus in accord with its national objectives and conversely, Uganda is by virtue of its Constitution, obliged to fulfil its obligations under international and regional treaties it has ratified, including the EAC Treaty. Uganda ratified the EAC Treaty and domesticated it *vide* the East African Community Act 2002. The makes the EAC Treaty in its entirety, law in force in Uganda.

The Constitution of Rwanda also makes provision for international treaties and agreements. The most notable provision is Article 190 which provides that 'international treaties and agreements which have been conclusively adopted in accordance with the provisions of the law shall be more binding than organic laws and ordinary laws except in the case of non-compliance by one of the parties'. This provision of the Rwandan Constitution represents the monist tradition of most Francophone African States[6], of which Rwanda was part, although now it practices a hybrid system of both civil law and common law traditions. With regard to Article 190, the Rwanda Government explains that 'if an international instrument is ratified and published in the official gazette, it automatically becomes a binding legislation'[7]. The EAC Treaty therefore, having been ratified by Rwanda is takes precedence over the organic and ordinary laws of Rwanda. Article 190 of the Rwanda Constitution reinforces the provisions of EAC Treaty to the effect that the Treaty shall take precedence over national laws on matters pertaining to the implementation of the Treaty[8].

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[5] The Constitution of the Republic of Uganda 1995 as amended, Objective XXVIII (ii) & (iii).
[6] Magnus Killander & Horace Adjolohoun 'International law and domestic human rights litigation in Africa: an introduction' in Magnus Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 5. According to the monist concept of international law, treaties become part of the domestic law upon ratification. This is contrasted with the dualist concept where an international Treaty may only have effect in a given State after it has been domesticated.
[7] Republic of Rwanda, *The 9th and 10th Periodic Report of the Republic of Rwanda under the African Charter on Human and Peoples' Rights* para. 19, available at http://www.achpr.org/files/sessions/47th/state-reports/9th-10th-2005-2009/staterep9and10_rwanda_2009_eng.pdf, accessed on 15 November 2015.
[8] EAC Treaty Articles 8.4 & 8.5.

The Constitutions of Kenya and Tanzania do not contain analogous provisions, but both have ratified and domesticated the EAC Treaty[9], as they too, just like Uganda, belong to the dualist tradition. It can therefore be said that all the focal EAC Partner States have duly incorporated the EAC Treaty into their domestic law. Thus the EAC Treaty, its Protocols and annexes have direct effect in all the Partner States that are bound to fulfil all their obligations thereunder.

The EAC Partner States having ratified and domesticated the EAC Treaty, are bound by Article 8.4 & 8.5 which make the EAC Treaty supreme over national laws with regards to matters pertaining to the implementation of the Treaty, a position that has now and again been stressed by the EACJ[10]. National courts in the few cases that involve migration rights issues, to be illustrated later on in the chapter, have equally upheld the supremacy of EAC law over contrary national law, as well as its direct effect where domestication has occurred. With regards to migration rights, the CMP which elaborates these rights is an integral part of the EAC Treaty. The Partner States should, therefore, implement the provisions of the CMP directly since they have the force of law in the respective countries and all contrary legal provisions should be read in accordance with the terms of the Treaty, its Protocols and annexes.

The Constitutions of Kenya, Rwanda, Tanzania and Uganda do not contain provisions that reiterate any of the migration rights provided for under both the EAC Treaty and the CMP. It is thus arguable that migration rights of EAC citizens are not a subject of national Constitutions among the EAC Partner States. Hence it might be the case that migration rights of EAC citizens are not recognised as equivalent to analogous rights provided for in the national Bills of Rights. The Bills of Rights guarantee an assortment of rights and freedoms to a State's nationals and persons lawfully on the State's territory. These rights include the right to free movement and residence, the right to work and practice one's profession or trade, which, as discussed in chapter two, may be regarded as parallels to migration rights under Community law.

As discussed in the preceding chapters, however, the key issue is not whether migration rights are human rights, as they are not, but rather whether they can be approached more from a

[9] Kenya has domesticated *vide* the Treaty for the Establishment of the East African Community Act 2000; while Tanzania passed the Treaty for the Establishment of East African Community Act 2001. These laws give the EAC Treaty the force of law in the respective countries.
[10] *Peter Anyang' Nyong'o & others v The Attorney General of Kenya & others,* EACJ Reference No. 1 of 2006, 41-42; *Mukira Mohochi* case supra note 4 paras. 48, 122-123.

human rights perspective than an economic one. This is an issue that is more relevant at the point of interpretation than practical application. When it comes to implementation, Partner States should really focus on conforming to the Treaty obligations and fulfilling their obligations thereunder.

What follows is a discussion on the status of implementation of these rights within the Partner States. One thing that will come out clearly is the predominance of the economic rationale for migration rights at the point of implementation. At this point, there is a clear divergence of constitutionally guaranteed rights that are analogous to migration rights from migration rights as guaranteed under Community law.

6.2 The free movement of persons

Freedom of movement is guaranteed in each of the Constitutions of Kenya, Rwanda, Tanzania and Uganda. Moreover, the right to free movement in virtually all EAC Partner States is guaranteed for 'citizens or nationals' of that State. By way of illustration, in Uganda, the right to move freely throughout Uganda and to reside and settle in any part of Uganda, as well as the right to enter, leave and return to Uganda, is guaranteed to '*every Ugandan*'[11]. Similarly in Tanzania, the right to freedom of movement, and to live in any part of Tanzania; the right to enter and leave the country is guaranteed to '*every citizen*' of the United Republic of Tanzania[12]. The Constitution of Rwanda, too, is explicit in providing that '[*E]very Rwandan*' has the right to move and to circulate freely and settle anywhere in Rwanda, as well as the right to leave and to return to Rwanda[13]. The Constitution of Kenya is slightly different; it provides for the right to freedom of movement and the right to leave Kenya to 'every person'[14]. But then again, the right to enter, remain in and reside anywhere in Kenya is guaranteed to '*every citizen*'[15].

[11] The Constitution of the Republic of Uganda 1995 as amended, Article 29(2).
[12] The Constitution of the United Republic of Tanzania cap. 2, Article 17(1).
[13] The Constitution of the Republic of Rwanda 2003 as amended, Article 23.
[14] The Constitution of the Republic of Kenya 2010, Article 39(1).
[15] Ibid Article 39(2). For further discussion on the beneficiaries of the right to free movement ie 'everyone' and 'every citizen', see especially Jonathan Klaaren 'Freedom of movement and residence' in Stu Woolman, Theunis Roux & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2008). Although he speaks specifically about the South African Constitution, there are substantive comparisons with the free movement provisions in the Constitution of Kenya.

Generally speaking, the guarantee of the freedom of movement and residence in all EAC Partner States is still pretty much a preserve for the citizens or nationals of that Partner State to the exclusion of all others, considered as aliens or foreigners[16]. As such this wording seems to depart from the international human rights law recommended formulation of 'everyone lawfully within the territory of a State' as the object of the right. One possible implication of this is that the rights of aliens and foreigners to free movement and residence may, in accordance with each State's laws, be subject to restrictions and conditions that may not pertain to nationals of the State. In practical terms, however, all persons lawfully within the territory of any of the EAC States will enjoy the right to free movement and residence save for where lawful restrictions apply. More importantly, though, what needs to be examined closely is how the constitutional provisions on free movement may impact on migration rights of EAC citizens.

With the domestication of the EAC Treaty and its protocols, all domestic law should be read and applied consistent to Community law. Although the various national Constitutions may guarantee the right of free movement to nationals, these respective provisions should, according to the EACJ's interpretation in the *Mukira Mohochi* case, be read so as to conform to the requirements of the EAC Treaty[17]. Thereby, the respective constitutional provisions, much as they focus on nationals of the State, should in application be extended to EAC citizens to the extent that is required by the EAC Treaty, the CMP and its relevant annexes. As shall be illustrated by the domestic jurisprudence to be discussed further on in this chapter, national judges have so far been mindful of national laws being conformed to the EAC Treaty, hence upholding the supremacy of Community law. Consequently, the national constitutional provisions on the right to free movement, despite their specific reference to citizens, would not adversely impact on the right of free movement of EAC citizens that is guaranteed under Community law.

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[16] The Uganda Citizenship and Immigration Control Act cap.66, Section 2 defines 'alien' as a person who is not a citizen of Uganda; The Kenya Citizenship and Immigration Act cap. 172, Section 2 defines 'foreign national' as a person who is not a citizen of Kenya; The Tanzania Immigration Act 1995, Section 3 defines 'alien immigrant' as a person who is not a citizen of Tanzania; while the Rwanda Law on Immigration and Emigration 2011, Article 2.12 defines 'foreigner' as a person who does not hold Rwandan nationality. Article 42 of the Rwanda Constitution actually specifies that '[e]very foreigner legally residing in Rwanda shall enjoy all rights *save those reserved for nationals* as determined under this Constitution and other laws' (emphasis added). Free movement of persons is obviously one of the rights reserved for Rwandan nationals.

[17] See chapter five above, section 5.2, particularly section 5.2.1.

Despite the national Constitutional Bill of Rights provisions on the right to free movement, the practice among the Partner States has considerably progressed towards conforming to Community law. Much in conformity with Article 7.2 of the CMP, all EAC Partner States have abolished visa requirements for each other's nationals. All that is required, is a valid travel document, which may be a passport or national ID; and completion of entry and exit forms at the border points. In order to ease movement of EAC citizens, separate counters have been established for EAC citizens or nationals at the border posts in the various Partner States. Given that the use of national IDs is optional, subject to Partner States agreeing to accept them as travel documents[18], they are only accepted as such in Kenya, Rwanda and Uganda[19], while Burundi and Tanzania still insist on the use of passports only. The regional EAC passport is also recognised by all the Partner States and is an acceptable travel document within the EAC[20]. All in all, the formalities of entry and exit of EAC citizens, to a great extent, seem to be harmonised in all the EAC Partner States and also to be in conformity with Community law requirements. The only exception may be where a Partner State may require additional documents from EAC citizens for immigration purposes. One such instance is the requirement of a yellow fever certificate from EAC citizens moving into Tanzania which is not a requirement in other EAC countries[21].

In addition to having valid travel documents, EAC citizens are required to enter and exit a Partner State through recognised or gazetted border posts[22]. Border posts still exist among EAC states, unlike for instance within the EU Schengen area. At these border posts, all persons have

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[18] EAC Free Movement of Persons Regulations regulation 5.2.
[19] http://www.commonmarket.eac.int/index.php?option=com_content&view=article&id=87&Itemid=137; Kenya Legal Notice No. 133 of 2014; Henry Kibet Mutai 'Assessing the implementation of the East African Community common market: a preliminary scoping study' 2015 *Tralac Working Paper S15WP04/2015* 21.
[20] Kenya Citizenship and Immigration Act cap. 172, Section 25(1) para (c); The Tanzania Passports and Travel Documents Act 2002, Section 3(2) para (d) & Section 8(3); Law on Immigration and Emigration in Rwanda No. 4/2011, Article 25; For Uganda, The Passport Regulations Statutory Instrument No. 14 of 2004, regulation 2. All EAC citizens are entitled to an EAC Passport, obtainable upon application and payment of ten dollars- for further discussion refer to chapter four above section 4.2.1.
[21] See Tanzania Public Health Act 2009. See also http://www.taa.go.tz/index.php/traveller-guides/health-requirements, accessed on 16 December 2015. With a rise of yellow fever cases in 2016, all EAC countries presently require a yellow fever certificate upon exit and entry.
[22] The Uganda Citizenship and Immigration Control Regulations No. 16 of 2004 (made under S.82 of the Principal Act), regulation 16; Tanzania Immigration Regulations 2002 (made under S. 33 of the Principal Act), regulations 19-20; Ministerial Order No. 02/01 of 31/05/2011 Establishing Regulations and Procedure Implementing Immigration and Emigration Law of Rwanda, Article 30; The Kenya Citizenship and Immigration Regulations 2012 Legal Notice No. 64 of 2012, regulation 15.

to complete immigration/emigration forms before they can enter or exit a Partner State[23]. Upon fulfilment of these administrative procedures, EAC citizens will be granted a six-month pass into the host Partner State. According to the Rwanda Immigration law, EAC citizens are issued a visitor's pass valid for six months renewable[24]. Kenya also issues a six-month visitor's pass[25]. In Tanzania, a visitor's pass is issued to any person entering for lawful purposes other than work or business and is valid for ninety days[26]. This provision does not distinguish between EAC citizens and other visitors, but the practice is that EAC citizens are given a six-month pass in accordance with Community law[27]. The Ugandan law, too like the Tanzanian law does not distinguish visitor's passes of EAC citizens from other foreign nationals, but states that such passes are valid for two months extendable up to six months by the Commissioner's discretion[28]. In practice, however, EAC citizens visiting Uganda are granted six-month passes.

6.2.1 Assessing free movement of EAC citizens in real terms

In all fairness, the EAC Partner States have demonstrated willingness and commitment to their CMP obligations on ensuring free movement of EAC citizens. They have to a large extent put in place legal and practical administrative measures with the aim of fulfilling the requirements of the CMP. However, on the part of the legal measures put in place there is need for improvement in terms of harmonisation of laws, particularly within individual Partner States. Kenya and Rwanda have attained some harmony in the relevant laws following recent amendments that incorporate the requirements of the CMP and its regulations. In Tanzania and Uganda, the relevant laws appear to be scattered in various documents; some of the enabling laws are not easily available even from the relevant government departments and yet the prescribed practices have been implemented. The failure to harmonise and consolidate the laws creates a discord between the practice and the laws. There is therefore a need to update, clarify and harmonise the laws relating to free movement of EAC citizens.

In terms of the administrative and practical measures put in place to implement the CMP and the regulations on the free movement of persons, the process of entry and exit for EAC citizens

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[23] Ibid.
[24] Regulations for Immigration and Emigration in Rwanda Article 8.
[25] Kenya Citizenship and Immigration Regulations regulation 31(3).
[26] Tanzania Immigration Regulations regulation 13.
[27] Regarding six-months passes for EAC citizens, see http://www.immigration.go.tz/module1.php?id=25, accessed in June 2015.
[28] Uganda Citizenship and Immigration Control Regulations, regulation 6.

across the Partner States has been greatly eased. Moreover, there are a couple of regulatory barriers that may necessarily hamper or hinder the free movement of persons.

The first instance of such barriers is the administrative and border controls that EAC citizens are still subject to in the individual EAC States. These procedures are actually sanctioned under Community law and Partner States are implementing them in accordance thereto[29]. EAC citizens actually require permits to enter in any Partner State other than their own. What this suggests is that free movement within the EAC is not uninhibited free movement as such, but rather regulated movement still subject to bureaucratised and formal immigration procedures. This appears to be more the case when comparison is made between the free movement of EAC citizens within the EAC and the free movement of nationals that pertains within each individual EAC State where movement within a State is not necessarily subjected to formal and regulated administrative procedures. In relation therefore, the free movement of EAC citizens within the EAC appears to be less 'free'. Yet another comparison may be made with free movement of EU citizens within the EU Schengen area where inter-state border posts do not exist. The rationale for removal of inter-state borders was precisely for the purpose of promoting free movement of persons within the Union. From this comparative view the cross-border movement of EAC nationals can be said to be still more formal and consequently 'less free'.

It could, however be that maintaining the border posts and controls is a reflection of the nascence of the EAC migration rights regime and probably in future it might evolve to such a point where EAC citizens are not generally subject to border controls. It remains to be seen whether these prescribed border and administrative procedures and controls will be retained for EAC citizens.

The second instance of regulatory barriers goes to the substantive issues that would prompt or encourage EAC citizens to exercise their right to free movement. As discussed in chapter two, the right to free movement will necessarily be inhibited if States retain measures, regulatory, administrative or otherwise, which prevent one from exercising that right. Within the EAC, focus seems to be only on the formal immigration procedures and not on related substantive matters of migration. The effect is that there are relevant areas other than immigration that

[29] EAC Free Movement of Persons Regulations regulations 5.2 and 5.3.

impact on the right of free movement, but for which no significant measures have been taken to give effect to the free movement of persons. As a result, laws and regulations still exist which hinder the exercise of the right of free movement of EAC citizens. For instance, students may be able to freely and easily enter a Partner State, but gaining admission or even having access to admission will be another matter altogether. Admission requirements may be quite disparate in each country, just as the fees payable by nationals and non-nationals. For researchers, the clearance requirements are country-specific and do not privilege EAC citizens over other foreign nationals in any way[30]. This may inhibit one from conducting research in a given country, and so, refrain an EAC citizen from exercising their freedom of movement.

The right to free movement goes beyond formal entry and exit procedures in the various Partner States. There is yet more to be done both at the Community level and at the Partner State level to ensure that the substantive aspects of the right to free movement are given equal attention and duly implemented. One can only expect that the current state of affairs is just the beginning and that as the Community evolves and integration advances, EAC citizens will gradually enjoy their right to free movement both in formal and substantive matters.

6.3 Right of residence

The CMP is quite clear that the right of residence only pertains to those EAC citizens who are workers or who wish to establish themselves as self-employed persons in another Partner State[31]. Thus the right of residence as provided for under Community law only applies to a restricted range of persons- those who are economically active. This is one of the aspects in which there is a divergence between the right of residence under Community law and the right of residence under national laws.

In actual terms, what Community law prescribes may be regarded as substantively less than what national laws of the individual Partner State prescribe. Under the various national Constitutions, the right of residence is corollary to the right to free movement. However, as mentioned in the immediately preceding section, the right to freely reside, just like the right to

[30] Apart from Rwanda which charges the same fee for local and EAC researchers (ranging from USD 20- USD 100), all other Partner States regard EAC citizens as foreign nationals with regard to payment of research clearance fees. The fees range from USD 300 to USD 400 for foreigners applying to do research in Kenya, Tanzania and Uganda.

[31] CMP Article 14.3; EAC Right of Residence Regulations regulations 5.1, 6.2 & 8.

free movement is generally couched in such terms that it is only guaranteed to *nationals* of each State. What this implies is that the right of residence for persons who are not nationals of that State, including EAC citizens, may not be guaranteed to the same degree as a State's nationals. Furthermore, the right of residence for nationals of any EAC Partner State is not based on one's economic-activity status as is the case under the CMP provisions.

The analysis on the right of residence as pertains in the various Partner States shall be considered in terms of formal requirements before it can be duly exercised by an EAC citizen, the attendant rights of spouses and dependants, and conditions regarding permanent residence.

6.3.1 Formal requirements pertaining to the right of residence

In all EAC countries, it is a requirement that all non-citizens, considered aliens in that country, who immigrate for purposes other than short-term visits, obtain a residence permit. The residence permit is generally issued on the basis of an application specifying the purpose for which residence is required. The common practice is for the residence permit to be linked to the work permit as stipulated in the various national laws. Most of the residence permits are classified in accordance with the purpose for which they are required and as Table 2 (see Appendix 1) illustrates this will depend on the work or business one intends to do in the respective country.

It is quite clear from Table 2 that permits among the EAC countries are not exactly harmonised; each country still uses its own classification or structure of work/residence permits. Furthermore, all four countries issue permits that serve as both work and residence permits. Specific to Tanzania, though, is the requirement for applicants of Class "A" and Class "B" permits to obtain Re-entry passes once their permit applications have been approved.

The fees charged in each country will vary according to the class of permit sought. The fees structure too is not harmonised across all EAC States, with each State still setting its own fees. Actually, in Kenya, Rwanda and Uganda, work permit fees have been abolished for each

other's citizens[32]. For Tanzania, fees are still being charged for citizens from other EAC countries who wish to work and reside in Tanzania[33]. In reciprocation, Tanzanians who seek work/residence permits in Kenya, Rwanda or Uganda have to pay the specified work permit fees[34].

The duration of residence permits, although usually aligned to the work permit, varies from country to country. In Tanzania, a residence permit is issued for any period not exceeding three years and may be renewed for a period not exceeding two years[35]. In Kenya, a permit shall not be issued or renewed for a period exceeding five years from the date of issue or renewal[36], but the initial period is usually two years[37]. The duration for the permit in Rwanda varies according to the class of permit: some are two years, others three years, but they are all renewable[38]. In Uganda, the duration of the residence permit may depend on the work permit, the duration of which is determined by the Board[39], otherwise certificates of residence are categorised in durations of five years, ten years, fifteen years, and for life[40].

The basis for the right of residence for EAC citizens in each of the Partner states is much in accord with the CMP in as far as the right largely accrues to only workers or self-employed persons who wish to establish themselves in another Partner State. However, according to Table 2, some national laws go beyond Community law in extending the scope of persons to

[32] Interview with official at Ministry of East African Community Affairs (MEACA), Kampala, Uganda (March 2015); Interview with official at Directorate of Citizenship and Immigration Control (DCIC), Kampala, Uganda (April 2015).
[33] Depending on the type of permit sought, fees range from USD 1000 to USD 3000 for work permits in Tanzania- Immigration (Amendment) Regulations 2012. These may be subjected to change if and when the recently enacted The Non-Citizens (Employment Regulation) Act 2014 comes into effect. Therein, the fees have been revised to USD 1000 for both Class "A" and Class "B" permits.
[34] In all countries, the fees will depend on the class of permit sought. In Kenya, work permit fees range from KES 5000/- to 250,000/- per year, in addition to a processing fee of Kenya Shillings 10,000/- (Ninth Schedule-Kenya Citizenship and Immigration Regulations); in Rwanda, the fees range from RwF 20,000/- to 100,000/- per year (https://www.migration.gov.rw/index.php?id=79, accessed in June 2015); in Uganda, the permit fees range from USD 800 to 5000; while residence certificates range from USD 2000 to 2500, depending on the duration of residence applied for - see The Uganda Citizenship and Immigration Control (Fees) Regulations 2013.
[35] Tanzania Immigration Act 1995, Section 18(2). The new law regulating the employment of non-citizens stipulates that the validity of the work permit shall be two years, renewable, but the total validity period of the 1st grant and renewal shall not exceed five years - see The Non-Citizens (Employment Regulation) Act 2014.
[36] Kenya Citizenship and Immigration Regulations regulation 24(2).
[37] http://www.immigration.go.ke/Information.html, accessed in June 2015.
[38] Regulations for Immigration and Emigration in Rwanda Articles 3 & 4.
[39] The Uganda Citizenship and Immigration Control Act Section 54(3).
[40] The Uganda Citizenship and Immigration Control (Fees) Regulations 2013.

whom residence permits may be issued. For instance in Kenya, Class "K" permits are issued to persons, usually thirty five years old and above, who have an assured income from sources outside Kenya and undertake not to accept any paid employment of any kind[41]. Similarly, Rwanda issues Class "K" permits to persons with an assured income, including a retired person, who does not intend to be employed in Rwanda[42]. Tanzania issues Class "C" permits to persons who do not qualify for Class "A" (business and trade-related) permits, or Class "B" (specific employment) permits. The Class "C" permits are granted at the discretion of the Director for immigration[43], and this enables one to obtain a residence permit not necessarily related to work or business, provided one fulfils certain specified conditions. Uganda has no similar permit. Persons who wish to reside in Uganda for purposes other than work or business are granted a six-month permit if they are EAC citizens. There is admittedly a challenge with persons such as pensioners who wish to retire since these are not covered under the Ugandan law. This, however, is expected to be addressed in a forthcoming amendment to the law[44].

Also worth mentioning is that while in Kenya, Rwanda and Uganda, the laws do not stipulate any restrictions on where one may reside, in Tanzania, one of the conditions for a residence permit is that the area of residence should be stated[45]. What this implies is that non-Tanzanians are restricted to where they may reside and as such they do not enjoy the right of residence as Tanzanian nationals. In the other three countries, provided one has a valid residence permit (which might be in consideration of the fact that one may not wish to live so far from one's place of business or work), one may reside where one chooses, but may need to update immigration authorities of change of address.

6.3.2 Requirements for spouses and dependants

Regarding dependant passes, the laws, much as they largely promote family reunion, particularly where the principal applicant has obtained a work/residence permit, are still varied in some particular aspects in the various Partner States.

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[41]Kenya Citizenship and Immigration Regulations Schedule 7. One must have an assured annual income of at least USD 24,000 or its equivalent in Kenya Shillings- regulation 20(4).
[42] Regulations for Immigration and Emigration in Rwanda Article 4.11. The applicant must show proof of an annual income of at least USD 5000 per year.
[43] Tanzania Immigration Act Section 20. Actually Tanzania also issues permits for retired persons who want to reside in Tanzania- see http://immigration.go.tz/module1.php?id=15, accessed in June 2015.
[44] Interview with official at DCIC, Kampala, Uganda (April 2015).
[45] Tanzania Immigration Act Section 19(2).

In Tanzania, what is really striking about the law is that language used is not gender-neutral. A dependant permit shall be issued upon proof that one is a *wife*, child or near relative of the applicant and is dependent on the applicant for his or her maintenance[46]. In addition, the applicant has to prove that he is able to provide accommodation and has sufficient income to continue to maintain each of the dependants adequately while in Tanzania[47]. Upon satisfaction of these and any other required conditions, a dependant pass shall be issued by way of an endorsement of the names of the dependant on the applicant's residence permit[48]. Asides from presupposing that an applicant for a work permit will always be a male, the law specifically emphasises as dependants, a wife and dependent children[49]. The fees payable for a dependant pass are USD 500[50].

In Kenya, a dependant's pass will be issued to a person who depends on the applicant for maintenance and this could be a spouse, child, or a person by reason of age, disability or other incapacity is maintained by the applicant[51]. The applicant has to prove that the person for whom the pass is sought depends on him or her for their maintenance, and that the applicant has sufficient income to maintain each of the dependants adequately[52]. Once all these conditions are satisfied, a dependant's pass shall be issued. Issuance fees of Kshs. 5000 per year are payable for a dependant's pass[53]. In Rwanda, a dependant's pass is also issued to a dependant of a residence permit holder, whereby dependant means 'a family member, close relative or any other person who may be considered as a family member'[54]. The dependant applicant has to provide proof of relationship, a police clearance certificate and copy of the resident permit of the principal applicant[55]. The law does not seem to require the principal applicant to prove sufficient income to maintain each of the dependants, and neither does the specified list of

[46] Tanzania Immigration Regulations regulation 9.
[47] Ibid.
[48] The Immigration Act Section 25(1).
[49] Ibid. Although the definition of dependant under Section 2 of the Act means 'a person who is materially dependent upon the earnings of another', the term as used in relevant provisions of the Act specifies 'a wife and dependent children'.
[50] Tanzania Government Notice (G.N.) No.262 of August 03 2012.
[51] Kenya Citizenship and Immigration Regulations regulation 27(2).
[52] Ibid regulation 27(3).
[53] Ibid schedule 9.
[54] Regulations for Immigration and Emigration in Rwanda Article 2.14.
[55] https://www.migration.gov.rw/index.php?id=136, accessed in June 2015.

requirements[56]. Moreover the fees charged are half of what the principal applicant pays[57]. In Uganda, the principal applicant will have to apply for the dependant's pass and prove that one is indeed a dependant and that the applicant can adequately accommodate and maintain the dependant[58]. A dependant is taken to be 'a person who, by reason of age, disability or other incapacity, is unable to maintain himself or herself and depends upon another person for his or her maintenance and includes a spouse'[59]. The fees payable for a dependant's pass vary depending on the nature of the relationship, with a spouse paying USD 200, a child paying USD 100 and others paying USD 500[60].

Although the regulations pertaining to dependants of workers and self-employed persons in each Partner State, are largely in conformity with the procedural standards stipulated in the regulations[61], in some instances, they go beyond what is stipulated. For example, on the upside, the definition of 'dependant' in Kenya, Rwanda and Uganda is quite expansive going beyond the spouse and child of a worker or self-employed person. On the downside, though is the requirement to provide accommodation and show sufficiency of income in Kenya, Tanzania and Uganda. This, however could be justified by the Partner States on the ground that the CMP gives them leeway to ask for any other document[62]. This at times may be difficult to prove considering that there is no yardstick for what amounts to sufficient income. Consequently, the right to family reunion that is the objective of dependant's passes may be interfered with. A more compelling argument could be that the principal applicant will be either a worker or self-employed person, thus obviously having some means of income, and in any case they will have proved sufficient means to reside in the country before a permit is issued. It therefore appears absurd to require them to provide, once more, proof of accommodation and sufficiency of income for dependants, yet nationals of the country in similar situations are not required to do so. This is one of the provisions that may benefit from judicial scrutiny in order to determine whether such a requirement is justifiable in the circumstances.

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[56] Ibid. See also Regulations for Immigration and Emigration in Rwanda Article 4.12.
[57] Ibid.
[58] The Uganda Citizenship and Immigration Control Regulations regulation 4.
[59] Ibid regulation 2.
[60] The Uganda Citizenship and Immigration Control (Fees) Regulations 2013.
[61] EAC Right of Residence Regulations regulation 8; see discussion under Section 4.2.3 in chapter four above.
[62] Ibid regulation 8.3 para (d).

6.3.3 Permanent residence

The CMP does not contain any prescriptions regarding permanent residence, but leaves it within the remit of national policies and laws of the Partner States[63]. In a way this makes sense when one considers that the right of residence as guaranteed under Community law does not, in substance, extend to EAC citizens seeking permanent residence in another EAC country. It applies to EAC citizens who are in a Partner State other than their own for a specified period. Therefore, permanent residence is not regulated by Community law, but it is one of those areas in which national laws may be seen to offer substantially more than Community law in broadening the right of residence of EAC citizens. Consequently, the requirements for permanent residence vary from Partner State to Partner State.

In Rwanda, permanent residence is issued to a foreigner who wishes to reside permanently in Rwanda for purposes of work or business[64]. Kenya grants permanent residence to persons who were citizens by birth but have since lost their citizenship status and cannot enjoy dual citizenship; or persons who have worked in Kenya for at least seven years and have been continuously resident in Kenya for three years preceding the application; or children of citizens born outside of Kenya and have acquired citizenship of domicile; or a spouse of a Kenyan citizen married for at least three years[65]. In Uganda, in order to be eligible for a certificate of permanent residence, one must prove that he or she has contributed to the socio-economic or intellectual development of Uganda; has continuously lived in Uganda for ten years; is of good character and proven integrity; has no criminal antecedents; has not defaulted in payment of taxes; and is neither bankrupt nor destitute[66]. In Tanzania, the laws on immigration and citizenship are not exactly clear on the issue of permanent residence. Presumably this might be catered for under the Class "C" permits which are granted at the Director's discretion. The fees, duration and other conditions for the permanent residence, accordingly, vary from one EAC state to another.

[63] CMP Article 14.7.
[64] Regulations for Immigration and Emigration in Rwanda Article 5.
[65] Kenya Citizenship and Immigration Act Section 37.
[66] The Uganda Citizenship and Immigration Control Act Section 55.

6.3.4 Assessing the right of residence in real terms

The CMP prescribes the harmonisation of residence permits[67], but as demonstrated above, the classification and issuance of permits is still in accordance with each Partner State's preferences. The lack of harmonisation with regards to work and residence permits, and the failure to provide specially for EAC citizens as distinct from other non-nationals have been cited as some of the reasons why the free movement of workers is painstakingly slow[68]. Among the Northern Corridor countries[69] (Kenya, Rwanda and Uganda), these issues may be a thing of the past as the abolition of work permit fees may partly provide a solution. According to one official, harmonisation of work permits ceases to be a significant issue where fees for work permits have been abolished[70]. For purposes, however, of uniformity, certainty and clarity on the part of the EAC citizens, it might be worthwhile harmonising residence/work permits among EAC countries.

The law and practice with regard to the right of residence within the EAC demonstrates that the right does not extend to all EAC citizens, but only those that are economically active. The scope of persons targeted is not the only aspect in which the right seems to be restrictive. It is also rather clear that EAC citizens that reside in a Partner State other than their own may not necessarily enjoy the right of residence in the same way as nationals of that Partner State. Consequently, the content of the right of residence in each Partner State does inevitably impact on the right of free movement of EAC citizens. When residence requirements tend to be more restrictive, free movement is coincidentally inhibited.

The laws and policies notwithstanding, there have been instances where the normative content of residence of EAC nationals has been interpreted in a more liberal and broader sense than what the laws seem to provide. In the case of *Deepak Shah & others v Manurama & others*[71],

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[67] EAC Right of Residence Regulations regulation 6.5; EAC Right of Establishment Regulations regulation 6.10.
[68] Mutai op cit note 19 at 22; Andrew Luzze 'EAC states should harmonise work permits' *Daily Monitor* 4 November 2014.
[69] Reference to the Northern Corridor countries herein is with regard to three EAC Partner States, Kenya, Rwanda and Uganda that have signed up for the Northern Corridor Integration Projects Initiative (herein 'the Northern Corridor'). This initiative, which also includes South Sudan, is the transport corridor linking the landlocked countries of Uganda, Rwanda, South Sudan and Burundi to Kenya's Maritime Port of Mombasa. The transport corridor also serves Democratic Republic of Congo and Northern Tanzania'- see http://www.nciprojects.org/, accessed in June 2015.
[70] Interview with official at DCIC, Kampala, Uganda (April 2015).
[71] Miscellaneous Application No. 361 of 2001 arising out of H.C.C.S No. 354 of 2001.

an application before the High Court of Uganda, the defendants in the underlying suit were ordinarily resident in Uganda, while the plaintiffs were ordinarily resident in Nairobi, Kenya. The defendants applied to the court for an order that the plaintiffs pay security for costs since they were residents abroad, that is, outside the court's jurisdiction, and additionally, they had no property in Uganda. Bearing in mind that at the time, the EAC had been re-established, the court considered whether it was necessary for a resident of the Community to pay security for costs. Some of the factors that the court took into account included the fact that all three East African countries (as they were then) had virtually identical legal provisions with regard to security for costs, and foreign judgements enforcement. Furthermore Court considered Article 104 of the EAC Treaty which provides for migration rights, among others, and stressed the obligation of Partner States to ensure enjoyment of these rights by their citizens within the Community. In its decision, the court thus observed that in East Africa, 'there can no longer be an automatic and inflexible presumption for court to order payment for security for costs with regard to a plaintiff who is resident in the East African Community'. Thus, the Court disregarded the plaintiff's residence as a ground for ordering security for costs and taking also other circumstances into consideration, dismissed the defendant's application.

The court's ruling in this case is quite remarkable, more so considering that it was made soon after the coming into force of the EAC Treaty and long before the CMP came into force. At the time, the right of residence was not well-elaborated. Although, the issue in point was not exactly about the right of residence, but rather the jurisdictional powers of a national court over EAC nationals, the court's view on residence within the EAC was quite far-reaching. By considering the entire EAC as one jurisdictional space, the court broadly interpreted and applied what would have been a narrow national legal provision, and thus recognised and gave effect to the supremacy of Community law over national law. Hard though it may be to assess the impact of the decision on the wider audience, the precedent was set and can always be followed should similar matters arise.

The *Deepak Shah* case demonstrates that national courts can give substance to and apply the right of residence of EAC citizens even in matters more far-reaching than what is provided for in the CMP and its regulations. In other words, the national Courts can give substance to the right of residence far beyond the formalistic provisions of both national and community laws.

6.4 Right of establishment

The right of establishment, as previously explained, applies to those persons who wish to set-up or manage, economic activities as self-employed persons in a Partner State other than their own[72].

6.4.1 Formal requirements pertaining to the right of establishment

EAC citizens who wish to so establish themselves will have to fulfil the necessary requirements and conditions in the host Partner State before they can obtain a work or residence permit. The class of permit to be issued varies in each Partner State and, as shown in Table 2, depends on the type of economic activity one wants to undertake. The requirements set by each country before one can establish oneself vary. For purposes of illustration, we may use the examples of persons who intend or wish to engage in trade, business or a profession, i.e. permits: Class "A" in Tanzania; Classes "C" and "G" in Kenya and Rwanda; and Classes "D" and "F" in Uganda. Table 3 (see Appendix 1) shows the requirements in each country for each of these permits.

Table 3 demonstrates that while some of the requirements for establishment are standard across all countries, there are also some distinct variations. With regard to Tanzania, the list of requirements appears to be quite lengthy, but this could probably be due to the fact that there are many sub-categories of permits merged into one Class (see Table 2). Additionally, depending on which permit sub-category one seeks, not all listed requirements may be necessary.

The time it takes to process permits varies in each country. Save for Rwanda which claims to process a permit in an average of three days[73], it is not clear the time it takes in other Partner States. In Tanzania, for those who process work permits through the Tanzania Investment Centre, it supposedly takes about fifteen days[74]. For Uganda and Kenya, the timelines are not very clear. The process may still be quite cumbersome in almost all the Partner States and in some instances, it has been reported to take about six months before a work/residence permit is acquired[75].

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[72] CMP Article 13.3.
[73] https://www.migration.gov.rw/fileadmin/templates/PDF_files/FREQUENT_ASKED_QUESTION_VISA_AND_PERMIT.pdf, accessed in June 2015.
[74] http://www.tic.co.tz/procedure/285/162?l=en, accessed in June 2015.
[75] Luzze op cit note 68.

The amount of fees charged in each Partner State further demonstrates a lack of uniformity. Permit fees have been waived selectively for citizens of Kenya, Rwanda and Uganda that wish to establish themselves in any of those countries, while for Tanzania fees are still charged for citizens from the other countries. In reciprocation, the other countries still charge fees for Tanzanian nationals who wish to establish themselves in any of those countries. With regard to the fee waiver, the EAC Partner States have applied the principle of variable geometry, one of the operational principles of the EAC[76]. In an advisory opinion, the EACJ has explained this principle as being intended for or actually allowing 'those Partner States who cannot implement a particular decision simultaneously or immediately to implement it at a suitable certain future time or simply at a different speed while at the same time allowing those who are able to implement immediately to do so'[77]. Thus, the Northern Corridor countries, Kenya, Rwanda and Uganda, in an effort to fast-track the integration process have made use of the variable geometry principle in waiving work permit fees, implementing a single tourist visa, and allowing the use of national IDs by each other's nationals who wish to travel among any of these States. Tanzania and Burundi have not yet opted into this initiative, although they too are served, perhaps in part, by this corridor[78].

The waiver of permit fees makes it more attractive and less costly for EAC citizens who want to work or establish themselves in other EAC countries[79]. There is therefore expected to be an increase in the movement of labour, persons, services, goods and capital, as is indeed envisaged under Community law, at least among three of the Partner States. Moreover, the less and easier the requirements and formalities, the more investors or entrepreneurs that a Partner State attracts, and the more equal treatment that may be attained between nationals and non-nationals[80]. As explained in chapter two, the gist of the right of establishment is non-

[76] EAC Treaty Article 7.1 para (e).
[77] *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion*, EACJ Application No. 1 of 2008.
[78] During the 9th Summit of the Heads of State of the Northern Corridor countries, Burundi announced that it would cease being an observer and become a full-fledged member- see, Edmund Kagire 'Jakaya Kikwete in Kigali for Northern Corridor meet as countries pledge speed' *The East African* 7 March 2015.
[79] Interview with official at DCIC, Kampala, Uganda (April 2015). See also http://www.nciprojects.org/project/immigration-tourism-trade-labour-and-services-ittls, accessed June 2015.
[80] Although there may not be official statistical data to this effect, there has been reported some increase in movement of persons and trade volumes among the three countries- http://www.sustainabletourismalliance.net/northern-corridor-integration-projects-countries-seek-uniform-tourism-marketing-approach/, accessed June 2015.

discrimination among nationals and non-nationals as they are both exactly in the same situation. This however, is not necessarily the case in all EAC Partner States, as partly demonstrated with the requirement to pay permit fees by EAC citizens in those Partner States where this is the case.

Furthermore, in all EAC Partner States, there is a clear distinction between local investors and foreign investors, with EAC citizens largely still being regarded in the latter category. Although across all EAC States, the documents that are required of persons who wish to establish themselves, are fairly much the same for nationals and non-nationals, there are some requirements that may differ in each country, which thus accentuate the difference in treatment between nationals and non-nationals. For instance, Kenya, Tanzania and Uganda require a security bond or payment of a security deposit prior to issuance of permits to persons who intend to engage in business, trade, consultancy or prescribed professions. This is not required of nationals, and for purposes of comparison, it seems not to be a requirement in Rwanda. While a police clearance or certificate of good conduct is one of the emphasised requirements in Uganda and Rwanda, it is not mentioned among the permit requirements in Kenya and Tanzania. Neither does it seem to be a requirement for nationals in either Uganda or Rwanda. All four countries, however, have set minimum thresholds of capital required from an investor that seeks to establish himself or herself in the host Partner State. In Uganda, foreign investors (including EAC citizens) require a minimum of USD 100,000, while local investors (nationals) require USD 50,000[81]. In Tanzania, the Tanzania Investment Centre handles projects that are worth USD 300,000 for foreign investors and USD 100,000 for Tanzanian nationals[82]. The Kenyan law requires applicants for the Class "G" permit to show proof of capital of at least USD 100,000[83]. In Rwanda, a minimum start-up of USD 250,000 is required for overseas citizens, and USD 100,000 required for locals and members of the EAC and COMESA States[84].

From the foregoing discussion, it is quite evident that only Rwanda has removed the distinction between Rwandan nationals and other EAC citizens for purposes of capital requirements for

[81] See http://www.ugandainvest.go.ug/index.php/faqs; Investment Code Act cap. 92 Laws of Uganda, Section 10(5), accessed in June 2015.
[82] Tanzania Investment Centre *Tanzania Investment Guide 2014-2015* available at http://www.tic.co.tz/ accessed in June 2015.
[83]Kenya permit requirements as mentioned on http://www.immigration.go.ke/Information.html accessed in June 2015.
[84] See http://www.rdb.rw/departments/investment/faqs.html accessed in June 2015.

establishing a business in Rwanda. The other EAC countries still discriminate between nationals and other EAC citizens.

6.4.2 Judicial insights into the right of establishment in the EAC

Despite the apparently discriminatory provisions on the right of establishment, the issue has hardly been the subject of adjudication before the national courts. Nonetheless, there are a couple of cases, which provide an insight on the perspective of the national courts on some of the relevant national laws.

The first of such cases is the Ugandan case of *Pearl Impex (U) Ltd and 2 Others v Attorney-General and Another*[85]. One of the issues that the High Court had to determine was whether or not a foreign investor engaging in trade only could validly be issued with an entry permit by the Directorate of Immigration without a certificate of remittance of USD 100,000 from the Bank of Uganda, in accordance with specific provisions of the Uganda Investment Code Act. In its decision, court noted that the term 'foreign investor' used in the Act included any person that is not a citizen of Uganda, and thus it extended also to nationals of other EAC Partner States. The court then touched on the sub-issue of whether the Investment Code Act was consistent with the concept of free movement of capital, labour, goods and services in the East African Common Market. In this regard, the court held that the Uganda Investment Authority could determine who a foreign investor was. As far as entry permits were concerned, 'the effectiveness of the law and implementation of its objectives depends on enforcement of the provision that a foreign investor who wishes to engage in *trade only* is required to open an *[sic]* bank account with the Bank of Uganda and deposit a minimum of United States Dollars 100,000 or its equivalent in Uganda Shillings and obtain from the Bank of Uganda a certificate of remittance. *This provision of law has ramifications on regional common market policies due to the citizen based definition of a foreign investor'* [86] (emphasis added).

Although the judge neither went into detail of the possible ramifications nor said outright that the Investment Code Act was inconsistent with the EAC law, he definitely intimated as much. This is so because further on, he actually observed that 'it is the duty of the Uganda Investment

[85] H.C.C.S. No. 3 of 2011.
[86] Ibid.

Authority to ensure that the policy and the law is consistent with Uganda's strides towards regional integration and common markets as far as the intended flow of investment capital as envisaged under… the Treaty creating the East African Community and its Common Market…'.

The case did not concern matters to do with the EAC *per se*, but was mainly looking at the importance of the remittance a foreign investor needs to pay to the Central Bank and its effect on other formal requirements. Thus the issue of consistency or inconsistency with community law was more or less *obiter dicta*, a probable explanation for why the learned judge hedged around it instead of dealing with it decisively. Had he delved a little deeper into it, he might have possibly found that the Ugandan law was discriminatory towards other EAC citizens who wished to establish themselves in Uganda, a measure in breach of its obligations under the EAC Treaty and the CMP. Such a judgment, would of course have rung true for some of the other EAC States as well where measures that distinguish between nationals and non-nationals still exist. As it is, the Uganda Investment Code Act has not yet been amended, and neither has the Uganda Citizenship and Immigration Control Act that still regards EAC citizens as 'foreigners' or 'aliens' for purposes of investment capital required for establishment[87]. The failure to amend laws among the EAC Partner States has been pointed out as one of the major hold-backs to compliance with and hence implementation of the EAC Treaty, the CMP and its annexes[88].

The second notable case was a Kenyan case that involved the issue of limiting the right of establishment with regard to Advocates in Kenya. As discussed earlier, the right to establishment (as well as the right of residence) is not absolute and may be subject to limitations on grounds of public policy, public security or public health. Whether or not the measures in the various EAC Partner States, which apply to EAC citizens, but do not apply to nationals, qualify as justifiable limitations on any of the specified grounds, is a matter that would require judicial interpretation.

[87] There is an attempt by the Uganda Government to identify all laws that are not in conformity with Community law; and the Uganda Investment Code Act as well as the Immigration laws are some of the many that have been identified by the Uganda Law Reform Commission.
[88] Interview with official at MEACA, Kampala, Uganda (March 2015).

In *The Law Society of Kenya v The Attorney-General and 2 Others*[89], the petitioners challenged an amendment to the Advocates Act of Kenya[90] which extended admission as an advocate in Kenya to citizens of Burundi, Rwanda, Tanzania and Uganda, provided they are duly qualified. Some of the qualifications required are that one should have obtained a law degree, and that he or she is an advocate of the High Court of Uganda, the High Court of Rwanda, the High Court of Burundi, or the High Court of Tanzania, as the case may be[91]. The petitioners argued that opening up Kenya's market for trade in legal services in favour of non-Kenyans without reciprocal access for Kenyan lawyers and judges in those other countries, *inter alia*, violated the public good expressed in the Kenyan Constitution. Furthermore, this measure could lead to unqualified persons being admitted in practice to the detriment of young Kenyan lawyers. To put this in terms of Community law, the petitioners were, in effect, arguing that Kenya's opening up to admit lawyers from other EAC countries was not fair in the circumstances, hence Kenya should have restricted market access by other EAC citizens for purposes of public interest in accordance with Article 13.8 of the CMP.

In its decision, the court agreed with the 1st respondent that the amendment in question had only served to include citizens of Burundi and Rwanda since the two countries had then joined the EAC[92]; and that since the amendment was clear that the citizens of the EAC Partner States must be duly qualified as advocates in accordance with Section 13 of the Advocates Act of Kenya, the issue of different standards and entrenching discrimination against Kenyan advocates did not arise[93]. The court went on to emphasise that the amendments were consistent with Kenya's obligations under Articles 7.1, 76 and 104 of the EAC Treaty and Article 23 of the CMP which provide for the free movement of persons, labour and services, and the enjoyment of the right of establishment and residence for EAC citizens within the Community[94]. In other words, the court upheld the right of establishment as contained in the EAC Treaty and CMP whilst rejecting the argument that it would be in public interest or for

[89] High Court at Nairobi, Petition 318 of 2012.
[90] The Statute Law Miscellaneous (Amendments) Act 2012 No. 12 of 2012 which amended certain sections of the Advocates Act, (chapter 16 of the Laws of Kenya) with some consequential amendments being made to the Law Society of Kenya Act (chapter 18 of the Laws of Kenya).
[91] Advocates Act of Kenya as amended Sections 12 & 13.
[92] Before the amendment, the provision recognized citizens of Uganda and Tanzania as being eligible to admission as advocates in Kenya. Hence the amendment was a recognition of new parties to the EAC Treaty.
[93] *The Law Society of Kenya v The Attorney General & Others*, supra note 89 para 32.
[94] Ibid paras 33 & 34.

the public good of Kenyan nationals to restrict market access in legal services. In essence, the ground of 'protecting the public good' was not justifiable in the circumstances to limit or restrict the right of establishment of other EAC citizens who wished to practice as advocates in Kenya.

This case demonstrates yet another instance of a national court upholding the Community law over national laws, even where by so doing it had to reject a constitution-based argument. Thus, the Court went beyond the nationalistic confines to advance the demands of Community law, thus upholding Kenya's obligations under the EAC Treaty and CMP.

The Kenyan law and the foregoing judgment notwithstanding, it has been reported that Kenya still 'does not allow foreigners to practice law unless they work with a domestic counterpart, and foreigners cannot sign or file pleas in court'[95]. This is not an issue peculiar to Kenya only, all other EAC States have their peculiar requirements regarding legal practice, among other professions, that necessarily discriminate between nationals and non-nationals[96].

Although related to free movement of labour rather than the right of establishment, it is also worth mentioning at this point that most EAC countries will issue work permits to other EAC citizens upon assurance that there are no nationals with the required skills available on the local market. This is definitely the case in Kenya, Tanzania and Uganda[97]. Actually in Uganda, this is one of the common grounds for denial of issuance of a work permit[98]. Tanzania, taking this a little further, has recently enacted a law regulating employment of non-citizens, including East Africans[99]. The Rwandan policy is such that EAC citizens from other Partner States are granted the first privilege when competing for the same positions or job with non-EAC citizens[100]. Nevertheless, first option goes to qualified Rwandans, failure to find whom leads to

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[95] The World Bank/EAC *East African Common Market Score Card 2014: Tracking EAC Compliance in the Movement of Capital, Services and Goods* (2014) 21.
[96] Ibid.
[97] Kenya Citizenship and Immigration Regulations schedule 1, Form 25; The Tanzania Investment Act 1997, Section 24; Tanzania Non-Citizens (Employment Regulation) Act 2014; 'Proof of failure to employ a Ugandan' is one of the requirements for a Class "G2" Permit- see http://www.immigration.go.ug/content/permits; Uganda Immigration Guidelines 2012, accessed in June 2015.
[98] Interview with official at DCIC, Kampala, Uganda (April 2015).
[99] Tanzania Non-Citizens (Employment Regulation) Act 2014.
[100] Report on the Social Sector Programme in the Ministry of East African Community Affairs available at http://www.mineac.gov.rw/fileadmin/templates/Documents/Social/The_Social_Sector__2_.pdf, accessed in June 2015.

employment of a foreign national[101]. These nationalistic tendencies, however, also at times extend to the right of establishment as clearly illustrated in the *Law Society of Kenya* case.

Although individual Partner States are right to be concerned about high youth unemployment levels, it was thought that the common market could in a way provide more employment opportunities beyond national boundaries[102]. The current laws and policies restricting employment of foreign nationals, including EAC citizens, however, demonstrate scepticism on the part of the Partner States[103]. Suffice to say that where such measures exist, they inevitably hamper free movement as the reason for moving would be obviated. Hence the freedom of movement of persons could cease to have substance.

From the foregoing discussion one can surmise a variance in community law and national laws; and also a variance in the law and practice. Partner States can be seen to be moving at a much slower pace in implementing their obligations on the right of establishment, than they comparably are with regard to their obligations on the free movement of persons.

The removal of restrictions under the right of establishment is supposed to be gradual and progressive[104]. Mindful of this leeway that Partner States have got, as well as their specific commitments to the liberalisation of services, a careful assessment would be required to determine whether or not a Partner State is meeting its obligations. It would be interesting if the various laws and policies pertaining in the respective Partner States, which apply separately to nationals and other EAC citizens, were to be subjected to judicial scrutiny in the national courts. The court, taking each State's peculiar circumstances into consideration, would then determine whether or not such ostensibly discriminatory measures are justifiable or not;

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[101]https://www.migration.gov.rw/fileadmin/templates/PDF_files/FREQUENT_ASKED_QUESTION_VISA_AND_PERMIT.pdf, accessed in June 2015.
[102] EAC Secretariat *Report of The Committee on Fast Tracking East African Federation* (2004) para 218.
[103] See Edwin Mutai 'Kenyatta, Kagame call for EAC member states to open borders' *The East African* 16 October 2014.
[104] CMP Article 11, para (b); EAC Right of Establishment Regulations regulation 10.1 reiterates that the restrictions under the right of establishment shall be in accordance with the Schedule on the Progressive Liberalization of Services annexed to the CMP. CMP Article 23.1 recognises that the implementation of this Schedule is to be gradual. This is also in accordance with the Partner States' obligations under the GATS- see WTO 'Factual Presentation: Economic Integration Agreement East African Community Common Market (Services)' *Report by the EAC Secretariat to the WTO Committee on Regional Trade Agreements* available at rtais.wto.org, accessed on 24 April 2017.

whether the various measures, laws and policies in the individual Partner States are legitimate, objective, and proportionate[105].

Another issue that would yet benefit from judicial scrutiny is the very requirement for work permits for EAC citizens establishing themselves or working in Partner States other than their own. The main issue here would be whether or not the requirement for work permits by EAC nationals who wish to work or establish themselves in another Partner State amounts to discrimination.

Some stakeholders have reportedly singled out the failure to waive work permit requirements for citizens of Kenya, Uganda, Tanzania, Rwanda and Burundi as hampering regional movement of labour[106]. When compared with the practice in the EU, for instance, citizens of the Union, generally[107] do not need work permits to work anywhere in the EU whether as workers or self-employed persons. Within the EAC, however, the CMP and its annexes, much as they emphasise the principle of non-discrimination, actually do stipulate for the requirement for work permits for EAC citizens moving to other EAC countries for purposes of work or business, which might seem as a contradiction. This is yet an indication of the emphasis of the focus of the framers of the CMP on the formalities, in this case formalities pertaining to the work activity, rather than on the substance of the right guaranteed.

Looking at the grounds of limitations to the right of establishment as provided for in the CMP, the requirement for a work permit for EAC citizens who wish to establish themselves in a Partner State would have to be justified on the grounds of public policy, public security or public health. This would be an issue best determined by the courts, and particularly the EACJ. In the meantime, one can argue that the only justification so far is that the CMP itself prescribes that EAC citizens who wish to work or establish themselves in a Partner State other than their own require a work permit[108].

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[105] See especially Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 para 37.

[106] Gahiji 'EAC legal team urged to harmonise regional work, residence permit rule' *News of Rwanda* 4 November 2014.

[107] There are some exceptions regarding Croatian citizens or some citizens of the Union working in Croatia- http://europa.eu/youreurope/citizens/work/work-abroad/work-permits/index_en.htm, accessed in June 2015.

[108] See discussion in chapter four sections 4.2.1.1 and 4.2.2; EAC Right of Establishment Regulations; and EAC Free Movement of Workers Regulations.

On a more practical level, during the 10th Northern Corridor Integration Projects Summit[109], the Heads of State signed the Agreement on Total Liberalization of the Free Movement of Labour, and the Agreement on Total Liberalization of Free Movement of Services. Although the terms of the agreement are not yet fully available to the public, it appears like they provide for, *inter alia*, the abolition of work permits for nationals of Kenya, Rwanda and Uganda who wish to practice their professions in any of the three countries[110]. In yet another development, there was a meeting of multi-sectoral experts on the Harmonisation of the Entry/Work/Residence Permits Fees, Forms and Procedures within the EAC Common Market Protocol Framework[111]. The purpose of the meeting included reviewing forms, fees and procedures of obtaining entry/work/residence permits with a view to harmonising them. So it seems like there are parallel developments or views with regard to the issue of work permits within the EAC, which creates some confusion on the way forward- is it abolition of work permits or their harmonisation? What is apparent is that there are different levels of progress being made within the EAC with some countries moving faster in some aspects than others. The ideal situation would of course be abolition of work permits in all aspects for EAC nationals in all the Partner States.

6.5 Role of national courts in upholding and protecting migration rights

Article 54.2 of the CMP provides that Partner States shall, in accordance with their Constitutions, national laws and administrative procedures, guarantee that any person whose rights and liberties as guaranteed under the Protocol have been infringed shall have a right of redress before competent judicial, administrative, legislative or other authority. Accordingly, national courts and other established administrative bodies may provide avenues for redress with regard to migration rights of EAC citizens.

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[109] Joint Communiqué of 10th Northern Corridor Integration Projects Summit held at Kampala, Uganda, 6th June 2015.

[110] Dicta Asiimwe 'Uganda joins Kenya, Rwanda in abolishing work permits for professionals' *The East African* 13 June 2015.

[111] The meeting was held in Nairobi, Kenya on 8-10th June 2015. The meeting brought together experts drawn from immigration, labour, investment authorities, workers, and employers organisations to address issues of work/residence permit harmonisation- see http://www.eatuc.org/news, accessed in June 2015.

All the EAC countries have a redress or appeal mechanism within the Ministry or Government Department responsible for immigration. In Uganda, the National Citizenship and Immigration Board has as one of its functions the grant and cancellation of immigration permits[112]. Any person aggrieved by a decision of the Board may appeal to the Minister for Internal Affairs[113]. Where a person still feels aggrieved after the Minister's decision, he or she may appeal to the High Court and the decision of the High Court shall be final[114]. However, with regard to a deportation order, which is made by the Minister, an aggrieved person may appeal to the High Court, the decision of which may be appealed to the Court of Appeal[115]. In Kenya, any person aggrieved by a decision of a public officer made under the Kenya Citizenship and Immigration Act may apply to the High Court for a review[116]. Elsewhere the law provides that any person aggrieved by decisions of the Cabinet Secretary or of the Kenya Citizens and Foreign Nationals Management Service may appeal to the High Court[117]. Likewise, a person aggrieved by a decision of the Permit Determination Committee, established under the Kenya Citizens and Foreign Nationals Management Service Act, may appeal to the High Court[118]. Although there may appear to be many decision points in Kenya, what's of importance is that the decision of any of these bodies can be challenged in a Court of law. Under the Tanzania law, deportations are recommended by the Director of Immigration Services and an order is made by the Minister responsible for immigration[119]. Moreover, where an application for a permit is denied or the conditions of or validity period of a permit are varied, the aggrieved person may appeal to the Minister and the Minister's decision shall be final and 'not be subject to any inquiry by any Court of law'[120]. In Rwanda, the law stipulates that appeals against a deportation order shall be made to the Head of the National Intelligence and Security Service[121]. The power, though, to cancel visas or residence permits lies with the Director-General of Immigration and Emigration[122].

[112] The Uganda Citizenship and Immigration Control Act Section 7(1).
[113] Ibid Section 10(1).
[114] Ibid Section 10(5).
[115] Ibid Section 60(7).
[116] Kenya Citizenship and Immigration Act Section 57(1).
[117] Ibid Section 57(2).
[118] Ibid Section 40(10).
[119] Tanzania Immigration Act Section 14.
[120] Ibid Section 23.
[121] Law on Immigration and Emigration in Rwanda Article 16.
[122] Ibid Article 11.

It would appear like only the immigration laws of Kenya and Uganda expressly allow for appeals to courts of law, or some sort of judicial scrutiny of decisions emanating from the respective immigration bodies. For Rwanda, the law does not make any mention of the role of national courts in immigration matters. Upon responding to an inquiry on whether immigration cases can be handled by the Rwandan courts, an official of the Rwandan judiciary clarified that 'Rwandan Courts are competent for this cases but I don't know if there are cases taken before Courts up to know *[sic]*. Generally the immigration office handles these cases properly'[123]. Thus one can assume that any person aggrieved by an immigration decision of the Directorate of Immigration may appeal to the relevant courts of Rwanda. In Tanzania, the position is rather categorically stated, the courts have no jurisdiction over decisions made by immigration authorities.

In addition to these appeal mechanisms, each country has its complaints process with regards to rights guaranteed in the CMP. In Uganda, for instance, there is a complaints desk hosted by the Ministry of Trade. It usually handles trade-related complaints, and matters of immigration may not necessarily fall in its purview, but then again goods do not move on their own. Failure to move goods necessarily impacts on the free movement of persons and other related rights[124], such as the right of establishment for those who wish to deal in trade.

It is not surprising therefore that with the administrative procedures in place, some playing a quasi-judicial role, some having the final say, that there is a dearth of cases determined by the national courts on matters of migration rights of EAC citizens. Most of the cases that are usually adjudicated upon, at least from the jurisprudence of Kenyan and Ugandan courts, concern matters of the Customs Union and its protocol[125]. One possible explanation for this could be that it is mainly persons dealing in trade and business that are bringing matters to court, and they are mostly affected by the Customs Union Protocol which has been in force much longer than the CMP.

[123] Email correspondence 8 May 2015.
[124] Interview with official at MEACA, Kampala, Uganda (March 2015).
[125] This is evident from an online search on relevant cases available on http://kenyalaw.org/caselaw/ and http://www.ulii.org/ and http://www.ugandaonlinelawlibrary.net/#, as at end of June 2015.

The rights contained in the CMP and its annexes have not really been brought for adjudication before national courts. Although this might be an indicator that all is well, this is definitely not the case within the EAC as presented in the foregoing discussion. An explanation that was proffered to the question on why appeals to the High Court of Uganda on immigration matters were virtually non-existent, was that 'the cases are straight-forward'[126]. Hence, there is no cause to appeal. This in a way echoes the response, quoted earlier, in the case of Rwanda.

There does not appear to be any contestation concerning the decision-making powers of these administrative bodies. Research efforts did not reveal any cases in which the national laws restricting judicial review or decisions of the administrative bodies were contested. Hence, it is hard to discern the position of the national courts on such issues.

The EACJ, much as it views the national judicial, administrative and other authorities referred to in Article 54.2 of the CMP as alternative dispute mechanisms, it has categorically stated that their power to 'rule on disputes of persons seeking redress does not and should not include final determination over questions of interpretation of the Protocol'[127]. The obvious implication of this is that inasmuch as the national law may seem to provide a final point of determination of a matter involving migration rights of EAC citizens, issues that involve interpreting the CMP or even the EAC Treaty, should always be referred to the EACJ for final determination. Accordingly all national organs and institutions referred to in Article 54.2 of the CMP should make use of the preliminary referencing procedure provided for under Article 34 of the EAC Treaty. From the point of view of the EACJ, national laws that have the effect of ousting judicial review, might be of no consequence when the EACJ becomes apprised of the matter.

By way of summary, therefore, one can infer that matters concerning migration rights for EAC citizens are not being much adjudicated upon because: one, the national laws may exclude the courts from handling them, as is the case, say, in Tanzania. Two, there may be alternative, faster, less-costly and less cumbersome non-judicial procedures available such as the complaints mechanisms, and the various administrative procedures in the various immigration departments, hence these are more preferable. Three, it could be that the concerned citizens,

[126] Interview with official at DCIC, Kampala, Uganda (April 2015).
[127] *The East African Law Society v The Secretary General of the EAC*, EACJ Reference No. 1 of 2011.

for various reasons, are either unwilling or not able to take such matters before national courts. The third reason could be more plausible considering that most persons who benefit most from the EAC migration rights regime, especially when considering the provisions of the CMP, are the business persons, the workers in the private sector, and students. They may have faster or more efficient means and mechanisms to resolve their problems[128]. As it is, the rate of litigation under the CMP is currently still low, not only at the national level, but also in the EACJ. There is therefore a need for more intervention by civil society organisations undertaking more public interest litigation as well as advocacy for the promotion and protection of migration rights of EAC citizens within the Community.

6.6 Chapter conclusion

The migration rights regime of the EAC is, fairly speaking, quite nascent and so, much may not be expected to happen too soon. The CMP has only been in force since 2009 (less than ten years) and the EAC Partner States, some much faster than others, are still trying to make the relevant adaptations and modifications to conform to its provisions.

With regard to the free movement of persons, although there are a number of notable progressive steps these are more to do with formalities of immigration and emigration leading to more eased cross-border movement for nationals of EAC Partner States within the Community. The right of residence is currently only available for workers and business persons and members of their family, which is a very small percentage of East Africans. Additionally, each State still determines its own procedures for issuing work/residence permits, thus emphasising the lack of harmony and certainty in the migration process. Save for the waiver of work permit fees among the Northern Corridor countries, EAC citizens will not, in many aspects in each of the Partner States, be treated different from other foreign nationals. This is underscored by the fact that most laws in virtually all Partner States still contain provisions that discriminate between their nationals and nationals of other EAC States. The discrimination between nationals and other EAC citizens is even more manifest when it comes to the right of establishment. EAC citizens who wish to establish themselves in a Partner State

[128] James Gathii 'Variation in the use of sub-regional integration courts between business and human rights actors: the case of the East African Court of Justice' (2016) 79 *Law and Contemporary Problems* 45-49. Some of the reasons he gives for business actors eschewing the EACJ may perhaps explain a similar occurrence at the national level. These reasons include: administrative mechanisms are deemed more effective than judicial review or litigation; and low levels of legalisation of EAC integration, which may result in less litigation.

other than their own still face many frustrating and discouraging legal and administrative hurdles, which essentially mark the distinction between them and nationals. Hopefully, with the new agreements recently signed by the Northern Corridor countries, discriminatory measures among the Partner States will soon be done away with. As it is, the requirement of non-discrimination under Community law is yet to be met.

The amendment of national laws that are not in conformity with Community law is yet to be completed. In Uganda, for instance, such laws have been identified, but the process of amending them is taking quite a while[129]. Currently the issue of amending and harmonising laws in order to bring them into conformity with the CMP seems to be high on the agenda, particularly among the Northern Corridor countries.

As has been demonstrated, some of the discriminatory practices or practices that seem to hinder full enjoyment of migration rights, such as the requirements for residence/work permits, are actually entrenched in the Community law itself. This appears to be a self-contradiction since the same laws provide for non-discrimination. This as has been explained by some researchers[130] was a result of compromises that had to be made before the CMP could come into force, an event that occurred at least a couple of years later than was originally envisaged[131]. This is an area that would benefit greatly from judicial insight.

Apparently, national courts as well as the EACJ, as yet, are underutilised. This is particularly so with regards to migration rights of EAC citizens. There is so much that the courts could do in order to give substance and effect to these rights, but presently most of the related issues seem to be handled more by administrative authorities. This may not be too surprising when one considers that the nature of the rights as elaborated in the CMP, particularly in the annexes to the CMP, is still largely to do with administrative and bureaucratic processes that are best handled by the administrative authorities and bureaucrats of each Partner State. Besides, immigration matters among EAC Partner States are usually considered as security matters and

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[129] By the end of February 2015, the Uganda Law Reform Commission had identified about twenty two sets of laws that needed to be brought in conformity with the CMP, but by end of June 2015, the report on the same was yet to be finalised and approved.
[130] Mutai op cit note 19 at 1; James T Gathii *African Regional Trade Agreements as Legal Regimes* (2011) 50-51.
[131] EAC Secretariat *Report* op cit note 102 paras 83, 130.

so it is almost impossible to get access to cases handled by these administrative or quasi-judicial bodies. Consequently, with the courts still exercising a minimal role, it is difficult to get a complete picture of how the substance of migration rights is perceived in each Partner State, and whether or not these rights are being adequately protected at the national level. The few cases discussed herein have demonstrated that national courts can indeed be drivers for promoting and protecting migration rights, but their potential is yet to be fully exploited or maximally utilised.

When migration rights within the EAC are compared to the various concepts elucidated in chapter two, there is still more that needs to be addressed, in terms of laws, policies and practices, both at the national and Community level in order for EAC citizens to fully enjoy migration rights in a region that intends to become a political federation. Migration rights, go beyond mere immigration procedures. All laws, policies and measures that inhibit or hamper free movement need to be removed in all Partner States. As the situation currently stands, migration rights of EAC citizens are still largely formalistic and not really substantive. Evidence of this may be seen in the extant border posts among EAC countries; the continued subjection of EAC citizens to immigration controls which have thus far only been eased through abolition of visas, use of national IDs (in only three EAC countries), establishment of separate border counters, and faster or eased progress through the border immigration points; the lack of harmonised laws; and the continued handling of CMP matters by administrative institutions without much judicial review or oversight. Hence, migration rights within the EAC may be seen to be still in early or preliminary phases of taking full effect. There is thus need to move from the formal to the more substantive aspects of migration rights if EAC citizens are to fully enjoy them.

Furthermore, the status of implementation of migration rights, as presented in this chapter, leaves no doubt that the rationale or justification behind their implementation in each of the Partner States is decidedly economic.

CHAPTER SEVEN
CONCLUSION- WHICH WAY FOR MIGRATION RIGHTS IN THE EAC?

7.0 The EAC and the role of migration rights

The integration of the EAC is one of a kind since it is not purely an economic integration project, as is usually the case with other regional integration schemes in Africa and elsewhere. Going beyond the principally economic objectives of the archetypal REC, the EAC integration incorporates political, social and cultural, defence and security, research and technology, legal and judicial affairs objectives as well.

The ultimate objective of the EAC is the establishment of a political federation, which means that all community undertakings, economic or otherwise, should be guided by that objective in mind. Hence, and following the recommendations of the Wako committee report on fast-tracking the political federation[1], EAC integration has not necessarily abided by the linear and sequential evolution from a free trade area to a customs union, to a common market, and onto an economic union. Rather, the attainment of these phases of integration is happening more or less simultaneously, in a parallel and overlapping manner. For instance, it was not necessary for a full customs union to have been attained before the CMP came into force. Neither was it after the objectives of the CMP been satisfactorily met before the EAC Protocol establishing the Monetary Union came into force.

Migration rights, that is, the free movement of persons, including workers; the right of residence; and the right of establishment, have really developed and become defined in the course of regional economic integration. This was illustrated in chapter one with the example of how these rights developed in the EU, the prototype REC upon which most of the other RECs including the EAC have been modelled. The position of migration rights within the economic integration process has therefore justified rationalising them as economic freedoms ineluctably linked to economic development processes.

Moreover, as argued in chapter one, the course of regional integration has tended to occur outside or parallel to the human rights discourse, with the former being considered to belong more to the realm of economics and trade-related matters. In recent years, however, with the growing and wide recognition of human rights, they have gradually been incorporated into

[1] Refer to chapter three section 3.4.2.

economic integration discourses and processes. Consequently, a number of REC Treaties including the EU Treaty, the EAC Treaty, and the ECOWAS Treaty contain provisions on human rights and fundamental freedoms, at least recognised as fundamental principles of the Treaty and the integration process as a whole.

The EAC entrenches human rights as one of its fundamental and operational principles. In light of the human rights influence, migration rights within the EAC framework might perhaps be seen or perceived of as analogous to human rights espoused in international and regional human rights instruments. Consequently, migration rights have been referred to as a 'hybrid' right[2] owing to their conceptual duality. Chapter two provided an analytical framework of this conceptual duality. The issue that thus arises is whether migration rights should be conceived of as 'economic or market freedoms' or as 'human rights'.

This has been one of the key objectives of this research: to ascertain the overriding conceptual basis of migration rights within the EAC, and to ascertain whether or not this would fit in with its overall objectives. The issue has been addressed by examining the substance of migration rights generally; looking at the legal provisions on migration rights under EAC law and examining how the EACJ, the Community Court, has interpreted and applied them. Finally it has analysed how they are being applied within the various Partner States- whether this domestic application is in consonance with Community law and in which direction it leans towards, that is, economic or human rights.

One of the main arguments in this research has been that migration rights can and should be interpreted with a human rights-oriented approach, particularly where doing so is commensurate with the overall objectives of the regional community, and actually boosts their attainment. Even where, human rights may not be fully recognised in a regional community, migration rights, initially conceived of as economic freedoms, could be the indispensable link to gradually and eventually incorporating human rights within a REC's integration trajectory.

7.1 Summary of key findings

Chapter two involved a discussion on the correlated concepts of migration rights and community citizenship. While migration rights have contributed to the development of the

[2] See Laurence Helfer 'Sub-regional courts in Africa: litigating the hybrid right to free movement' *iCourts Working Paper Series, No. 32, 2015*.

concept of community citizenship within RECs, the latter concept would be hollow without the former. The chapter analysed the hybridity of migration rights, looking at both their economic and human rights underpinnings. The distinction was made between migration rights as enunciated within regional economic treaties, and analogous rights of free movement and residence; and the right to work and exercise one's profession or trade as provided under human rights law. It emerged that migration rights as expressed and applied within regional integration may not be exercised to the same extent as analogous human rights. Migration rights are limited in terms of the persons that may benefit from them, and they are subject to conditions, regulations and restrictions that may not necessarily apply from a human rights perspective. These inherent limitations can be attributed to the economic underpinnings of migration rights. They are availed only to the extent that they are necessary to fulfil the objectives of the REC, which objectives are usually, economic. Moreover, regional courts, specifically the ECJ, have incrementally applied a human rights approach to migration rights in the course of their interpretation and application under community law. Be that as it may, the interpretation and rationalisation of migration rights may vary from REC to REC, hence the need to look at the EAC in detail as focal REC examined in this research.

Chapter three provided an overview of the EAC, juxtaposing the original EAC that existed between 1967 and 1977, with the current EAC which was established in 1999 in attempt to revive the integration project. Unlike the old EAC, the new EAC is marked by broader objectives which go beyond economic objectives, and is guided by the principles of good governance, democracy, rule of law and human rights, among others. The current dispensation sets the tone for a more liberal and progressive interpretation of the rights guaranteed under Community law.

Within the EAC, although there had been prior integration efforts and some free movement by citizens, *albeit* informal, the current EAC Treaty and CMP contain elaborate and well-articulated provisions on migration rights of EAC citizens. An in-depth look at these provisions in chapter four revealed the inherent duality in the nature of these rights. On the one hand, the fact that they are contained in the CMP, which establishes the common market; and most of them relate to economically active citizens migrating within the common market, strongly suggests that they should be regarded as economic or market freedoms. On the other hand, looking closely at the content of these rights, one cannot miss the distinct human rights overtones, for example as relates to non-discrimination and equality in treatment; free movement as a right pertaining to all community citizens; the rights of family members and

dependants; and restrictions or limitations of these rights, among others. In this regard, the language of the Treaty and the CMP echoes more that of human rights instruments than that of economic treaties. Coupled with the overarching objectives of the Treaty that aim at establishing a political federation, and human rights being some of the guiding principles of the EAC, it is thus a reasonable expectation that migration rights within the EAC are interpreted and applied with a human rights approach as opposed to an exclusively economic approach. It was, however, concluded that migration rights as provided for under the CMP and its regulations seem more focussed on formal procedures as pertain to free movement of persons, rights of establishment and residence and not the substance of the rights as such. Additionally they tend to benefit more the economically active EAC citizens, particularly the rights of residence and establishment.

Chapter five considered the interpretation and application of migration rights in the EAC by the EACJ. It involved a detailed discussion of the *Mukira Mohochi* case, the only case involving a migration right that the court has decided on its merits. In this case, while the Court upheld the free movement of persons under the CMP, it did not consider whether or not there was an overriding economic or human rights rationale. Although it entertained the alleged human rights violations, including that on free movement, and made a finding to that effect, the Court avoided deeply analysing these allegations within the ambit of human rights instruments. As such it did not exactly endorse the human rights interpretation, but rather came up with a neutral term of 'Treaty-guaranteed rights', which in effect espouses the duality of migration rights.

The main challenge in this chapter was forming a definitive opinion on the Court's approach to migration rights on the basis of a single case. However, when considered in the totality of other significant decisions of the EACJ, a common trend was the EACJ's proclivity to a textual-formalist interpretational approach. It was contended that, overall, the EACJ tends to be cautious and restrained, hence it may not be seen as pushing the boundaries of the express Treaty provisions, even where doing so would mean adopting a human rights approach or more expansive interpretation to migration rights. This restraint could partly be as a result of the Court's express lack of jurisdiction over human rights matters, in which case it tries to steer away from directly adjudicating upon them. Understandably, interpreting and adjudicating upon migration rights as human rights might mean exercising jurisdiction not yet bestowed upon it, thus setting it on a possible collision course with the other organs of the EAC. This is a turn of events that the Court seems ready and willing to avoid especially after the backlash

experience it suffered after the *Peter Anyang' Nyong'o* decision. Therefore, as far as the EACJ is concerned, migration rights are interpreted as expressly provided for in the Treaty, no more or less- a non-committal neutral position.

Chapter six examined the status of implementation of migration rights in various EAC Partner States. The main findings herein were as follows: the Partner States are not really moving at the same pace in ensuring Treaty compliance, some appear to be moving faster, while others appear hesitant. Secondly, relevant laws and regulations are yet to be amended or even harmonised throughout the Community. Thirdly, discrimination on grounds of nationality, especially with regards to work and establishment, is still largely prevalent; nationals of Partner States still receive favourable treatment than other community citizens. Community citizenship in some cases does not seem to count, even where it should. Moreover, the application of migration rights, save for the general free movement of persons, to a large extent applies to economically active persons. However, members of their families and dependants may also benefit, their rights deriving from those of the economically active member. Fourthly, despite the existence of many national laws, policies and State practices that should be challenged in Courts of law, there are hardly any cases on migration rights being taken for adjudication before either the national courts or the EACJ. The possible explanations for this may vary: there are other parallel administrative forums and mechanisms through which matters pertaining to migration rights can be resolved[3]. In a community that may not be so litigious, such mechanisms have been much preferred especially by the business community[4]. With regard to immigration matters, the immigration departments seem to be dealing with such matters conclusively leaving no room for judicial recourse. Nevertheless, the couple or so cases before national courts that have been examined in this thesis show a tendency by these courts to uphold supremacy of Community law, thus interpreting national laws in accordance thereof.

The fact that there is no significant adjudication on migration rights suggests that within the EAC, migration rights are being shaped or defined by administrative bureaucrats more than the courts. One possible explanation for this state of affairs could be that the Community law itself stipulates more on formal procedures and requirements and places little emphasis on the

[3] The Complaints mechanisms under the Trade Ministries; the review procedures under the national Immigration Departments, and the good-offices role played by the East African Business Council.
[4] James Gathii 'Variation in the use of sub-regional integration courts between business and human rights actors: the case of the East African Court of Justice' (2016) 79 *Law and Contemporary Problems* 45-49.

substance of the rights. Yet another possible explanation could be due to the nascence of the migration rights regime within the EAC whereby formalities or formal procedures are indicative of the preliminary phases of implementation.

Emphasis on administrative mechanisms could result in lack of harmonisation and uniform application of Community law. Each State may still want to assert its sovereignty over matters which should be governed by Community law leading to divergences. This state of affairs could only derail the integration process.

Community law, and the CMP in particular is meant to have direct effect, but the reality is that the Partner States are still struggling with implementation and meeting their obligations. Admittedly, there may be better compliance with regard to some rights such as the free movement of persons, particularly with regard to formal procedures, than with the other migration rights.

At the moment, EAC Partner States seem to be focussing more on immigration procedures, but in actual sense and as explained in chapter two, migration rights are much more than mere immigration procedures. It may therefore be concluded that migration rights within the EAC are still being approached in mere formalistic terms and not quite in their substance. Formalities, although necessary, should facilitate rather than hamper the exercise of migration rights in accord with the Community objectives.

Turning to the theoretical issue raised in this research on how migration rights are rationalised in the EAC, the answer is not so straight-forward. The Community law provisions on migration rights contain both economic and human rights nuances. The EACJ has stuck to this approach by adjudicating upon them as 'Treaty-guaranteed rights'; while when it comes to implementation and practical execution, Partner States seem to approach migration rights as economic freedoms. Hence within the EAC, the duality of migration rights is preserved, both economic and human rights rationales may be adopted depending on the circumstances. The courts have a significant role to play in ensuring that the rights guaranteed under Community law are given substance depending on how they interpret and apply them. Moreover, a comparison with other regional courts, particularly the ECJ, has revealed that a textual approach may not always give substance to migration rights, but rather a teleological approach. With the teleological approach, regional courts have adopted a more human rights-oriented approach towards migration rights thus giving them full effect for the benefit of all community citizens.

The role of the Courts, both national and the EACJ, but especially the EACJ being the Community Court, in shaping and defining migration rights is therefore vital and critical. With regard to the EACJ, whose role is to interpret and apply the Treaty and its Protocols, its limited remedial powers coupled with its textual-formalism might partly account for its lack of popularity as a recourse mechanism on migration rights matters[5]. Interestingly and quite ironically, the Court is adjudicating more on matters which allege human rights violations, for which it does not have express jurisdiction, than matters such as migration rights over which it has express jurisdiction. The former cases are considered to fall under the general provisions on principles of the EAC which include rule of law and human rights protection (Articles 6 para (d) and 7.2 of the EAC Treaty). But quite paradoxically, on matters of migration rights, the Court tends to deal with those aspects of the case for which there are express provisions in the Treaty or Protocol, while there is hardly any deductive reasoning or analysis on the aspect pertaining to human rights. Therein seems to lie the Court's dilemma – how to deal with the conceptual duality of migration rights within the ambit of Community law and its jurisdiction.

What follows is a suggestion on the approach that the EACJ and national courts should adopt in their interpretation and application of migration rights so as to give them more substance and make them more meaningful for EAC citizens.

7.2 A synchronised approach or a paradigm-shift towards a human rights approach to migration rights within the EAC?[6]

7.2.1 Arguments for a synchronised approach

The synchronised approach is currently what seems to pertain within the EAC, at least from the perspective of the EACJ. Herein, the Court apparently embraces the duality of migration rights and deals with them as such. It cannot be seen to uphold one conceptual approach to migration rights over another- there is neither a strong emphasis on them being economic freedoms nor human rights or fundamental freedoms. Although it has emphasised that the EAC Treaty is not a human rights Treaty, the Court has not exactly treated migration rights in a strict economic sense whereby persons are viewed as mere factors of production serving the

[5] See chapter five section 5.2.3.

[6] A modified version of this section has been incorporated in an article which has been accepted for publication in *Journal of African Law* published by Cambridge University Press- Caroline Nalule 'Defining the scope of free movement of citizens in the East African Community: The East African Court of Justice and its interpretive approach' accepted for publication in *Journal of African Law*.

economic objectives of the Community, mainly increased market access and improved economic welfare. Rather it has considered them as persons moving in exercise of their Treaty-guaranteed rights and freedoms. One might speculate that the reason for not considering migration rights in the EAC solely as economic freedoms, is because doing so would not be in keeping with the objectives of the EAC in their entirety. It would only meet one and not the other objectives. On the other hand, neither has the court exactly gone overboard with the human rights interpretation as well, but has taken the neutral stance.

This stance fits in with the Court's textual-formalism approach which may be justified in consideration of the institutional or structural and external challenges it may face. For instance, the Treaty amendments that effectually undermined the supremacy of the Court, and restricted access by natural and legal persons; the lack of jurisdiction over human rights matters; the *ad hoc* nature of the Court, limited remedial powers, and the executive influence over the Court, particularly with regard to the appointment and removal of judges. Over all, the executive organs exercise some control over the EACJ, and in turn, the EACJ will tread with much restraint where its decision might appear confrontational[7]. External factors include the geo-political environment; most of the countries in the EAC are strongly under the control of the Executive, and other arms of government are relatively weak, which is mirrored at the regional level. The civil society, though influential is still relatively weak; and the human rights culture is not yet particularly strong within the region.

In addition, organs and institutions of the EAC are operating more at a level of cooperation and not as supranational bodies. This is particularly the case with the EAC Secretariat, which thus far, despite having the mandate to do so, has not brought any matter before the Court against any Partner State for failing to fulfil its obligations or even infringing the Treaty. Actually, in most cases, the Secretariat will side with Partner States and not those alleging violation or infringement of the Treaty by Partner States[8]. The EACJ, thus lacks the strong co-operation

[7] See, for example: *Hon. Sitenda Sebalu v The Secretary General of the East African Community; the Attorney General of the Republic of Uganda & 2 others,* EACJ Reference No.1 of 2010; and *Hon. Sitenda Sebalu v The Secretary General of the EAC,* EACJ Reference No. 8 of 2012.

[8] The EAC Secretariat has been criticized for viewing 'its mandate through the prism of Member States' interests' and not engaging sufficiently with civil society actors, especially during the course of the events that culminated in the backlash against the EACJ- See Karen J Alter, James T Gathii & Laurence Helfer 'Backlash against international courts in West, East and Southern Africa: causes and consequences' (2016) 27 *European Journal of International Law* 320.

from an organ that would boost its function and unique mandate, as, for instance, the European Commission did for the ECJ.

Despite having political objectives as the ultimate phase of integration, the EAC is still very much at a stage where economic objectives and drivers are still largely predominant. The present reality is that of an economic community rather than a potential political federation. This could explain why migration rights are set out in the CMP, including the free movement of persons that are not economically active. It could also explain why the EAC Treaty and its Protocols hedge at the concept of community citizenship.

The synchronised approach is thus reflective of the status of integration and the institutional and geo-political dynamics within the EAC. In the circumstances, it might be more effective and prudent for the court to interpret migration rights as Treaty-freedoms in the time-being, or to handle them in their hybridity as currently seems to be the approach of the EACJ. As the citizens of the Community become more aware of their rights and as the Community develops further towards the envisaged political federation, it would perhaps be more appropriate if a more expansive and human rights-oriented interpretation of migration rights were to be adopted.

7.2.2 Seeds for a paradigm-shift

The key argument for a paradigm-shift in the interpretation and application of migration rights in the EAC hinges primarily on the broad nature of its objectives, with the ultimate aim of establishing a political federation. Migration rights should not only be advanced for purposes of the economic objectives, but for the overall objectives of the community, hence the need for a more holistic interpretation and rationalisation. This calls for a shift from the predominantly economic paradigm among the Partner States, or the neutral 'Treaty-guaranteed rights' position of the EACJ, to a human rights-oriented approach to migration rights. The EACJ, being the Community organ responsible for the interpretation and application of Treaty would be a major driving force for this shift. Even if it were to adhere to its textual approach, all that would be required is to read some Treaty provisions more expansively, or specifically to read such provisions from a human rights viewpoint.

As explained earlier, migration rights in the Treaty have human rights overtones, rendering it more a question of whether or not to interpret them from a human rights perspective. In this case, the Court would adopt a higher standard of construing migration rights broadly, while narrowly construing the restrictions upon them. Secondly, the Court already adjudicates on

matters alleging human rights violations under the rule of law and human rights principles embodied in the Treaty. Therefore, interpreting migration rights with a human rights bias could fall squarely within the fundamental and operational principles of the EAC. The Court has so far avoided analysing the alleged migration rights violations as human rights. The Appellate Division's decision that the EACJ has the mandate to interpret the African Charter on Human and Peoples' Rights[9] should actually embolden the Court to adopt a human rights interpretation over the economic-based interpretation of migration rights. This is so because the economic rationale can easily be subsumed within the human rights interpretation.

Furthermore the underlying principle in migration rights is non-discrimination on grounds of nationality or equality of treatment. As explained in chapter two, the substance and standards of non-discrimination are universal. 'Non-discrimination' or 'equality of treatment' as understood under human rights law applies equally to migration rights within the economic integration context. Non-discrimination may thus be seen as the point of intersection between the economic and human rights rationales for migration rights. This makes it easier to incorporate a human rights rationale for migration rights. The principle of non-discrimination is inherent in the EAC Treaty, particularly the provisions on migration rights. The jurisprudence of the ECJ reveals that it is these very principles that the ECJ teleologically interpreted, thereby broadening and shaping the scope of migration rights within the EC. Moving in tandem, the EACJ in its decisions on migration rights could also place more emphasis on non-discrimination and adopt the higher and more objective human rights standards, particularly when construing the application of limitations on the rights. Even if it does not adopt the teleological approach like the ECJ, which might not be the best course in light of the EACJ's operational context, if it took advantage of the non-discrimination provisions, the EACJ would surely be seen as being more progressive. In this case it would not only be championing the rights of EAC citizens but also advancing the higher objectives of integration.

This research has revealed that despite a number of infractions in the various Partner States, there is hardly any judicial challenge of the same. Recourse to administrative mechanisms or procedures appears to be the preferred mode of dispute resolution. Although the research has not empirically tested or proven why this may be the case, asides from where the laws

[9] *Democratic Party v The Secretary General of the EAC & others*, EACJ Appeal No. 1 of 2014.

specifically exclude judicial review, some reasons may not be hard to surmise. For instance, the administrative mechanisms may be faster and more efficient than judicial recourse[10]. Since migration rights are being exercised mostly by the economically active, they may need faster dispute resolution mechanisms, including diplomacy and good offices, than the usually long drawn-out judicial processes. Moreover, and specific to the EACJ, it is not in an advantageous or even competitive position over administrative bodies with regard to available remedies. The EACJ only makes declarations and awards as to costs, which remedies do not make economic sense for business persons. Hence it will be shunned in favour of avenues that offer more effective remedies. Moreover, as earlier mentioned, the danger in this current state of affairs is dissonance in interpretation and application of migration rights within the Community.

The remedial powers of the EACJ are more congruent to those of a human rights court than a purely economic court or tribunal. By adopting the human rights approach, the EACJ would have an edge over the national administrative bodies[11] in so far as it could offer more, in essence and substance. The human rights interpretation, since it easily subsumes the economic rationale for migration rights, offers a higher standard that will conduce to a harmonised and uniform interpretation of migration rights. Such interpretation should trickle down to the national courts and the administrative bodies who would have to apply EACJ's interpretation and guidance, for the advancement of the Community objectives.

The human rights interpretation advances the political federation objective of the EAC more than the economic interpretation could. This argument also draws on the notion of community citizenship discussed in chapter two. Migration rights, even where their rationale is purely economic, lie at the heart of community citizenship. Moreover, in most RECs such rights will apply only to those who are economically active and mobile. The EAC is in a unique position in that the economic objective is only a transitional phase towards a political federation. Within the envisaged political federation, community citizenship should be a better defined and more prominent status since the Community would be more of a politically defined entity. In such a political entity, migration rights ought to take on more the human rights rationale, as has been

[10] Gathii op cit note 4.

[11] The EACJ's edge in matters of human rights is well illustrated by the fact that majority of the cases it has decided concern the fundamental and operational principles on the rule of law and human rights protection. There is only a negligible number of cases that raise matters concerning the economic objectives of the EAC. Roughly about one tenth of the cases heard and decided by the EACJ raise matters on the CMP, of which only about three of these touch on free movement. See also Gathii op cit note 4.

possibly envisaged in the EAC Draft Bill of Rights. The key point here is that interpreting migration rights from a human rights viewpoint not only reinforces community citizenship, but also paves way for consolidation of these rights under the EAC political federation when it is established.

Yet as discussed in chapter four, migration rights as enunciated in the CMP do not address some of the specific concerns of some peoples who are for all intents and purposes EAC citizens. These include nomadic pastoralists, cross-border communities as well as EAC citizens that may be rendered stateless due to the generally ethno-centric citizenship definitions. Much as this might need an amendment or revision of the EAC Treaty and CMP, if the EACJ were to adopt a human rights approach in interpreting the Treaty, it might provide some guidance on how the law could be shaped in this respect so as to make migration rights meaningful to all EAC citizens.

In the final analysis, the process of bringing to fruition migration rights within the various EAC Partner States, is happening gradually and at varying degrees. The level of implementation of the Treaty obligations is still much focussed on the formal procedures of migration. The citizens in the Northern Corridor states are able to exercise their migration rights to a greater extent than those of the EAC states that do not belong to the Northern Corridor project. Moreover, even among the fast-moving Northern corridor countries, hurdles still pertain for those wishing to work, establish and reside in those countries. All over the EAC, discrimination on grounds of nationality with regard to migration rights still persists. But then again, the migration rights regime is relatively nascent and as yet evolving.

The rationale for migration rights within the EAC is not so clear-cut, leaving room for much ambiguity in their interpretation and application. While at the Partner State level, the economic rationale seems to be predominant, the EACJ has adopted a more neutral rationale of 'Treaty-guaranteed rights'. The objectives of the EAC, moreover, seem to support a human rights rationale.

The EACJ, whose uncontested mandate is to interpret and apply the EAC Treaty, therefore has a crucial role to play in defining the rationale for migration rights and putting to rest any inherent ambiguities. Moreover, the textual-formalism approach favoured by the EACJ, much as it may serve its purposes in the time-being, may not have any significant impact in advancing the citizens' migration rights for purposes of achieving the higher objectives of the community.

Even though it may as yet shy away from the teleological or purposive approach, the Court can still read the migration rights provisions more expansively in consonance with and to give effect to the human rights principles of the EAC Treaty. What is needed is a paradigm-shift from the diminutive economic rationalisation of migration rights to the more holistic human rights-oriented interpretation. In the meantime, while the EAC is still at the stage where economic objectives are largely predominant and the key drivers for integration, it may be wise if this paradigm-shift would occur gradually in tandem with the advancement of the EAC's integration.

7.3 Recommendations for further research and looking forward

Considering that there is sparse research on the subject of migration rights in the EAC, this research serves as a basis for further investigation in this area. The thesis has exposed a number of issues that merit further research that may be undertaken in various disciplines. Some specific issues were pointed out in various sections in chapter six, and hence may not be repeated. The suggestions provided here are not exhaustive, but might just as well be a starting point. First and foremost is the need for an in-depth and empirical research, done at the national level, on the status of implementation of each of the migration rights in each of the EAC Partner States, which might be utilised for assessing levels of compliance with the EAC Common Market Protocol and its regulations. The right to establishment seems to be quite multi-faceted compared to the other migration rights, hence it might need more detailed attention. The free movement of workers within the EAC also requires specific attention as it is also quite broad and elaborate.

Secondly, it would be interesting to explore whether migration rights, if fully and freely exercised by community citizens, would foster integration and co-existence among the ethnically-polarised African communities. Chapter four only highlighted some of the problems with the migration rights and community citizenships concepts in the EAC. Further investigations and research are needed to test the applicability of these concepts in the various RECs in Africa, and whether they can be adapted to provide comprehensive solutions to Africa's citizenship and nationality-related problems.

Thirdly, and specific to the EAC, is the need to study the form that the envisaged political federation would take and the status of migration rights and community citizenship in that establishment. Although some work is being done at the level of the secretariat following the

Wako committee report, a comprehensive scholarly study would contribute to recommending best available options for the EAC.

With regard to the EACJ, it would be interesting to study the profile of the judges and get an insight into how they perceive of their roles and their vision for EAC integration. It would also be worth investigating how the Court expects to overcome some of the challenges it faces, especially challenges to its authority. Does the Court see itself as being a 'motor for integration'[12] in the EAC, and how does it see itself playing this role?

These are just some of the general recommended areas of study. However there is still more to unpack and unravel in the area of EAC integration generally and particularly migration rights of EAC citizens.

Among the RECs in Africa, the EAC undoubtedly has the most developed normative framework for migration rights. As one of the building blocks for the continental integration project, that is the AEC and the AU, the way the EAC advances its migration rights regime will probably have implications for or impact upon the bigger project. As mentioned in chapter three, the EAC is part of the TFTA together with COMESA and SADC. This TFTA is one of the projected phases leading towards the establishment of a continental free trade area, one of the stages envisioned prior to the establishment of the AEC[13]. Although both SADC and COMESA allow for free movement of persons, albeit to varying degrees, there are a number of lessons they can draw from the EAC. The starting point would have to be its normative framework, but also the interpretation and application of the norms would set a valuable precedent. Therefore the human rights approach to migration rights suggested in this thesis would not only serve the interests of the EAC, but would most probably influence the continental approach towards migration rights as provided for under the AEC Treaty[14]. In other words, the EAC's rationalisation and approach to migration rights can serve as a benchmark for other African RECs with similar objectives.

[12] A phrase used by August Reinisch in reference to the ECJ. See August Reinisch *Essential Questions in EU Law* (2012) 68.
[13] AEC Treaty Articles 4.2 & 6.2 (c) para (d).
[14] AEC Treaty Article 43.

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APPENDIX 1 TABLE 2 Entry/Work/Residence Permit Requirements among EAC Partner States

Permit Class	Kenya	Rwanda	Tanzania	Uganda
A	Issued to a person who intends to engage in prospecting and mining.	Issued to a person who intends to engage in prospecting and mining. A1- for investors. A2 - for entrepreneurs.	Issued to a person who intends to engage in: prospecting and mining (A1); trade and business (A2); prescribed profession (A3); manufacturing and processing (A4); agriculture and animal husbandry (A5); artisans (A6); small scale farming, trade, business and fishing (A7); peasants (A8).	Issued to a person contracted in service for the Government of Uganda; or to an accredited diplomat.
B	Issued to a person who intends to engage in agriculture or animal husbandry.	Issued to a person who intends to engage in agricultural production, animal husbandry or related activities. B1 for investors. B2 for entrepreneurs.	Issued to a person offered specified employment.	Issued to persons who intend to invest in agriculture or animal husbandry.
C	Issued to a member of a prescribed profession who wishes to practice it in Kenya.	Issued to a member of a prescribed profession including professional players and artists. C1 for a person with a prescribed profession. C2 for a professional player or artist.	Issued to a person not granted Class 'A' or 'B' permit, if the Director thinks it fit to be granted such permit.	Issued to persons who intend to engage in prospecting and mining.
D	Issued to a person who has been offered specific employment.	Issued to diplomats. D1 for persons accredited as diplomats to Rwanda. D2 for a person working with an international organisation and has diplomatic status.		Issued to a person who intends to engage in business and trade.
E		Issued to a person employed on a Rwandan Government contract. E1 for a person employed on a government contract. E2 for a person providing technical assistance to Rwanda under a bilateral agreement.		Issued to a person who intends to engage in manufacturing.
F	Issued to a person who intend to engage in specific manufacturing.	Issued to a person who intends to engage in specific manufacturing or processing. F1 for investors. F2 for entrepreneurs.		Issued to a member of a prescribed profession who intends to practice that profession in Uganda.
G	Issued to a person who intends to engage in a specific trade, business, consultancy or profession (other than a prescribed profession).	Issued to a person who intends to engage in a specific trade, business and services. G1 *for persons within the region.* G2 for persons outside the region in which Rwanda is situated.		G1 – issued to volunteers, NGO workers and missionaries. G2- issued to persons who intend to work as employees in specific employment.

H		Issued to a person who has been offered specific employment. H1 for a skilled worker on an occupation on the demand list. H2 for a skilled worker sponsored by his or her employer. H3 for a journalist or foreign media representative with Rwandan accreditation. H4 for a semi-skilled worker or artisan *from a country within the region*. H5 for a foreign staff working in an international or regional organisation.		
I	Issued to a member of an approved religious or charitable organisation or activity.	Issued to a person engaged in approved religious activities.		
J		Issued to a person who invests in the hospitality sector and other related activities. J1 for investors. J2 for entrepreneurs.		
K	Issued to persons not less than 35 years of age and who have a prescribed assured income from sources outside Kenya.	Issued to a person with an assured income including a retired person.		
M	Issued to a person who has been granted refugee status.	Issued to a close relative or any person that may be considered a family member of a permit holder or national.		
N		Issued to a person who is in Rwanda for study purposes or as an occupational trainee.		
P		Issued to a person who undertakes voluntary work with an organisation that has a prescribed agreement with Rwanda, and to a student of a higher institution of learning working during his or her holidays or ne who has completed studies.		
R		Issued to a foreigner who secures employment for not more than 90 days. Also issued to a worker or self-employed person who has not yet acquired a resident permit.		

S		Issued to a person who resides along the border area of Rwanda who regularly crosses for reasons of work or business.		
W		Issued to a person who intends to invest in information and technology and other related activities. W1 for investors. W2 for entrepreneurs.		
X		Issued to a person who wishes to invest in transport and logistics and related activities. X1 for investors. X2 for entrepreneurs.		
Z		Issued to a person who wishes to invest in any sector other than one already mentioned.		

**Sources:* Kenya Citizenship and Immigration Regulations No.64/2012; Ministerial Order No. 02/01 of 31/05/2011 establishing Regulations and Procedures Implementing the Immigration and Emigration Law of Rwanda; The Immigration Act No. 7 of 1995 (Tanzania); The Immigration Regulations, G.N. No. 657 of 1997 (Tanzania); The Uganda Citizenship and Immigration Control Regulations No. 16 of 2004. Websites: http://www.immigration.go.ke/Information.html; https://www.migration.gov.rw/index.php?id=79; http://immigration.go.tz/module1.php?id=15; http://www.immigration.go.ug/content/permits as at 18 June 2015.

TABLE 3 Permit requirements for persons who wish to engage in a profession, business or trade in various EAC Partner States

Class of Permit	Kenya	Rwanda	Tanzania	Uganda
"A"			*Trade, business and prescribed profession*: Application forms; Security Bond; Cover letter; Curriculum vitae; A copy of national passport; Certified copies of academic certificates (if any); Evidence of capital of the company e.g. bank statement(s); balance sheet; a list of the company's assets with their value; proof of ownership of assets; Proof of importation of company goods (if any); Evidence of the premises of the company e.g. lease agreement or title deed; Memorandum and Articles of Association (for a limited company); Certificate of Incorporation, Compliance or Registration of the Company/Business; Extract from Register for business not incorporated as a Limited Company Business Licenses; Registration Certificates from relevant Regulatory Authorities; Value Added Tax (VAT) Certificate (for Businesses entitled to pay this type of tax); Tax Payer's Identity Number (T.I.N.) Certificate; Business License Tax Clearance Certificate; Certificate of Incentive); Share Certificate (where the applicant is a shareholder in a registered company); Transfer of Share(s)/Stock Deed (in case the applicant is a shareholder by virtue of some shares being transferred to him);	

			Board Resolution appointing the applicant as a Director (where the applicant is not among the first Directors); Return of Allotment of Shares from the Registrar of Companies in case the applicant has been allotted some shares; Six passport photos. Fees- USD 3000.	
"C"		Travel document; Permit fees (100,000Rwf) *not payable by citizens of Kenya and Uganda*; Police clearance; 1 coloured passport photo; Application form; Cover Letter to the Director of Immigration; Company Registration Certificate; Trading License; Curriculum Vitae; Certificate of Registration with Rwandan Professional body.		
"D"				*Business and trade* Work permit form; Covering letter from company; 2 passport size photos; Photocopies of the passport; Company's bank statement; Uganda Investment Authority license (where applicable);

				Articles and memorandum of association; Certificate of incorporation; Income tax clearance; Trading license; Banking of Uganda Certificate of remittance of US $ 100,000; Police clearance from country of origin; Security bond. *Fees waived for citizens of Kenya and Rwanda.*
"F"				*Prescribed professionals* Work permit form; 2 passport size photos; Photocopies of passport; Covering letter; Qualifications; Registration with the relevant professional agency; Company documents; Police clearance from home country; Security bond. *Fees waived for citizens of Kenya and Rwanda.*
"G"	*Specific trade, business and services* Application form; Cover letter; Copies of passport; 2 passport photos; Documentary proof of capital to be invested/already invested minimum of 100,000 US dollars or equivalent in any other currency;	*Specific trade, business and services* Passport photo; Application form; Cover letter; Business registration certificate; Curriculum vitae; Police clearance;		

	Registration certificate of the company OR certificate of incorporation; Copies of personal and company PIN (Personal Identification Number) if business is running; Processing Fee Kshs.10,000 non-refundable; Fee is Kshs. 100,000/= per year or part thereof *Fees waived for citizens of Rwanda and Uganda.*	Trading licence; Memorandum of Understanding between businessmen (if in partnership); Report from field inspection and law enforcement department; Fees (20,000 Rwf) *waived for citizens of Kenya and Uganda.*		

**Sources:* Kenya Citizenship and Immigration Regulations No.64/2012; Ministerial Order No. 02/01 of 31/05/2011 establishing Regulations and Procedures Implementing the Immigration and Emigration Law of Rwanda; The Immigration Act No. 7 of 1995 (Tanzania); The Immigration Regulations, G.N. No. 657 of 1997 (Tanzania); Immigration (Amendment) Regulations, 2012 (Tanzania); The Uganda Citizenship and Immigration Control Regulations No. 16 of 2004; The Uganda Citizenship and Immigration Control (Fees) Regulations, 2013. Websites: http://www.immigration.go.ke/Information.html; https://www.migration.gov.rw/index.php?id=79; http://immigration.go.tz/module1.php?id=15; http://www.immigration.go.ug/content/permits; http://www.rdb.rw/departments/investment/starting-a-business.html; http://www.tic.co.tz/menu/179?l=en as at 18 June 2015.

APPENDIX 2

Research Office

HUMAN RESEARCH ETHICS COMMITTEE (NON-MEDICAL)
R14/49 Nalule

CLEARANCE CERTIFICATE	**PROTOCOL NUMBER H14/10/23**
PROJECT TITLE	Advancing regional integration: Migration right of citizens in the East African Community
INVESTIGATOR(S)	Ms C Nalule
SCHOOL/DEPARTMENT	School of Law
DATE CONSIDERED	24 October 2014
DECISION OF THE COMMITTEE	Approved Unconditionally
EXPIRY DATE	03/11/2016

DATE 04/11/2014 **CHAIRPERSON** _____ (Professor T Milani)

cc: Supervisor : Prof J Klaaren

DECLARATION OF INVESTIGATOR(S)

To be completed in duplicate and **ONE COPY** returned to the Secretary at Room 10000, 10th Floor, Senate House, University.

I/We fully understand the conditions under which I am/we are authorized to carry out the abovementioned research and I/we guarantee to ensure compliance with these conditions. Should any departure to be contemplated from the research procedure as approved I/we undertake to resubmit the protocol to the Committee. **I agree to completion of a yearly progress report.**

_____ **Signature**

_____/_____/_____ **Date**

PLEASE QUOTE THE PROTOCOL NUMBER ON ALL ENQUIRIES