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LEGAL CHALLENGES RELATING TO IRREGULAR MIGRATION GOVERNANCE IN EAST AFRICA

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DOCTOR OF PHILOSOPHY (PhD in Law)
THE UNIVERSITY OF DODOMA
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LEGAL CHALLENGES RELATING TO IRREGULAR MIGRATION GOVERNANCE IN EAST AFRICA

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LL.B (RUCO), LL.M (UDSM)

THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY (PhD in Law)

THE UNIVERSITY OF DODOMA

JUNE, 2021
DECLARATION

AND

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I, Deogratias Ishengoma Gasto, declare that this thesis is my own original work and that it has not been presented and will not be presented to any other University for a similar or any other degree award.

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CERTIFICATION

The undersigned certify that he has read and hereby recommend for acceptance and examination by the University of Dodoma a thesis entitled: *Legal Challenges Relating to Irregular Migration Governance in East Africa*, in fulfillment of the requirements for the degree of Doctor of Philosophy of the University of Dodoma.

The Late Prof. Nicholas N. Nditi

(SUPERVISOR)

Hon. Dr. E.E. Longopa

Signature:………………………………………………… Date: June, 2021

(SUPERVISOR)
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Lastly, and most importantly, I wish to thank my entire extended family for providing an environment full of love and support. I particularly acknowledge the patience exercised by my wife, Kemilembe and our sons, Giovanni and Giancarlos during my study period.
DEDICATION

To my father, Gasto Wilbard Kabyemela and my sister, Liberata Gasto (*in memoriam*)
ABSTRACT

Governance of irregular migration has recently been a concern of the international community due to changes in terms of drivers, stocks and flows, actors and its impacts to social, economic and political systems. This means, the factors that either push or attract people to move irregularly across international frontiers, the role played by agents and technology in facilitating movements and its impacts have increasingly been heterogeneous, evolving and challenging.

The problem addressed in this study is lack of adequate and effective laws, policies and institutions governing irregular migration in the East African Community (EAC) and selected Partner States of Kenya, Tanzania and Uganda. The study aimed at examining irregular migration governance challenges caused by the current laws, policies and institutions in the EAC and selected Partner States. The study being descriptive and qualitative in nature, employed library research, interview and observation as key methods of data collection.

Weighed against universally acceptable irregular migration governance standards from international instruments and best practices in other Regional Economic Communities (RECs), the study has established that irregular migration governance frameworks in both EAC and selected Partner States are fundamentally inadequate, ineffective and contradictory. Also, the study has found that while the frameworks are generally security reactive and country centred, they do not address themselves to a number of pertinent issues in irregular migration governance such as smuggling of persons, transit migration and durable solutions. Also, the findings of this study indicate that various institutions tasked with governance of irregular migration at both levels are poorly coordinated and lack technical and financial capacities to effectively execute their roles.

In order to address the identified challenges, the study recommends that adequate, harmonious, effective and well-coordinated legal, policy and institutional frameworks should be developed at both national and regional levels.
# TABLE OF CONTENTS

Declaration and Copyright .................................................................................. i
Certification........................................................................................................... ii
Acknowledgment ................................................................................................ iii
Dedication .............................................................................................................. iv
Abstract .............................................................................................................. v
Table of Contents ............................................................................................... vi
List of Legal and Policy Instruments ................................................................. xiii
List of Cases ......................................................................................................... xviii
List of Abbreviations and Acronyms ................................................................ xix

## CHAPTER ONE: GENERAL INTRODUCTION ............................................ 1

1.1 Background to the Problem ........................................................................... 1
1.2 Statement of the Problem ............................................................................... 5
1.3 Objectives of the Study .................................................................................. 7
  1.3.1 General Objective .................................................................................... 7
  1.3.2 Specific Objectives ................................................................................... 7
1.4 Significance of the Study ............................................................................... 7
1.5 Literature Review ......................................................................................... 8
1.6 Hypothesis ....................................................................................................... 16
1.7 Research Methodology and Methods ............................................................... 16
  1.7.1 Research Approach ................................................................................ 17
  1.7.2 Methods of Data Collection .................................................................... 18
  1.7.2.1 Field Research .................................................................................. 18
1.7.2.2 Library Research ................................................................. 19
1.7.3 Sampling Design and Sample Size ................................................................. 22
1.8 Data Analysis ......................................................................................... 23
1.9 Scope and Limitations of the Study ................................................................. 25
1.10 Ethical Considerations ............................................................................. 27

CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK ON
IRREGULAR MIGRATION GOVERNANCE ......................................................... 29

2.1 Introduction ............................................................................................. 29
2.2 The Concept of Irregular Migration .......................................................... 30
2.2.1 The Role of State, Migration Laws and Policies ....................................... 32
2.2.2 Categories of Irregular Migrants ............................................................... 36
2.2.3 Irregular Migration in the Context of Mixed Migratory Flows .................. 40
2.2.4 The Global Trends, Stocks and Flows ....................................................... 42
2.3 The Concept of Migration Governance ....................................................... 46
2.3.1 Motives behind Governance of International Migration ......................... 48
2.3.2 Levels of Migration Governance ............................................................... 49
2.3.2.1 Governance at National Level .............................................................. 49
2.3.2.2 Bilateral Cooperation ......................................................................... 50
2.3.2.3 Governance at the Global Level (Multilateralism) ............................... 52
2.3.3 Global Strategies for Irregular Migration Governance ............................. 56
2.3.3.1 Accurate Data..................................................................................... 56
2.3.3.2 International Cooperation ................................................................. 58
2.3.3.3 Tackling “Root Causes” of Irregular Migration ................................... 58
2.3.3.4 Prevention and Combating Smuggling and Trafficking in Persons ........ 59
2.3.3.6 Integrated Border Management System ........................................... 61

vii
2.4 Theoretical Framework ................................................................. 62
2.4.1 Neo-classical Theory .............................................................. 63
2.4.2 Differentiation Theory ............................................................ 67
2.4.3 An Overview of Push-Pull Factors .......................................... 68
2.5 Conclusion .................................................................................. 70

CHAPTER THREE: THE LEGAL FRAMEWORK, POLICIES AND
CHALLENGES RELATING TO IRREGULAR MIGRATION GOVERNANCE
IN EAST AFRICA ................................................................................ 72

3.1 Introduction ................................................................................ 72
3.2 The Nature of Irregular Migration in the Region ....................... 72
3.2.1 Irregular Migration Trends in East Africa ............................... 73
3.2.2 Irregular Migration Data Challenges in East Africa ............... 78
3.2.3 The Impact of Irregular Migration in East Africa ..................... 78
3.2.3.1 Implications on States’ Security ........................................ 79
3.2.3.2 Economic Implications .................................................... 82
3.2.3.3 The Risks Faced by Irregular Migrants .............................. 83
3.3 EAC Frameworks on Irregular Migration Governance ............. 85
3.3.1 Legal Framework .................................................................. 86
3.3.1.1 The EAC Treaty .............................................................. 88
3.3.1.2 EAC Protocols .............................................................. 91
3.3.1.3 Rules Made by the Community Organs ......................... 94
3.3.2 Policy and Strategic Documents .......................................... 100
3.3.3 EAC Institutional Frameworks ............................................. 102
3.3.3.1 The Executive and Policy Organs .................................. 103
3.3.3.2 Legislative and Judicial Organs ..................................... 104
3.3.3.3 Regional and Inter-regional Consultative Forums on Migration .. 106
3.4 Key Challenges and their Implications to Irregular Migration Governance...... 109
3.4.1 Limited and Incomprehensive Frameworks.................................................. 110
3.4.2 Coordination and Implementation Challenges............................................. 113
3.4.3 Contradicting Provisions............................................................................... 116
3.4.4 Incoherent and Inefficient Institutional Framework ................................... 118
3.4.5 Security and Criminal Oriented Frameworks .............................................. 120
3.5 Conclusion ...................................................................................................... 121

CHAPTER FOUR: THE LEGAL FRAMEWORK, POLICIES AND
CHALLENGES RELATING TO IRREGULAR MIGRATION GOVERNANCE
IN THE SELECTED PARTNER STATES OF THE EAST AFRICAN
COMMUNITY........................................................................................................123

4.1 Introduction ...................................................................................................... 123
4.2 Historical Overview on Irregular Migration Governance in Kenya, Tanzania and
Uganda .................................................................................................................. 124
4.2.1 Migration Governance in Pre-Colonial Kenya, Tanzania and Uganda.......... 125
4.2.2 Migration Governance in Colonial Kenya, Tanzania and Uganda ............. 125
4.2.3 Post-Independence Migration Trends in Kenya, Tanzania and Uganda..... 127
4.3 Current Irregular Migration Policies and Legislation ....................................... 129
4.3.1 Migration Regimes in Kenya ........................................................................ 129
4.3.1.1 Migration Policy Documents ................................................................. 130
4.3.1.2 Legal Instruments on Migration in Kenya ............................................. 131
   (i) Laws with Connotations Describing Irregular Migrants and Migration ...... 131
   (ii) Laws Indicating Grounds of Irregularity ...................................................... 131
   (iii) Laws Relating to Governance Mechanisms .............................................. 133
   (iv) Laws Relating to Rights of Irregular Migrants and Refugees .................. 135
4.3.2 Migration Regimes in Tanzania .................................................................. 137
4.3.2.1 Policy Documents on Migration in Tanzania ................................................. 138
4.3.2.2 Legal Instruments on Irregular Migration Governance in Tanzania .......... 139
   (i) Laws with Connotations Describing Irregular Migrants and Migration ....... 139
   (ii) Laws Indicating Grounds of Irregularity ....................................................... 140
   (iii) Laws Relating to Governance Mechanisms .................................................. 140
   (iv) Laws Relating to Rights of Irregular Migrants and Refugees ..................... 142
4.3.3 Uganda Irregular Migration Regimes ............................................................. 143
4.3.3.1 Policy Documents on Migration in Uganda .............................................. 144
4.3.3.2 Legal Instruments on Irregular Migration in Uganda ............................. 147
   (i) Laws with Connotations Describing Irregular Migrants and Migration ....... 147
   (ii) Laws Indicating Grounds of Irregularity ....................................................... 147
   (iii) Laws Relating to Governance Mechanisms .................................................. 148
   (iv) Laws Relating to Rights of Irregular Migrants and Refugees ..................... 150
4.4 Institutional Frameworks ..................................................................................... 151
4.4.1 Principal Institutions ....................................................................................... 151
4.4.2 Secondary Institutions ..................................................................................... 157
4.4.2.1 Police and Defence Forces ........................................................................ 157
4.4.2.2 Ministries of Foreign Relations and Labour ............................................. 158
4.4.2.3 Statistics Agencies ....................................................................................... 159
4.4.3.4 Capacity Building Institutions ................................................................... 159
4.5 Comparative Analysis of Irregular Migration Governance Systems ............ 161
4.5.1 Comprehensiveness of Laws and Policies .................................................... 161
4.5.2 Reasons for Irregularity .................................................................................. 162
4.5.3 Criminalization of Irregular Migration ......................................................... 163
4.5.4 Anti-Irregular Migration Measures ............................................................... 164
4.5.5 Human Rights of Irregular Migrants ................................................................. 166
4.5.6 Institutional Structure and Capacity .............................................................. 170
4.6 Conclusion .......................................................................................................... 171

CHAPTER FIVE: STRATEGIES AND IMPACT OF GOVERNING IRREGULAR MIGRATION THROUGH THE EAST AFRICAN COMMUNITY ................................................................. 173

5.1 Introduction ......................................................................................................... 173
5.2 Regional Migration Governance Strategies ...................................................... 174
  5.2.1 Strategies on Intra-regional Mobility ............................................................ 174
  5.2.2 Strategies on International Migration ........................................................... 175
5.3 Major Features of Regional Migration Governance Strategies ....................... 176
  5.3.1 Formal and Informal Structures .................................................................. 176
  5.3.2 Economic and Security Driven ................................................................... 177
  5.3.3 Multiple Levels of Implementation .............................................................. 178
  5.3.4 Heterogeneous Objectives ........................................................................ 179
5.4 The Nature and Scope of Obligations ............................................................... 180
  5.4.1 Obligation to Cooperate ............................................................................. 180
  5.4.2 Obligation to Develop Policies, Laws and Institutions ............................... 183
  5.4.3 Obligation to Harmonise Rules and Practices ........................................... 185
  5.4.4 Obligation to Coordinate Implementation ................................................ 190
  5.4.5 Obligation to Protect and Promote Human Rights of Migrants .............. 193
5.5 The Impact of EAC Socio-Economic and Political Processes on Migration Governance .................................................................................................................. 196
  5.5.1 Political Federation ..................................................................................... 196
  5.5.2 Good Governance Programmes ................................................................ 198
  5.5.3 Socio-Economic Policies ........................................................................... 201
5.6 Experience from other RECs ................................................................. 202
5.7 Conclusion .............................................................................................. 205

CHAPTER SIX: SUMMARY OF MAJOR FINDINGS, CONCLUSION AND RECOMMENDATIONS ................................................................. 207

6.1 Summary of Major Findings .................................................................. 207
6.2 Conclusion ................................................................................................. 209
6.3 Recommendations ...................................................................................... 211
  6.3.1 Recommendations to Partner States ..................................................... 211
  6.3.2 Recommendations to EAC ................................................................. 213
  6.3.3 Recommendations for Further Research .............................................. 213

BIBLIOGRAPHY ......................................................................................... 215
LIST OF LEGAL AND POLICY INSTRUMENTS

National Legal Instruments

(a) Principal Legislation

(i) Kenya

The Constitution of Kenya, 2010

The Citizens and Foreign Nationals Management Service Act, No. 31, 2011

The Citizenship and Immigration Act, No. 12, 2011 (Rev. 2016)

The Counter-Trafficking in Persons Act, No. 8, 2010 (Rev. 2012)

The Immigration (Control) Ordinance, 1946

The Refugees Act, No 13, 2006 (Rev. 2012)

(ii) Tanzania


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The Immigration (Amendment) Act, No. 8, 2015

The Immigration (Control) Ordinance, 1948

The Immigration Act, No. 7, 1995

The Non-Citizens (Employment Regulation) Act, No. 1, 2015

The Refugee Act, No. 9, 1998

(iii) Uganda

The Employment Act, No. 6, 2006

The Immigration (Control) Ordinance, 1947

The Refugee Act, No 21, 2006

The Uganda Citizenship and Immigration Control Act, No. 6, 2009

(b) Subsidiary Legislation

(i) Kenya

The Citizenship and Immigration Regulations, L.N.N. 64, 2012

(ii) Tanzania

The Immigration (Amendment) Regulations, G.N. No. 246 of 2016

(iii) Uganda

The Citizenship and Immigration Control (Establishment of Immigration Custody Centers) Regulations, 2012

The Citizenship and Immigration Control (Fees) Regulation, 2009

National Policy Documents

(i) Kenya

The Kenya Diaspora Policy, 2014

The Kenya Foreign Policy, 2014

(ii) Tanzania

The National Employment Policy, 2008
The National Investment Promotion Policy, 1996

The National Population Policy, 2006

The National Refugee Policy, 2003

The New Tanzania Foreign Policy, 2015

(iii) Uganda

The National Diaspora Policy, 2013

The National Employment Policy, 2011

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LIST OF CASES

Cases from EACJ


Cases from Kenya


Cases from other Jurisdiction


# LIST OF ABBREVIATIONS AND ACRONYMS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ACBC</td>
<td>African Capacity Building Center</td>
</tr>
<tr>
<td>ACP</td>
<td>Africa, Caribbean, and Pacific Group of States</td>
</tr>
<tr>
<td>AMU</td>
<td>Arab Maghreb Union</td>
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<tr>
<td>Art.</td>
<td>Article</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>CASSOA</td>
<td>Civil Aviation Safety and Security Oversight Agency</td>
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<tr>
<td>CMP</td>
<td>Common Market Protocol</td>
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<tr>
<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
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<tr>
<td>CSFM</td>
<td>Centre for Studies of Forced Migration</td>
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<tr>
<td>EAC</td>
<td>East African Community</td>
</tr>
<tr>
<td>EACA</td>
<td>East African Competition Authority</td>
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<tr>
<td>EACJ</td>
<td>East African Court of Justice</td>
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<tr>
<td>EADB</td>
<td>East African Development Bank</td>
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<tr>
<td>EAHRC</td>
<td>East African Health Research Commission</td>
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<tr>
<td>EAKC</td>
<td>East African Kiswahili Commission</td>
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<tr>
<td>EALA</td>
<td>East African Legislative Assembly</td>
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<tr>
<td>EASO</td>
<td>European Asylum Support Office</td>
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<tr>
<td>EASTECO</td>
<td>East African Science and Technology Commission</td>
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<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<tr>
<td>Ed/s</td>
<td>Editor/s</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>FRONTEX</td>
<td>European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union</td>
</tr>
<tr>
<td>GAMM</td>
<td>Global Approach to Migration and Mobility</td>
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<tr>
<td>GCIM</td>
<td>Global Commission on International Migration</td>
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<td>GMG</td>
<td>Global Migration Group</td>
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<tr>
<td>Ibid</td>
<td>Ibidem (at the same place)</td>
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<tr>
<td>IBM</td>
<td>Integrated Border management</td>
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<tr>
<td>ICMPD</td>
<td>International Centre for Migration Policy Development</td>
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<td>IGAD</td>
<td>Intergovernmental Authority for Development</td>
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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Problem

The term irregular migration receives different meanings depending on migration policy guidelines of each State. As a result, the term is sometimes used synonymously with ‘illegal migration’, ‘unauthorized migrants’, or ‘undocumented migrants’.\(^1\) Normally, the use of the term “illegal” is not preferred and it is often criticized because it carries with it a sense of criminality while most of the irregular migrants are not criminals. Indeed, collectively calling them illegal migrants may jeopardize the status of asylum seekers and diminish assistance to victims of trafficking. Again, the term illegal migrants is much associated with smuggled migrants.\(^2\) The International Organization for Migration (IOM) defines the term “irregular migration” to mean the movement that takes place outside the regulatory norms of the sending, transit and receiving countries.\(^3\) This seems to be the most appropriate definition guiding this study.

Irregular migration can take many forms and covers a wide range of migrants, including those who enter or remain in a country without authorization, those who are smuggled or trafficked and unsuccessful asylum seekers who fail to observe a deportation order.\(^4\)

---


Several factors may lead to irregular migration within and across the region. These may include economic hardships and potential income generating opportunities in the destination countries, internal political unrest and cultural backgrounds of people. In addition, presence of smuggling agents and restrictive immigration policies may also be factors for irregular migration.

The actual number of irregular migrants is difficult to determine. This is so because of the clandestine nature in which such migrants enter or remain in an alien country. Accuracy of statistics on migrant stock and flow is a challenge since most of them tend to avoid registration in the admission process or overstay their visa. As a result, data on irregular migration are only estimates. The 2011 World Migration Report estimated the global number of irregular migrants in 2010 to be between 10 and 15 percent of the 214 million total estimates of international migrants. In the same period, the number of migrants in an irregular situation in the Least Developed Countries (LDCs) was estimated to be between 1.2 and 1.7 million people.

The period between 2010 and 2016 has recorded momentous global increase in the number of dead and irregular migrants who went missing. For example, in 2015 IOM estimated more than 5,700 migrants died or went missing globally during migration.

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10 Ibid.
Indeed, this human tragedy has predominantly occurred in the Mediterranean Sea where most of the migrants from Africa and some parts of Asia attempt to enter Europe. Out of 1.8 million irregular migrants who entered Europe in 2015, over a million (1,005,504) came from Africa and Asia.\(^\text{12}\) In the following year, 2016, out of 2,774 global irregular migrant deaths, 2,443 occurred in the Mediterranean Sea alone.\(^\text{13}\)

Like in other parts of the world, irregular migration governance is a difficult challenge in East Africa due to the mixed flows of migrants in the region and lack of coherent and effective laws, policies and institutions. As the report by the International Centre for Migration Policy Development shows, irregular migration governance in the region becomes challenging due to, among other reasons, the ‘composite character of its migration flows’.\(^\text{14}\)

East Africa borders major migrant source countries notably Somalia, Democratic Republic of Congo, Eritrea and Ethiopia. The outflow of migrants in these countries is due to political, social and environmental factors. The most challenging factor is the existence of incoherent and ineffective laws, policies and institutions governing irregular migration at both Partner States and EAC (Community) levels. For instance, most of anti-irregular migration measures contained under Article 12(1) of the EAC


Protocol on Peace and Security,\textsuperscript{15} are redundant for lack of common approach. In fact, this Protocol regards irregular migration as a threat to and a crime against peace and security deserving combative measures.\textsuperscript{16} It is neither the EAC Treaty,\textsuperscript{17} the EAC Protocol on Peace and Security nor the EAC Protocol on Common Market\textsuperscript{18} that offer coherent governance of irregular migration in the region. Further, the focus of the existing EAC legal and policy framework is to govern regular migration through facilitation of movement of persons within common market framework. In other words, the focus of the EAC legal instruments is to ensure intra-regional mobility of citizens.

Equally, the rules proscribing irregular migration in the EAC selected Partner States of Kenya, Tanzania and Uganda are largely contained in scattered legal and policy instruments. For instance, some irregular migration governance issues are addressed under immigration laws, citizenship laws, constitutions, as well as policy documents. It is also true that the laws in Tanzania and Uganda – the Tanzania Immigration Act\textsuperscript{19} and the Uganda Citizenship and Immigration Control Act\textsuperscript{20} lack express provisions on smuggling of migrants and transit migration. Another challenge is that in all three countries studied, the laws seek to govern irregular migration through combative and penal measures.\textsuperscript{21} In turn, this has disregarded the role of proactive and human right centred approaches.

Given the above described nature of laws and policies on irregular migration at regional and national level, the East African region is either a source, transit or destination of irregular migrants including victims of trafficking, smuggled migrants,  

\textsuperscript{15} Signed on 2013.
\textsuperscript{16} Ibid, art. 2(3) (i) and art. 12.
\textsuperscript{17} The Treaty for the Establishment of the East African Community, signed on 30th November, 1999 and entered into force on 7th July, 2000.
\textsuperscript{18} Entered into force on 2010
\textsuperscript{19} Act no. 7 of 1995 (amended in 2015).
\textsuperscript{20} Act no. 6 of 2009.
\textsuperscript{21} See for example, Ss. 48 (1) (e); 49(2), 50, 52 (Kenya Citizenship and Immigration Act); Ss. 12(1); 17(1) and (3); and 18(2) (Tanzania Immigration (Amendment) Act); and S. 66(1) (h) (Uganda Citizenship and Immigration Control Act).
asylum seekers and economic migrants. These irregular migrants are commonly from the Horn of Africa southwards towards South Africa and some originate from South and Central Africa towards the Gulf, the Middle East, Northern Africa and Europe. Also the region is reported to have experienced some incidences of violation of fundamental migrants’ rights, unbearable human sufferings and deaths as well as irregular migration associated insecurity.

1.2 Statement of the Problem

It is widely acknowledged that governance of irregular migration depends much on, inter alia, adequacy and effectiveness of the legal, policy and institutional frameworks put in place to address a range of issues. Governance of irregular migration in any jurisdiction whether in a regional economic integration or domestic settings calls for a robust legal, policy and institutional framework which address irregular migration in all its dimensions.

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24 Some scholars have expressed the importance of adopting migration governance frameworks which correspond to these necessary considerations. For example see Pocar, F. “Migration and International Law” in IOM, International Migration Law and Policies in the Mediterranean Context, Round Table, 2008, p. 19. Also, the EU-Africa Declaration on Migration and Mobility emphasize, as essential tools for fighting irregular migration, adoption of comprehensive and efficient policies which safeguard lives of irregular migrants, address cooperation, strengthen migration border management, fight against smuggling of migrants, return and readmission and address the root causes of irregular migration. See EU-Africa Declaration on Migration and Mobility, 4th EU-Africa Summit, 2-3 April, Brussels, 2014, p. 3.

The problem that is addressed in this study is the failure of the existing policies, laws and institutions of the EAC and selected Partner States to effectively govern irregular migration. The laws and policies governing migration at both Community and Partner States’ level do not provide for a number of issues related to irregular migration governance. At the Community level, the available frameworks which distantly relate to irregular migration are scattered around labour migration, peace and security, asylum and free movement of persons as contained under the Common Market Protocol\textsuperscript{26} leading to incoherence inconsistence and contradictions.

Equally, the laws and policies governing irregular migration in the selected Partner States do not address themselves to a number of important issues. For instance, the principal legislation governing immigration in Kenya (Citizenship and Immigration Act)\textsuperscript{27}, Tanzania (Immigration Act)\textsuperscript{28} and Uganda (Uganda Citizenship and Immigration Control Act)\textsuperscript{29} lack substantive provisions on rights of irregular migrants, transit migration and smuggling of migrants. Also they do not offer practical and durable measures to govern irregular migration. Existing institutions at both levels are also not well coordinated and complementary to each other and lack technical capacities to effectively govern irregular migration. This fall short of irregular migration governance standards contained under international instruments.\textsuperscript{30}


\textsuperscript{27} Act, No. 12, 2011 (Rev. 2016).

\textsuperscript{28} Act, No. 7, 1995 (Amended by Act No. 8, 2015).

\textsuperscript{29} Act No. 6, 2009.

\textsuperscript{30} Among them is the Global Compact for Safe, Orderly and Regular Migration, 2018; International Covenant on Civil and Political Rights, 1966; and United Nations Convention against Transnational Organized Crime, 2000.
All of the above call for the need to critically analyse the extent to which existing policies, laws and institutional framework at the EAC and Partner States’ level address the problem of irregular migration.

1.3 Objectives of the Study

1.3.1 General Objective

To examine the adequacy and effectiveness of the legal, policy and institutional frameworks governing irregular migration in the East African Community and its selected Partner States of Kenya, Tanzania and Uganda.

1.3.2 Specific Objectives

(i) To determine the state of law, policies and institutions on irregular migration in EAC and selected Partner States of Kenya, Tanzania and Uganda.

(ii) To identify the challenges caused by the present EAC and selected Partner States’ legal, policy and institutional frameworks towards adequate and efficient governance of irregular migration.

(iii) To assess the need for harmonization of laws and policies and coordination of institutions on irregular migration in the EAC and selected Partner States.

1.4 Significance of the Study

The significance of this study revolves around the following areas.

(i) Since the study identifies and discusses the conflicting laws and institutional practices, the study is of significant importance to national and regional organs responsible for policy making, legislation and harmonisation of migration laws and practices. Among others are, the Government Ministries, Law Reform Commissions, National Parliaments, EAC Secretariat, Committees and Sub-Committees, as well as Immigration Departments. These organs are well
informed by the study on issues that need their actions to address existing anomalies in the legal, policy and institutional frameworks governing irregular migration.

(ii) The study enriches the existing literature on irregular migration governance globally and East Africa in particular. This is because there is a limited number of studies and literature regarding the legal, policy and institutional frameworks on governance of irregular migration in East Africa. Thus, the study is a resourceful reference for future researchers and academia.

(iii) The findings of this study on the *modus operandi* used by human traffickers and smugglers and the legal consequences of engaging in or facilitating irregular migration increases understanding among the general public and civil society organizations engaged in migration governance advocacy. In turn, this will benefit potential emigrants in the source countries to make informed decisions prior embarking on perilous journey and avoid the resultant risks. In the same way, the study is significant to Immigration Departments and other stakeholders involved in border operations through understanding of emerging issues in international migration governance.

(iv) Lastly, the study informs EAC and governments of EAC Partner States on the effective mechanisms for governing irregular migration in the region. This will particularly inform them about the impacts of incoherent and ineffective migration laws, policies and institutions on irregular migration governance. Also, the EAC and governments of Kenya, Tanzania and Uganda can, for the purpose of improvement, learn from this study the best practice on irregular migration governance as used in other regional blocks.

1.5 Literature Review

Various legal scholars have written on irregular migration and its governance in different dimensions and perspectives. There are literature on the nature and causes of
irregular migration, the role of regional integration towards irregular migration governance, dynamics of irregular migration in Africa and the role of legislation in fueling and/or addressing irregular migration. However, the aspects of harmonization of migration laws and policies in the East African territory and the role of East African Community towards effective governance of irregular migration have largely not been covered by most of the existing literature. Equally, there is little documented information on the adequacy of existing legislative, policy and institutional frameworks in governing irregular migration in the region. Below is an extensive review of different available pieces of literature that were essential for the purpose of this study.

Castles et al\textsuperscript{31} have covered a wide range of migration issues. They have covered recent events and emerging migration trends, global perspective on the nature of migration flows, pushing factors and consequences for both origin and destination societies. Of more interest to this study is an account of the reasons why regional policies on irregular migration have been poorly implemented notwithstanding creation of rules on free movement of people and removing trade restrictions in regional and sub-regional communities like EAC, SADC, ECOWAS and the Arab Maghreb Union (AMU). These authors have pointed out restrictive policies and practices of States to be a major factor.\textsuperscript{32} This position is shared by Heather\textsuperscript{33} and Vollmer\textsuperscript{34} who believe that irregular migration is a product of restrictive policies and legislation. With regards to the relationship between highly restrictive irregular migration regimes and the allocated resources spent for their governance Castro\textsuperscript{35} argues that the more illegal the regime the more resources are required and vice versa.\textsuperscript{36}

\textsuperscript{32} Loc. Cit. p. 323.
\textsuperscript{36} Ibid, p. 142.
These pieces of literature were significant to this study when making analysis of the present legislation of the selected Partner States in EAC to identify the extent to which those laws and policies have either addressed or exacerbated the problem. However, these literature do not discuss the reasons for the existence of such restrictive laws and policies in EAC region perspective. Also, they have not identified the impact of irregular migration to transit countries like the selected EAC Partner States. This study therefore fills these gaps.

Battistella clearly points out that irregular migration is the evidence of the inadequacy of migration governance. He asserts further that irregular migration constitutes in itself a defeat of policy efforts to provide orderly governance in areas of admission, work and stay to migrants under various schemes. He observes that lack of concurrence in government approaches makes it more difficult to govern irregular migration. The author suggests an interesting approach towards reducing irregular migration by insisting on the removal of land border restrictions. Among the pertinent issues analyzed close to this study is whether such an approach can be useful in East Africa given the nature and pattern of migration and the socio-economic and political factors in the region. Also, the author’s proposition that irregular migration can be eliminated by removing land borders is controversial. In connection to his proposition, this study has gone a step further studying the impact of RECs’ attempts to remove land borders through ‘free movement’ regimes on migration governance. Lastly, he opines that irregular migration should be reduced and eventually eliminated by focusing on all the stages of the process and by issuing policies that are coherent and realistic. This argument is in line with the proposition of this study that without harmonization of the present disparities of laws and policies on migration in the EAC

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38 Ibid, p. 49.
39 The author cites Oceania as a region characterized by limited irregular migration due to lack of land borders among nations. See p. 50.
40 Ibid, pp. 53, 55.
member States or adoption of a coherent migration governance laws and policies at the national and regional levels, the challenges related to irregular migration shall persist.

Regarding irregular migration categories, Kubal\(^{41}\) is of the view that the law plays a significant role in defining categories and conditions of regular and irregular migration. Since the migrant’s status changes over time, the author is convinced that these categories are indistinct and hard to disentangle. This literature traces irregular migration from positive law era and does not tell exactly the factors which defined irregular migration in pre-positive law societies. Hence, some literature suggest that the phenomenon of irregular migration predates positive laws.\(^{42}\) This study has considered both arguments by tracing the history and conditions behind governance of migration in East Africa.

The existing studies on the effectiveness of regional and global economic integration to govern irregular migration present mixed arguments. For example, on the one hand, Vollmer is of the opinion that these regional economic communities have increased the mobility of people. Consequently, the ability of States to effectively control their borders is undermined.\(^{43}\) On the other hand, there is an argument that due to different political considerations, States are protective of their sovereign borders; hence, it becomes difficult for States to remove immigration restrictions.\(^{44}\) Both literature fall

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\(^{43}\) Vollmer, B.A., Policy Discourses on Irregular Migration in German and the United Kingdom, Ibid. p. 4.

short of contemporary studies of open border policies by RECs and the impact of those policies to States and beyond. In this study, we have demonstrated with examples from other RECs the implications of RECs to irregular migration governance.

According to Wandera, since its revival in 1999, the EAC has been striving to develop regional cooperation in various aspects, including migration. However, the efforts are seemingly on a few patterns of migration, namely to ensure free movement of persons, goods and services.\textsuperscript{45} This argument by Wandera is relevant to explain the scope of EAC migration governance regime. Nonetheless, the author limits his discussion of migration governance only to aspects covered by the EAC common market regimes. This study instead, offers a broader account of irregular migration governance regimes from normative to soft documents of the Community.

Betts\textsuperscript{46} argues that notwithstanding the efforts by stakeholders like the EU and IOM to encourage the EAC Secretariat to develop a set of policies to govern irregular migration, a number of political factors act as stumbling blocks towards harmonization of standards and policies relating to identity documents, land ownership and residence in the EAC territory.\textsuperscript{47} Betts acknowledges the presence of some positive efforts in the region compared to other RECs - that the EAC already has a forum for dialogue in the form of the EAC Chief Immigration Officers’ Meeting. This literature was useful to this study when making assessment of the factors affecting harmonization of migration issues across EAC Partner States and the role of the present institutions in the region towards governance of irregular migration. This literature, however, does not detail


the nature and efficiency of the Immigration Officers’ forum and whether it qualifies as a regional consultative process (RCP). In this study, we have critically analysed the shortcomings of this forum by benchmarking to qualities of RCPs in other regions. This study has further analysed the factors impeding the process of harmonization of laws in EAC beyond the ones considered by Betts.

Oppong\(^4^8\) offers an extensive discussion on harmonization of laws in four African RECs – namely East African Community (EAC), Southern Africa Development Community (SADC), Common Market for Eastern and Southern Africa (COMESA) and Economic Community of West African States (ECOWAS). He argues that harmonization of laws has a long history and taking place at international, regional and national levels.\(^4^9\) He further differentiate harmonization from various terminologies like approximation, legal integration, unification and convergence. He opines that harmonization in most RECs is inevitable due to differences in states’ legal systems and levels of development.\(^5^0\) The author further advances on the critical role of different organs of the EAC towards implementation of the Treaty obligation to harmonize national laws and standards. Despite the relevance of this literature to this study, the author does not discuss harmonization of migration laws in the EAC which is one of the objectives of this study.

On factors leading to regional migration governance policies, Triandafyllidou and Maroukis opine that policy development on irregular migration in the European Union is a result of external factors, namely spill-over effects from the completion of the internal market, the internationalization of European economies and the increased migration pressure since the late 1980s.\(^5^1\) Yet, some scholars like Ikuteyijo, Castles


\(^{4^9}\) Ibid. p. 113.

\(^{5^0}\) Ibid. pp. 115-16

\(^{5^1}\) Triandafyllidou, A & Maroukis, T., Migrant Smuggling: Irregular Migration from Asia and Africa to Europe
and others observe that ‘externalization of EU migration policies has exacerbated conditions which contribute to the gross violation of fundamental human rights’.\(^{52}\)

These pieces of literature assisted this study when drawing lessons from the European Union and suggesting the best ways to manage irregular migration in the EAC territory so as to avoid replication of gaps found in the EU migration policies.

Andrew et al\(^{53}\) have extensively covered a range of issues including regional governance of intra-regional and international migration, classification of migration, organizational role and the role of RECs in migration governance. To them, regional migration governance is the result of existing interdependencies between states. They argue that states forge cooperation on migration governance due to socio-economic and geo-political interdependencies.\(^{54}\) Also, it is their position that states prefer to cooperate in governing migration as a means to enhance their capacity to regulate access to their territories. The authors state further that international migration takes place due to differences in social, economic and political systems. However, despite the breadth of their discussion, their work does not address itself to governance of migration in the EAC. Also, this literature does not specifically focus on governance of irregular migration. These gaps form the central discussion of this study.

James\(^{55}\) underscores the roles and challenges faced RECs in tackling irregular migration. The author opines that multiple membership in regional trade agreements

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\(^{54}\) *Ibid*. p. 4-5.

by states has created opportunities towards migration governance. He further argues that if RECs aspire to holistically and effectively address irregular migration challenges, they need to involve countries of origin, transit and destination.\textsuperscript{56} With respect to implementation of EAC Common Market protocol agenda on free movement of persons, the author believes that elimination of security measures such as immigration laws and road blocks is vital towards fully realization of the Protocol.\textsuperscript{57} He also opines that implementation of COMESA-SADC-EAC tripartite is necessary for the EAC to reap the benefit of free movement of persons, goods and services in the region as provided for under the Common Market Protocol.\textsuperscript{58} However, the author does not provide an analysis of the current EAC and Partner States’ legal, policy and institutional frameworks on irregular migration governance. Similarly, the author does not make enquiries into irregular migration governance beyond trade-related agreements. In this thesis we have covered this gap by analyzing regional mechanisms on irregular migration governance.

Zachary\textsuperscript{59} examines a range of migration issues in the East and Horn of Africa which were useful in our research. The author, though in a nutshell, examines the nature and characteristics of irregular migration, compare regular and irregular migration flows and stocks and discusses the major factors responsible for both emigration and immigration in the region.\textsuperscript{60} The author also discusses policy priorities in the IGAD, EAC and COMESA and the role played by key international stakeholders in migration governance in the region – UNHCR and IOM.\textsuperscript{61} The author has also tried to examine policies governing migration especially from RECs’ common market and intra-regional movement of persons’ agenda. However, this literature offers limited analysis of laws, policies and institutions on migration governance in general and irregular

\textsuperscript{56} Ibid. p. 389.
\textsuperscript{57} Ibid. p. 199.
\textsuperscript{58} Ibid.
\textsuperscript{60} Ibid. pp. 4-13.
\textsuperscript{61} Ibid. pp. 20-22.
migration in particular. Also the work does not cover analysis of laws, policies and institution governing irregular migration in the EAC Partner States. Further, unlike Zachary’s work, this research endeavored to assess the challenges presented by the existing regional and national laws, policies and institutions on irregular migration governance.

Generally, this study contributes to the above literature by analyzing key aspects of irregular migration in the region and particularly considerations in the EAC selected Partner States. It also fills the gaps as identified in literature selected above.

1.6 Hypothesis

The study proceeded on the assumption that the laws, policies and institutions governing irregular migration in the East African Community and its selected Partner States of Kenya, Tanzania and Uganda are inadequate and ineffective. This hypothesis had the following elements:

(i) Poor governance of irregular migration in the East African region is largely caused by weak legal, policy and institutional frameworks of the EAC and selected Partner States.

(ii) The current EAC and selected Partner States’ legal, policy and institutional frameworks pose substantial challenges due to their inadequate and ineffective response to irregular migration.

(iii) The legal, policy and institutional frameworks relating to irregular migration in EAC and selected Partner States need to be harmonized and properly coordinated for effective governance of irregular migration.

1.7 Research Methodology and Methods

Although closely connected, research methods and methodology differ significantly. While research methods refer to specific techniques applied to collect and analyse data,
methodology on its part denotes the whole underlying logic of research. Broadly, methodology “deals with principles of the methods, concepts and procedural rules employed by a scientific discipline”. Drawing a distinction between the two, Kothari specifically notes:

The scope of research methodology is wider than that of research methods. Thus, when we talk of research methodology we not only talk of the research methods but also consider the logic behind the methods we use in the context of our research study and explain why we are using a particular method or technique and why we are not using others so that research results are capable of being evaluated either by the researcher himself or by others.

1.7.1 Research Approach

The accomplishment of the study which describes the nature of laws, policies and institutions governing irregular migration and explains their causal relationships largely depends on textual and verbal data (written/spoken) rather than numerical or quantitative data. Thus, this study is descriptive and qualitative in nature. Generally, descriptive approach to legal studies entails a process of ascertaining the precise state of the law on a particular point, explore implications of the state of the law, select and weigh materials by taking into account hierarchy and authority as well as understanding social context and interpretation. Through this methodology, the researcher was able to make content analysis and interpretation of legal rules, policy documents, judicial pronouncements, orders and other study materials for the purpose of identifying their logical implication on governance of irregular migration. Descriptive approach fits in studies of this kind since it best accommodates the use of

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observational data, as opposed to experimental data. Also, it allows the use of legal reasoning and interpretation approaches.

1.7.2 Methods of Data Collection

This study used two methods of data collection, namely, field research and library research/documentary review as detailed below.

1.7.2.1 Field Research

In qualitative legal research, field visits by a researcher are generally made to gather data which could not ordinarily be found in normative legal instruments. Likewise, qualitative legal research allows a researcher to gather important information through interviews and observation. It is through such field legal research methods legal researchers could make enquiries into external perspective pertaining to the law under scrutiny. This is particularly the case where the nature of the study cannot be systematic without exploring non-legal factors with a bearing on the subject matter. Therefore, the understanding of implications of the law under scrutiny to governance of irregular migration required collection and interpretation of views from key informants and observe some social conditions to understand how the law is applied and what is currently happening. In turn, expert opinion served to clarify some practical aspects underpinning the study. For instance, it was through this method the researcher was able to collect data on perspectives and experiences from informants who are directly engaged in irregular migration governance in the region either as operational officers or policy makers. Therefore, field data were necessary to complement and unveil the practical side of law texts.

Field research was achieved through two data collection methods, namely, –interview and non-participant observation. These methods are hailed for yielding positive results

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for qualitative migration studies. The researcher selected and interviewed key informants from Immigration Departments, IOM, EAC Secretariat and the academia. During face-to-face interviews, the researcher was guided by interview guide containing a list of open-ended questions. The use of this tool guaranteed flexibility and depth in enquiring about opinions, experience and facts on a number of themes and sub-themes of the study. In some few instances, especially when it was proved difficult to physically meet informants or for the purpose of verifying data obtained earlier through face-to-face interview, data were collected through telephone or email communications.

Simultaneous to interview, the researcher used non-participant observation method to collect information related to models of transport often used by irregular migrants and techniques of identifying and interrogating the suspected irregular migrants especially in border places. Similarly, it was possible to observe on diverseness of border communities and porosity of borders as well as social, economic and cultural inter-linkages. Also, the researcher observed some indoor operations in the Immigration Departments, check-points and borders. This included the ways of handling records and the conditions of holding facilities. To this end, a check list containing items to be observed was used.

1.7.2.2 Library Research

The study depended much on intensive analysis of data contained in normative, policy and academic documents. This entailed ascertainment and interpretation of conventional legal materials like Treaties, Conventions, Protocols, constitutions, statutes, decided cases, regulations, rules and orders. The process of locating the applicable law to the subject matter under scrutiny was not easy. This was because the laws and administrative procedures governing irregular migration are scattered in numerous legislation and executive decrees with frequent amendments. Also, the

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systems of compiling and reporting of laws and cases in three countries of concern and the EAC are rapidly undergoing transformation from paper-based volumes to computer-based online facilities. This dictated consultation of official online databases including EALA website,\textsuperscript{67} EACJ website,\textsuperscript{68} national Parliaments’ websites,\textsuperscript{69} Law Reform Commissions’ websites,\textsuperscript{70} Immigration Departments’ websites\textsuperscript{71} and different Ministries’ websites. Updated legislation and cases from Kenya and Uganda were accessed through the ‘Kenya Law’ website hosted and run by National Council for Law Reporting and the website for Uganda Legal Information Institute (ULII).\textsuperscript{72}

Data from the identified legal instruments enabled the researcher to determine the current state of laws on irregular migration, determine areas of similarities and differences; and through a thorough analysis, highlight on their relevance and the exhibited gaps. In order to ascertain the proper interpretation and enforceability of some provisions of laws, the study consulted a number of judicial decisions mainly from EACJ and courts of Partner States. Judicial decisions served to clarify the position of the law by explaining the proper meaning intended by drafters, the scope and effect of application of such laws and the legality of administrative actions purported to be done based on those laws.

Apart from legal materials, the researcher consulted and analysed policies, directives, parliamentary records and official reports of EAC and the selected Partner States. The review of these documents served to reveal the legislative and policy intent behind a particular law. Further, they furnished the study with information on practical challenges related to coordination and implementation gaps which are, in one way or another, caused by the existing frameworks.

\textsuperscript{67}http://www.eala.org/  
\textsuperscript{68}http://eacj.org/  
\textsuperscript{72}http://kenyalaw.org/kl/; https://ulii.org/
In order to understand various theoretical concepts and evaluate different analysis and commentaries made on the subject matter of this research, scrutiny of existing reports and information by various agencies, academic literature, political debates and media articles was necessary. Documentary review was employed to explore diverse arguments, interpretation and clarification put forward by different legal scholars on various legal rules governing the matters under this study. Further, this method enabled the researcher to make an analytical and comparative assessment of rules and principles contained in laws and policies governing irregular migration.

To this end, the researcher visited and reviewed library resources in various universities and other research centres; mainly, the University of Dodoma CBSL Library, Centre for Studies of Forced Migration (CSFM) and Tanzanian-German Centre for Eastern African Legal Studies (TGCL) both of the University of Dar es Salaam, Tanzania Regional Immigration Training Academy (TRITA) and African Capacity Building Center (ACBC) Library, EAC Library, University of Dar es Salaam Main Library (East Africana and Law Sections), and Research on Poverty Alleviation (REPOA) library.

Lastly, owing to the transnational and interdisciplinary nature of this study and the difficulties involved in physical access to some important information centres, internet based materials played a central role in accomplishing the objectives of this study. This involved access of electronic resources stored in databases of governmental and non-governmental organizations, migration research institutes, Regional Economic Communities, online publication depositories, statistics and security departments. The official websites for International Organization for Migration (IOM), United Nations High Commissioner for Refugees (UNHCR), European Union (EU), African Union (AU), Intergovernmental Authority on Development (IGAD), Economic Community of West African States (ECOWAS), Southern African Development Community (SADC) and United Nations Office on Drugs and Crime (UNODC) were utilized.
It is, thus, evident that the flexibility by the researcher in choosing proper methods was mainly guided by the nature of the required information; the effectiveness, efficiency and suitability of given method(s); and the prevailing circumstances.

1.7.3 Sampling Design and Sample Size

In qualitative research sampling denotes “the decision about the research site (where?), the unit of analysis (what?), and participants to a study (who?).”\(^{73}\) Given the nature and objectives of the study, the researcher employed purposive sampling. Being one of the non-probability sampling strategies, purposive sampling allows pre-determined or researcher’s prior judgment on participants to a study. It is alternatively known as judgmental or deliberate sampling.\(^{74}\) As Ayala observed, “with this sampling method, the researcher purposefully selects the subjects to be observed on the basis of which ones will be the most useful for the goals of the research.”\(^{75}\)

Therefore, the researcher identified key informants who could give expert information for interview. This design enabled the researcher to gather relevant information about causes and characteristics of irregular migration, the challenges caused by the existing frameworks designed to govern the phenomenon and the possible solutions. Thus, the researcher targeted and managed to interview key informants with knowledge, experience and insights into the research topic. The study involved 2 informants from IOM, 2 informants from EAC Secretariat, 8 informants from Immigration Departments of the selected States (4 from Tanzania, 2 from Kenya and 2 from Uganda) and 3 from the academia. Since data saturation in qualitative research is not determined by the sample size,\(^{76}\) samples were selected by keeping focus on the

\(^{74}\)Ibid, p. 162.
purpose to include only particular individuals involved in migration research and implementation of migration laws and policies.

1.8 Data Analysis

In legal research, data analysis is an exercise where legal rules and principles are systematically studied, synthesized and applied to the facts or problem under study before reaching a conclusion. This study being qualitative and descriptive in nature, it analyzed the legal rules and principles on irregular migration in order to describe their nature, meaning and implications underlying the legal materials under scrutiny. This method is, to a large extent, synonymous with content analysis method commonly used in social science research. In social sciences, ‘content analysis’ refers to “any technique for making inference by systematically and objectively identifying special characteristics of messages.”

Leeuw and Schmeets explain content analysis in relation to qualitative legal research as “a scientific understanding of the law itself as found in judicial opinions and other legal texts.” This signals an important message that the process of ascertaining, assorting and analyzing legal research data is not simple. Quoting Richard Posner, Siems describes the complex process involved in content analysis in legal research in the following words:

The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement and critique. These are intellectually demanding tasks, requiring vast knowledge and the ability (not only brains and knowledge and judgment, but also Sitzfleisch) to organize dispersed, fragmentary, prolix, and rebarbative materials. These are tasks that lack the theoretical breadth or ambition of scholarship in more typically academic fields. Yet they are of inestimable importance to the legal system and of greater social value than much esoteric interdisciplinary legal scholarship.

Based on the above approaches, the analysis of data collected through library research was made through three sequential but mutually dependent stages.

The first stage involved identification of the applicable legal rule. This stage entailed collection and organization of legal materials. As noted earlier, to this end, it was imperative to access study materials like statutes, case reports, treaties, conventions, protocols, regulations and other similar categories of primary and secondary sources of law. This initial process is all about ‘where to find what’. The selection of applicable legal materials was carefully done considering normativity, hierarchy and validity by ascertaining whether there are any amendments or repeals. In spite of the process being tedious, it was imperative for the researcher to go through international, regional and national legal instruments for the purpose of identifying legal rules with a bearing on the study.

The second stage involved generating sets of data/rules from the ascertained study materials. This is a process of ascertaining specific relevant rules to the matter under research. In particular, the researcher identified rules from specific provisions, ascertained their meaning and underlying sub-themes before inductively generating general rules (themes). This process is alternatively known as data reduction. The essence of this process is to reduce raw data through summaries of legal text and ultimately draw out various categorical themes. In ascertaining meanings underlying particular words, phrases, sentences, paragraphs or sections of law, the researcher observed the traditional aids to statutory interpretation. Attention was also paid to legal commentaries made by scholars on the law under scrutiny.80

The last stage concerned analysis and testing of rules against study propositions. After having generated themes, the next step was to analyze and test those rules on specific

themes against the facts/propositions under study. In other words, the identified rules were closely analysed for the purpose of identifying patterns by sorting out rules which present particular commonality and relationship towards the facts of the research problem and the study hypothesis. Through this evaluation approach, the researcher was able to describe and explain the relationship between the existing legal rules and the problem of irregular migration in the region. Likewise, this approach enabled the researcher to analyse if the law lives its purposes, detect the inbuilt gaps between the ideals and actual practices and inconsistencies with general irregular migration governance standards.

With regard to field research, data collected through interview method were analyzed through interpretative approaches. These approaches involved transcription into written text for recorded interviews, uncover the underlying meanings and deduce them into themes.\(^{81}\) Also, as Barglowski suggests,\(^{82}\) information collected through non-participant observation method were analyzed through inductive process. Through this process, the researcher was able to identify the presence or absence of some practices on migration governance or gather, in Kothari’s words, “information related to what is currently happening”\(^{83}\)

1.9 Scope and Limitations of the Study

This study was confined to assessing the laws, policies and institutions of the EAC and the selected Partner States on the area of irregular migration governance. The selection of Kenya, Tanzania and Uganda out of the current six EAC Partner States was motivated by a number of factors. Firstly, these EAC founding Partner States have for so long been experiencing the problem of irregular migration within and across borders due to their geographical location, economic potentials and political stability.

\(^{81}\)Bruce, L.B., *Op. Cit.* p. 239.
Secondly, Kenya, Tanzania and Uganda have the same legal tradition (common law) with almost parallel immigration regime thus comparable.  

In addition, the study sought to identify legal challenges presented by the said frameworks in governing irregular migration in the region. In the course of that assessment, the researcher analysed the historical background of irregular migration in the region, legal and institutional set up in response to the problem; and depicted challenges presented by the existing irregular migration governance frameworks before advancing possible solutions.

The study was conducted mainly in two broader areas. The first area involved major entry points for the three selected EAC Partner States. Thus, the Namanga and Holili borders between Kenya-Tanzania and Mutukula border between Tanzania-Uganda were visited for interviews and observation purposes. In order to study the rate and procedures for intra-regional mobility of EAC citizens, the researcher crossed borders and visited adjoining towns of Taveta in Kenya, Mutukula and Kyotera in Uganda and Misenyi/Bunazi in Tanzania. The second area involved places where key informants and important library resources for this study are located. For this purpose, the researcher often visited the EAC Headquarters situated in Arusha.

The study faced some limitations like shortage of literature especially those focusing on the subject in the region, limited access to web-based resources due to highly prohibitive subscription rates, and absence of accurate statistical data on irregular migrants in the region. However, in order to ensure that these limitations do not affect the study it was indispensable for the researcher to make good use of available region-based literature, subscribe to most needed literature and use of data from scattered yet reliable sources.

Further, the choice considered the language factor where English and partly Kiswahili are the main official languages used in all official documents and public offices in all three chosen EAC Partner States unlike in Rwanda, Burundi and Southern Sudan where the languages used are unfamiliar to the researcher. However, whenever better understanding and presentation of some concept compelled the use of data outside the study area, resort to other EAC Partner States were made.
1.10 Ethical Considerations

It is the requirement of the University of Dodoma (UDOM) research guidelines and general professional norms that ethical issues be strictly observed in the whole process of research. This takes on board a range of considerations including the manner under which a researcher conducts himself, treatment of respondents, upholding confidentiality and integrity and avoidance of any form of dishonesty. The researcher complied with these requirements by first seeking and obtaining research clearance from the office of the Vice Chancellor-UDOM. This alone was not enough to guarantee access to field places. Requests for authorization to access some places for interview, documentary review, and observation were made to persons in charge of respective authorities. Also, the researcher always sought and obtained informed consent from informants prior to the interview. Similarly, the researcher guaranteed anonymity for respondents who preferred non-disclosure of their identity.

The nature of the study raised some important ethical issues. First, it was extremely important to build trust between the researcher and informants. This is because some questions were security sensitive thus difficult for the respondent to disclose some information to the researcher. In fact, in some public offices dealing with internal security officials were not ready to participate in the research or let the researcher access information under their custody for the reason that the exercise may lead to leakage of classified and sensitive security information. However, this did not detract a researcher from getting important information from those offices. Instead, trust was achieved by insisting on the fact that the research is for pure academic purpose.

Second, it was equally important to abide to confidentiality. The researcher explained to the informants on their right to non-disclosure of their identity (anonymity) for the use of some information they deemed sensitive. The researcher was aware of the continued duty to uphold confidentiality as van Liempt warns:

In some cases, researchers have to be aware of the fact that obtaining certain information would automatically turn them into ‘bearers of secrets’— as being in possession of
information that could prove to be very harmful for the respondents, sometimes without even being aware of it. 

Lastly, the researcher endeavored throughout the research to ensure that access to and the use of data collected through library research were properly acknowledged, quoted and presented.

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CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK ON IRREGULAR MIGRATION GOVERNANCE

2.1 Introduction

Conceptualization of irregular migration has not always been an easy task due to the complexities involved in defining, classifying and determining factors underpinning the whole migratory cycle. An attempt to address irregular migration in isolation of other patterns of migration is challenging and, in fact, both empirically and theoretically impossible. The defining line between regular and irregular migration is blurred. Equally, contextualizing governance of irregular migration in a contemporary globalized world where migration is increasingly becoming complex is never an easy task.

This chapter explores important concepts related to irregular migration and its governance and offers theoretical clarifications on the nature and causes of irregular migration, classification of irregularities in migration, and the current global trends of irregular migrants’ stocks and flows. It also explains the concept of migration governance in relation to irregular migration. The purpose is to clarify key concepts underpinning this study.

2.2 The Concept of Irregular Migration

There is no single universally or regionally adopted definition of what irregular migration is. While acknowledging that irregular migration is multifaceted and that some of its aspects are not addressed by national policies, it can be maintained that a broad and better understanding of the concept of irregular migration requires assessment of migration policies and institutions of the origin, transit and destination countries. This understanding is in line with the definition of irregular migration as conceived by IOM which defines the term alongside the regulatory norms of the sending, transit and destination countries.

Commenting on the difficulties of conceptualizing irregular migration, Agnieszka believes that the question of migration being regular or irregular is never clear and straightforward. This study subscribes to this assertion as it is quite common for migrants’ status to change over time depending on circumstances. This tells us an important point that irregular migration is based on status in which migrants find themselves as a result of breaking the states’ imposed conditions governing entry, exit, stay or work. It is from this contextualization that states’ sovereignty is said to shape irregular migration discourse. Further, this is in line with the IOM definition as adopted in this study that irregular migration denotes the movement that takes place outside the regulatory norms of the sending, transit and receiving countries.

It is well established throughout literature that irregular migration is an old phenomenon, in fact, aging with the existence of human societies. Local communities

devised various mechanisms to identify themselves from outsiders.\textsuperscript{91} Vogel traces irregular migration from medieval era where cities had adopted ways of excluding strangers.\textsuperscript{92} During feudalism, emigration and immigration restrictions were dominant for the purpose of retaining skilled workers while deterring immigration of the poor.\textsuperscript{93} In the same line of history, Martin opines that migration restrictions had existed in Germany since 1548 and the same sentiments were expressed in Great Britain through the 1662 Act of Elizabeth I.\textsuperscript{94} Partly, this disapprove the common notion linking irregular migration with creation of modern states. In fact, we find reality in the assertion by Ambrosini that “until the 1970s unauthorized migration was tolerated than it is now.”\textsuperscript{95}

However, with creation of modern states,\textsuperscript{96} industrialization of some regions of the world and advancement in transport and communication technologies irregular migration got new momentum and characteristics. Some states passed restrictive policies aiming at safeguarding borders against non-nationals. Among the earliest anti-irregular migration legislation is the 1924 law to restrict recruitment of irregular immigrants into the United States of America, followed by a similar law in Europe in the 1970s.\textsuperscript{97} So, as Alice and Milena point out, it is policy reaction to irregular migration that is relatively new and not irregular migration itself.\textsuperscript{98}

\textsuperscript{92}Vogel, D., \textit{Ibid}.
\textsuperscript{94}Ibid.
\textsuperscript{96}This can be traced from 1648 when the Treaty of Westphalia was concluded creating territorial states. See Brian, O \textit{et al.}, “Conceptualising International Migration Law” in Brian, O \textit{et. al.} (eds.), \textit{Foundations of International Migration Law}, Cambridge University Press, New York, 2012, p. 1.
\textsuperscript{97}Vogel, D., \textit{Loc. Cit}.
2.2.1 The Role of State, Migration Laws and Policies

Irregular migration in international migration is held to be a product of creation of territorial borders coupled with strict restrictions and control. This view by advocates of open border policies is justified by the arguments that borders coupled with restrictions have altered traditional migratory movements. In the same perspective, Adepoju has demonstrated that the imposed colonial borders in Africa, which remained intact even after independence, interrupted homogeneous ethnic groups across countries. The arbitrarily imposed borders which did not ‘accommodate the socio-cultural realities of the countries concerned’ have generated irregular migration through border policies and in some places border conflicts. In its report, the Organisation for Economic Co-operation and Development (OECD) argued that irregular migration cannot be contained through closed borders. In fact, it is their opinion that:

It is the obstacles to entry which have the effect of ultimately inducing an increase in the number of illegal immigrants greater than would be the case under a more liberal system of entering and leaving.

This concept, which tries to explain irregular migration as a direct impact of border creation, is quite interesting and important in understanding the nexus of the two in the East African context. People in East Africa continue to move irregularly between EAC partner states irrespective of national borders due to some cultural, historical and social factors.

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100 Ibid.
States influence irregular migration through exercise of their sovereign rights – to determine who to admit or exclude and ensure effective control of territory. This creates irregular migration categories through stringent migration rules passed by states.\(^{102}\) It is argued in literature that restrictive migration policies were mostly adopted by states in the 1970s and 1980s following diminishing of labour demands and the rising of economic recession in the developed countries.\(^{103}\) The changes in classification, involvement of transnational criminal agents and rapid increase in number of migrant flows and stocks\(^ {104}\) have necessitated the adoption of counteractive policies. It can be argued that the formulation and enforcement of stringent immigration policies by states gave birth to irregular migration. Castle and his co-authors are of the opinion that irregular migration is the result of the national laws and regulations which discriminatively categorize mobility as legal and illegal, desirable or unwanted.\(^ {105}\) A similar position was observed in the report by the Select Committee to the House of Lords where it was clearly stated that:

> It was only when States were in a position to formulate rules governing the entry and residence of foreigners and to enforce them that contravention of those rules – and consequently the concept of illegal immigration – became possible.\(^ {106}\)

In an attempt to avoid State created stiff rules on irregular migration, migrants tend to resort to irregular channels of entry, stay or exit. A recent study on drivers and trends

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\(^{104}\) According to *IOM Glossary on Migration*, “migrant stocks” refers to the number of migrants residing in a country at a particular point in time, whereas, “migrant flow” signifies the number of migrants counted as moving or being authorized to move, to or from a given location in a defined period of time. See Perruchoud, R & Redpath-Cross, J (eds.), *International Migration Law: Glossary on Migration*, IOM, Geneva, Switzerland, 2011, p. 62.


of mixed migration in East and Horn of Africa confirmed that the region suffers irregular migration due to, *inter alia*, high administrative and legal restrictions which leave a few options for regular migration. The same concerns were raised in a recent study done to establish the drivers of irregular migration in Ethiopia. A part of the findings reads:

> The choice for irregular ways depends by the barriers to regular migration. [Migrants] choose irregular routes because of their cheapness compared to regular routes, the inaccessibility of regular routes, their lengthy and costly bureaucracy, and finally for the persuasion of brokers.

On this score, Dilip and William have concluded that restrictive migration rules which leave limited opportunities for legal migration have spurred irregular migration in some Asian countries, Argentina, South Africa and Russia. Also the OECD report notes that restrictive migration rules and regulations on entering, leaving and accessing labour market define the extent of irregular migration. The evidence collected by the IOM indicates that restrictive migration policies adopted by Spain in 1991, including imposing visa requirement to migrants from the Maghreb, had increased irregular migration from less than 5,000 migrants in 1999 to close to 20,000 in 2003.

Historically, sovereignty was linked to migration since the ability of states to retain their people and prevent invasion was paramount to the economic and political

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wellbeing of states. Thus, violation of emigration and immigration rules was regarded as synonymous to treason and invasion respectively.\textsuperscript{112} Like in the early states, control of borders against illegal intrusion, existence, or exit remains imperative today because it signifies states’ sovereignty in its entirety.\textsuperscript{113} Effective control of territorial sovereignty is one of the well-established rules of international law that determine existence of a functioning political state.\textsuperscript{114}

It is not surprising that States have, in several occasions, exercised their sovereignty over their territories by imposing tough migration rules to deter, detain and remove irregular migrants. In recent times, states have resorted to tightening of borders and introduction of travel documents to address challenges associated with irregular migration. This trend has increasingly applied in recent years following security threats like terrorism. For example, while by 1976 only 7 per cent of the UN member states had restrictive immigration policies, the number increased tremendously to 40 per cent in 2002.\textsuperscript{115} Consequently, border crossings became increasingly tightened and highly restricted in almost all parts of the world to deter irregular migration and maximize security. Accordingly, some factors like securitization and regionalization of migration have compounded irregular migration than it was before.\textsuperscript{116}

It is claimed that some processes pertaining to state creation, decolonization and nationalism have greatly shaped irregular migration particularly in Africa. Such was the case with wars of liberation, the fight against apartheid regime in South Africa and the war against authoritarian regimes. These processes generated a sizable number of

irregular migrants in the continent.\textsuperscript{117} Also, anti-emigration and immigration policies by nationalist and newly established governments respectively spurred irregular migration in the continent.\textsuperscript{118} Indeed, the world witnessed unprecedented massive irregular migration during the first and second world wars. The argument is that it is through state actions and policies that caused irregular migration. Some of these factors have continued to generate irregular migration all over the world but with greater intensity in areas where socio-political conditions are unstable.

\textbf{2.2.2 Categories of Irregular Migrants}

Any attempt to categorize migrants in an irregular situation is subject to challenges. Amir believes that ‘migrants categories are far from being mutually exclusive or clear cut’.\textsuperscript{119} As noted in this study, categorization of irregular migrants is complex due to \textit{inter alia} varying migration rules in the sending and destination countries, overlapping motives for movements, and changing of conditions during movements and on stay. In spite of the difficulties involved, classification of irregular migrants is often made based on two broad factors.

The first factor is the consideration of the motives behind movement and the ability of prospective migrants to make free decision. It is from this factor irregular migration is being sub-categorized as voluntary or forced migration. Voluntary irregular migration covers migrants who at will decide to migrate for economic purposes like better employment, business and educational opportunities. They are sometimes called economic migrants.\textsuperscript{120}

\textsuperscript{117}Flahaux, M.L & De Haas, H., “African Migration: Trends, Patterns, Drivers”, 4 \textit{Comparative Migration Studies}, 1, 2016, pp. 5-6.

\textsuperscript{118}Ibid.


In contrast, forced irregular migration comprises migrants whose decision to migrate is not willingly made. This sub-category is essentially characterized by elements of coercion and threat to life and livelihood whether human or naturally caused.\textsuperscript{121} Refugees, asylum seekers and environmental migrants are predominant irregular migrants in this category.\textsuperscript{122}

The second factor is based on the extent of violation of migration conditions in the transit and destination countries. Alice and Melina believe that in irregular migration exists hierarchy depending on degree of violation of immigration policies.\textsuperscript{123} It is from this context that unauthorized migrants are differentiated from semi-compliant migrants or unsuccessful asylum seekers.

The Global Commission on International Migration (GCIM) viewed irregular migration in three broad categories. Firstly, irregular migration resulting from unauthorized crossing and remaining in a foreign country. This is the common form of irregular migration and in fact replicates itself in other categories. It involves crossing of international borders without possessing required documentation or possessing a forged or expired documents. Secondly, irregular migration which involves trafficked and smuggled migrants across borders. The third category includes rejected asylum seekers who fail to observe deportation orders.\textsuperscript{124}

Of the three categories above, irregular migration by trafficking and smuggling of persons deserve special attention in this study. This is due to the fact that the problem

\textsuperscript{121}Ibid, p. 39.


\textsuperscript{124}GCIM Report, Op. Cit., p. 32.
of irregular migration in the EAC territory is compounded by proliferation of trafficking and smuggling networks. Equally important is the impact caused by smuggling and trafficking to the economies, securities of the involved countries and the wellbeing of migrants. For example, it is through the services of smugglers’ forging of migration documents and bribing officials that became common practices.\textsuperscript{125}

It is widely agreed that smuggling of migrants and human trafficking are not novel concepts. In fact, as Triandafyllidou and Maroukis argue, the phenomena are as old as migration restrictions.\textsuperscript{126} Historically, the two were treated synonymously until the global efforts to distinguish and proscribe them became fruitful in 2000 when the United Nations adopted the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling of Migrants Protocol);\textsuperscript{127} and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking in Persons Protocol).\textsuperscript{128}

Article 3(a) of the Smuggling of Migrants Protocol defines smuggling of migrants as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.” In contrast, the term trafficking in persons is defined under Article 3(a) of the Trafficking in Persons Protocol as:

\begin{quote}
...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other
\end{quote}

forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

From this definition, it is apparent that in practice smuggling of migrants and human trafficking have some common variables hence often confused. First, it is not uncommon to hear stories of migrants who initially sought the services of smugglers but only to find themselves victims of trafficking.\textsuperscript{129} The situation is attributed to criminal networks which interchangeably manage the processes. As demonstrated by Aronowitz, smuggled migrants can end up being coerced, tortured and sometimes held under involuntary servitude and bondage.\textsuperscript{130} The events in Libya, where the smuggled migrants are reportedly coerced, imprisoned and sometimes sold as slaves, help to demonstrate the blurred line between smuggling and trafficking.\textsuperscript{131}

Secondly, though human trafficking can be executed internally or across international borders unlike smuggling of migrants which must involve crossing of international borders, both are forms of transnational organized crimes. Criminalization, according to both Protocols, is aimed at prosecuting traffickers, smugglers and their accomplices and not smuggled migrants and victims of trafficking.\textsuperscript{132} In fact, the latter even deserve assistance and protection.\textsuperscript{133}

 Trafficking differs from smuggling in two basic ways. The first way is that while the former is usually perpetrated by means of coercion, abduction, fraud and vulnerability of the victim, the latter operates upon the consent and willingness of migrants to engage smugglers in the process of seeking illegal entry into a foreign country. The


\textsuperscript{130}Aronowitz, A., “Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that Drive it and the Organizations that Promote it”, \textit{9 European Journal on Criminal Policy and Research}, 2, 2001, p. 167.


\textsuperscript{132}Article 5 of the Trafficking in Persons Protocol; and Article 5 of the Smuggling of Migrants Protocol.

\textsuperscript{133}\textit{Ibid}, Article 6 and 5 respectively.
second way is by looking at the purpose. Unlike in smuggling where the smugglers intend to profit solely from the agreed fee paid by prospective migrant, traffickers’ intention is to exploit the victim in terms of sex, forced labour, slavery, removal of organs and other financial profits.\textsuperscript{134}

2.2.3 Irregular Migration in the Context of Mixed Migratory Flows

Mixed migratory flows refer to composite categories of migrants moving irregularly using the same routes though with different motivations and intentions. It is a situation whereby both voluntary and forced migrants share the same migration processes. This being the case, migrants who deserve international and national protection like refugees, asylum seekers and victims of trafficking move alongside economic migrants and other categories of migrants hence doubling their vulnerability.\textsuperscript{135}

Drawing a distinction between different categories of irregular migrants is always not easy due to the fact that in the course of migration, migrants in one category may at the same time fall into another category. For example, refugees involved in secondary movement may engage smugglers to access a safe third country for different motivations such as better economy or family reunification. In this situation, refugees change status into smuggled migrants.\textsuperscript{136} Similarly, migrants who do not meet immigration requirements may resort to claim refugee status. Catherine summarizes the situation in the following words:

…there is a blurred overlap between categories of migrants and methods of migration. For example, persons who wish to cross a border but are unable to obtain visas are forced to


couch their immigration in terms of the language of refugees.\textsuperscript{137}

The asylum-migration nexus creates protection and policy challenges for actors in ensuring protection to migrants of concern to UNHCR and other actors while safeguarding borders against illegal entry.\textsuperscript{138} As part of the solution to these challenges, in June 2006, UNHCR launched the “10-Point Plan of Action” on refugee protection and mixed movements.\textsuperscript{139} Generally, the Plan emphasizes the need to identify migrants who deserve international protection in spite of travelling alongside those who do not belong to any established legal category.

In order to achieve an efficient and responsive management of irregular migration in mixed flows’ context, actors like state governments, international agencies and RECs are urged to adopt a multi-tiered approach.\textsuperscript{140} This has to be accompanied by some practical measures including avoiding indiscriminate policies and practices like interception\textsuperscript{141} and detention on ground of illegal entry and security concerns.\textsuperscript{142}


\textsuperscript{138} Refugees have specific protection under the 1961 UN Refugee Convention, regional and national instruments. Equally, most vulnerable migrants involved in mixed flows like victims of trafficking, women and children are accorded some degree of protection by the 2000 Anti-Trafficking and Smuggling Protocols, the 1989 Convention on the Rights of the Child, and the 1979 Convention on the Elimination of All Forms of Discrimination against Women.


\textsuperscript{141} The term is defined to mean and include “all measures applied by a State, outside its national territory, in order to prevent, interrupt, or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination”. See UNHCR ExCom Conclusion on Protection Safeguards in Interception Measures, No. 97 (LIV) (Oct. 10, 2003); also Miltner, B., “Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception”, 30 \textit{Fordham International Law Journal}, 75, 2006-2007, p. 79.

A similar implication relates both to human and infrastructural capabilities needed to comprehend and address mixed flows. This entails building capacity to officials, equipping them with necessary tools and raising awareness to the public. This may reduce negative attitude associated with mixed movement and irregular migration. According to UNHCR and IOM:

…the public, government and even civil society are inadequately informed about the nature of mixed movements and the protection, service and assistance needs of people who are on the move.\(^{143}\)

2.2.4 The Global Trends, Stocks and Flows

Difficulties associated with availability of precise data on irregular migration stocks are widely documented. Equally, identification of clear routes, actors and patterns involved in irregular migration flows is challenging. However, there are some reliable estimates and figures obtainable from credible national and international agencies.\(^{144}\)

This part presents briefly the core dimensions of irregular migration including the main routes, common drivers, composition in terms of age and sex, the role of criminal networks and estimates of irregular migrants’ stocks and flows in some regions and countries.

The 2011 World Migration Report estimated the global number of irregular migrants in 2010 to be between 10 and 15 percent of the 214 million total estimates of international migrants.\(^{145}\) In the same period, the number of migrants in an irregular


\(^{144}\)Apart from national administrative and statistical agencies, data on irregular migration stock and flows can be obtained from \textit{inter alia} the Global Migration Data Analysis Centre (GMDAC), UN Department of Economic and Social Affairs (UNDESA), UN Office on Drugs and Crime (UNODC), Mixed Migration Centre (MMC), CLANDESTINO Database on Irregular Migration, Eurostat, Pew Research Center, World Bank, and FRONTEX Database.

situation in the Least Developed Countries (LDCs) was estimated to be between 1.2 and 1.7 million people.¹⁴⁶

In 2017, the IOM’s Global Migration Data Analysis Centre estimated that there were 58 million irregular migrants globally.¹⁴⁷ Regionally, the data indicate that the United States of America (USA) hosts a big number of irregular migrants. In 2016, 11.3 million irregular migrants were reported to live in USA.¹⁴⁸ Majority of the irregular migration population in the US comes from Mexico, Latin America and Asia.¹⁴⁹ Labour demand, income differentials, social networks and long US-Mexico border are cited as main drivers of irregular migration to USA.

Europe is another important global destination for irregular migrants especially from Africa and Asia. Out of 1.8 million irregular migrants who entered Europe in 2015, over a million (1,005,504) came from Africa and Asia.¹⁵⁰ Besides the highest records in 2015, FRONTEX reported that a total of 511, 371 and 204, 719 irregular migrants were detected crossing EU’s external borders in 2016 and 2017 respectively.¹⁵¹ Majority of the detected migrants in 2014 and 2017 entered Europe through the Central Mediterranean route¹⁵² as opposed to the trend in 2015 where the Eastern Mediterranean route was predominant.¹⁵³ The Southern European countries have been destinations of irregular migrants from Africa, Asia and the Middle East for some

¹⁴⁶Ibid.
¹⁵²Ibid.
¹⁵³Ibid.
geographical, historical, security and economic factors.\textsuperscript{154} A big proportion of irregular migrants enter into Europe by aid of smuggling services while others become irregular migrants by overstaying their permits or possession of fraudulent documents.\textsuperscript{155}

Also Africa is a source, transit and destination continent for irregular migrants. A large proportion of migrants migrate within the region (intra-regional movements).\textsuperscript{156} The continent is also characterized by extra-regional movements of irregular migrants towards Europe, USA and Asia. The trends on volume and direction of irregular migration in Africa have been shaped by multiple factors including colonialism, decolonization and state creation processes, conflicts and socio-economic motives. At least four major irregular migration routes exist in Africa. From the Horn of Africa and Eastern corridor to South Africa, Europe and America; from West and Central Africa to Europe via the Mediterranean Sea; from North Africa to Middle East and Europe; and the Eastern route to Yemen, Saud Arabia and beyond.\textsuperscript{157}

The IOM World Migration Report indicates that migrants in Africa, and East Africa in particular, are increasingly using smuggling services to further their migration goals.\textsuperscript{158} According to UNODC, at least 380,000 migrants were smuggled along the West-North Africa route, whereas 117,000 migrants were smuggled to Yemen from the Horn of Africa in 2016. The number is relatively low for migrants smuggled from different routes to South Africa being estimated at 25,000 migrants in the same year.\textsuperscript{159}

For the past ten years irregular migration has caused human casualties ever recorded in migration perhaps since the World War II. The period between 2010 and 2016 has recorded momentous increase in the number of dead and irregular migrants who went missing. For example, in 2015, the International Organization for Migration (IOM)

\textsuperscript{155}FRONTEX, \textit{Annual Risk Analysis}, 2017, p. 22.
estimated that more than 6,281 migrants died or went missing during migration worldwide. The number increased to 7,929 in 2016. Indeed, this human tragedy has predominantly occurred in the Mediterranean Sea where most of the migrants from Africa and some parts of Asia attempt to enter Europe. In 2015 alone, it is estimated that a total of 3,785 migrants died or went missing in the Mediterranean Sea. The number increased significantly to 5,143 in 2016\textsuperscript{160} and 6,163 in 2017.\textsuperscript{161}

Generally, the trends depict some common characteristics across regions with exception of a few specific places. First, majority of the migrants move between countries found within the same region. This implies that the number of intra-regional migrants surpasses those who migrate across regions. The 2017 UN world migration report estimates intra-regional migration (out of total migration flow) to be 67% in Europe, 60% in Asia and Oceania, and 53% in Africa.\textsuperscript{162} It is only in North America, Latin America and the Caribbean where migration outside the region outnumbers intra-regional migration.\textsuperscript{163}

This trend further refutes the illusion that many Africans migrate to Europe and other developed world than they do within the continent. Likewise, the trend proves the claims that most of the African migration takes place within shorter distance, usually between neighbouring countries.\textsuperscript{164} In fact, Europe is the second main continent of destination for migrants from Africa.\textsuperscript{165}

Secondly, although generally the trend depicts unavailability of accurate and complete data on irregular migration, the available data on age and sex of migrants indicate that the number of migrant women has increased significantly. According to the UN report, women count for 48.4% of all international migrants.\textsuperscript{166} Also, the report

\textsuperscript{160}Ibid. p. 26.
\textsuperscript{163}Ibid.
\textsuperscript{165}Ibid., p. 13.
indicates that majority of the migrants are of the working age. In 2017, the age of many migrants (74%) ranged between 20 and 64 years.\textsuperscript{167}

Thirdly, economic imbalances, conflicts, increased role of smuggling networks, environmental and geographical factors have remained major drivers for irregular migration worldwide. However, in some other parts of the world, irregular migration is driven by the existence of social ties between the areas of origin and destination.

Lastly, the role played by smuggling networks in shaping irregular migration is enormous. Many migrants seek the services of smugglers to overcome migration huddles despite the high risk and cost involved. According to the United Nations Office on Drugs and Crime, in 2016, at least 2.5 million migrants were smuggled globally.\textsuperscript{168}

2.3 The Concept of Migration Governance

The term governance receives different meanings depending on the purpose. However, in 1995, the Commission on Global Governance comprehensively defined governance as:

\begin{quote}
the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken.\textsuperscript{169}
\end{quote}

Building on this definition, IOM defines governance in relation to international migration as a “system of institutions, legal frameworks, mechanisms and practices aimed at regulating migration and protecting migrants”.\textsuperscript{170} Although migration

\textsuperscript{167}\textit{Ibid.} p. 17.
governance is used interchangeably with the term migration management, the application of the latter is mostly limited to measures taken to address numerous migration issues at a state level. In the early times, the term “migration control” was preferred and used widely in migration legislation and policies. So, as opined by Koser, there has been a shift in terminologies used by policy-makers and academics in describing this phenomenon.

It is obvious that migration governance seeks to offer a broad spectrum of responses at the state, inter-state and multilateral levels. The responses include migration policies and programs, bilateral and multilateral agreements and forums, consultative processes, normative frameworks and institutional structures. Ultimately, it is proposed that a comprehensive migration governance approach must seek to “optimize the overall benefits of migration, while addressing risks and challenges for individuals and communities in countries of origin, transit and destination.”

Despite the fact that governance of international migration, especially in the area of irregular migration, is relatively a new endeavor, the literature indicates that governance of some patterns of international migration is almost a century old process. For instance, the introduction of travel passport system, the ILO labour migrants regime and the refugee protection system are among the earliest adopted multilateral migration governance mechanisms.

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171 Ibid. p. 63.
174 Proposed *Global Compact for Safe, Orderly and Regular Migration*, UNGA, A/CONF.231/3, July 2018, para. 11; (hereinafter *Global Compact*).
2.3.1 Motives behind Governance of International Migration

In spite of the negative perception that governance of international migration would impinge on state sovereignty, the plea for collective efforts on governance of international migration is widely supported. A number of reasons have been put forward in support of governance of international migration. Two out of those factors deserve our attention. First, the diverse and multifaceted nature of contemporary international migration flows has rendered effective governance through international cooperation a necessary approach. There is sufficient evidence to suggest that states acting unilaterally under their policies and institutions have failed to efficiently manage international migration.\textsuperscript{176} It can rightly be argued that the conventional sovereign right of state to govern migration has been challenged by the transnational nature of migration hence slowly paving way for inter-states forum and agreements.

Second, increase in the number of international irregular migrants, vulnerability associated with irregular migration and negative consequences of irregular migration to all societies involved in migration process call for immediate global intervention. The study has demonstrated that the number of irregular migrants has recently increased. Likewise, the level of vulnerability, exploitation and abuse of migrant rights is high due to, \textit{inter alia}, increase in the number of women and children migrants, the role of criminal networks and the absence of, or weak global, protection regime.\textsuperscript{177} Since irregular migration has caused unprecedented social, economic and security challenges to countries of origin, transit and destination, cooperation among all relevant actors on migration is highly desired. Francois and Idil share the view as contained in the Global Compact on Migration that international migration governance is generally intended to regulate the causes and consequences of migration through

\textsuperscript{177}\textit{Ibid.}
mixed joint measures at various levels.¹⁷⁸ Such cooperation is also pivotal in achieving national policy goals.¹⁷⁹

Despite the above factors, the road towards achieving international migration governance is never smooth. Some factors like conflicting interests between receiving and sending states, anti-immigration sentiments by nationalist populist movements, and the jealously protected state sovereignty are cited to have hindered those efforts.¹⁸⁰

2.3.2 Levels of Migration Governance

Governance of migration and irregular migration in particular entails a combination of actors and mechanisms applied at different levels. Besides the traditional governance of migration by states and given the inherently transnational nature of the modern migration, there are inter-state mechanisms predominantly operating between neighbours in the sub-regions and multilateral systems cutting across regions of the world as demonstrated below.

2.3.2.1 Governance at National Level

In spite of the increased recognition among states that contemporary migration governance strategies require collective efforts, still migration is largely governed at national and inter-state levels. As Antoine argues, international interest in migration governance presents a turning point.¹⁸¹ Generally, states are jealous of their sovereign right to determine categories of persons to enter and/or live in their territories and conditions thereon. Also, migration governance is, for a long time, being regarded by many countries as part of national peace and security agenda. Thus, it is not surprising

that inter-state and multilateral migration governance mechanisms are informal, with a few or no binding rules.\textsuperscript{182}

At national level, migration governance is chiefly characterized by varying system of laws, policies and institutions. Generally, governance at the national level involves detection, interdiction, detention and expulsion of irregular migrants. In some jurisdictions, detention is accompanied by administrative or judicial measures.\textsuperscript{183} On the nature of existing governance infrastructure, the GCIM observed that, in most countries, migration policies, laws and institutions are the result of political, historical, economic and social circumstances.\textsuperscript{184} The Commission further observed that many countries have multiplicity of institutions responsible for migration governance which are also uncoordinated and lack effective information sharing mechanisms.\textsuperscript{185}

\textbf{2.3.2.2 Bilateral Cooperation}

The transnational nature of contemporary migration has necessitated cooperation between states, sub-regions and regions. There are plenty of bilateral cooperation agreements between states in the area of migration governance. Cooperation aims at joint border patrol, visas, information sharing, readmission of irregular migrants and technical assistance.\textsuperscript{186} Traditionally, these agreements existed between neighbouring states under “good neighbourhood” arrangements. But slowly the scope developed wider following regional and sub-regional integrations. This trend indicates the shift from looking at migration as a national concern rather as a regional issue by making and enforcing common policies.

Currently there is a good number of regional and inter-regional based migration governance agreements focusing on enhancing partnership. For example, the adoption

\textsuperscript{183}Measures include, but not limited to, prosecution, payment of fines and/or imprisonment.
\textsuperscript{184}GCIM Report, p. 67.
\textsuperscript{185}\textit{Ibid.}
of the European Union Global Approach to Migration and Mobility, the European Neighbourhood Policy and the establishment of Frontex are some of the mechanisms intended by EU to enhance cooperation with third countries in governing migration. As between regions, the Euro-African Dialogue on Migration and Development (Rabat Process) and the dialogue on migration between the African, Caribbean and Pacific Group of State and European Union feature prominently. Moreover, there are inter- and intra-regional migration governance platforms in Asia, North America and South America.  

The focus of these approaches differs depending on the agenda underpinning their establishment. However, governing irregular migration through enhancing cooperation with countries of origin, transit and destination in different aspects is among the top priorities. Additionally, there are migration governance agreements between individual European countries like Italy, Spain and France and individual or groups of African States.

In Africa, the African Union Border Governance Strategy, Migration Policy Framework for Africa and the AU Common Position on Migration and Development are the major continental policies on migration governance. Further to this point, is the role played by sub-regional consultations and dialogues processes in the continent – particularly, the Migration Dialogue for Southern Africa (MIDSA), Migration Dialogue for West Africa (MIDWA) and the Intergovernmental Authority on Development Regional Consultative Process on Migration (IGAD-RCP). Generally,

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consultative processes and dialogues aim at fostering cooperation in migration governance through development and sharing of good practices.\textsuperscript{190}

\textbf{2.3.2.3 Governance at the Global Level (Multilateralism)}

Generally, there is no formal binding multilateral agreement which coherently governs international migration. Equally, there is no single multilateral institution dealing with migration in all its dimensions. Notwithstanding the above stated weaknesses, the existing global migration governance systems within and outside the UN system have played an increasing role in initiation, monitoring and implementation of various migration governance programs.\textsuperscript{191}

Global governance of migration and irregular migration in particular, can be traced back to events which occurred between the First World War to the end of the Cold War period. This period witnessed the introduction of travel passport under the League of Nations, the establishment of refugee protection regime under the 1951 UN Convention on the Status of Refugees and the adoption of a series of migrant labour’s rights pioneered by the International Labour Organization (ILO).\textsuperscript{192} Important is the ILO Convention on Migrant Workers (Supplementary Provisions)\textsuperscript{193} which contains binding standards for protection of basic rights of irregular migrant workers during recruitment, admission and post-admission period.\textsuperscript{194}

Another important international legal framework with impact on migrants is the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).\textsuperscript{195} Adopted in 1990, the Convention aimed at extending

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\textsuperscript{192}Betts, A & Lena, K., \textit{Loc. Cit}.
\textsuperscript{193}No. 143 of 1975.
\textsuperscript{194}\textit{Ibid}, Article 2.
\end{flushleft}
protection to specific categories of migrants, that is, migrant workers. The Convention applies to irregular migrant workers as well.196

This category of specific international norms governing migration was later improved in 2000 by adopting the UN Convention against Transnational Crimes and its two supplementing Protocols on smuggling of migrants and Trafficking in persons.197 The convention and its two protocols came as a critical response to proliferation of transnational crimes and worsening security.

In 2016, the UN General Assembly adopted the New York Declaration for Refugees and Migrants.198 In a bid for implementation of the Declaration, two parallel Global Compacts for refugees on the one hand, and migrants on the other hand have been drafted. In fact, the Global Compact for Safe, Orderly and Regular Migration199 was presented and adopted during an intergovernmental conference held in Morocco on 10th and 11th December, 2018. Moreover, the Global Compact on Refugees was tabled through the High Commissioner’s annual report to the General Assembly.200

From the titles and contents of the above instruments it can be seen that they subjectively deal with specific category of international migrants. For example, while the refugee regime only extends protection to refugees and asylum seekers, migrant workers, smuggled migrants and victims of trafficking are covered under separate regimes with different degree of protection. But the truth is that describing categories of migrants in today’s increased mixed flows is challenging and sometimes unrealistic.

As shown earlier in this chapter, the status of migrants tends to change during the migration cycle and the factors underlying movements are usually indistinct.

In contrast to migration specific norms, global governance of some migration issues is indirectly provided for under various international instruments in the areas of human

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196 See Article 25.
197 See note 76 & 77.
200 See Annex I para. 19 of the New York Declaration.
rights, humanitarian law, maritime law and the World Trade Organization law. The applicability of these instruments to migrants finds justification under the fact that migrants are also human beings. This tendency of forging governance of migrants from general provisions applicable to all people regardless of their status is what Betts described as “embedded governance.”

The existing multilateral systems of migration governance can be challenged in two basic ways. First, most of the frameworks are non-binding in nature. For example, the New York Declaration for Refugees and Migrants and the Global Compact for Safe, Orderly and Regular Migration is one of the non-binding instruments. Even those binding on states, the challenge remains with ratification, domestication and implementation of the same. The ICRMW is most cited to have attracted a few ratifications, with enormous reluctance from major migrants receiving industrialized countries. Thus, the realization of objectives contained in these instruments largely depends on the political will to cooperate with other actors.

Indeed, there is no single multilateral institution with specialized mandate over all forms of international migration. Instead, the existing institutions assume conflicting, different and/or similar mandates over the same or different categories of migrants. For example, labour migrants issues are overseen by the International Labour Organization (ILO) whereas promotion and protection of the rights of migrants are within the mandate of the Office of the United Nations High Commissioner for Human Rights (OHCHR). The United Nations High Commissioner for Refugees (UNHCR) is a long time known UN refugee agency. Moreover, the mandates of the United Nations Population Fund (UNFPA), the United Nations Department of Economic and Social Affairs (UNDESA), United Nations Conference on Trade and Development

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202 See Para. 52 and 7 respectively.
(UNCTAD) and the United Nations Development Programme (UNDP) extend in one way or another to migration related aspects. Other institutions outside the UN system like the World Bank and the World Trade Organization (WTO) have also developed interest in migration due to linkages between migration and development.\textsuperscript{205} The plurality of these institutions which are uncoordinated and with conflicting objectives have led to the establishment, through the UN Secretary General, of the alliance called Global Migration Group (GMG) in 2006. Further, the alliance was established to promote cooperation and coordination between and among diverse global migration governance institutions.\textsuperscript{206}

It was in 2016 when the IOM was incorporated into the UN system as a related organization.\textsuperscript{207} Yet the bringing to the UN of the IOM, as a related organization, is for cooperation and consultation purposes. The relationship agreement between the two does neither affect their respective mandates, resources arrangements nor their structure.\textsuperscript{208}

Second, implementation of agreements and programs is largely by conditions. For example, the Global Compact clearly states that its implementation at all levels will take into account different national realities, capacities and levels of development, and will respect national policies and priorities.\textsuperscript{209} This has two important implications. One, it implies that realization of Global Compact objectives will remain a dream in least developed nations or where governance of migration is not part of national priorities and where policies do not comply with the Global Compact. Two, it is likely that the Global Compact, if implemented, will yield different results to migration governance depending on conditions in the places of origin, transit and destination.

\textsuperscript{205}GCIM Report, p. 73.
\textsuperscript{208}\textit{Ibid.} Article 2 and 3.
\textsuperscript{209}The Global Compact, para. 41.
2.3.3 Global Strategies for Irregular Migration Governance

Building on pioneering works by various organizations inside and outside the UN system and recalling states’ commitments contained in a number of binding and non-binding international instruments, the UN Global Compact on Migration proposes a total of twenty three plan of action for achieving safe, orderly and regular migration.\textsuperscript{210} Generally, the document presents a clear indication of the shifting in irregular migration governance strategies from unilateral border control to multilateral migration governance by seeking to address the root causes in the source countries. In this chapter, however, the focus is paid to six thematic strategies which, though not exclusively, address irregular migration. These include the following:

2.3.3.1 Accurate Data

Data on irregular migration, unlike in other patterns of migration, are scarce.\textsuperscript{211} Worse still, even the available data are mere estimates and the methods for collection of those data are questionable.\textsuperscript{212} This situation is due to the clandestine nature of this pattern of migration compounded by lack of coordination, differences in policies; and poor methods of data collection, analysis and sharing.\textsuperscript{213} Further, this situation is also caused by lack of political will and limited infrastructural and human resources.\textsuperscript{214} Moreover, it is contended in the literature that family members tend to conceal

\textsuperscript{210}Ibid. p. 6.
information pertaining to irregular migration because they are often involved in the process.\textsuperscript{215}

Despite the above challenges, it is important to have accurate data on irregular migration. It is widely accepted among statisticians and policy makers that data are key driver in comprehending the dynamics of irregular migration. Additionally, through data one can precisely know about the number, age, sex, health status and citizenship of the concerned irregular migrant.\textsuperscript{216} It is clear that lack of accurate and reliable data may make governments fail to address some serious concerns.

Mindful of the importance of data in governing migration, the Global Compact identifies collection, analysis, dissemination and utilization of accurate, reliable and comparable data as fundamental in conducting research, policymaking and implementation of programs at all levels. It is further emphasized that the process should take into account important variables like age, sex and migration status while upholding and protecting the right to privacy and personal data respectively. Stressing the role of data in migration governance, especially through policies, the Global Commission on International Migration (GCIM) observed that “[i]t is hard to formulate and implement effective policy when it is not clear who the targets of that policy are, how many they are, where they are and what their problems are.”\textsuperscript{217}

Any strategy to try addressing the problem of irregular migration at both national and regional levels, including adopting policies and programs, should be informed by accurate data. This study assesses, among other things, the extent to which irregular migration policies, laws and institutions of the EAC and its selected partner states uphold the aspect of accurate data in migration governance.

\textsuperscript{217}GCIM Report, p. 68.
2.3.3.2 International Cooperation

The Global Compact for Safe, Orderly and Regular Migration states clearly in the preamble that the realization of its objectives largely depends on cooperation among multi-stakeholders.\textsuperscript{218} States are urged to cooperate in areas of information sharing and return and readmission of migrants. It is further anticipated that cooperation in sharing, through national websites, of accurate and timely information pertaining to, \textit{inter alia}, regular migration options, applicable immigration laws and policies, visa requirements, application formalities, and conditions for employment would inform migrants’ decision making.\textsuperscript{219} Also, promotion of bilateral, regional and international cooperation and dialogue is encouraged as a means to get updated about migration trends.

State cooperation has proved efficient in addressing other trans-boundary issues in the area of environment, security, conflict, trade and development. This signals an important point that collective efforts in governing migration through bilateral and multilateral agreements and institutions are necessary.\textsuperscript{220} However, international cooperation can give more positive and durable solutions if directed to addressing the root causes of irregular migration.

2.3.3.3 Tackling “Root Causes” of Irregular Migration

States and other stakeholders are called upon to create conducive political, economic, social and environmental conditions in the places of origin and ensure timely and full implementation of the 2030 Agenda for Sustainable Development.\textsuperscript{221} This strategy reiterates recommendations by GCIM that challenges presented by migration can

\textsuperscript{218}See para. 7.
\textsuperscript{219}See para. 19.
efficiently be responded by bridging the widening differences in areas of development, democracy and demography.\textsuperscript{222}

It is anticipated in the Global Compact that irregular migration can be eradicated through investing in programs aimed at reducing poverty, ensuring food security, inclusive economic growth, employment creation, creating a balance between urban and rural development, and promotion of rule of law and good governance.\textsuperscript{223}

Additionally, the Global Compact urges states to do away with stringent and bureaucratic migration laws and policies by enhancing availability and flexibility of pathways for regular migration.\textsuperscript{224}

\textbf{2.3.3.4 Prevention and Combating Smuggling and Trafficking in Persons}

The Global Compact calls upon states and other actors to, through collective efforts, prevent and counter smuggling of migrants and endeavour to combat and eradicate trafficking in persons.\textsuperscript{225} It commits states to take measures ranging from prevention, investigation, prosecution to penalization of perpetrators while considering the needs of vulnerable migrants especially women and children, and extending protection to victims of trafficking.\textsuperscript{226} It is further stated that the listed measures be taken at all governance levels in accordance with the international law.

Smuggling and trafficking in persons have compounded the problem of irregular migration all over the world and present special concern in migration governance. There is a range of measures put forward in the Global Compact addressing the two related concepts. Importantly, enhancement of international cooperation; ratification, accession and implementation of the Protocols against smuggling of migrants and human trafficking; information sharing and awareness raising campaigns; adopt

\textsuperscript{222}GCIM Report, pp. 12-4.
\textsuperscript{223}See Para. 18
\textsuperscript{224}See Para. 19.
\textsuperscript{225}See Para. 25-26
\textsuperscript{226}Ibid.
legislative and policy measures and provide assistance to victims of human trafficking.\textsuperscript{227}

\textbf{2.3.3.5 Human Rights for Irregular Migrants}

One of the most controversial areas in migration governance is the question whether states’ obligations, under international law, to respect, protect and fulfill human rights extend to irregular migrants. It is alleged that obligating states to extend the application of human rights to irregular migrants interferes with the prerogative right of states to control their borders and prevent irregular migration. In fact, to a large extent, the two are irreconcilable.\textsuperscript{228}

Nevertheless, the duties imposed on states by core international human rights instruments to respect, protect and fulfill human rights apply to irregular migrants as well. Clarifying the subject matter, IOM holds the position that:

\begin{quote}
Since human rights inhere due to a person’s status as a human being and not because of citizenship, the vast majority of human rights are guaranteed to migrants and citizens alike, regardless of immigration status or other characteristics.\textsuperscript{229}
\end{quote}

Thus, the core human rights instruments like the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) use general and neutral terms as “everyone”, “every human being” and “no one” to signify inheritance of those rights to all human beings regardless of their status.\textsuperscript{230}

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\textsuperscript{227} See the list of Action Plans for implementation of Objective No. 9 & 10 of the Global Compact at pp. 15-17.
\textsuperscript{229}IOM, \textit{World Migration Report 2018}, p. 130.
\textsuperscript{230}For example, see Article 1 and 2 of UDHR, article 9, 10, 26 of ICCPR, and article 2(2) of ICESCR.
\end{flushright}
The treaty law and customary international law are fairly clear on the rights of refugees especially the principle of non-refoulement, fair procedures and appeal against unfair or discriminatory treatment.\textsuperscript{231} Gradually, the international community has expanded the scope of irregular migrants who deserve special protection of their rights to include migrants in the most vulnerable situation like children, women and victims of trafficking.\textsuperscript{232}

In addition, the Global Compact reiterates the commitments of states, while combating irregular migration, to respect, protect and fulfill the human rights of migrants irrespective of their migration status. Indeed, the human rights aspect forms part of a set of cross-cutting and interdependent guiding principles of the Global Compact.\textsuperscript{233} In extensive paragraphs, the Compact emphasizes observance of international human rights standards. Special attention is paid to migrants who face vulnerability – unaccompanied or separated children, older persons, women, persons with disabilities and victims of violence and exploitation.\textsuperscript{234}

\textbf{2.3.3.6 Integrated Border Management System}

Integrated border management offers a comprehensive package of measures aimed at governing cross border movements of persons at different levels. Measures range from normative, policy and solidarity to administrative, technical and operational mechanisms. The Global Compact recognizes ‘integrated border management’ as an important aspect of migration governance, particularly irregular migration. Integrated border management, as it applies to customs and migration, connotes a system of cooperation and coordination among various authorities involved in border management at the national and international levels for achieving maximum


\textsuperscript{232}The Trafficking in Persons Protocol generally pay particular attention to victims of trafficking, women and children. Also Art. 16 of the Smuggling of Migrants Protocol calls states to take into account, when applying the Protocol, special needs of children and women.

\textsuperscript{233}See Para. 15(f).

\textsuperscript{234}For instance, see Paras. 23, 25, 27, 28.
effectiveness and efficiency. Explaining the concept in relation to the EU regulations and practices, Koslowski expands the scope to include the role of modern technology in border surveillance.

The Global Compact outlines at least six elements constituting governance of borders in an integrated manner. They include cooperation at the national, bilateral, regional and international levels and with all actors; prevention of irregular migration and fight cross-border crimes; review existing migration policies and enact relevant laws, regulations and procedures to align with national sovereignty, rule of law, human rights of migrants and obligations under international law. Moreover, it adopts the coordination system among agencies at all levels; ensures security for states, communities and migrants; and uses modern information communication technology.

The above elements tally, to a large extent, with integrated border management components under the European Border and Coast Guard Agency Regulations.

2.4 Theoretical Framework

This part briefly offers an overview of different theoretical accounts on drivers of irregular migration with a view of depicting their underlying features, divergent and convergent aspects, and application to the contemporary situation of irregular migration in East Africa. Since this study is guided by normative rules and not a particular theory, the theories discussed under this section only intend to explain the causes or drivers of irregular migration.

Most of the theories on factors influencing irregular migration conclude that there are multiple interconnected factors leading to the phenomenon as demonstrated in Chapter

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237 Para. 27.
238 See Art. 4 of the European Border and Coast Guard Agency (Frontex) Regulation, (EU) 2016/1624.
One. Equally, it is well established in migration literature that drivers of regular and irregular migration can hardly be argued in isolation. Some of the theories tend to explain factors causing irregular migration in connection with imbalance in economic and social opportunities. Others, especially those who advocate for open border policies, have viewed irregular migration as a direct result of the State’s reaction through restrictive policies. However, some recent scholars have argued that the decision to move, as opposed to the misconceived notion that irregular migration especially South-North migration is caused by poverty and oppressive regimes, is primarily ‘a function of people’s aspirations and capabilities’. Thus, one can rightly say that there is no single theory which comprehensively explains the factors behind international migration and irregular migration in particular.

Since the nature of migration is heterogeneous, most of the available theories tend to explain factors behind cross border movements of persons from sociological, historical, political, demographic and economic perspectives. Movements of persons across borders are regulated by states using migration laws and policies.

2.4.1 Neo-classical Theory

This theory is broadly premised on the postulation that “migration mainly takes place because of geographical differences in demand and supply on labour markets.” This theory specifically explains the economics of labour migration. For instance, Ravenstein in his propositions made in 1889 strongly argues that migration takes place for economic motives. While acknowledging the role of other motives, Ravenstein wrote:

Bad or oppressive laws, heavy taxation, an unattractive climate, uncongenial social surroundings, and even

compulsion (slave trade, transportation), all have produced and are still producing currents of migration, but none of these currents can compare in volume with that which arises from the desire inherent in most men to “better” themselves in material respects.241

The analysis of this theory is often carried out at macro and micro levels. At macro level, the theory tries to establish the causal link between migration and geographical differences in terms of economic development, employment opportunities and wages.242 This tells us about migration motivating factors beyond individual’s aspirations and capabilities. Instead, migration is viewed as a function of socio-economic forces creating disequilibrium between two interdependent parts.243 It attempts to explain migration in the context of capitalism where demands for labour and wage differentials trigger movements of workers. At the micro level as pioneered by Lee in 1966, the neo-classical theory postulates migration from an individual’s economic cost-benefit analysis.244

In an almost similar line of argument to Ravenstein, Lee believed that migration results from consideration and comparison of numerous negative and positive factors in both areas of origin and destination (pull-push model).245 To him, factors like good climate, schools and knowledge of the area of destination are likely to attract migrants or hold them to a particular area, while the opposite factors tend to repel them.246 His hypotheses suggest that people will migrate if the positive factors in the area of

246 Ibid, p. 50.
destination weigh high compared to the negative factors in the area of origin. However, it is his views that weighing of the above factors alone does not guarantee decision to migrate. Consideration of intervening factors like strict migration laws, physical barriers, lack of clear information about conditions in the destination areas and distance are fundamental in making decisions.  

Researches around the world have confirmed that these intervening factors, as used in this theory, are increasingly influential today in migration decision making. For example, the choice of routes by migrants or smugglers considers strictness or otherwise of the migration laws and physical barriers in form of patrol, arrest and detention in the countries of transit and destination. It is noted that irregular migrants from Ethiopia and Somalia who use Kenya and Tanzania as their transit to South Africa and beyond prefer to go through Mozambique or Malawi since it is easy in those countries to acquire tourist visa or claim refugee status. Equally, the change in routes by migrants and smugglers aimed at circumventing obstacles is reported to happen in many places of transit. Migrants are even ready to diversify to longer and more perilous routes if the shorter ones become tightly policed. The research on trends of irregular migration across the Mediterranean Sea to Europe show the changing of routes by irregular migrants from shorter to long distance routes following adoption of penal laws criminalizing and punishing irregular migration in Morocco, Tunisia and Algeria.

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247 Lee, 1966, p. 51
Harris and Todaro used the notions of disequilibrium and wage differentials to explain the factors behind rural-urban migration especially in developing nations.\textsuperscript{252} Relevant to this study is their reservation against restrictive migration laws aimed at reducing unemployment rate in urban areas and create welfare improvement in rural areas.\textsuperscript{253}

With respect to factors facilitating irregular migration, the proponents of the neo-classical theory consider advancement in technology and transportation as essential in spurring migration through reduced cost of movement and the possibility to circumvent what Lee termed as “intervening obstacles” becomes high.\textsuperscript{254} The role played by technology especially the use of internet, mobile phones and social network platforms in inducing irregular migration is much reported. Studies have confirmed that technological developments especially in the area of information technology and transportation have greatly attracted cross-border movements in either form.\textsuperscript{255}

It is obvious that the use of modern technology in border patrols and record tracking and storage has helped in counteracting irregular migration in a number of ways. For example, in Europe, different Information Technology (IT) tools like biometric technology and electronic surveillance systems have been deployed in combating irregular migration.\textsuperscript{256} This theory, to a large extent, informs this study in a number of ways. For instance, the theory laid a foundation for this study to undercover the factors responsible for irregular emigration and immigration in the region. Through the lens

\textsuperscript{252}Harris & Todaro, 1970, p. 129.  
\textsuperscript{253}Ibid, p. 135, 137.  
\textsuperscript{254}Lee, 1966, p. 54. Also see Ravenstein, 1889, p. 288.  
of this theory, the study identifies the role played by laws, policies and institutions in either motivating or limiting irregular migration.

2.4.2 Differentiation Theory

Unlike the neo-classical theory, differentiation theory tries to explain drivers of irregular migration from structural mismatch between the social and political conditions for migration. The presumption of this theory is that the world as a society is composed of subsystems which are different from one place to another. It is prudent to admit at the outset that the differentiation theory is much used to explain a range of social concepts. In spite of limited application to migration studies, differentiation theory has been used by scholars to analyse the causes of irregular migration with positive results.

According to this theory, it is the economic, social and political differences between two areas that influence human mobility. The proponents of this theory believe that migrants move in search for “positive life chances”. These are generally equivalent to what are known as pull factors. Also, they believe that irregular migration is triggered by the functioning of some other subsystems like the political and legal subsystems which impose and enforce territorial distinctions between insiders and outsiders.

The principal argument in this theory is that irregular migration develops from the differences between subsystems at both internal and international levels. For example,

261 Cvajner, M & Sciortino, G., Loc. Cit.
while an international economic subsystem has produced transnational networks and induced migration beyond borders, the management of migration process and treatment of migrants are regulated by conditions set by states through internal political subsystem.\textsuperscript{262}

Connected to this proposition is the role played by intergovernmental bodies like EAC in regulating irregular migration. As the theory posed, political and economic transnationalism produces challenges which require extra-territorial solutions. It may be argued that failure to appreciate and respond to differences in the systems which regulate migration in the EAC has generated and compounded irregular migration in the region.

Contrary to the notion that irregular migration is a natural state of being, King proposes that irregular migration is caused by structural factors laid down by states to define conditions of inclusion and exclusion like visa and border pass requirements.\textsuperscript{263} This theory was instrumental in explaining the causal link between the conditions established by state’s laws and policies governing migration and the proliferation of irregular migration in the region. Therefore this study examines the extent the conditions laid down by laws and policies in the selected EAC Partner States have influenced irregular migration.

2.4.3 An Overview of Push-Pull Factors

The movements of people whether internal or international, regular or irregular, permanent or circular, are driven by a combination of factors. It is equally true that there is no single theory that comprehensively explains drivers of irregular migration. The factors in the country of origin which force people to migrate are commonly called

\textsuperscript{262}\textit{Ibid}.
“push factors”, while the factors attracting people to areas of destination are called “pull factors”.

It is not easy to exhaust the list of push-pull factors responsible for irregular migration. This study, however, is persuaded by the classification made by the Global Commission on International Migration (GCIM) where drivers of migration were grouped into three major forces, namely the differences in development, demography and democracy.\footnote{Global Commission on International Migration, “Migration in an Inter-connected World: New Directions for Actions,” GCIM, Switzerland, 2005, p. 12.} The empirical evidence reported by the Commission suggests that migration from low-income areas to high-income areas is spurred by an escalating gap in living standards. On the one hand, the situation is compounded by unemployment and low wages, civil wars and conflicts, repressive regimes and insecurity.\footnote{Ibid, pp. 12-14.} On the other hand, employment opportunities, access to services like schools and hospitals, and stable political and economic systems are cited as pull forces of migrants in the destination countries.\footnote{Boswell, C., “The Politics of Irregular Migration” in Azoulai, L & De Vries, K (eds.), EU Migration Law: Legal Complexities and Political Rationales, Oxford University Press, Oxford, 2014, p. 50.} It is confirmed that modern communication and transport technologies, the role of smugglers’ networks and feedback by successful migrants have greatly influenced migrants’ aspirations and decision to migrate.\footnote{Read generally de Haas, H., “The Internal Dynamics of Migration Processes: A Theoretical Inquiry”, 36 Journal of Ethics and Migration Studies, 10, 2010.}

Additionally, environmental factors either human or naturally caused like prolonged droughts, hurricanes and floods have in some places caused irregular migration within or across borders. Experts in environmentally induced displacements have insisted on the differences between those who migrate due to sudden environmental change, called environmental refugees; and those who migrate to escape gradual long-term environmental change, called environmental migrants.\footnote{Waldinger, M & Fankhauser, S., “Climate Change and Migration in Developing Countries: Evidence and Implications for PRISE Countries”, Policy Paper, ESRC Centre for Climate Change Economics and Policy & Grantham Research Institute on Climate Change and the Environment, 2015, p. 9.} A survey conducted by the
Regional Mixed Migration Secretariat (RMMS) to establish the common drivers of irregular emigration in Ethiopia found that environmental factors like prolonged drought, famine, land erosion, overpopulation and lack of arable land motivated 38% of potential migrants, 8% of current migrants and 30% of returnees.\(^{269}\)

However, it is generally agreed that environmental events which lead to irregular migration are mostly ancillary; instead, they find their roots in political, economic and social practices and policies.\(^{270}\) Arguably, the failure of these sub-systems renders negative consequences to the environment which in turn becomes uninhabitable for human population.

Connected to the basic objectives of this study is the role played by national laws and institutions either as pull or push catalyst of irregular migration. For example, the study commissioned by the South African government pointed out that, among other factors leading to the problem of irregular migration in South Africa, irregular migrants were taking advantage of the loopholes in migration and asylum laws and institutions.\(^{271}\) Equally, the gaps and bureaucracy in the Ethiopian legal system are singled out to have fuelled irregular migration.\(^{272}\) This study analyses the existing policies, laws and institutional set ups in order to underscore extent to which the same have contributed to the proliferation of irregular migration in EAC and selected Partner States.

### 2.5 Conclusion

The chapter has offered a conceptual and theoretical account of two major aspects, namely, irregular migration and migration governance. Indeed much attention was
paid to irregular migration governance. Although the notion of irregular migration has recently received attention from the media, state authorities, regional as well as international community, it has been shown in this chapter that its existence can be traced from the creation of human societies. In fact, the foregoing discussion has demonstrated clearly that irregular migration in liberal terms started when states imposed territorial borders and enacted rigorous migration and citizenship rules which in turn classified people based on nationality and status.

A review of theories underpinning migration, and particularly irregular migration, has demonstrated that there is no single theory that offers comprehensive explanation on drivers of cross-border movements of people. However, political and socio-economic reasons remain principal factors driving movements in most regions of the world. Along similar lines, the chapter has identified the change in quality and quantity of irregular migration stocks and flows especially in the last three decades. Factors responsible for these changes include the active role of criminal networks, globalization and demography.

It was further observed that while governance of irregular migration is challenging at all levels and in almost all aspects, adoption of collective policy, legal and institutional systems to address multi-dimensional aspects of migration in a coherent and responsive manner is an indispensable endeavor. Despite the conflicting interests between receiving and sending states, anti-immigration sentiments by nationalist populist movements and the jealously protected state sovereignty, the chapter has identified some promising initiatives aimed at governing migration at the global level.
CHAPTER THREE

THE LEGAL FRAMEWORK, POLICIES AND CHALLENGES RELATING TO IRREGULAR MIGRATION GOVERNANCE IN EAST AFRICA

3.1 Introduction

Migration issues were conventionally treated as concerns of sovereign states. However, due to globalization forces and the ever-increasing socio-economic, political and human effects of migration and irregular migration in particular, new migration governance approaches which transcend national borders started to emerge. As argued in the preceding chapter, irregular migration is one of the global issues that require collective reactions by various actors and at different levels. One of the inter-state forums where collective approaches on migration governance have been adopted is through Regional Economic Communities (RECs).

In order to better understand the situation of irregular migration in the region, the chapter is divided into three main parts. The first part sheds light on some background issues underpinning irregular migration in the region; the second part identifies and examines the existing EAC policy, legislative and institutional frameworks aimed at governing irregular migration in the region, and the last part attempts to offer insights on issues and challenges which are presented by the existing irregular migration governance frameworks.

3.2 The Nature of Irregular Migration in the Region

The nature and characteristics of irregular migration in the East African region is, by and large, not different from the rest of Sub-Saharan Africa. Irregular migration in East Africa and particularly in countries relevant to this study is the result of movements of people outside the frameworks and channels established by states’ authorities. Irregular migration in East Africa is mainly composed of migrants who evade border control procedures, and some proportions of irregular migrants are those who initially
observed immigration procedures but find themselves in an irregular migration status by overstaying their permits; for example, students, tourists and migrant workers. The latter category is what some authors refer to as ‘semi-compliant migrant’.273

Reports indicate that a large proportion of irregular migrants in the region are those who enter into a foreign country (as a country of transit or destination) without required documentation or with illegally obtained permits.274 However, some irregular migrants had been reported to enter a foreign country legally by possessing valid travel documents before engaging smugglers to further their journey illegally through other countries to their destinations.275 Sometimes irregular migrants are reported to have occasionally changed their identity so that they can outmaneuver stringent immigration policies of the transit and destination countries and make them work in their favour.276 As a result, it is hard to disentangle irregular migrants’ categories in the region.

3.2.1 Irregular Migration Trends in East Africa

Some literature on the history of the East African population movements conclude that the region had internal and external population movements, especially along the coast, sometimes before the seventh century of our era.277 The earliest immigrants into East Africa were Arabs followed by Asians who settled and operated trade along the coast (including slave trade) and later penetrated into the mainland.278 The history behind

these movements points out geographical factors, especially accessibility by sea, to have influenced inter-regional movements and opened up the region to the world.\textsuperscript{279} Among the key factors which steered migratory movements included internecine warfare, natural disasters, searching for farm and grazing land and for ethnic affiliations.\textsuperscript{280}

During colonialism, people in East Africa continued to migrate using their traditional routes regardless of the imposed boundaries and policies by the colonial regimes. Movements were mostly motivated by the needs of labour force in mines and plantation, wars of liberation, internal strife and search for fertile soil.\textsuperscript{281} White migrants (settlers) were privileged and in fact given citizenship status and moved freely within the region and beyond.\textsuperscript{282} Similarly, labour migrants were allowed to move freely between British East African countries.\textsuperscript{283} Apart from the introduction of cash (monetized) economy, it is widely accepted that migration in East Africa was as well motivated by social and spiritual service centres where people moved across borders in search for schools, mission stations and hospitals.\textsuperscript{284} For example, Uganda was a destination country for African migrants looking for education at Makerere University.\textsuperscript{285}

After independence, the region continued to experience irregular migration due to the adopted strict policies, war of liberation in neighbouring southern countries and expulsions following the collapse of the former EAC. In the past two decades, the

\textsuperscript{279}Ibid. pp. 551 & 556.
\textsuperscript{281}Ibid.
\textsuperscript{285}Mafukidze, J., \textit{Loc. cit.}
region has experienced and continues to experience transit irregular migrants from the Horn of Africa especially Ethiopia, Somalia and Eritrea. Studies on irregular migration in the region indicate that Kenya and Tanzania are major transit countries for migrants from the Horn of Africa and the Great Lakes Region who target South Africa and Europe as their preferable destinations. Unlike in the past, the region is now experiencing irregular migrants from Asian countries like Bangladesh, India, Pakistan, and China who also target South Africa as their destination. Moreover, the region is increasingly becoming a place of origin and transit hub for trafficked persons towards Europe, the Middle East and beyond.

Like in the past, insecurity and economic imbalances remain significant factors for the movements in the region. In addition, irregular migration in the region is reported to be intensified by weak border management strategies, inadequate resources and the absence of a comprehensive migration management regime. Furthermore, research conducted by the United Nations Office on Drugs and Crime concluded that irregular migration in East Africa is exacerbated by, inter alia, long and porous borders, weak governance and criminal systems and lack of necessary training to border officials.

In recent times, irregular migration has taken different trends due to advancement in technology and involvement of transnational criminal networks. A big proportion

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of apprehended irregular migrants reported in the region admit to have engaged smugglers in their pursuit to cross borders.

Kenya is reported to be a source, transit and destination hub of irregular migrants. According to the 2015 country profile survey conducted by IOM, the situation is compounded by, *inter alia*, the presence of direct and indirect air and sea links to Europe, Asia, America and African countries; the existence of trafficking in persons networks; and its economic position in the region. The 2009 IOM report on smuggling of migrants to South Africa indicates that at least 39% of the interviewed irregular migrants from Ethiopia and 10% from Somalia used air transport to fly from Nairobi to either Harare, Maputo, Lilongwe or Lusaka on their way to South Africa.

Uganda has been experiencing irregular migrants from the Great Lakes region. The country is either a transit or destination for irregular migrants mostly from Democratic Republic of Congo (DRC) and Southern Sudan. Uganda is also a transit country for irregular migrants from Asia who enter through Entebbe International Airport before onward movements. Between 2010 and 2012, a total of 1,965 irregular migrants were arrested by the Ugandan authorities and 608 migrants were deported. Uganda is also hosting a large number of refugees in the region following the crisis in South Sudan where by March 2017, the figure stood at 1,199,051 refugees.

Since irregular migration takes place in violation of rules of involved countries, migrants tend to avoid the use of specific routes. It is smugglers and their local brokers who decide the appropriate routes based on safety issues and cost to be incurred. It is

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296 IOM, “Migration in Uganda: A Rapid Country Profile 2013”, Kampala, 2015, p. 34.
reported that new routes are often opened up and the old ones supplemented or even abandoned due to risks associated with those routes. The risk factors include arrest, imprisonment, violence and high level of corruption.

However, some routes in East Africa have been identified as common. Research by IOM and UNHCR indicates that most of the irregular migrants in the region use overland routes which by nature are circuitous and mostly undertaken in buses, trucks, containers, airplanes and even on foot. Most of the Ethiopian migrants start their journey in Addis Ababa, Moyale, and a few in Angecha and Dila whereas Somalis begin their journey in Mogadishu. The most common entry points in Kenya are Nairobi and Garisa, while Tanzania has several entry points by irregular migrants. The Tanzanian Ministerial Task Force on irregular migration identified Namanga, Bagamoyo, Tanga, Sirari, Longido, Mwanga, Hai, Mtwarra and Pemba as major entry points. Some irregular migrants have also adopted some routes from Nairobi to Kampala, Uganda before they enter Rwanda and leave for Bujumbura-Lusaka-Maputo to South Africa.

As a result, the region has witnessed an increase in both regular and irregular migration among Partner States. For example, in 2013, the government of Tanzania through the operation labeled “Operation Kimbunga” expelled approximately 35,000 irregular migrants primarily from Uganda, Rwanda and Burundi. It can be argued that apart from the historical factors and the Tanzanian liberal policy on admission of foreigners,

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301 MTF report, pp. 11-12.
this trend is somewhat caused by economic integration and the policy on free movements.303

3.2.2 Irregular Migration Data Challenges in East Africa

Like other countries in the world, the EAC member states face irregular migration data challenges. A survey on three countries of concern to this study indicates that data on migration are randomly available from population censuses documents, administrative records and registers at border points. Irregular migration data are rarely or completely not recorded.304 Even where such data exist, they are not easily accessible, analysed, updated, or publicized.305 For example, in Tanzania, a research commissioned by African, Caribbean and Pacific Group of States (ACP) to establish the status of availability and accuracy of data on migration observed that data on irregular migration is widely lacking.306 Similarly, studies conducted by IOM in Kenya and Uganda confirmed discrepancy and lack of irregular migration data.307

3.2.3 The Impact of Irregular Migration in East Africa

Unlike in many geographical areas, studies on the impact of irregular migration in East Africa are generally limited308 save for studies on the area of asylum. However, a few available pieces of literature agree in principle that irregular migration has multiple social, economic and political implications to countries in the East African either as a

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source, transit or destination region. It is also true that irregular migration causes enormous impact on migrants themselves and their families. The Tanzanian Ministerial Task Force on irregular migration unequivocally summarized the impact of irregular migration in the following words:

…the people who move in an irregular manner often place their lives at risk and are obliged to travel in inhumane conditions and may be exposed to exploitation and abuse. Such movements are not only dangerous to the populations concerned; they also constitute a threat to national sovereignty and state security.

The discussion in this part is restricted to the linkages between irregular migration and state security, the impact of irregular migration on the economy and on the rights of migrants.

3.2.3.1 Implications on States’ Security

In many instances, irregular migration is regarded as a catalyst of insecurity in some parts of the region. Today, irregular migration in the region is being associated with proliferation of cross border crimes like terrorism, human trafficking and smuggling of persons, goods and arms. Although the nexus between irregular migration and insecurity is somewhat criticized of being mere political and media misperceptions un-backed up by data, it is fair to maintain that the region has experienced insecurity cases which can directly be linked to the problem of irregular migration.

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This is the case in, for example, Northwest Tanzania where irregular migrants from the Great Lakes countries (DRC, Burundi, Rwanda and Uganda) were accused of being involved in crimes. Gasarasi lists those common alleged crimes to include “murders, armed robberies, cattle theft, poaching of wild game, attacking vehicles on high ways, attacking villages and stealing foodstuffs, unlawful possession of arms and armaments, illicit trade in arms, and environmental degradation caused by overgrazing.”

Similar insecurity scenarios are reported in coastal Kenya with regard to irregular immigrants from Somalia. While maintaining that there is little empirical evidence to support the claim that the presence of irregular migrants, especially, refugees has escalated insecurity in East Africa and Kenya in particular, Kamanga says that:

There can be little doubt that the civilian character of the Dadaab refugee camp in Kenya has been compromised by illicit arms trafficking and brokerage being undertaken by some refugees. Neither can it be disputed that some of the refugees residing in Nairobi’s Eastleigh suburb form part of the arms trade syndicate.

Such observation cements findings by the UN Habitat which reported that the influx of illegal arms by irregular migrants particularly from Somalia has increased violent crimes in Kenya, especially in Nairobi and Mombasa. Also, the report by East Africa Response Force (EARF) describes the relationship between irregular migration and insecurity as of vicious cycles.

Generally, the following inferences can be drawn: firstly, there are substantial factors connecting irregular migration to alleged insecurity in the region. This nexus is

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attributed to the clandestine nature of irregular migration where cross border criminal networks take advantage of the situation. This can be described as indirect participation by irregular migrants. Secondly, in some limited instances irregular migrants have persuasively been proved to either facilitate criminal activities by financing criminal groups, smuggling fire arms or take direct participation in commission of crimes.\footnote{317}

As a result, it is not surprising that the EAC Treaty envisages irregular migration as a threat to peace and security. Article 124 identifies refugees, cross border crimes, border insecurity and terrorism as part of major regional peace and security concerns; hence, a call for joint mechanisms to address them.\footnote{318}

However, the causal link between irregular migration and insecurity needs be cautiously and empirically established. As Koser warned, “it is not always easy to disentangle the implications of irregular migration from those of regular migration.”\footnote{319}

As a result, any failure to determine the status of migrants may lead to wrong criminalization of their entry, stay or transit. For example, a study by Rutinwa and Kamanga confirms that not all insecurity allegations leveled against irregular migrants in the Northwestern part of Tanzania can unequivocally be proved by the existing data.\footnote{320}

Equally, generalization that irregular migrants often cause insecurity tends to affect the rights of some categories of irregular migrants like refugees, victims of trafficking and asylum seekers, who deserve protection.

\footnote{318} See article 124(4), (5), and (6).
3.2.3.2 Economic Implications

On the side of the economy, irregular migration is being viewed as one of the factors which jeopardize states’ ability to offer social services to their subjects. In turn, this can be calculated into failure by states to fulfill their constitutional obligations. One of the factors behind the decision by states to enact stringent immigration rules is to avoid fiscal burden imposed by irregular migration upon states.\textsuperscript{321} As Milton Friedman once said “It is just obvious you can’t have free immigration and a welfare state”.\textsuperscript{322} The economic impact of irregular migration is often analysed from both positive and negative perspectives. However, the negative consequences of irregular migration to the economy seem to outweigh positive consequences of irregular migration.

Since irregular migration mostly involves the youth population the majority of whom are men, the economies of the source countries are likely to lose labour force in the production sectors. It should also be noted that migrants pay smugglers sizable amount of money. For example, a research by IOM reveals that Ethiopians and Somalis pay between 850 to 5,000 USD to be smuggled to South Africa.\textsuperscript{323} The research further found that usually family members “pull resources together for a male family member to migrate in the hope that he will support the family left behind once he reaches the country of destination.”\textsuperscript{324} Apart from donation, some irregular migrants fund their journey through the sale of private properties, leasing government-owned land, or taking loans from relatives in Ethiopia or abroad.\textsuperscript{325} Indeed, whenever they are intercepted, imprisoned or returned home, their economic status and that of the entire community gets affected. This is so because the decision to migrate, as Harwood puts

\textsuperscript{322} As quoted in Kobach, K.W., \textit{Ibid}. Milton Friedman is an economist and a Nobel Prize winner.
\textsuperscript{324}\textit{Ibid}. p. 64.
it, “is not just a personal decision but a strategic, economic and investment decision by other family members.”

To the transit and destination countries, irregular migration is alleged to overstretch the economies in terms of the budgets allocated for border operations, court processes, maintaining them in custodies and prisons, and the cost involved in deportation. Countries in East Africa are not spared of these challenges. For example, the Ministerial Task Force reported the cost of supporting one irregular immigrant inmate on food alone per month to be around 33,309 Tanzanian shillings. This is considered to be a huge amount of money taking into account the total number of detained irregular immigrants countrywide. Certainly, that is the reason that causes governments to often appeal to IOM, UNHCR and other partners to assist in expatriating irregular migrants to their home countries.

Lastly, bearing on their status, irregular migrants are forced to find jobs in the informal market. This may, in turn, impact negatively on the economies of the involved countries through loss of revenue, and increase in economic crimes like corruption and money laundering.

3.2.3.3 The Risks Faced by Irregular Migrants

In this era of tightened border security and proliferation of criminal networks, irregular migration has gradually become more dangerous than in the previous time. There are many risks and violations faced by irregular migrants trying to cross East African countries. In spite of majority of the migrants being aware of the human casualties...

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326 Ibid.
along the journey, still they decide to take risks and place their trust to smugglers.\textsuperscript{330} The risks include travelling in very degrading and vulnerable conditions mostly in sealed trucks or overloaded boats with little or no supply of food, water, and medical care. In some instances, deaths are reported where irregular migrants decide to jump overboard owing to desperation and fear, or being thrown overboard by smugglers.\textsuperscript{331} The condition is worsened by arrest and prolonged detention, sexual and physical abuse by smugglers, traffickers, robbers, and sometimes the local communities, and abandonment by smugglers. Owing to these conditions of travel and incidences upon arrival, deaths, disappearance, and deteriorating health condition of migrants are often reported in East Africa.\textsuperscript{332}

It is becoming common to hear reports of arrest and detention of migrants who irregularly enter in the region. Reports indicate that at least every year an average of 20,000 irregular migrants enter Tanzania and Kenya,\textsuperscript{333} and the figure stands relatively low in Uganda.\textsuperscript{334}

The study on irregular migrants by the Regional Mixed Migration Secretariat (RMMS) revealed bad experiences to irregular migrants related to sexual violence, protracted detention in overcrowded prisons and physical and mental torture in East Africa.\textsuperscript{335} Similar concerns were observed in Tanzania by the Ministerial Task Force.\textsuperscript{336}

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334 For the period 2010-2012 IOM approximate 1,965 irregular migrants were arrested in Uganda. See IOM, “Migration in Uganda: A Rapid Country Profile 2013”, Op. Cit. p. 34.


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3.3 EAC Frameworks on Irregular Migration Governance

The history underpinning regionalism in East Africa and Africa at large is widely covered in literature. It suffices to say that creation of regional groupings is mostly driven by a combination of factors ranging from geographical proximity to common political, social and economic ties. The East African Community (hereinafter called “EAC” or “the Community”) is not an exception of these drivers. Generally, the creation of EAC was influenced by the desire to widen cooperation in political, economic and social spheres for mutual benefit of partner states.

Although there might be significant deviation in terms of objectives and structure, the EAC is a rejuvenation of efforts and desire to integrate East African countries as expressed in the past endeavors during and after colonial regimes. Historically, the establishment of EAC can be traced from initiatives for the establishment of inter-state cooperation in the area of postal communication, banking and financial sector, legislative and judicial organs. There was formation of the East African High Commission in 1948, the East African Common Services Organization in 1961 and the defunct East African Cooperation in 1967. These precursors of the current EAC somewhat shaped migration governance in the region. In fact, these arrangements predating EAC have relatively enhanced the long existing cultural, economic and social ties among communities in the region.

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341 Ibid.
3.3.1 Legal Framework

The EAC legal framework is contained in the Treaty for the Establishment of the East African Community (“the EAC Treaty” or “the Treaty”), Protocols made thereunder, various Acts passed by the East African Legislative Assembly (EALA), decisions of the East African Court of Justice (EACJ) and formal decisions and directives issued by the Summit of Heads of State and the Council of Ministers.\(^{342}\)

Among the contested issues in regional integration law, which unfortunately lack clear interpretation by the EACJ, is the question of nature and effect of community law vis-à-vis Partner States’ law. Put differently, in the course of implementing matters falling under the Community law, it is pertinent to understand the normativity hierarchy, supremacy, precedence and applicability of the community law in Partner States jurisdiction. With respect to normativity hierarchy for Community matters, the EAC Treaty is the fundamental law of the Community followed by sectoral protocols concluded by Partner States.\(^{343}\) For proper implementation and achievement of the Community objectives, the Treaty confers legislative power on the EALA to enact Acts of the Community\(^ {344}\) and the Summit and Council are mandated to make regulations, issue directives and take decisions.\(^ {345}\) The Council’s regulations, directives and decisions bind the Partner States, organs and institutions of the Community except the Summit, the Court and the Assembly.\(^ {346}\)

The Treaty provides for the precedence of the Community law over similar national laws. Article 8(4) provides that “Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of


\(^{343}\)Art. 151 of the EAC Treaty.

\(^{344}\)Art. 62 of the EAC Treaty.

\(^{345}\)Arts. 11(1) and 140(6) of the EAC Treaty.

\(^{346}\)Art. 16 of the EAC Treaty.
this Treaty”. However, the primacy of community law is limited to two conditions: firstly, the Community law only takes precedence over national laws which are similar in contents and context. This means, there must be an enabling national legislation recognizing the applicability of the community law to the respective Partner State or through domestication. Secondly, the primacy of community law over national laws is only on matters pertaining to the implementation of the Treaty. In essence, Article 8(4) of the Treaty does not confer upon community law precedence over the national laws; instead, precedence is supposed to be conferred through Partner States’ legislation.

The analysis of national and EAC legal orders, including decisions of Courts, suggests divergent and uncertain positions on whether EAC law has direct effect and applicability to Partner States. This has led some authors to conclude that the EAC used “rule skeptical approach” where unlike the status of laws in the EU, the position on direct application, direct effect and superiority of the community laws is unclear, imprecise and conditional.

Moreover, constitutions of Partner States do not fall within the scope of Article 8(4) of the Treaty. This means national constitutions are superior to EAC Treaty and more so to the least of Community norms. This position is well settled from various EACJ decisions where the Court unequivocally held that sovereign state powers as contained in the national constitutions and other laws were not submerged with the coming into

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347 Art. 8(4) of the EAC Treaty.
348 Ibid.
349 The position as declared in the case of NV Algemene Transport- en ExpeditieOnderneming van Gend en Loos v NederlandseAdministratie der Belastingen[1963] ECR 1, Case 26/62. (Hereafter Van Gend en Loos) is that the EU law is autonomous and with direct effect not only to Member States but also their nationals. For more discussions on the nature and effect of EU law see generally Craig, P. & de Burca, G., EU Law: Text, Cases, and Materials, 5th ed. Oxford University Press, New York, 2011.
force of the EAC Treaty and Protocols. Further, the Court observed that when a State acts in accordance with its national legal framework, it lacks powers to make findings of Treaty violation.351

3.3.1.1 The EAC Treaty

This is the parent instrument establishing the EAC.352 The EAC Treaty making process can be traced way back in 1993 when the Summit of East African Heads of State, held in Kampala-Uganda, signed the Agreement establishing the Permanent Tripartite Commission to forge cooperation among East African States. In 1997, the Summit mandated the Tripartite Commission to embark on the process of upgrading the Agreement into a Treaty.353 The process took almost three years until the Treaty was signed on 30th November, 1999 and entered into force on 7th July, 2000 upon its ratification by the original three Partner States - Kenya, Tanzania and Uganda. Rwanda and Burundi acceded to the Treaty and became Community members in 2007 followed by South Sudan in 2016.354

The Treaty inter alia establishes the Community and its institutions, describes the core objectives and fundamental principles, and defines the powers and functions of the Community organs and institutions. Further, the Treaty delineates strategic areas of cooperation to include trade, investment and industrial development; monetary and fiscal policies; infrastructure and services; human resources, science and technology; environment and natural resources management; and agriculture, food security and

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352 Article 2(1).
tourism. Broadly, the Treaty envisages cooperation in almost all spheres of life – economic, social, cultural, political, legal and judicial affairs.

Migration governance, whether regular or irregular, is increasingly becoming one of the top agenda of most RECs. Most RECs are interested in regulation of movements of citizens of Partner States and those coming from outside the community by adopting common policies, programs and institutions. In this regard, the EU and ECOWAS serve as best examples. It can rightly be said that, by and large, the EAC Treaty does not contain specific and direct provisions on irregular migration governance. Instead, some aspects of irregular migration governance can be inferred from provisions related to “peace and security”, “objectives of the Community”, and “fundamental and operational principles”.

In accordance with the international rules regarding interpretation of treaties, the process of ascertaining the meaning of provisions of any treaty shall be in the light of the object and purposes as contained in the objective clauses. In light of this authority, it is prudent to first examine the wording of the Treaty objective clause and find out if or not irregular migration governance features in the priorities of the Community. According to Article 5(1) of the Treaty, the objectives of the Community shall be:

…to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.

This provision presents a wider spectrum of areas of cooperation. An implied connection between these objectives and the question of irregular migration

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governance can be established in at least two ways: firstly, irregular migration is closely associated with social, political, economic and cultural fields as both cause and effect. It has been established in this study that people migrate, whether regularly or irregularly, due to push-pull drivers. Common factors responsible for population movements like conflicts, family reunification, natural disasters, poverty, lack of land, discriminative laws and authoritarian regimes on the one hand, and the presence of opposite factors in countries of destination on the other hand, are directly or indirectly influenced by operative social, economic, political and cultural policies. Also, irregular migration causes a range of effects to social, economic, political and cultural fields to all countries involved in the migration cycle. Some of the measures proposed for irregular migration governance under the Global Compact are indirectly reflected under the objectives of the Treaty.  

Secondly, the Treaty commits the Community to develop policies and programmes aimed at strengthening co-operation among Partner States in, *inter alia*, social, economic, political and cultural fields. This can be interpreted as an enabling provision under which Community policies and programmes on irregular migration governance can be developed. Though remotely and incomprehensively, some of the existing policies and programmes on labour mobility, border surveillance and security operations, foreign policy coordination and common market address some few aspects related to irregular migration.

The Treaty lists migration-related aspects like free movement of persons, labour, right of establishment and residence and cooperation with regional and international organization as important goals to be achieved by the EAC.

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357 Measures aimed at, *inter alia*, ensuring balanced, equitable and harmonious economic development, promotion of peace and stability, partner with private sector and civil society and embrace gender-balanced programs are reflected under Art. 5(3) (a) of the EAC Treaty.

358 Article 5(1).

Another priority area of the Community with a bearing on irregular migration is maintenance of regional peace and security. In a bid to address security challenges, the Treaty lists terrorism, drug trafficking, disputes and conflicts, refugee problem, disasters, and cross border crimes as serious threats to regional peace and security. Though the Treaty uses a general term “cross border crime” the same is not defined by the Treaty. The definition of this term which is provided for under the Peace and Security Protocol includes irregular migration. As observed in this study, most of the present classification of irregular migration including smuggling and trafficking are being classified by international and national laws as cross border organized crimes.

The Treaty proposes mechanisms for enhancing border security and handling cross border crimes. The mechanisms include exchange of criminal intelligence and other security information, enhancing joint operation and patrol, establishing common communication facilities and running training programmes for security personnel. In Article 123(1), the Treaty states that “Partner States shall establish common foreign and security policies.” It further clarifies that the objectives of those policies shall be, *inter alia*, to “strengthen the security of the Community and its Partner States in all ways.” This is a wide-ranging provision on security matters. As such, irregular migration which is referred to in EAC instruments as “illegal migration” is one of the issues covered under security and foreign policies of the Community.

### 3.3.1.2 EAC Protocols

Protocols are among the primary sources of the Community law. In fact, according to Article 151(4) of the Treaty, protocols are an integral part of the Treaty. It is expressed in the Treaty that, for smooth execution of the Community objectives, Protocols be

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360 Article 124.
361 Article 124(5).
362 See Article 12(1) (d) and (e).
363 Article 124(5) (a),(b),(c) and (g).
364 Article 123(3) (b) of the Treaty.
concluded with respect to each area of cooperation.\textsuperscript{365} On the basis of this Treaty provision, the Community has, so far, concluded a number of Protocols in many areas of cooperation including custom union, common market, environmental and natural resources, health, science and technology, drug trafficking and peace and security.

Significant to this study are the Protocols on the Establishment of the East African Community Common Market (Common Market Protocol or CMP),\textsuperscript{366} the EAC Protocol on Peace and Security (Peace and Security Protocol),\textsuperscript{367} and the EAC Protocol on Foreign Policy Coordination (Foreign Policy Coordination Protocol).\textsuperscript{368} The selected Protocols contain provisions which have direct and indirect impact on migration governance particularly irregular migration. For instance, Partner States agreed to cooperate in combating transnational and cross border crimes including human trafficking and illegal migration.\textsuperscript{369} Further, the Protocol outlines measures to be taken by Partner States in controlling and preventing ‘illegal’ migration and human trafficking. Such measures include undertaking joint operations; developing appropriate mechanisms, policies, measures, strategies and programs; establishment of regional database on cross border crimes; enhancement of technical capacity for criminal intelligence; exchange of security information; strengthening of cross border security; and training of personnel.\textsuperscript{370}

Further, the Peace and Security Protocol provides differentiated governance procedures for refugees.\textsuperscript{371} It further demands incorporation into their national legislation the 1951 UN Convention on Refugees and 1969 OAU Convention Governing Specific Aspect of Refugee Problems in Africa.\textsuperscript{372}

\textsuperscript{365}Article 151(1) of the Treaty.  
\textsuperscript{366}Entered into force on 2010.  
\textsuperscript{367}Signed on 2013.  
\textsuperscript{368}Of 2010.  
\textsuperscript{369}Article 2(3) (i) of the EAC Peace and Security Protocol  
\textsuperscript{370}See Article 12(1) and (2).  
\textsuperscript{371}See Article 10.  
\textsuperscript{372}Article 10(2).
The specific Protocol regulating movements of citizens of Partner States (intra-regional movements) is the Common Market Protocol. The Protocol aims at ensuring free movement of persons and labour and it provides for related rights of establishment and residence.\textsuperscript{373} Migration-related aspects covered under this Protocol are for the purpose of achieving the economic growth and development objectives of the Community. It is categorically stated under the Protocol that the objective of the Common Market is to “accelerate economic growth and development of the Partner States through the attainment of free movement of goods, persons and labour; and the rights of establishment and residence…”\textsuperscript{374} Accordingly, Partner States agreed to make cross-border movement of persons easy; adopt an integrated border management system; remove restrictions on movement of labour; and harmonise labour policies, programs and legislation.\textsuperscript{375}

The Common Market Protocol guarantees free movements of persons who are citizens of other Partner States and removes visa requirement.\textsuperscript{376} However, this does not mean that intra-regional movement of citizens of EAC Partner States is free of conditions. For instance, the Protocol subjects the enjoyment of the freedom of movement to conditions imposed by national laws on grounds of public policy, security or public health.\textsuperscript{377} Furthermore, Article 9(1) introduces the requirement of possessing a valid common standard travel document for citizens in the EAC.

Moreover, the Foreign Policy Coordination Protocol is relevant to the matter. Through this Protocol, the Community commits itself to preserving peace and strengthening security, including fighting against international crimes, among the Partner States and with foreign countries.\textsuperscript{378} As part of its objective, the Protocol aims at strengthening security with foreign countries. This can broadly be construed to include safeguarding

\textsuperscript{373}Article 2(4) (b)-(e) of the Common Market Protocol.
\textsuperscript{374}Article 4(2) (a) of the Common Market Protocol.
\textsuperscript{375}Article 5(2) (b) and (c) of the Common Market Protocol.
\textsuperscript{376}Article 7(1) and (2) (a) of the Common Market Protocol.
\textsuperscript{377}Article 7(3) and (5). Similar conditions are imposed to migrant workers under Article 10(11).
\textsuperscript{378}Article 4(1) (d) and (h).
EAC territory against illegal border crossing by persons from neighbouring countries. The assumption is corroborated by reference made by the Protocol to Treaty provisions on ensuring security and fighting cross-border crimes, particularly irregular migration. Generally, this Protocol reference to ensuring peace and security and preventing cross border crimes entails within it aspect of irregular migration governance as such movements contravene legal and policy frameworks of the EAC Partner States.

3.3.1.3 Rules Made by the Community Organs

Apart from the Treaty, Protocols and Annexes made thereunder, the Community legal order can further be derived from rules made by the Community organs. According to Article 11(1) of the Treaty, it is the Summit which is bestowed with general legislative powers – including powers to issue directives aimed at achieving the objectives of the Community. However, cognizant of the importance of delegating some powers principally enjoyed by the Summit, the Treaty confers some powers to other Community organs. These rules of the Community are Acts passed by the EALA, Regulations, Directives and Decisions made by the policy organs of the Community. A survey of these sources of Community rules indicates that issues of irregular migration governance have generally attracted less attention of legislative, judicial and policy organs of the Community. However, with regard to a few aspects of irregular migration like trafficking in persons, border management and movement of persons and labour as demonstrated below some legislative, judicial and policy steps have been taken.

The EAC One Stop Border Posts Act is, so far, the only legislation passed by the EALA which, albeit distantly, addresses some aspects of irregular migration. It is

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379 See Article 3(1) of the Foreign Policy Coordination Protocol which refers to Articles 5-7 and 123-126 of the EAC Treaty.
380 Article 11(5) and (6). However, pursuant to Article 11(9), delegation of powers by the Summit does not extend to giving general directions and impetus, appointment of judges, admission of new members and granting observer status, and assent to Bills.
381 Act No. 2, 2016.
stated under section 3 of the Act that among the purposes for the establishment of one stop border posts is to enhance trade through efficient movement of persons. In order to achieve efficiency in movement of persons, and perhaps curb irregular migration, the law puts forward some measures to be taken by Partner States. Firstly, the border control laws of Partner States must allow extra-territorial application of law in exercise of reciprocal powers to arrest, search and detain persons. Secondly, the law calls for Partner States to develop and use comprehensive ICT facilities in their common borders. The use of ICT is aimed at facilitating, among others, collection and exchange of data within and between various agencies of the Partner States. Thirdly, the Act calls upon adjoining Partner States to arrange for modalities for carrying out security related joint border patrols beyond the control zones for the purpose of combating cross-border crimes.

The strength of the EAC One Stop Border Posts Act in governing irregular migration can still be challenged on two major grounds: firstly, its implementation solely depends on bilateral arrangements to be entered between Partner States. The dependence on bilateral agreements between Partner States, which mostly are non-binding and temporary in nature, implies the inclination by the Assembly, as do other Community organs, to the thinking that border governance is entirely within mandates of the sovereign states. Secondly, irregular migrants do not use designated common border posts due to the increased risk of being apprehended. Instead, they opt for circuitous and less visible routes. Reports indicate that designated common border posts among EAC Partner States are less preferred as entry or exit points by irregular migrants.

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382 Section 11(2) and (3).
383 Section 22.
384 Section 26(2).
385 Section 4; and 26(2).
Another Community instrument providing for border management and movement of persons is the Common Market (Free Movement of Persons) Regulations.\textsuperscript{387} The Regulations maintain the spirit of the Common Market Protocol by providing that intra-regional movement of Community citizens shall continue to be governed by the migration laws and procedures of the Partner States.\textsuperscript{388} Contrary to the title, the Regulations do not guarantee “free” movement of persons. As discussed under the Common Market Protocol, movements of persons in the Community are subjected to a number of conditions including legal framework of respective Partner States.\textsuperscript{389}

With respect to border management, regulation 8 of the Regulations provides:

For the purpose of effective border management, the Partner States shall consult and advise the Council on…easing of border crossing for citizens of the Partner States; reciprocal opening of border posts; operational hours for the border posts; manning of border posts for twenty four hours; the necessary infrastructure and standards for border management; harmonisation of immigration procedures…\textsuperscript{390}

The first line of the regulation appears to be contradictory. One could question the intention of drafters saying “Partner States shall consult and advise the Council”. This is because a survey of the EAC legal framework has indicated categorically that implementation of border management programs rests with Partner States. So instead, it is the Council which is supposed to consult and advise Partner States. In this case, we find the provision contradictory since, being a policy organ, it is the Council which is tasked to issue directives, take decisions, make recommendations and give opinions to Partner States on effective implementation of Community objectives.\textsuperscript{391} Therefore, measures listed under Regulation 8 are supposed to be organised by the Council and

\begin{itemize}
\item \textsuperscript{387} The East African Community Common Market (Free Movement of Persons) Regulations, 2009.
\item \textsuperscript{388} See Reg. 5(1).
\item \textsuperscript{389} Reg. 5(2). The conditions include possession of a valid common standard travel document or national identity card and be issued a Pass for entry.
\item \textsuperscript{390} Reg. 8.
\item \textsuperscript{391} Article 14(3) (c) and (d) of the Treaty.
\end{itemize}
proposed to Partner States for implementation as provided for under Article 14(3) (f) of the Treaty.

Mindful of the increase in trafficking in persons in the region, the EALA in 2015 passed a resolution calling for urgent legislative intervention, at EAC and Partner States’ levels, to prevent trafficking in persons, protect victims and prosecute perpetrators of trafficking in persons in the region.\(^{392}\) Consequently, in a bid to respond to the Assembly Resolution and implement provisions of the Treaty, the provisions of the EAC Peace and Security Protocol, and relevant AU instruments, a Bill on Counter-Trafficking in Persons was tabled before the Assembly in 2016.\(^{393}\) The overall objective of the proposed anti-trafficking in persons’ law is to provide a legal framework at the Community level that will prevent and counter trafficking in persons, protect and assist victims, promote cooperation and harmonized action in prosecuting perpetrators among Partner States.\(^{394}\) Generally, the Bill replicate the contents of the UN Trafficking in Persons Protocol.

Issues of irregular migration have, at least in two instances, engaged the EACJ. The findings on practice indicate that most of the complaints against breach of established EAC standards by the Partner States, especially in areas of common market and custom union, are resolved administratively. The records indicate that for the first time the Court had an opportunity in the case of \textit{Samwel Mukira Mohochi v. The Attorney General of the Republic of Uganda}\(^{395}\) to interpret and give effect to provisions of the Community law pertaining to irregular migration.

Mr. Mohochi, a Kenyan citizen, travelled to Uganda from Kenya on 13\textsuperscript{th} April, 2011 on a Kenya Airways flight. On arrival at Entebbe International Airport, he was denied entry into the country, restrained, confined and detained at the immigration offices at

\(^{392}\)EALA/RES/3/5/2015.

\(^{393}\)The East African Community Counter-Trafficking in Persons Bill, \textit{EAC Gazette No. 8 of 19\textsuperscript{th} August, 2016}.

\(^{394}\)See Section 3 of the Proposed Bill.

\(^{395}\)EACJ, Reference No. 5 of 2011.
the airport and subsequently deported to Kenya. The Ugandan’s authorities claimed that Mr. Mohochi was denied entry and deported to Kenya because he was a “prohibited immigrant” within the wording of section 52 of the Ugandan National Citizenship and Immigration Control Act. Mr. Mohochi contended before the EACJ that the actions by the Ugandan authorities were in violation of Articles 104 and 7 of the Treaty and the Common Market Protocol respectively, which oblige Partner States to ensure free movement and non-discrimination treatment to EAC citizens. He further contended that Uganda violated Articles 6(d) and 7(2) of the Treaty which guarantee EAC citizens the right to due process of law or fair administrative process.

The EACJ had an opportunity to deal with this matter and grant orders to the Petitioner. First, the Court concluded that by importing the provisions of the Treaty and Protocol into their legal systems without reservations, Partner States accept to be bound by them and cannot justify their actions based on national pieces of legislation which are inconsistent with the Community laws. Further, the Court made it clear that while Partner States retain their sovereign right to determine admission or exclusion of EAC citizens from their territories using their national laws, including declaring one “prohibited immigrant”, this will be valid if it complies with the Community provisions.

The EACJ was persuaded by the decision of the European Court of Justice (ECJ) in Costa v. Enel, and quoted verbatim the ECJ position:

The transfer by the States from their domestic legal system to the Community legal system, of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail....

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396 Cap. 66 (Act No. 5 of 2009) of the Laws of Uganda.
397 See para. 52 and 54 of the Judgment.
398 Case 6/64 of 15 July 1964.
399 See para. 55 of the Judgment.
Second, the Court was of the view that Partner States cannot shield themselves behind sovereignty and act in a manner that disrespects their obligations as contained under Articles 104, 6(d) and 7(2) of the Treaty and Articles 7 and 54(2) of the Common Market Protocol. The Court remarked:

The Sovereignty of the Republic of Uganda to deny entry to unwanted persons who are citizens of the Partner States is not taken away by the Treaty and the Protocol but, in denying entry to such persons, the Republic of Uganda is legally bound to ensure compliance with the requirements of the relevant provisions of the Treaty and the Protocol. Sovereignty cannot act as a defence or justification for non-compliance, and neither can it be a restraint or impediment to compliance.400

The case is relevant in explaining the implications brought by the Community law to national systems governing intra-regional movement of EAC citizens. The Court decisively interpreted and gave its position on the effects and extent of concurrent application of the Community and Partner States’ laws.

In 2013, Tanzania expelled thousands of alleged irregular immigrants from Rwanda, Burundi and Uganda. Following the incident, the EACJ was moved in the case of East African Law Society v. The Secretary General of the East African Community401 to determine whether the EAC Secretariat discharged its Treaty obligation to take effective and proactive measures as provided for under Articles 29 and 71(1) (d) and (e).

The Court was of the view that governance of irregular migration, including expulsion by a Partner State of immigrants from other Partner States, is of interest to the Community since the mishandling of the same violates the fundamental principles and the spirit of regional integration. Consequently, the Court concluded that EAC has an obligation, through its executive organs, to take vigilant measures to mitigate the problem. Categorically, the Court remarked:

400See para. 130(ii) of the Judgment.
401Reference No. 07 of 2014.
Given the imperative need to shed light on the aforesaid alleged illegal expulsion of immigrants which, if its illegality was confirmed, would constitute a flagrant violation of the objectives and fundamental principles of the Community and gravely undermine the spirit of regional integration high on the Community agenda, the Respondent should have, as a matter of utmost urgency, submitted the findings and recommendations of the aforesaid fact finding mission to the Council of Ministers for consideration. In those circumstances, indeed, the Respondent ought to have executed due diligence in carrying out his Treaty obligations.\textsuperscript{402}

From these precedents it is argued that implementation of the Community provisions governing intra-regional movement of persons is not free of challenges. It is clear from the arguments raised by defendants in both cases that authorities in Partner States still regard governance of migration to be exclusively under domestic legal systems. Similarly, it is clear in the latter case that sometimes there is poor coordination between the Community organs and Partner States. This raises the question of non-compliance with the Community rules. The hesitation by the Secretariat to take immediate actions pursuant to the Treaty at the excuse of leaving the matter to be attended by involved Partner States serves as the best example.

3.3.2 Policy and Strategic Documents

In addition to the Community legislative instruments and Court decisions are policies and other strategic documents which outline policy statements, strategic intentions and vision which should be applied by implementing organs and institutions of the EAC. Out of the existing policy documents, the EAC Development Strategy 2016/17-2020/21, the EAC Vision 2050, the EAC Gender Policy 2018, the EAC Communication Policy and Strategy 2014, and the EAC Child Rights Policy 2016 have impact on irregular migration governance in the region.

The EAC Child Rights and Gender Policies recognize the need to protect the rights of most vulnerable categories of migrants, especially women and children. According to

\textsuperscript{402} See para. 66 of the Judgment.
these policies, the rationale behind according migrant women and children special protection is due to risks posed to them. Women and children are vulnerable to trafficking, exploitation, poor and hazardous working conditions, denial of labour rights, sexual harassment, intimidation and extortion at borders.

Lack of disaggregated data, delayed harmonisation of migration and labour laws and policies, and inadequate funding of migration governance activities at the regional and Partner States levels are among the critical challenges identified by EAC Gender Policy and the EAC Development Strategy. Consequently, the trend has affected the achievement of the Community objectives and rendered realization of free movement of persons and governance of irregular migration by Partner States difficult.

Another area covered by policy and strategic documents of the Community is the push-pull factors for movements of persons in the region. Generally, development disparities between rural and urban areas, and population growth and opportunities created by the EAC regime especially in areas of common market and custom union are singled out. The EAC through its vision document considers rural-urban migration as a catalyst of development. This is partly in line with current dynamics underpinning migration-development nexus.

Lastly, the EAC Vision 2050 and the Communication Policy and Strategy propose some goals and interventions towards realizing free movement for citizens in the EAC while promoting regional peace and security by preventing human trafficking and other cross border crimes. To this end, the Community commits itself to enhancing cooperation among Partner States; strengthening and building capacities of immigration and law enforcement agencies; easing border restrictions and

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403 See EAC Child Rights Policy, 2016, item 4.4 at p. 22 and EAC Gender Policy, 2018, item 2.9 at p. 20.
404 See EAC Gender Policy, p. 21; and 5th EAC Development Strategy 2016/17-2020/21, p. 46.
405 Ibid.
407 See EAC Vision 2050, p. 60.
harmonizing laws, policies and practices. The policies consider exchange and centralization of information between responsible sector players across Partner States, use of INTERPOL/24-7 system and informing EAC citizens of the existing legal and administrative migration requirement central tools towards migration management.408

3.3.3 EAC Institutional Frameworks

The term “institutional framework” is used in this study to connote formal organizational set-up established by and for the purposes stated in the Treaty and other enabling instruments.409 The term is used in its broader context unlike the Treaty which treats organs and institutions separately. The Treaty establishes and lists seven governing organs entrusted to perform various functions of the Community.410 They are, the Summit, the Council of Ministers, the Coordination Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat.411

In addition to these organs of the Community, the Treaty also establishes and empowers the Summit to establish various specialized institutions.412 So far, nine semi-autonomous institutions have been established. These are Civil Aviation Safety and Security Oversight Agency (CASSOA); the East African Competition Authority (EACA); the East African Development Bank (EADB); the East African Health Research Commission (EAHRC); the East African Kiswahili Commission (EAKC); the East African Science and Technology Commission (EASTECO); the Inter-University Council for East Africa (IUCEA); the Lake Victoria Basin Commission (LVBC); and the Lake Victoria Fisheries Organization (LVFO).413

410 Article 9(1) of the Treaty.
411 Article 9(1) (a)-(g).
412 Art. 9(2) and (3).
Generally, there is no designated formal institution or organ of the Community with specific mandate on irregular migration. Instead, throughout their general mandates some institutions and organs are, in one way or another, fitted to address some aspects related to irregular migration or migration in general. The section below offers a description of some of the Community institutions’ roles in line with irregular migration governance attributes.

3.3.3.1 The Executive and Policy Organs

The executive and policy organs of the Community include the Summit, the Council and the Secretariat. They are tasked with policy making, issuing directions and regulations, and ensuring their implementation in line with the Treaty. The Summit, which is the top organ of the Community, is comprised of Heads of State and Government and charged with issuance of general policy directions and impetus to the Community.\footnote{Art. 11(1).} Moreover, it is within the Summit’s mandate to review the state of peace and security in the region.\footnote{Art. 11(3).} Since the Community instruments consider irregular migration as a threat towards ensuring peace, security and free movement of persons, the important features of the integration agenda, one would expect the same to feature prominently in the Summit agendas. However, only a few aspects of irregular migration especially those related to insecurity and realization of common market are occasionally discussed by the Summit. Further, it is the prerogative of the Summit to establish organs and institutions of the Community.\footnote{Art. 9(1) (h) and 9(2).} Therefore, the Summit through its mandate could establish a Community-based institution with special mandate to oversee intra- and inter-regional migration.

The Council which is constituted by the Ministers responsible for East African Community affairs, other Minister determined by each Partner State and the Attorney
General of each Partner State. The Council has the role of initiating policies and programs, make decisions and propose Bills to the Assembly. Additionally, the Council has powers to establish specific institutions, Sectoral Councils and Committees to deal with such matters as it may determine. Also, the Council through its mandates, can direct other organs and institutions of the Community to initiate programs related to irregular migration governance and monitor their implementation. Such institutions, councils or committee may be dedicated to regulate irregular migration issues within the EAC region.

The Secretariat, being the executive organ of the Community, is tasked to ensure proper implementation of regulations, directives and programs as issued by the Summit and the Council. Further, the Secretariat, through the Co-ordination Committee, is responsible to coordinate and harmonise policies and strategies for the development of the Community. The Court stated categorically in *East African Law Society v. The Secretary General of the East African Community* that in executing its Treaty obligations contained under Articles 29 and 71(1) (d) and (e), the Secretariat is supposed to play an active role in ensuring compliance by Partner States in all matters agreed under the Treaty.

### 3.3.3.2 Legislative and Judicial Organs

The EALA and EACJ are Community organs tasked with an oversight role executed through rule making and interpretation respectively. Being the Community legislative organ, the Assembly can play a significant role through passing Bills relevant to irregular migration governance. Since the Treaty permits initiation of Bills by members of the Assembly, this affords opportunity to the Assembly to legislate on

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417 Art. 13(a)-(c). *The Council is established under Article 9(1) (b) of the Treaty.*
418 See Art. 14.
419 Articles 14(3) (i) and 76(3) of the Treaty.
420 Art. 71(1) (l).
421 Art. 71(1) (e).
422 Article 59(1).
matters which the Council has not acted upon. A typical scenario is the tabling before the Assembly in 2016 of the Counter-Trafficking in Persons Bill.\textsuperscript{423}

Further, the Assembly may pass resolutions, request or make recommendations to the Council on any matter pertaining to the implementation of the Treaty.\textsuperscript{424} The Assembly can initiate such legislative process where it is considered that action is required on the part of the Community. In exercise of its oversight mandate and cognizant of the impact caused by cross-border crimes, particularly trafficking in person, the Assembly passed a Resolution in 2015\textsuperscript{425} calling for urgent legislative action at both Community and national levels in accordance with the UN Protocol on Human Trafficking.

Additionally, the EACJ has a core role to ensure adherence to the Community law by the EAC organs and institutions, as well as Partner States. It is the Court that gives effect to the Treaty provisions and determines whether or not the actions by Partner States, organs and institutions of the Community comply with the Community law.

For example, in \textit{Mohochi’s case}, the Court emphasized the need to strike a balance between fighting irregular migration and respect for freedom of movements of Citizens of the Community. Another notable contribution by the Court came in the case of \textit{East African Law Society v. The Secretary General of the EAC} where it emphasized the role of the executive organs of the Community in ensuring that irregular migration governance measures in the Partner States do not contravene the principles and objectives of the Treaty.\textsuperscript{426} These legislative and judicial organs thus are pivotal towards proper irregular migration governance in EAC.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{423} The Bill was tabled before the 2\textsuperscript{nd} Meeting of the 5\textsuperscript{th} EALA Session by Hon. Dora C.K Byamukama on 18 October 2016.
  \item \textsuperscript{424} Articles 49(2) (d) and 59(3) (b) of the Treaty.
  \item \textsuperscript{425} EALA, Resolution of the Assembly to Call for Urgent Action to Prevent Trafficking in Persons, Protect Victims of the Crime of trafficking in Persons and Prosecution of Perpetrators of Trafficking in Persons in the East African Community, EALA Resolution No. EALA/RES/3/5/2015, of 20 August 2015.
  \item \textsuperscript{426} See detailed discussion of these cases at item \textsuperscript{v} above.
\end{itemize}
\end{footnotesize}
3.3.3.3 Regional and Inter-regional Consultative Forums on Migration

Due to the transnational nature of migration and the absence of all-inclusive binding instruments on migration governance, there are some informal mechanisms at the regional and inter-regional levels. The common mechanisms are the Regional Consultative Processes (RCPs) and Inter-regional Fora (IRFs). These mechanisms facilitate consultations and dialogue and strengthening cooperation on migration governance among states and between regions.\textsuperscript{427} Unlike RCPs, which are geographically based, IRFs connect distinct regional blocs beyond geographical limits and mostly with broader cooperation agenda including that relating to, migration. The broader cooperation agenda is described as ‘coalitions of the like-minded’ where common interest connects two or more regions.\textsuperscript{428} As GCIM observed, by working in isolation, RCPs cannot address migratory challenges which are intercontinental and global in character.\textsuperscript{429} Indeed, inter-regional dialogue is necessary as it enables sharing of information and good practices, building confidence, networking and in some cases have steered policy making.\textsuperscript{430}

A number of RCPs do exist in Africa within the pre-existing regional economic communities. The vibrant RCPs are the Migration Dialogue for Southern Africa (MIDSA) which was established in 2000 to facilitate migration policy dialogue in the SADC; the Migration Dialogue for West Africa (MIDWA) established in 2001 in close cooperation with ECOWAS; and the Intergovernmental Authority on Development – Regional Consultative on Migration (IGAD-RCP) established in 2008 for IGAD states

\textsuperscript{429} GCIM Report, p. 71.  
of East Africa.\textsuperscript{431} Facilitated, to a large extent, by the IOM and the European countries, the core activities of RCPs in Africa revolve around, \textit{inter alia}, irregular migration, information gathering and exchange, border management, regional capacity development, policy coherence, and recently migration and development agenda.\textsuperscript{432} Unlike in SADC, ECOWAS, COMESA and IGAD regions where migration consultative processes take the form of RCPs, in the EAC there exist only some formal meetings usually attended by sectoral ministers, heads of immigration departments and technical experts from government ministries. Dialogues on some migration issues take place through the meetings of the Chiefs of Immigration, usually coordinated by the EAC Secretariat. The Chiefs of Immigration from the Partner States meet as a specialized Sub-Committee of a Committee on the Facilitation of Movement of Persons, Immigration, Labour and Refugee Management. It was assumed to be improper and duplication of forums by establishing a RCP in a region where immigration ministers meet annually.\textsuperscript{433}

The formal meeting referred to above, are incompatible with the RCPs model for the following reasons: first, the Chiefs of immigration and Ministers’ meetings do not have their own agenda and priorities. In fact, meetings are convened to discuss particular issues either as directed by the Council\textsuperscript{434} or in accordance with EAC calendar of activities. The primary agenda of the meetings often is on the assessment of implementation of Common Market Protocol. Second, issues around free movement of persons, labour mobility and adoption of common immigration standards on visa, passport and reciprocal recognition of national identity cards feature eminently in these meetings. It is submitted that the scope of discussions in both forums is limited

\textsuperscript{434} See East African Community Secretariat, \textit{Report of the Meeting of Chiefs of Immigration}, 22\textsuperscript{nd}-23\textsuperscript{rd} May 2014, EAC/IMM/COI/1/2014.
compared to broader items usually considered by RCPs for comprehensive migration governance.435

Further, the consultation model employed in EAC is the one that, as Harns puts it, “strays beyond the ‘informality’ and ‘non-binding decisions’ that has long been ascribed to RCPs.”436 To put it differently, the consultations on migration in the EAC are formal with binding recommendations upon being adopted by the Sectoral Council and Council of Ministers. The nature of these meetings falls squarely in what Harns describes as ‘RCPs-like meetings’. He further wrote:

Consultation processes that proceed as an integral part of a regional economic or trade body are somewhat problematic for characterization… Some may have not yet fully established their identities and purposes to be correctly classified as an RCP…others may be more akin to recurrent conference events or technical cooperation project activities, and, as such, do not display the more intimate, informal and regular discussion among States that has been a hallmark of established RCPs.437

Migration governance requires cooperation and partnership between regional communities and international organizations. A closer look at the EAC frameworks and activities reveals the existence of partnership with some lead agencies in international migration, notably IOM, UNHCR and ILO. For instance, in 2006, EAC signed the MoU with IOM aimed at building capacity in the area of migration and border management. Through Capacity Building in Migration Management in East Africa (CBMM) project, IOM in collaboration with the EAC Secretariat have jointly managed to organize workshops and coordinate specific training courses for migration officials from EAC countries. The capacity building activities are executed by IOM through its African Capacity Building Centre (ACBC) in cooperation with Tanzania Regional Immigration Training Academy (TRITA). Likewise, in March 2010, a MoU

435 See item 2.3.4 (Chapter Two of this study).
436 Harns, C., Regional Inter-State Consultation Mechanisms on Migration: Approaches, Recent Activities and Implications for Global Governance of Migration, IOM, Geneva, 2013, p. 20.
437 Ibid, p. 20-1.
between UNHCR and EAC was signed to establish a framework for cooperation in five areas of common concern. They include conflict prevention and peace building, early warning and response, movement of persons, immigration and movements, and promotion and protection of human rights. Seeking to implement the Treaty and Protocol provisions on labour mobility in line with international standards, the EAC and ILO signed a MoU in January 2001 to cooperate in improving labour mobility, harmonization of labour legislation and guaranteeing migrant labour’s rights. The MoU was revised in May 2018 to, among other things, accommodate the task of developing EAC Labour Migration Policy.

Finally, EAC is a party to an Agreement establishing free trade area with neighboring regional communities - SADC and COMESA. Among the objectives of the agreement is to facilitate movement of business persons. Also, EAC is accorded a partner status to IGAD-RCP. This is within the spirit of Article 130(3) of the EAC Treaty that provides for cooperation arrangements between EAC and other regional and international organisations.

3.4 Key Challenges and their Implications to Irregular Migration Governance

In spite of some administrative, legislative and policy measures aimed at governing irregular migration in the EAC, a number of substantive and operational challenges remain. These range from adequacy of these measures in light of international governance framework to implementation challenges. In fact, an evaluation of the

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440 See 10th para. of the Preamble to the Agreement establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community.
existing migration governance challenges in the EAC frameworks is made in line with
guidelines on irregular migration governance from UN and AU instruments.\footnote{441}

\textbf{3.4.1 Limited and Incomprehensive Frameworks}

The analysis in this study has articulated that a comprehensive irregular migration
governance system that would seek to address the phenomenon in all its dimensions is
important. These include addressing root causes; recognizing different categories of
irregular migrants and treating them accordingly, outlining framework under which
different stakeholders can cooperate and endeavouring to propose sustainable
solutions. However, the EAC framework on irregular migration governance does not
address some pertinent issues including transit migration, inter-regional migration, and
return and readmission procedures. Moreover, the EAC framework on migration
governance does not address itself to important issues like migrant rights, gender and
age dimensions, demographic data and research as well as the socio-economic impact
of remittance and brain drain. Besides, where attempt is made, they are only implied
under ‘soft instruments’ like strategic and policy documents with neither binding effect
nor implementation strategy.

The silence of the EAC legal and policy frameworks on governance of transit
migration, a common form of irregular migration in the region, could be construed as
a serious omission. This has been the trend despite the EU and IOM strongly
encouraging the EAC Secretariat to develop a set of policies to address transit
migration particularly from the Horn to Southern Africa and beyond.\footnote{442} A similar
omission is observed in the Common Market Protocol in relation to irregular migrant
workers and residence, another critical category of irregular migration in the region.

\footnote{441 They include the Global Compact for Safe, Orderly and Regular Migration, 2018 and the AU
Migration Policy Framework for Africa and Plan of Action 2018-2027. Also a resort is made to IOM
and UNHCR specific guidelines on regional migration governance.}

In this regard, Masabo is of the view that the Protocol ‘is likely to increase the rate of irregular employment and residence because it favours professionals’. Lack of standard procedure on return and readmission of irregular migrants has caused Partner States to act contrary to EAC law. Underscoring this point this study has observed that governance of irregular migration becomes more complex and burdensome because the tendency has been to push-back irregular migrants to the nearest place of the adjoining state where they sought entry from. It was claimed further that sometimes irregular migrants from Ethiopia and Somalia who often get arrested in Tanzania were once interdicted by Kenyan Authorities while transiting Kenya but left to advance into Tanzania.

The existing policies are restricted to intra-regional mobility of nationals of Partner States. The only exception is accorded to the introduction of common EAC passport to facilitate emigration of EAC citizens. Since irregular migration in the region is notoriously featured by migrants coming outside the EAC block, a common approach aimed at influencing third countries would be desirable. On the contrary, as Reith and Boltz argue “[t]he Community is still far from presenting a unified front.” Further, it is clear from the preceding discussion that the EAC legal and policy frameworks place much attention to regulation of ‘regular’ movements of labour, business persons, students and classified categories of professionals. With irregular migration, little is found around smuggling and trafficking, and nothing is found with respect to other numerous categories of irregular migration.

Further, since governance of irregular migration in today’s’ complex situations of human mobility requires collective efforts, entrusting individual states to govern

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444 East African Law Society v. The Secretary General of the East African Community (supra).
migration through bilateral agreements and inter-state joint patrols present a fragile and ineffective approach. The dependency on bilateral measures taken by individual states in fighting regional cross-cutting issues diminishes the potentials of acting collectively as a block. The inter-state approach is being criticized of lacking wider geographic focus and sustainability as it normally involves only the adjoining states and is ad hoc in nature. The ineffectiveness of this approach rests on the fact that it fails to reflect the reality that irregular migrants exploit the vastness of EAC region borders and they alternatively change routes depending on security and other risks. It is also argued that tight border control by states is not an efficient means of governing irregular migration as it spurs demand for smugglers, causing the process to become increasingly organised and more dangerous for migrants.447

Joint border patrols and exchange of criminal information are some of the counter-irregular migration measures listed in the EAC instruments whose implementation is dependent on the existing bilateral agreements between states. Up to now the region lacks an official mechanism for exchange and management of migration data and information including those on irregular migration.448 With regard to joint border patrol, data from the field indicated the existence of a few occasions of security operations organised under the EAC umbrella. Also, there are bilateral joint patrols often arranged under ujirani mwema ‘good neighbourhood’ context.449 However, the joint border patrols and security operations are ad hoc in nature and covers small area out of extensive EAC borders.

The scope of ‘free movement of persons’ provisions, one among the mechanisms devised to govern migration in the region, is limited and unrealistic. Unlike the first impression one gets from the phrase, provisions on free movement of persons affect a

449This was pointed out during interview with an officer at Tanzania Immigration Department (HQ), (6th September 2018); Interview with Ugandan Immigration Officer at Mutukula Border Post, (26th July 2019); and written interview with EAC officer, EAC (HQ), (September 2018).
small fraction of population by targeting only specified categories of citizens like students, visitors, persons seeking medical treatment and the selected professionals.\textsuperscript{450} Consequently, the framework on free movement of persons does not seek to capture persons who are likely to engage in irregular migration. For instance, according to the UNODC report, people who seek employment in the domestic service and hospitality sectors constitute an important category of irregular migrants in the EAC.\textsuperscript{451} On this note, Mshomba has argued that if really the CMP was meant to address irregular migration through easing cross-border movement of labour, it should have targeted semi-skilled workers and not highly qualified workers.\textsuperscript{452}

Along similar lines, a comprehensive framework on governance of irregular migration must address itself to sustainable solutions aimed at addressing root causes. Throughout the EAC documents, nothing can directly be inferred to as sustainable ways of governing irregular migration in the region. In other words, the proposed measures on irregular migration are reactive as opposed to proactive. They are purposely tailored to combat or control rather than governing irregular migration.\textsuperscript{453} Since EAC instruments generally regard irregular migration as one of the serious cross border crimes, the words used to explain the phenomenon are similar to those which proscribe terrorism, piracy and genocide.

\textbf{3.4.2 Coordination and Implementation Challenges}

An intensive examination of Community policy and legislative instruments leads to one getting an impression that governance of irregular migration requires multi-dimensional mechanisms. In this regard, the instruments list the need for the establishment of a regional database, enhancement of training, sharing of information, carrying out joint border operations and patrols, easing cross border movements and

\textsuperscript{450} See Reg. 4 of the EAC Common Market (Free Movement of Persons) Regulations.
\textsuperscript{452} Mshomba, R.E.,\textit{Op. cit.}, p. 119.
\textsuperscript{453} See for example article 2(3) (i) of the Peace and Security Protocol;
harmonization of laws, policies and practices as instrumental mechanisms. To this end, cooperation, coordination and consultation among Partner States are repeatedly named as important tools towards implementation of the proposed mechanisms.454

Realization of this commitment is far from being a reality. Listing in the normative and policy documents of activities aimed at governing irregular migration is one thing, and implementation of the same is completely a different thing.455 As Zoomers and Adepoju observed that implementation of regional instruments on migration governance in most of the African RECs is faced by various limitations.456 Implementation of EAC provisions on migration governance is not immune from these challenges. In this respect, the EALA Committee on Legal, Rules and Privileges summarized the challenges facing implementation by Partner States of EAC provisions affecting migration to include slow pace in harmonizing and approximating national laws.457 Further, it was observed that the process is challenged by budget constraints, limited awareness, poor coordination and poor communication and information sharing among various stakeholders at the national and EAC levels.458

Implementation of various programs on irregular migration governance is premised chiefly on availability of accurate, reliable and comparable data. This calls for the establishment of regional mechanism for data collection, storage and sharing. To date, there is no established (irregular) migration data management system at the EAC level. This was confirmed during data collection that there is no regional database on cross

454 See for example article 124 (1) and (5) of the Treaty; article 3(2) (b) and article 12(1) of the EAC Peace and Security Protocol; and section 26(1) of the OSBP Act. Also read EAC Vision 2050, p.78 and EAC Communication Policy and Strategy, p. 31.
455 It is claimed that there is a great gap between what was agreed upon and what has actually been done. See Mshomba, R., Economic Integration in Africa: The East African Community in Comparative Perspective, Cambridge University Press, USA, 2017, p. 208.
458 Ibid, p. 6-7.
border crimes (irregular migration included) yet established as required under various EAC instruments.\textsuperscript{459} There is no formal common communication and information sharing facility among key migration stakeholders in the region. Instead, all border-related matters are coordinated and communicated through official channels of the governments.\textsuperscript{460} Studies have confirmed the existence of a causal connection between lack of awareness on the part of the population and authorities due to poor communication and information sharing on the one hand, and proliferation of irregular migration in the region on the other hand.\textsuperscript{461}

Multiple and overlapping REC memberships by EAC Partner States is another factor impeding implementation of regional rules on migration governance. Kenya, Tanzania and Uganda belong to at least two RECs. Besides being a member to EAC, Tanzania is a member to SADC; and Kenya and Uganda are members to COMESA and IGAD. All these RECs have policies on migration with either duplicated objectives or different mechanisms of implementation. It is claimed that this condition creates conflict of interest and sometimes slows down implementation of commitments contained in those instruments.\textsuperscript{462} Also, this has led to disparities in policy reforms and priorities. For instance, while Uganda and Kenya have initiated the process of drafting comprehensive migration policies under IGAD agenda, there are no similar initiatives on the part of Tanzania.

Similar findings were reported by Economic Commission for Africa (ECA) which clearly pointed out that multiple membership has caused low programme implementation or/and duplication of conflicting programmes.\textsuperscript{463} The situation is worsened by the existence of multiple institutions and forums which sometimes work

\textsuperscript{459} An interview with Principal Immigration and Labour Officer at the EAC Secretariat, September 2018, EAC Headquarters Arusha-Tanzania.
\textsuperscript{460} Ibid.
\textsuperscript{463} \textit{Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities}, ECA & AU, Addis Ababa, 2006, p. 51-2.
in competition with each other despite the purported alliance of their agenda. For instance, by belonging to a *de facto* REC – the Economic Community of the Great Lakes Countries – Burundi is said to have given preferential treatment to migrant workers from Rwanda and DRC contrary to the EAC principles contained under Article 3(2) (a) and (b) of the CMP.\textsuperscript{464}

The slowness and hesitancy to put in place new frameworks to govern irregular migration or implement the existing ones implies the absence of political will and the trend of subjecting migration issues to sovereign interests. It is important to recall that “political will” is listed under Article 6 (a) of the Treaty as one of the fundamental principles on which the achievement of the Community objectives hinges. Lack of political will is evidenced by dearth of specific and coherent regional legislation or policy document on governance of irregular migration. For instance, the only legislative attempt so far by the EALA is the passing of Anti-Trafficking Bill. The Bill was tabled through private member’s motion after inaction by the Council despite the Assembly’s resolution requiring legislative intervention on the matter. However, the Bill is awaiting assent by the EAC Heads of State before it becomes a Community law.\textsuperscript{465}

As it stands, the EAC took a dual approach to migration governance where a few issues are provided for under the Community frameworks while many aspects are left to be governed by national frameworks. For the latter, only EAC rules seek to achieve harmonisation or approximation of national laws, practices and policies in line with the Community objectives. However, the two exercises are not free of challenges.

### 3.4.3 Contradicting Provisions

It has been observed that provisions on what is called ‘free movement of persons’ scheme are contradictory. In reality, instead of ‘free’ movement of persons it should


\textsuperscript{465} See the list of EALA pending Bills at <http://www.eala.org/documents/category/bills> (accessed on 6/5/2019). The Bill is awaiting the accomplishment of procedures listed under Art. 63 of the Treaty.
read ‘eased’ cross-border movements of persons since a number of restrictions remain. In other words, the substantive provisions of the EAC Treaty and the CMP speak about easing cross border movement of persons and not rendering the same free.466 This is similar to the words ‘facilitation of movement’ as used in the SADC instrument.467 A pertinent question would then be: Does “easing” movements analogous to rendering movements “free”? Literally, the two words convey different meanings. The former can be defined to mean reducing bureaucracy, while the latter signifies the absence of any sort of restrictions. Unlike the EAC-CMP, the SADC Protocol stipulates clearly that it aims at eliminating obstacles to the movement of persons into and within territories of Member States and that the same shall be progressive.468

In fact, a thorough interpretation of Article 7(2) (a) of the CMP suggests that what is being referred to as “free” is not the entry. Instead, the freedom of movement referred to in this provision relates to movements of persons who are citizens of other Partner States when they are already within the territory of another Partner State. This means, enjoyment of free movement is post-entry.

Another area of inconsistency lies between the proposed collective mechanisms for governing irregular migration and the causes, nature and modus operandi under which irregular migration takes place. For example, the EAC framework is silent on proper mechanisms in handling mixed flows especially those facilitated by organised criminal groups. Likewise, nothing from the proposed mechanisms seems to respond to the critical question of malpractice by state officials, vastness and porosity of borders, the commonly pointed out factors facilitating irregular migration in the region. While the Treaty provisions anticipated a comprehensive policy framework on border security, the implementing Protocols are inconsistent with this anticipation. For example, Article 123(3) of the Treaty stipulates that the objectives of the common foreign policy

466 See for example art. 104(3) (a) of the Treaty and art. 5(2) of the CMP.
468 Ibid, Article 2.
and security policy shall be to strengthen the security of the Community and its Partner States in all ways. In essence, both Protocols on foreign policy and peace and security do not seem to comprehensively embrace that Treaty spirit.

With respect to governance of refugees, it can be argued that the EAC laws are at least precise and the words used indicate a clear intention of drafters to accord differentiated treatment to refugees compared to other categories of irregular migrants. First, the law calls for common mechanisms for the management of refugees through “harmonization of Partner States laws, policies, strategies and programmes”. The precision of the law in this regard is evidenced by a direct link between the means tailored to achieve the end. It is practically possible to achieve “common mechanisms” through “harmonization”. Further, the drafters of the EAC law were mindful of the fact that the refugee problem needs to be “managed” in a way that adheres to the established international standards of treatment of refugees expressed under the 1951 UN Convention. However, until now, the said common mechanism for the management of refugees is not yet in place.

3.4.4 Incoherent and Inefficient Institutional Framework

Unlike in the EU, there is no specific regional organ designated with exclusive mandate on migration governance at the EAC level. Instead, activities related to governance of migration are entrusted to Partner States’ institutions. One would expect, at least, to find a regional supervisory body tasked with overseeing the implementation of the Community provisions on border management. As noted above, the Community instruments propose “integrated border management” as a strategic mechanism to promote cross border security, including irregular migration. Specifically, the strategy is to be achieved through cooperation in information sharing, joint operations and training among Partner States.

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469 Article 10(1) and (2) of EAC Peace and Security Protocol.
470 Article 124 of the Treaty and Article 12(1) of the EAC Peace and Security Protocol.
According to Article 151 of the Treaty, Protocols concluded in each area of cooperation must spell out, among other things, the institutional mechanisms for overseeing and effecting such cooperation. Based on this provision, one would expect the EAC Peace and Security Protocol, under which Partner States undertook to cooperate in combating irregular migration, to set up regional institutional mechanisms for management of irregular migration. Instead, the Protocol states that “the Council shall determine the institutional arrangements for the implementation of this Protocol”. Further, the Protocol directs Partner States to cooperate with regional and international organizations whose activities have a bearing on its objectives. This direction to cooperate appears to be one of the reasons the Community has relied much on the support of international agencies like IOM and UNHCR in management of migration in the region.

Since the Secretariat which is the only organ of the Community tasked to implement decisions made by the Summit and the Council and oversee Treaty implementation by Partner States, it is expected to be vested with concrete executive authority, resources and administrative mechanisms to deal with migration governance. To the contrary, the evidence indicates that the Secretariat lacks the said attributes hence affecting the realization of EAC objectives. The inaction by the Secretariat, especially against the Partner States, was clearly observed in the case of East African Law Society v. The Secretary General of the East African Community where the Court remarked that “…in those circumstances, indeed, the Respondent ought to have executed due diligence in carrying out his Treaty obligations.”

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471 Article 15 of EAC Peace and Security.
472 Article 16 Ibid.
474 Reference No. 07 of 2014.
475 Ibid, Para 66.
take immediate measures was, in fact, wrongly justified on their part by the reason that matters related to migration governance entirely rest with Partner States authorities.

Governance, infrastructural and resource challenges facing EAC institutions are also acknowledged in a number of EAC documents. For example, the EAC Communication Policy lists inadequacy of resources as a serious concern slowing down the level of performance of the Secretariat and other organs and institutions of the Community.\textsuperscript{476} Further, it was reported to the Council by the Secretariat that being donor dependent, the peace and security sector (where irregular migration is placed) is much affected by non-disbursement of funds to finance its activities.\textsuperscript{477} Following the inefficiency of EAC institutions in addressing cross border challenges including irregular migration, some studies have recommended creation of new regional institutions and equip them with required resources and mandates.\textsuperscript{478}

\subsection*{3.4.5 Security and Criminal Oriented Frameworks}

In spite of the confluence of migration and security discourses,\textsuperscript{479} the implications resulting from governing irregular migration under strict security laws are well documented.\textsuperscript{480} The spirit of the existing framework is to criminalize, control, combat and prevent irregular migration through coercive measures. This can be discerned from the words and phrases used in EAC laws and policy documents. For example, both the

\textsuperscript{476} See item 2.2 at p. 12 of the Policy. For details on critical challenges facing the EAC institutions and organs generally see Kamanga, K.C., “An Enquiry into the Achievements and Challenges of East African Regional Integration”, in Johannes, D \textit{et al.} (eds), \textit{Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Other Regional Economic Communities}, LawAfrica, Nairobi, 2018, p. 79.

\textsuperscript{477} The EAC Secretariat, \textit{Report of 38\textsuperscript{th} Ordinary meeting of the Council of Ministers: Enhancing the Economic, Social and Political Integration of the East African Community}, 30\textsuperscript{th} January, 2019, Arusha, Tanzania (Ref: EAC/ExCM/388/2019), p. 89.

\textsuperscript{478} Reith, S \& Boltz, M., \textit{Loc. cit.} p. 104.

\textsuperscript{479} See the discussion on the nexus of the two as presented in item 3.2.3.1 above.

\textsuperscript{480} See item 3.2.3.1 of this report.
EAC Treaty and Protocols use the term “illegal migration”.\textsuperscript{481} This is not by chance because a similar phraseology is common in the Partner States’ laws and policies.

Irregular migrants are classified under the Community regime as cross-border criminals who need be prevented, controlled and punished.\textsuperscript{482} Since migration is regarded as a serious threat to peace and security, it is not surprising to find relevant provisions on irregular migration falling under the EAC defence and security domain. In turn, this criminalization of migration tends to compromise universal governance standards applicable in irregular migration including respect for human rights. Equally, it tends to obscure the positive impact of migration to development.\textsuperscript{483} This is contrary to the position expressed for instance, in the Global Compact for migration, Migration Policy Framework for Africa, the 2030 Agenda for Sustainable Development, and IOM 2015 Migration Governance Framework which view migration as a catalyst of development.\textsuperscript{484}

\textbf{3.5 Conclusion}

This chapter has examined the nature, causes and impact of irregular migration in East Africa from historical, political and socio-economic perspectives. For the purpose of identifying the existing regional mechanisms put in place to govern irregular migration, the chapter examined the EAC laws, policies and institutions, and offered articulate insights on the challenges presented by the said frameworks.

It has been shown that the phenomenon of irregular migration has long existed in the region, like in the rest parts of the Continent, with diverse impact on all countries

\textsuperscript{481}For the criticisms levelled against the use of the term “illegal migrants” as opposed to “irregular migrants” see Koser, K., “Irregular Migration, State Security and Human Security”, (supra) p.5; and Harwood, C., “In Pursuit of the Southern Dream: Victims of Necessity (Assessment of the Irregular Movement of Men from East Africa and the Horn to South Africa)”, (supra) p. 15.

\textsuperscript{482}See for example Art. 12(1) (e) of the Peace and Security Protocol.

\textsuperscript{483}Irregular migration is proved to have some positive impact to both communities of origin and destination in terms of remittance, technology transfer and labour force, among others.

\textsuperscript{484}See Objective 2 (para. 18) of the Global Compact for Migration, Item 9.1 (p. 44) of the Migration Framework for Africa, para. 29 and SDG 10 of the 2030 Agenda for Sustainable Development and Objective 2 of the IOM Migration Governance Framework.
involved in the migratory cycle and migrants themselves. However, despite conflicts, search for economic opportunities, social and cultural ties being traditional factors triggering irregular migration in the region, the situation is exacerbated by the increased role of smuggling and trafficking networks.

Whilst the role of RECs in governance of irregular migration is well known and acknowledged, the focus of the EAC is primarily on regulation of regular movements especially for economic reasons and control irregular migration under the umbrella of regional peace and security. There is absence of detailed provisions on irregular migration governance. The few existing ones are incomprehensive with impractical implementation strategies. For those few provisions on migration governance, a clear gap exists between what was anticipated in the EAC instruments and what have actually been done.

This chapter has also shown that there is no specific institution dealing with migration governance in the EAC. However, some irregular migration governance aspects expressly or impliedly fall within the mandates of the Secretariat, the Council, EALA and the Court.\(^{485}\) Lack of enough human and financial resources, required skills and technologies and poor coordination are among the key identified challenges facing EAC institutions in realizing the Community agendas on migration. On the whole, the analysis of EAC migration governance regime indicates that the regional frameworks are largely characterized as being incomprehensive, incoherent and contradictory with poor system of coordination and implementation. This means, little has been provided in the Community rules instead, many issues are mainly left to be governed by national laws. For this reason, the next chapter examines the status of irregular migration governance systems in the three selected EAC Partner States – Kenya, Tanzania and Uganda.

\(^{485}\)They include policy and law making (Summit, Council and the EALA respectively), coordinating programmes and ensuring implementation of the Community rules, policies and directives (secretariat) and ensuring adherence to Community rules (EACJ).
CHAPTER FOUR

THE LEGAL FRAMEWORK, POLICIES AND CHALLENGES RELATING TO IRREGULAR MIGRATION GOVERNANCE IN THE SELECTED PARTNER STATES OF THE EAST AFRICAN COMMUNITY

4.1 Introduction

There is a great inter-dependence between national and regional migration governance. Since, as GCIM remarked, “coherence begins at home, and if states cannot define clear objectives for national migration policies, it should not come as a surprise that overlaps; and contradictions sometimes occur at the multilateral and institutional level.” \(^{486}\) This means, good national policies enable and support successful international cooperation while incoherent national migration policies are likely to affect responses and approaches at the regional level and beyond. \(^{487}\) The EAC systems, which are intergovernmental in character and devoid of supranational powers, require a number of measures regarding irregular migration governance to be taken at the national level. \(^{488}\) This means, the inherent competence of national authorities in this area is expressly recognized.

This chapter surveys the state of irregular migration governance systems in Kenya, Tanzania and Uganda with a view to identifying and analysing common practices, disparities and ensuing challenges. A parallel objective is to assess the extent to which those frameworks conform to or depart from regional and multilateral standards on irregular migration governance.

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\(^{488}\) Particularly, art. 124 of the Treaty and arts. 2 and 12 of the Peace and Security Protocol.
Out of the six current EAC Partner States, Kenya, Tanzania and Uganda are the founding members of the EAC from its historical inception.\textsuperscript{489} The three Partner States ought to have benefited from experience of cooperating in several areas including governance of cross border migration. A significant experience to the three EAC States relates to the requirement for harmonization and approximation of domestic laws to fit the purposes of the Community.\textsuperscript{490} The fact that these three EAC Partner States inherited a similar legal system i.e. common law tradition from the British colonial master with almost parallel laws and institutions, make their systems, to a large extent, comparable to one another.\textsuperscript{491}

The three countries concerned in our study – Kenya, Tanzania and Uganda – all share common borders; and communities on both sides of the borders share some common cultural and social ties.\textsuperscript{492} Consequently, it becomes easy for irregular migrants and smugglers to exploit these geographical and social factors. Likewise, there is evidence that social, economic and cultural connections of people in these three countries greatly contribute to the increase in inter-states irregular migration regardless of the existence of official borders.\textsuperscript{493} Based on these factors, and of course to limit the scope, the study selected three EAC Partner States.

4.2 Historical Overview on Irregular Migration Governance in Kenya, Tanzania and Uganda

The present system of (irregular) migration governance in Kenya, Tanzania and Uganda cannot be perfectly studied without resorting to some important historical

\textsuperscript{489} The three countries came together to form the Custom Union in 1919, the East African High Commission in 1948 which later after independence was transformed into East African Common Service Organisation, followed by the formation of the defunct EAC in 1967 (which collapsed in 1977).

\textsuperscript{490} This requirement long existed since the 1967 EAC Treaty, see article 2(2) (f) and (j).

\textsuperscript{491} The discussion on the uniformity of general law in Kenya, Tanzania and Uganda fall outside the scope of this study. However, for detailed discussion on this topic see Cotran, E., “The Unification of Laws in East Africa” 1 The Journal of Modern African Studies, 2, 1963, 209, pp. 210-12.

\textsuperscript{492} The 1st para to the Preamble of the EAC Treaty testifies this.

\textsuperscript{493} As observed by the researcher during field visits of border communities at Namanga, Holili/Taveta, and Mutukula borders.
forces that shaped the dynamics of migration in the region. In other words, in order to understand today’s policies governing irregular migration in Kenya, Tanzania and Uganda it is pertinent to consider, albeit briefly, the economic, social and political factors that shaped irregular migration governance in the three selected countries during the pre-colonial, colonial and post-independence times.

4.2.1 Migration Governance in Pre-Colonial Kenya, Tanzania and Uganda

This time in history refers to a period prior to the occupation of Africa (and the East African territory in particular) by European powers in the 1880s. By that time, since there were no citizenship criteria and immigration control, cultural aspects such as language, were used to identify aliens from the local people in a particular community. Human migration in pre-colonial East African societies was characteristically free of restrictions, as known today, due to the absence of state borders. People moved for cultural, environmental and economic factors. Writing on the nature of migration in Africa, Adepoju says that “the movements were, as a result, unstructured, occurred in groups, and the migrants were demographically undifferentiated”. During this time the classification of migrants based on regularity or otherwise was naturally inoperative since the movements were undocumented.

4.2.2 Migration Governance in Colonial Kenya, Tanzania and Uganda

The East African region fell under the colonial powers during late 1880s and early 1890s. In 1895, Kenya and Uganda were declared the British East African

Protectorates under the administration of the Imperial British East African Company (IBEACO).\textsuperscript{498} Tanganyika (the present Tanzania mainland) together with the present-day Rwanda and Burundi officially became Germany East African colonies (\textit{Deutsch-Ostafrika}) in 1891. Later in 1919, following Germany defeat in World War I and the Versailles Treaty, Tanganyika was handed over to British administration as a trust territory.\textsuperscript{499} Therefore, from 22\textsuperscript{nd} July 1920 Tanganyika officially joined Kenya and Uganda to become a British colony.\textsuperscript{500}

With colonialism, the three countries witnessed a slight shift in migration governance. During colonialism, migration policies in East Africa were twisted to further colonial goals. This can clearly be demonstrated by, for example, a statement made by the then British Commissioner of the East Africa Protectorate, Sir Charles Eliot, that:

\begin{quote}
We have in East Africa the rare experience of dealing with a tabula rasa, an almost untouched and sparsely inhabited country, where \textit{we can do as we wish, to regulate immigration and open or close the door as seems best}.\textsuperscript{501} (Emphasis supplied).
\end{quote}

The British introduced Immigration Control Ordinances in her East African territories to regulate immigration into the colonies of persons other than natives.\textsuperscript{502} According to the referred laws, it was an offence punishable by imprisonment and/or fines for a person “prohibited immigrant” to enter colonies without entry permit, passport, or recognized identity documents. Governors were mandated to deport such immigrants

\begin{flushleft}
\textsuperscript{500}British administration over Tanganyika was officially established by the Tanganyika Order in Council of 22\textsuperscript{nd} July 1920.
\textsuperscript{502}See the Immigration (Control) Ordinance, 1946 (Kenya); the Immigration (Control) Ordinance, 1947 (Uganda); and the Immigration (Control) Ordinance, 1948 (Tanzania).
\end{flushleft}
whose presence in the colonies were unlawful. The exception was accorded to government officials and their families.

Moreover, the introduction of colonial economy coupled with indirect coercive policies on taxation and recruitment generated rural migration where migrants flocked in mines and settler plantations. Labour migrants were allowed to move freely between Kenya, Tanzania and Uganda. To sum-up, notwithstanding the continuation of traditional migratory movements, colonial administration shaped migration governance systems in the region by, among other things, drawing up boundaries for East African countries, enacting migration laws, generating forced migrants due to internal resistance and later war of liberation, imposition of money economy and easing movements within the region through road and rail infrastructure.

4.2.3 Post-Independence Migration Trends in Kenya, Tanzania and Uganda

The three East African countries – Kenya, Tanganyika and Uganda got their independence in 1963, 1961 and 1962 respectively. It is widely acknowledged that this period marked significant changes in migration governance. The most remarkable move was the creation of the East African Cooperation (EAC) in 1967. The Treaty for East African Co-operation contained, as part of its cooperation objectives, provisions on free movement of goods, capital and labour within the region. In implementing free movement of labour, the Treaty exempted movements of persons employed in the service of the Community from immigration restrictions of Partner States. Generally, governance of irregular migration remained out of the scope of the Co-operation.

505 Article 3(4) (a). Also see Paulo, S., “The East African Community”, 16Journal of African Law, 3, p. 358. This is replicated in article 73(1) (b) of the 2000 EAC Treaty.
Unlike before, as Gould argues, international boundaries now seemed to have some significance to migration governance.\textsuperscript{506} Independent governments vigorously safeguarded their territorial sovereignty by enforcing immigration and emigration restrictions. This was achieved through, \textit{inter alia}, enactment of migration laws aimed at regulating regular migration, controlling irregular migration and ensuring security.\textsuperscript{507}

This period witnessed the adoption of policies aimed at strengthening local economies and inculcating nationalism which resulted into expulsion and deportation of aliens and increased internal as well as cross border movements. For example, in 1972, Uganda expelled 50,000 Asians claimed to be irregular migrants. Expulsions continued following the collapse of the East African Cooperation in 1979 where, for example, about 2000 Community workers and their families from Tanzania and Uganda were expelled from Kenya. In the same year, Kenya expelled 2400 Ugandan irregular migrants followed by expulsion of 2000 Tanzanian irregular migrant workers.\textsuperscript{508}

Despite the strict migration governance policies, countries in East Africa continued to receive asylum seekers and economic migrants from neighbouring countries, notably Mozambique, Namibia, Zimbabwe, Malawi, South Africa, Rwanda and Burundi, due to the struggles for independence, internal strife and economic hardship.\textsuperscript{509} Tanzania, for example, through her open door policy drawn from Pan-Africanism spirit admitted, integrated and even naturalized hundreds of thousands of irregular migrants from some of the aforementioned countries.


\textsuperscript{508} \textit{Ibid}, p. 167.

\textsuperscript{509} UNHCR & IOM, “A Long and Winding Load”, \textit{Background Paper, Regional Conference on Refugee Protection and International Migration: Mixed Movements and Irregular Migration from the East and Horn of Africa and Great Lakes Region to Southern Africa}, Dar Es Salaam, Tanzania, 2010, p. 5-6.
It is certainly true that these developments together with other factors have greatly shaped the present policy and institutional systems on irregular migration governance in the respective countries as demonstrated in the next sections.

4.3 Current Irregular Migration Policies and Legislation

The identification and examination of legislation and policies applicable to irregular migration in Kenya, Tanzania and Uganda is done sequentially. Further, analysis is done around four main thematic areas, namely the lexicological description of irregular migration and migrant; grounds for irregular migration; proposed governance mechanisms and irregular migrant rights.

4.3.1 Migration Regimes in Kenya

As a response to migration governance challenges, Kenya has adopted a number of legislative and policy measures aimed at, inter alia, managing irregular migration. The most relevant and specific pieces of legislation are: the Constitution of Kenya, \(^{510}\) the Kenya Citizenship and Immigration Act, \(^{511}\) the Kenya Citizens and Foreign Nationals Management Service Act, \(^{512}\) the Counter-Trafficking in Persons Act, \(^{513}\) the Refugees Act \(^{514}\) and the Kenya Citizenship and Immigration Regulations. \(^{515}\) In addition, Kenya has several policies and strategic documents affecting some aspects of migration governance. They cover areas of refugee management, internal displacement, diaspora, climate change and labour migration. \(^{516}\)

\(^{510}\) Of 2010.
\(^{511}\) No. 12 of 2011 (as revised in 2016).
\(^{512}\) No. 31 of 2011.
\(^{513}\) No. 8 of 2010 (as amended in 2012).
\(^{514}\) No. 13 of 2006 (as revised in 2012).
\(^{515}\) Legal Notice No. 64 of 2012.
4.3.1.1 Migration Policy Documents

Out of diverse policy documents, the Kenya Foreign Policy\footnote{Republic of Kenya, Kenya Foreign Policy, 2014; available at <http://www.mfa.go.ke/wp-content/uploads/2016/09/Kenya-Foreign-Policy.pdf> (accessed 5/6/2019).} expressly links global forces like globalization and advancement in technology to emergence of new security threats including irregular migration. While acknowledging that Kenya has experienced direct impact of transnational crimes, terrorism and human trafficking, the Policy advocates bilateral and multilateral cooperation and engagement in protecting the country’s territorial integrity and regional security.\footnote{See Pp. 16, 19, and 29.}

Another important Policy instrument is the Diaspora Policy\footnote{Republic of Kenya, Kenya Diaspora Policy, 2014; available at <http://www.mfa.go.ke/wp-content/uploads/2016/09/Kenya-Diaspora-Policy.pdf> (accessed 5/6/2019).} which is largely aimed at mainstreaming the role of Kenyan Diaspora to the development agenda. Distantly, the Policy addresses itself to governance of migration where it proposes public education and awareness raising programmes for individuals leaving Kenya to reside abroad.\footnote{Ibid, Item. 2.4.10.} However, the aim for undertaking the said programmes is not to inform prospective irregular migrants of the danger involved in clandestine movements and thus reduce irregular emigration; instead, the programmes are aimed at seizing prospective emigrants with potential knowledge and skills to be able to compete in the international job market.\footnote{Ibid.}

In spite of the fact that, as of now, Kenya lacks a comprehensive Policy on Migration and irregular migration governance in particular, the country through the Immigration Department initiated in 2013 the drafting of the National Migration Policy. This task was later spearheaded by the National Coordination Mechanism on Migration (NCM).\footnote{NCM was established in 2016 as a government-led interagency platform for coordinating migration and related issues among state and non-state stakeholders.} This policy document, which is yet to be promulgated by the Government,
is commended for addressing matters pertaining to migration in a broad spectrum. The Draft Policy is further hailed for taking into consideration the agendas of national security and development on the one hand, and addressing many thematic migration issues including irregular migration and border management on the other hand. The Draft Policy is said to be informed by relevant international, regional and national frameworks on migration.

4.3.1.2 Legal Instruments on Migration in Kenya

(i) Laws with Connotations Describing Irregular Migrants and Migration

Irregular migrants are referred to in the laws of Kenya as “prohibited immigrants”; “inadmissible persons” or as “illegal foreign nationals”. The use of these terminologies can be inferred from the general intent behind the statute. By so doing the law proscribes entry into and presence in Kenya of any person who is categorized or declared as a prohibited immigrant, an inadmissible person or illegal foreign national.

(ii) Laws Indicating Grounds of Irregularity

With respect to grounds which render a foreign national an irregular immigrant, the law in Kenya is largely analogous to that of Tanzania and Uganda. The Kenya Citizenship and Immigration Act lists categories of prohibited and inadmissible persons to include persons engaged in human trafficking and smuggling, persons who facilitate or engage in activities detrimental to the security of Kenya or other State and

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524 Ibid. Also see Wanja, C., The National Coordination Mechanism on Migration (NCM) has completed a draft Kenya National Migration Policy, KBC, 14 March 2017, available at <https://www.kbc.co.ke/newly-drafted-kenya-national-migration-policy-complete/> (accessed on 21/6/2019).
525 Kenya Citizenship and Immigration Act, Ss. 2 and 33(1).
526 Ibid. Ss. 2 and 33(2).
527 Ibid. Ss. 45(4) and 47(3).
Based on Kenyan security and socio-political experience, the law extends categories of prohibited immigrants to include persons who commit terrorist activities against Kenya or any other State and persons who advocate or become members to ethnic, racial, regional hatred or social violence association or organization.529

Apart from categories of persons who are deemed by the law to be irregular migrants, a person becomes an irregular immigrant in Kenya if he or she seeks to enter, has entered or resided in the country illegally.530 This includes entering and or residing in Kenya without requisite documentation, i.e., pass or permit. Additionally, a person can be declared an irregular immigrant by the Cabinet Secretary responsible for matters relating to citizenship and the management of foreign nationals531 or where the entry or presence of such person is unlawful under any written law.532

The Citizenship and Immigration Act also covers irregular migrants who enter Kenya for the purpose of transiting to other destinations. The law attempts to address transit irregular migration, a common form of irregular migration in the region. The section reads:

Subject to section 34 the entry into and residence in Kenya of a Prohibited Immigrant or an inadmissible person shall be unlawful, and a person seeking to enter Kenya shall, if he or she is a prohibited immigrant or inadmissible person, be refused permission to enter or transit through Kenya, whether or not he or she is in possession of any document which, were it not for this section, would entitle him or her to enter or transit through Kenya.533

528Ibid. S. 33(1) and (2).
529Ibid. Ss. 33(1) (h)-(j) and (p).
530Ibid. Ss. 33(1) (s) and 34(1) and (2).
531Ibid. Ss. 33(1) (v) and 33(7).
532Ibid. S. 33(1) (f).
533Ibid. S. 33(5).
Similarly, the spirit of the law to curb transit irregular migration is expressed through inclusion of persons engaged in human trafficking and smuggling to a list of prohibited immigrants. Smuggling is defined by the law to mean “the procurement, in order to obtain, directly or indirectly a financial or other material benefit, of the illegal entry (and exit) of a foreign national into and outside Kenya.”

In Kenya, unlike in Tanzania and Uganda, the Cabinet Secretary may from time to time review the status of prohibited immigrants and inadmissible persons as advised by the Committee. This raises two implications. One, the law is flexible to accommodate new possible categories of irregular migrants. Two, the law takes into account the importance of consultation from relevant Committee that draws membership from relevant sectors. This is in line with “the whole-of-government approach” and “the whole-of-society approach” guiding principles of the Global Compact.

(iii) Laws Relating to Governance Mechanisms

With respect to measures aimed at governing irregular migration in Kenya, the law is premised more on reactive mechanisms. The Citizenship and Immigration Act puts forward anti-irregular migration mechanisms to include stop, arrest and detention of any person suspected to be an irregular migrant. For the purpose of carrying out detention, the law recognizes prisons, police custody and immigration holding facility to be lawful custody for holding irregular migrants. According to section 48(1) (e) irregular migrants are to be detained at nearest police post. For irregular migrants who are ordered to be removed from Kenya, the law requires that holding facility be established at entry and exit ports and any other immigration operation areas.

534 Ibid. S. 33(1) (b) and (c).
535 Ibid. S. 2.
536 Ibid. S. 33(8).
537 See Para. 15, item i and j.
538 Ibid. Ss. 48(1) (e) and 49(2).
539 Ibid. S. 49(4).
540 Ibid. S. 50.
Further, an immigration officer and other authorized officers are empowered to investigate and prosecute before the Court offences related to irregular migration.\textsuperscript{541}

Upon being convicted, an irregular migrant becomes liable to pay a fine or to serve imprisonment term or to both fine and imprisonment.\textsuperscript{542} This is followed by an order of immediate removal from the country. Removal of irregular migrants can be ordered by the court,\textsuperscript{543} the Cabinet Secretary\textsuperscript{544} or an immigration officer.\textsuperscript{545} Moreover, the law requires owners, agents or any person in charge of a carrier to furnish to immigration officers details of all passengers on board and such other information as the Cabinet Secretary may prescribe.\textsuperscript{546} The law mandates immigration officers to detain a carrier, compel a carrier to pay surcharge or penalties for bringing irregular immigrants into Kenya and order detention and removal of such person at a carriers’ cost.\textsuperscript{547} The fine for bringing into Kenya passengers with forged documents, without travel documents, without visa or passengers in transit who are not properly documented is the payment of a surcharge of Kenya Shillings one million for every passenger, failure to which the carrier can be detained at own cost.\textsuperscript{548}

Equally, employers are banned under section 45(1) from engaging a foreign national who entered Kenya illegally. In fact, according to section 45(2) and (6) an employer who engages a foreign national without applying and obtaining in advance a work permit commits an offence. Similar obligation is imposed on learning institutions to ensure that, before admitting a person for purposes of training or instruction, he or she is not a foreign national who is in the country illegally.\textsuperscript{549} Lastly, the law imposes a stringent duty on any business or person offering accommodation to maintain, in the

\textsuperscript{541}\textit{Ibid.} S. 52.
\textsuperscript{542}\textit{Ibid.} Ss. 53(2) and 54(2).
\textsuperscript{543} Penal Code Cap 63 [RE 2012] S. 26A;
\textsuperscript{544} The Citizenship and Immigration Act, S. 43(1)
\textsuperscript{545}\textit{Ibid.} S. 43(5).
\textsuperscript{546}\textit{Ibid.} S. 44(1).
\textsuperscript{547}\textit{Ibid.} S. 44(3) and (7).
\textsuperscript{548}\textit{Ibid.} S. 44(3) (d).
\textsuperscript{549}\textit{Ibid.} S. 46(1) (a).
prescribed manner, records of all customers who are foreign nationals and make weekly returns to the Director of Kenya Citizens and Foreign Nationals Management Service.\textsuperscript{550} If this obligation is not met and an irregular migrant is found in the accommodation premises the presumption that he or she was harbored by the person who has control over such premises stands unless proved otherwise.\textsuperscript{551} This tendency of the law to incriminate facilitators of irregular migration is also expressed under the Counter-Trafficking in Persons Act.\textsuperscript{552} According to this Act, the penalty for any person who commits, finances, controls, or abets the commission of offences proscribed thereunder is imprisonment for a term not less than thirty years to life imprisonment or payment of a fine not less than thirty million shillings or both.\textsuperscript{553}

(iv) Laws Relating to Rights of Irregular Migrants and Refugees

Concerning the rights of irregular migrants, the Citizenship and Immigration Act contains specific provisions on the right to access justice, respect of human dignity, the right to appeal and seek review and special treatment to refugee women and children. According to section 49(2), procedures for arrest and detention of irregular migrants must observe the standards established under the Bill of Rights and the laws governing criminal procedures.\textsuperscript{554} For instance, it is stated under Article 49(1) (e) and (f) of the Constitution all arrested persons have the right to be held separately from persons who are serving a sentence and to be brought to justice within twenty-four hours after being arrested. Indeed, section 49(1) and (4) of the Citizenship and Immigration Act replicates this position of the Constitution. Further, the Constitution states categorically that respect for human dignity, right to fair trial, and freedom from torture, cruel, inhuman or degrading treatment shall apply to all persons without any limitations.\textsuperscript{555}

\textsuperscript{550}\textit{Ibid.} S. 47(2).
\textsuperscript{551}\textit{Ibid.} S. 47(3). Non-compliance with this section amounts to an offence – S. 47(4).
\textsuperscript{552} The Counter-Trafficking in Persons Act, Act No. 12 of 2012.
\textsuperscript{553} Ibid. Ss. 3(5) and (6), 5, 7, 9.
\textsuperscript{554} This is also in line with Art. 51 of the Constitution of Kenya.
\textsuperscript{555} The Constitution of Kenya, Arts. 25, 28 and 29(d).
The Citizenship and Immigration Act also addresses the problem of prolonged detention faced by irregular migrants. Section 49(6) reads:

…all persons against whom a deportation order has been issued shall be removed from Kenya within a period of ninety days from the day such final removal order is made or after appeal and further detention shall be extended by a court of law for not more than thirty days.

Together with the right of access to justice for all persons as contained under Article 48 of the Constitution is the right accorded to irregular migrant to make application to the High Court for review of a decision of a public officer or appeal against a decision of the Cabinet Secretary or of the Kenya Citizens and Foreign Nationals Management Service.\(^{556}\) Since affairs of irregular migrants are mostly determined by administrative authorities, the Constitution requires that the process be expeditious, efficient, lawful, reasonable and procedurally fair and be subject to review by a court or an independent and competent tribunal.\(^ {557} \)

The Refugees Act entitles refugees and members of their families to all rights and subject them to obligations contained in all international Conventions to which Kenya is a party.\(^ {558} \) Moreover, the law extends special protection to refugee women and children.\(^ {559} \) Another category of irregular migrants who are accorded special treatment are victims of trafficking in persons. The Counter-Trafficking in Persons Act guarantees the victims’ rights to privacy during court proceedings; restitution or compensation for the costs of any medical or psychological treatment and costs of necessary transportation, accommodation and other living expenses.\(^ {560} \) Also the law

\(^{556}\) The Citizenship and Immigration Act, S. 57(1) and (2) respectively. The Kenya Citizens and Foreign Nationals Management Service is established under s. 3 of the Kenya Citizens and Foreign Nationals Management Service Act, No. 31 of 2011.


\(^{558}\) The Refugees Act, S. 16(1) (a).

\(^{559}\) Ibid. S. 23.

\(^{560}\) Ibid. Ss. 11(1) and 13.
guarantees to victims of trafficking the immunity from being criminally liable under immigration or any other laws.  

4.3.2 Migration Regimes in Tanzania

The fundamental rules and practices governing irregular migration in Tanzania are mainly contained in the Constitution of the United Republic of Tanzania,\textsuperscript{562} the Immigration Act,\textsuperscript{563} the Immigration (Amendment) Act,\textsuperscript{564} Anti-Trafficking in Persons Act,\textsuperscript{565} the Refugees Act,\textsuperscript{566} the Non-Citizens (Employment Regulation) Act,\textsuperscript{567} various Regulations and Rules, executive Orders, Directions and Notices made under enabling legislation. Tanzania does not yet have a policy document that specifically addresses irregular migration or migration and citizenship matters in general.

However, a survey of existing policies indicates that there are some policies which hint, albeit indistinctly, on some aspects of migration governance. Such policies include the National Employment Policy,\textsuperscript{568} the National Investment Promotion Policy,\textsuperscript{569} the National Population Policy,\textsuperscript{570} the National Refugee Policy\textsuperscript{571} and the New Tanzania Foreign Policy.\textsuperscript{572} Governance of migration in Tanzania is a union matter covering both mainland Tanzania and Tanzania Zanzibar.\textsuperscript{573} Other matters

\begin{footnotes}
\item[561] \textit{Ibid.} S. 14.
\item[562] Of 1977(as amended from time to time).
\item[563] Act No. 7 of 1995.
\item[564] Act No. 8 of 2015.
\item[565] Act No. 6 of 2008.
\item[566] Act No. 9 of 1998.
\item[567] Act No. 1 of 2015.
\item[568] Of 2008.
\item[569] Of 1996.
\item[570] Of 2006.
\item[571] Of 2003.
\item[572] Of 2015.
\item[573] See item 7 of the list of “Union Matters” in the First Schedule to the Constitution of the United Republic of Tanzania, Also see, among others, S. 2(1) of Immigration Act; S. 2(1) of Anti-Trafficking in Persons Act; and S. 2 of Refugee Act.
\end{footnotes}
closely affecting migration governance like citizenship, foreign affairs and defence and security are also unified.  

4.3.2.1 Policy Documents on Migration in Tanzania

Out of the Policy documents listed above, the New Foreign Policy explicitly addresses itself to issues of irregular migration governance. According to the Policy irregular migration (referred in the Policy as “illegal migration”), drug trafficking, international terrorism, proliferation of refugees, illicit trade in small arms and light weapons are among the contemporary shared challenges which have compelled Tanzania to adjust her policies. Accordingly, the Policy identifies border security, sustaining good neighbourhood and cooperation with regional and international communities as among the key strategies towards addressing irregular migration.

The second Policy which at least tries to link migration and development is the National Population Policy. The Policy states that international migration especially involving refugees to have impacted population growth on some receiving areas in the country.

Further, the Policy identifies the impact caused by rural-urban migration to include urbanization, over-burdening public service and infrastructure, and increase in urban population. In spite of that the Policy does not address itself to international migration other than refugee flows; at least it acknowledges that matters of population governance require multi-sectoral approaches. In that regard, the role of the Immigration Department under the Ministry of Home Affairs in coordinating migration and managing refugee matters is emphasized.

574 See item 6, 2, and 3 (respectively) of the list of “Union Matters” in the First Schedule to The Constitution of the United Republic of Tanzania.  
575 The United Republic of Tanzania, New Foreign Policy, 2015, Para. 2 and 23.  
577 URT, National Population Policy, 2006; Para 2.3.1.  
578 Ibid, Para. 2.3.6.  
579 Ibid, Paras. 5.2 & 5.2.13.
The National Employment Policy and the National Investment Promotion Policy relate to migration governance by offering policy guidelines on issuance of working permit to foreign workers. The Policies recognize the role of foreign workers especially in strategic areas where technology and skills lack locally. As such these two policies touch on regular migration aspect as working permits are issued to those who do regularize their stay in Tanzania.

4.3.2.2 Legal Instruments on Irregular Migration Governance in Tanzania

(i) Laws with Connotations Describing Irregular Migrants and Migration

Similar to Kenya, the laws in Tanzania use phrases like ‘prohibited immigrant’, ‘illegal migrants’, ‘unwanted immigrants’ and ‘undesirable immigrants’ to denote migrants in an irregular situation. The use of these connotations is criticized for ignoring the rights of migrants; disregarding their humanity; and above all, for being contextually problematic and ambiguous. For the widely accepted reasons, the word ‘irregular’ fits better to explain the phenomenon than others. The use, in the Tanzanian law, of the above identified expressions implies the purpose behind that legislation which is to criminalize irregular migration. The Immigration Act expressly states that “[a]ny person who unlawfully enters or is unlawfully present within Tanzania in contravention of the provisions of this Act shall be guilty of an offence.”

Generally, most of the terminologies used in relation to irregular migration demonstrate the tendency of seeing irregular migration as a security concern which deserves to be combated and prosecute all those who get involved. However, in a few cases, the law acknowledges that migration needs to be ‘managed’, ‘monitored’ and ‘facilitated’.

580 See for example Para. 3.13 of the National Employment Policy.
581 See for instance Ss. 10-14 and 17(3) of the Immigration Act, No. 7 of 1995; and S. 12(1) (h),(l),(n) and (p) of the Immigration (Amendment) Act, No. 8 of 2015.
582 Supra, note (2) and (3) above.
583 S. 31(1) (i) of the Immigration Act. Also see s. 12(1) (t) of the Immigration (Amendment) Act.
584 S. 12(1) (l) and (t) of the Immigration (Amendment) Act.
585 Ibid, S. 12(1) (a) and (c).
(ii) Laws Indicating Grounds of Irregularity

According to the laws in Tanzania, an irregular migrant means any person whose entry or presence within Tanzania is contrary to the provisions of the law. Further, the law broadens the scope of persons who are deemed by law to be irregular migrants to include a destitute person, a person who is mentally defective and a person who refuses to submit to medical examination or the one who is being certified to be suffering from a contagious or infectious disease. The category also includes criminals of capital offences, a prostitute, a person declared by the minister undesirable, a person against whom an order of deportation or expulsion is made, dependents of the above categories of persons, and a person who is dealing in dangerous drugs.  

In addition to the above grounds of irregularity, unless exempted under section 15 (2), (3) and (5) of the Immigration Act, a person becomes an irregular immigrant if he/she enters and remains in Tanzania without possessing a valid passport; does not hold a pass or residence permit; or possesses fraudulent documents. The Refugees Act, on its part, excludes refugees and asylum seekers from being declared prohibited immigrants. Yet, on the same law deems an applicant for refugee status and asylum whose application has been rejected to be an illegal immigrant within the meaning of the Immigration Act and thus, must be treated accordingly. Thus refusal of the application to grant refugee status or asylum results continued stay of the applicant in Tanzania to be illegal.

(iii) Laws Relating to Governance Mechanisms

With respect to irregular migration governance mechanisms, the law in Tanzania proposes a number of measures ranging from reactive to proactive ones. The measures

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586 S. 10(1) (a)-(j) of the Immigration Act.
587 Ibid. S. 15(1) (a)-(c).
588 Ibid. S. 26(2).
589 S. 9(3).
590 S. 9(9). Also S. 12(3) of the same law render the stay of asylum seeker or a refugee who fails to obtain or is denied a permit unlawful and the stay thereof of such person become an offence.
listed under the Immigration (amendment) Act include conducting operations and patrol, search and investigation, arrest and detention, and eventually prosecution which results into imprisonment or fine before they are deported from Tanzania. According to the Immigration (amendment) Act, irregular migrants in Tanzania are detained in prisons or police stations. In other words, irregular migrants in Tanzania are detained in mainstream facilities used to detain persons suspected or convicted of crimes. During prosecution, the burden to prove that his or her presence in Tanzania is lawful lies with the alleged irregular migrant.

Penalties and imprisonment terms upon being convicted for irregular migration related offences vary depending on the nature of the offence. Forging documents, unlawfully entering, or unlawfully residing, and failure by the irregular migrant to comply with an order to leave Tanzania attract a penalty of not less than five hundred thousand Tanzanian Shillings, or imprisonment for a term not exceeding 3 years or to both. The same penalties extend to facilitators who harbour persons who they know or have reasonable grounds for believing to be irregular migrants. Persons who employ irregular migrants may be liable to the same penalties. Further, the law imposes relatively heavy fines of not less than one million five hundred thousand shillings to owners, agents, or persons in charge of the ship, vehicle, train, or aircraft who with or without knowledge harbours irregular migrants in Tanzania.

Moreover, the law acknowledges the importance of coordination and cooperation with national, regional and international agencies, security organs and other stakeholders in governing cross border crimes. Similarly, the law extends the scope of cooperation to embassies, consulates, airlines and other checkpoint stakeholders with a view to sharing or exchanging information relating to fraud activities. Section 12(1) (l) of

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591 See particularly Ss. 12(1); 17(1) and (3); and 18(2) of the Immigration (Amendment) Act.
592 S. 17(4).
593 S. 30 (b) of the Immigration Act.
594 S. 31(1) and (2) of the Immigration Act (as amended by S. 6 of the Immigration (Amendment) Act).
595 S. 31(4) of the Immigration Act; read together with S. 6 (c) of the Immigration (Amendment) Act.
596 S. 12(1) (g) and (j) of the Immigration (Amendment) Act.
597 Ibid. S. 12(1) (m).
the Immigration (Amendment) Act expressly stipulates cooperation with Immigration Departments of other countries and international organizations that deal with immigration matters as an important mechanism towards combating irregular migration. Lastly, the law recommends public awareness campaign on problem and danger of transnational organized crimes as one of the durable solutions that seek to involve the public from the grass root.598

(iv) Laws Relating to Rights of Irregular Migrants and Refugees

Another important aspect surveyed pertains to irregular migrant rights. The right to access justice by every person without any discrimination is enshrined under the United Republic of Tanzania Constitution.599 A corresponding provision requires that no person charged with a criminal offence shall be treated as guilty of the offence until proved so by the court.600 In response to the constitutional requirements, the Immigration Act guarantees two rights. Firstly, it is the requirement of the law that the arrested persons be brought to justice within a reasonable time or as soon as is practicable.601 Secondly, every person arrested or detained for violating immigration laws shall be informed, as soon as reasonably practicable in a language which he understands, of the reason for his arrest, search, or detention.602

Victims of human trafficking are another category of irregular migrants whose rights are protected by law. The Anti-Trafficking in Persons Act contains a number of rights ranging from rescue, protection, assistance and rehabilitation to safe and voluntary repatriation.603 Special attention is paid to the most vulnerable victims of human trafficking, namely, children and persons with disabilities. The penalty for a person convicted of trafficking involving this category of victims is not less than five million

598 S. 12(1) (o).
600 Art. 13(6) (b) of the Constitution of the United Republic of Tanzania.
601 S. 31(6) of the Immigration Act; and S. 17(1) of the Immigration (Amendment) Act
602 S. 36(1) of the Immigration Act.
603 Generally see Ss. 17-24 of the Act.
shillings but not more than one hundred and fifty million shillings or to imprisonment for a term of not less than ten years but not more than twenty years or to both.\textsuperscript{604}

The Refugees Act and its corresponding Policy provides for some rights enjoyable by refugees and asylum seekers in Tanzania. According to the Act, asylum seekers have a right to petition to the Minister for a review of rejected application for refugee status or petition to the Director and appeal to the Minister when he is denied a permit.\textsuperscript{605} Refugees have rights to voluntary repatriation, family re-union and resettlement.\textsuperscript{606} Furthermore, the law provides for the right to work after being granted a work permit. Every refugee child is entitled to primary education and an adult refugee desiring to pursue adult education is entitled to do so in accordance with the domestic laws.\textsuperscript{607}

4.3.3 Uganda Irregular Migration Regimes

As in the case of Tanzania and Kenya, irregular migration in Uganda is governed under various normative instruments. The instruments include the Constitution of the Republic of Uganda,\textsuperscript{608} the Uganda Citizenship and Immigration Control Act,\textsuperscript{609} the Prevention of Trafficking in Persons Act,\textsuperscript{610} the Employment Act,\textsuperscript{611} and the Refugee Act.\textsuperscript{612} In addition to the named statutory instruments are Regulations made particularly to impose fees\textsuperscript{613} and for establishment of custody centres.\textsuperscript{614} On the part of policies and strategic documents, there are the National Policy for the Internally

\textsuperscript{604}Ibid. S. 6(4).
\textsuperscript{605} The Refugees Act, S. 9(6) (g); and 12(4)-(6) respectively.
\textsuperscript{606}Ibid. Ss. 34(1); 35(1); and 36(1) respectively.
\textsuperscript{607}Ibid. S. 31(1).
\textsuperscript{608} Of 1995.
\textsuperscript{609} Cap. 66 of the laws of Uganda.
\textsuperscript{610} Act, No. 6 of 2009.
\textsuperscript{611} Act No. 6 of 2006.
\textsuperscript{612} Act No. 21 of 2006.
\textsuperscript{613} The Uganda Citizenship and Immigration Control (Fees) Regulation, 2009.
\textsuperscript{614} Uganda Citizenship and Immigration Control (Establishment of Immigration Custody Centers) Regulations, 2012.
Displaced Persons (IDPs), the National Policy on Disaster Preparedness and Management, the Uganda Vision 2040, the National Employment Policy, the National Diaspora Policy and the National Draft Migration Policy.

4.3.3.1 Policy Documents on Migration in Uganda

Similar to Kenya, Uganda has commenced developing a comprehensive migration policy. The Country has, in addition, drafted a policy on diaspora. However, both policy documents are yet to be formally adopted. The general objectives of the National Draft Migration Policy is to provide an enabling, predictable and secure environment for the legal and orderly movement of persons from, to and within Uganda; to maximize the benefits of migration for national development; and to define and implement a balanced and integrated approach to migration management through facilitation and control interventions. Further, the Policy aims at enhancing inter-agency cooperation at national, bilateral, regional and international cooperation and dialogue when managing migration; and to address migration-related issues without achieving the goals of one sphere at the expense of neglecting the goals of another.

It has been underscored that the aim of the Draft Migration Policy is to promote the benefits and minimize the costs of migration in the country and the region at large.\textsuperscript{621} It is further remarked that the policy “comprehensively addresses key migration issues in Uganda including irregular migration, human trafficking, migrant smuggling, labour migration, brain drain and gain, diaspora engagement, dual citizenship, remittances, return, readmission, and reintegration of Ugandan migrants, border management, and refugee issues.”\textsuperscript{622} From this highlight, it can be argued that the finalization and implementation of this policy document is imperative for irregular migration governance in Uganda.

Regarding interdependence between diaspora management and development, the Diaspora Policy overtly views the diaspora population as a key driver for poverty reduction through foreign direct investment, technology transfer and remittance.\textsuperscript{623} The Policy identifies searching for economic opportunities and escaping autocratic regime as major factors behind emigration in Uganda over the years.\textsuperscript{624} Further, the scope of the Policy extends to diaspora who find themselves in search of work and regularization of their migration status.\textsuperscript{625} This can be construed to mean that the Policy applies to both regular and irregular migrants who are abroad.

Moreover, the Disaster Preparedness and Management Policy considers internal armed conflict as a critical factor that has led to irregular emigration in Uganda over the years. Also the Policy links the problem of terrorism with poor monitoring of borders and entry points in the country. In a bid to addressing irregular migration, the Policy proposes some measures including implementation of national identity card program;

\textsuperscript{621} This was said by the Ugandan Second Deputy Prime Minister Kirunda Kivejinja during the first IGAD ministerial meeting on migration. See Andrew Ssenyonga “Government Drafts National Migration Policy” \textit{New Vision}, 11th Nov. 2016 available at <https://www.newvision.co.ug/new_vision/news/1439866/govet-drafts-national-migration-policy> (accessed on 21/6/2019).
\textsuperscript{622}\textit{Ibid.}
\textsuperscript{623} Diaspora Policy, p. 8.
\textsuperscript{624}\textit{Ibid.} p. 3.
\textsuperscript{625}\textit{Ibid.} p. 14.
carrying out inspection in borders and entry points; and developing mechanisms for conflict management and early warning systems.\textsuperscript{626}

Another policy document with significant implication on irregular migration governance is the Employment Policy. The Policy identifies the implications created by the EAC Common Market Protocol and Regulations, especially the regime on free movement of persons and labour, on migration and employment.\textsuperscript{627} The Policy acknowledges the fact that the regional regime is likely to increase influx of migrant workers in Uganda including those who are smuggled into the country.\textsuperscript{628} Additional factors inducing rural-urban irregular migration in Uganda relate to demography and limited job opportunities.\textsuperscript{629} As a way forward, the Policy calls for collection, analysis, storage and dissemination of reliable information relating to migration and its effect on employment.\textsuperscript{630}

In the area of migration governance, the Uganda Vision 2040 proposes adoption of policies and systems of management of emigration and control of immigration; regular updating of data; and establishment of national identification system. Additionally, the Vision commits the country to continue strengthening protection capacities of the rights of refugees and IDPs.\textsuperscript{631} The use in the Vision of the terms “management” alongside emigration and “control” alongside immigration is not inadvertent.

\textsuperscript{626} See item 2.2.3 and 2.2.6 of the IDPs Policy.
\textsuperscript{627} See Item 3.4.8.2 of the Employment Policy.
\textsuperscript{628} Ibid, p. 12.
\textsuperscript{629} Ibid, p. 2.
\textsuperscript{630} Ibid, p. 27.
\textsuperscript{631} Uganda Vision 2040, para. 324.
4.3.3.2 Legal Instruments on Irregular Migration in Uganda

(i) Laws with Connotations Describing Irregular Migrants and Migration

Similar to Tanzania and Kenya, the Ugandan laws use the phrase “Prohibited Immigrants” to refer to migrants with irregular migration status.\textsuperscript{632} The law defines the term “prohibited immigrants” to mean any person whose entry or presence in Uganda is unlawful.\textsuperscript{633} Also, it means any person who falls under categories described under section 52(a)-(k). A phrase assigned to irregular migrants in Uganda, which is also common to Tanzania and Kenya, is “Undesirable Immigrants.”\textsuperscript{634} Section 2(u) of the same law defines “Undesirable Migrants” by making reference to section 52(g) and (h) which defines the term to mean;

\begin{quote}
(g) a person who as a consequence of information received from the government of any State, or any other source considered reliable by the Minister or the commissioner, is declared by the Minister or by the commissioner to be an undesirable immigrant; but every declaration of the commissioner under this paragraph shall be subject to confirmation or otherwise by the Minister;

(h) any person who, not having received a free pardon, has been convicted in any country, for murder, or any offence for which a sentence of imprisonment has been passed for any term, and who by reason of the circumstances connected with the offence is declared by the Minister to be an undesirable immigrant; except that this paragraph shall not apply to offences of a political character not involving moral turpitude.
\end{quote}

(ii) Laws Indicating Grounds of Irregularity

According to the law in Uganda, irregular entry or presence become unlawful because either an immigrant does not possess travel and identification documents\textsuperscript{635} or, has

\textsuperscript{632} See S. 52 of the Uganda Citizenship and Immigration Control Act.
\textsuperscript{633} Ibid. S. 52.
\textsuperscript{634} Ibid.
\textsuperscript{635} Ibid. S. 52(e).
been declared so by the Minister or Commissioner. Further, irregularity arises whenever there is in force an order of deportation from Uganda against him. Other grounds include being a destitute person, engaged in drug trafficking, convicted of any immigration offences, and being a citizen of any country with which Uganda is at war.

(iii) Laws Relating to Governance Mechanisms

The law has devised some mechanisms to govern irregular migration in Uganda. It is important to note that all of the proposed measures are reactive and penal in nature. They include criminalization of irregular immigration, conducting search, arresting suspects, carrying out investigation and prosecution, and finally imposing fines, imprisonment sentence, and/or deportation order. Section 50(1) (a) of the Citizenship and Immigration Control Act empowers immigration officers, without a search warrant, to enter upon and search any ship, aircraft, train or vehicle for the purpose of identifying the status of passengers. Similarly, immigration officers have powers to search and interrogate any person reasonably believed to be a prohibited immigrant or in ascertaining if he or she possesses requisite documents.

Besides the power to search and interrogate, an immigration officer can investigate any matter relating to immigration and, when there is reasonable cause to suspect that the entry or residence of a person is unlawful, arrest such person in conformity with section 17 of the Criminal Procedure Code Act. Arrest is followed by detention in lawful custody, prosecution before the court, sentence (imprisonment or fine) and, at last, deportation from Uganda. This is clearly provided for under section 66(1) (h) which reads:

636 Ibid. S. 52(g) and (h) respectively.
637 Ibid. S. S. 52(c).
638 Ibid. Specifically S. 52(a), (b), (h), (i), (j), (k).
639 Ibid. Ss. 50(1) (b) (i) & (ii) and 50(4) (a).
640 Ibid. S. 50(1) (e) and (f). The referred S. 17 of the Criminal Procedure Code Act (Cap. 116 of the Laws of Uganda) provides for the procedure of handling suspects arrested without warrant and hold in police custody.
A person who unlawfully enters or is unlawfully present within Uganda in contravention of the provisions of this Act or any regulations made under it; commits an offence and is liable on conviction to a fine not exceeding one hundred currency points or imprisonment not exceeding three years or both and may, in addition, be deported.\textsuperscript{641}

Deportation from Uganda of irregular migrants can be ordered by and be effected as the Minister may direct. Section 60(1) and (2) provides that the Minister must order the deportation of any prohibited immigrant or person whose presence in Uganda is unlawful. Such deportation order must be in writing and signed by the Minister. It may specify the duration for which such order applies or indefinitely in respect of that person.

Lastly, the law sanctions carriers who in one way or the other facilitate entry into Uganda of irregular migrants through a ship, aircraft or vehicle. The law, apart from imposing monetary penalties, compels the carrier to convey such irregular migrants out of Uganda. In particular, section 66(4) and (6) states:

(4) Where a prohibited immigrant enters Uganda from a ship, aircraft or vehicle, whether or not with knowledge of the owner, agent or person in charge of it, the owner, agent or person in charge commits an offence and is liable on conviction to a fine not exceeding one hundred currency points; and provision shall be made by the owner, agent or person in charge, as the case may be, to the satisfaction of an immigration officer for the conveyance out of Uganda of the prohibited immigrant.

(6) Any aircraft which brings into Uganda any undesirable person shall be liable to a fine of not less than one hundred and fifty currency points and shall be required to arrange for the departure out of Uganda of the undesirable alien.

\textsuperscript{641} A currency point, according to the First Schedule of the Uganda Citizenship and Immigration Control Act, shall be equivalent to twenty thousand Uganda shillings.
In order to ensure that irregular immigrants are discouraged and those who facilitate their entry or stay are punished, the law bans employers from employing a non-citizen who is an irregular migrant. Any employer who contravenes the requirement of the aforementioned provision commits an offence and is liable on conviction to a fine not exceeding one hundred and fifty currency points or imprisonment not exceeding two years or both.

(iv) Laws Relating to Rights of Irregular Migrants and Refugees

The laws in Uganda notably, the Constitution, the Citizenship and Immigration Control Act, the Prevention of Trafficking in Persons Act, and the Refugees Act accord some rights to irregular migrants. The Constitution of Uganda guarantees to all persons without any discrimination the right to be detained in authorized custody. Likewise, a person arrested or detained has the right to be informed immediately, in a language that the person understands, of the reasons for the arrest, restriction or detention. Ensuring the right to access justice to all and address the problem of prolonged detention, the Constitution requires that “a person arrested or detained shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty-eight hours from the time of his or her arrest.”

In cognizance of the possibility of unfair treatment of a person appearing before the administrative official or body, Article 24 of the Constitution expressly states that:

Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.

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642 Citizenship and Immigration Control Act, S. 59(1).
643 Ibid. S. 59(2).
644 The Constitution of Uganda, Art. 23(2).
645 Ibid. Art. 23(3).
646 Ibid. Art. 23(4).
This provision implies the right to apply for review of administrative action. Additional to this right, if an irregular migrant is aggrieved by a deportation order may appeal against such order within fifteen days after the date of the order to the High Court. Further, if a person is aggrieved by the decision of the High Court may appeal against it to the Court of Appeal.\textsuperscript{647}

Irregular migrants who are victims of trafficking in persons are accorded special protection of their rights. According to the Prevention of Trafficking in Persons Act, perpetrators of the offence are sentenced to 15 years or to life imprisonment term or may even face death sentence depending on the nature and the victim involved.\textsuperscript{648} Section 12 of this law provides for a range of measures aimed at protecting, assisting and supporting victims of trafficking.\textsuperscript{649} In the same vein, victims of trafficking are protected against criminal prosecution.\textsuperscript{650}

### 4.4 Institutional Frameworks

Irregular migration issues in Kenya, Tanzania and Uganda are provided for under various legislation and policy documents cutting across a number of sectors. This implies existence of implementing institutions which are multifaceted and interdependent in nature. This section surveys the institutional mechanisms put in place to ensure governance of migration in general and irregular migration in particular. For orderly examination of the structure, role and competence of institutions involved in governance of irregular migration in the select countries we have considered both principal and secondary institutions.

#### 4.4.1 Principal Institutions

All three countries have official principal institutions responsible for governance of migration. Irregular migration governance emerges as one of the critical areas of

\textsuperscript{647} The Citizenship and Immigration Control Act, S. 60(7).
\textsuperscript{648} Prevention of Trafficking in Persons Act, Ss. 3(1); 4(a); and 5.
\textsuperscript{649} Also read S. 15 and 16 which provide for the right to restitution and compensation respectively.
\textsuperscript{650} \textit{Ibid.} S. 12(1).
concern by the institutions. In all three countries, it is the ministries responsible for internal affairs and their subordinate organs that take overall responsibility for migration. Specifically, in Kenya, the Immigration Service Department is the focal institution responsible for governance of irregular migration. The Department is structured under the Directorate of Immigration and Registration of Persons responsible for population registration, migration management, border control and refugee welfare within the Ministry of Interior and Coordination of National Government.651

The Department is headed by the Director appointed pursuant to section 4(1) of the Citizenship and Immigration Act. Unlike Tanzania where the President appoints the Commissioner General, in Kenya the Director of Immigration Service Department is appointed by the Kenya Citizens and Foreign Nationals Management Service (hereinafter the Service).652 The Service is governed by the Board comprising the Chairperson who is appointed by the President, Principal Secretaries from Ministries responsible for foreign affairs, internal security and immigration. Further, members of the Board include the Director-General and the Board Secretary both serving as ex officio members and five other members who are not public officers appointed by the Cabinet Secretary.653

With respect to migration governance, the Department is tasked to issue passports and other travel documents; designate ports and points of entry and exit; and manage borders by controlling and regulating entry and exit of all persons at ports and points of entry and exit. Besides, the Department is responsible to advise the Cabinet Secretary on declaration and removal of prohibited immigrants and inadmissible persons. It also conducts research, collects and analyses data and manages records.654

652 Kenya Citizens and Foreign Nationals Management Service Act, No. 31 of 2011, S. 16(1) and the Citizenship and Immigration Act, S. 4(1).
653 See S. 5(2) of Kenya Citizens and Foreign Nationals Management Service Act, No. 31 of 2011
654 Citizenship and Immigration Act, S. 4(2).
In cognizance of the importance of coordinating border control and operation in management of irregular entry and exit, the law establishes the Border Control and Operations Co-ordination Committee.\textsuperscript{655} The Committee is composed of top executive officials from various state-organs responsible for, national security, immigration, health, finance, police, and transport services.\textsuperscript{656} Apart from other functions, the Committee is tasked with formulation of policies and programmes for the management and control of designated entry and exit points; and coordination of exchange of information between agencies responsible for the security and management of the borders.\textsuperscript{657}

In Tanzania, it is the Immigration Services Department (Tanzania ISD) established under the Immigration (Amendment) Act.\textsuperscript{658} The Department is organized under the Ministry of Home Affairs (MoHA) and the Chief Executive Officer is the Commissioner General, an appointee of the President.\textsuperscript{659} The core functions of the Department are to preserve national security through immigration control; issue of passports, permits, passes and other travel documents; facilitate and control movements of persons in and outside the country; and coordinate and facilitate Tanzania citizenship applications.\textsuperscript{660}

Pursuant to section 12(1) of the Immigration (Amendment) Act, the Department is tasked to perform specific duties aimed at governing irregular migration. They include, conducting patrols, operations and investigations with a view to combating national and transnational immigration crimes. Parallel measures include apprehending, prosecuting and removing of irregular migrants. Besides, mindful of trans-national and cross-sectoral nature of the phenomenon, the Department cooperates with immigration

\textsuperscript{655}Ibid. S. 5A (1).
\textsuperscript{656}Ibid. S. 5A (2).
\textsuperscript{657}Ibid. S. 5B (1).
\textsuperscript{658} S. 4(1). Before the amendment, there was an Office of Director of Immigration Services (s. 4(1) of Act No. 7 of 1995).
\textsuperscript{659} Immigration (Amendment) Act, 2016, S. 5(1) and (2).
departments of other countries and coordinates with national, regional and international agencies in the prevention of transnational organized crimes. Lastly, the Department conducts public awareness campaign on the problem and danger of transnational organized crimes.

In Uganda, the main institution responsible for managing migration is the Directorate of Citizenship and Immigration Control (DCIC) in the Ministry of Internal Affairs. For proper carrying out of its mandate, the DCIC is divided into three departments namely, Department of Immigration control; Department of Citizenship and Passports Control; and Department of Inspection and Legal Services. The activities related to border management and issuance of permits and passes belong to the Department of Immigration Control. Matters of inspection, investigations prosecution and removal of irregular migrants are the concern of the Department of Inspection and legal Services.\textsuperscript{661}

The Directorate is also the Secretariat of the National Citizenship and Immigration Board.\textsuperscript{662} According to the Constitution, the function of the Board is to register and issue national identity cards to citizens; issue Uganda passports and other travel documents; grant and cancel citizenship by registration and naturalisation; grant and cancel immigration permits and register and issue identity cards to aliens.\textsuperscript{663}

In all the three countries, management of refugees, asylum seekers and victims of trafficking in persons have attracted establishment of special government organs other than the ones responsible for general migration matters. In Kenya, for instance, the Department of Refugee Affairs,\textsuperscript{664} the Refugee Affairs Committee\textsuperscript{665} and Refugee Appeal Board\textsuperscript{666} are key organs established to manage refugee matters. In Tanzania,

\begin{footnotes}
\textsuperscript{661} See Ministry of Internal Affairs, \textit{DCIC: Who we are}, available at <https://www.immigration.go.ug/about/who-we-are> (accessed on 1/7/2019).
\textsuperscript{662} The Board is established under Art. 16(1) of the Constitution of Uganda.
\textsuperscript{663} Ibid. Art. 16(3); and S. 7(1) of the Uganda Citizenship and Immigration Control Act.
\textsuperscript{664} Established under S. 6(1) of Refugees Act.
\textsuperscript{665} Ibid. S. 8(1).
\textsuperscript{666} Ibid. S. 9(1).
\end{footnotes}
the Department of Refugee Services in the Ministry of Home Affairs and the National Eligibility Committee\textsuperscript{667} are special organs dedicated to deal with management of refugees and asylum seekers. In Uganda, the law establishes the Office of Refugees manned by the Commissioner for Refugees, and the Refugee Eligibility Committee as national organs with overall responsibility for refugee management.\textsuperscript{668}

For the purpose of prevention and control of trafficking in persons, Tanzania established the Anti-Trafficking Committee\textsuperscript{669} responsible for defining, promoting and coordinating the policy of the Government for prevention and control trafficking in persons.\textsuperscript{670} With almost similar functions, the Counter Trafficking in Persons Advisory Committee exists in Kenya.\textsuperscript{671} In Uganda, the law gives power to the Minister of Internal Affairs to designate an office to be responsible for the coordination, monitoring and overseeing the implementation of the law.\textsuperscript{672} In 2013 the Minister designated within the Ministry of Internal Affairs a Coordination Office for Prevention of Trafficking in Persons.

Apart from state institutions, there exist in all three countries international organisations putting migration governance agenda at the forefront. Such organizations include the International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR). Being UN migration and refugee Agencies, IOM and UNHCR work closely with governments and other partners in different operation areas. For instance, in all three countries IOM has worked, in collaboration with governments and other partners, to improve migration

\textsuperscript{667} The Committee is established under S. 6(1) of the Refugees Act and the key responsibilities are to consider applications for refugee and asylum status, family re-unification, and resettlement and make recommendation to the Minister – S. 7. Also, where it is not feasible for the National Eligibility Committee to convene, the law direct that an Ad-hoc Committee be constituted – S. 8(1) of the Refugees Act.

\textsuperscript{668} See Ss. 7(1), 9(1) and 11(1) of the Refugees Act (respectively).

\textsuperscript{669} The Committee is established under S. 30(1) of the Anti-Trafficking in Persons Act.

\textsuperscript{670}ibid.

\textsuperscript{671} Established under S. 19(1) and its functions listed under S. 20(1) and (2) of Counter-Trafficking in Persons Act.

\textsuperscript{672} See S. 21(1) and (2) of Prevention of Trafficking in Persons Act.
management through building capacities of relevant stakeholders. Also, IOM’s programmes on migration management include equipment and infrastructure support; facilitation of voluntary return and resettlement and reintegration of migrants. In ensuring protection of migrant rights, IOM has executed different activities in the area of migration and health, counter trafficking and education.\textsuperscript{673}

Uganda and Kenya have benefited from Better Migration Management Programme (BMM) implemented by IOM and other partners.\textsuperscript{674} The Programme specifically aims at "improving migration management in the Horn of Africa, notably by supporting partners in the region to better address irregular migration, the smuggling of migrants and the trafficking in human beings."\textsuperscript{675} The components of the Programme comprise support for policy and legislative development and harmonization; capacity building; support to the identification, assistance and protection of migrants in need and awareness-raising.\textsuperscript{676}

With the exception of situations involving mixed migratory flows, the main activities of UNHCR is to offer protection and assistance to refugees and asylum seekers. Through its country offices in Kenya, Tanzania and Uganda, UNHCR in collaboration with governments and other partners has assisted in protecting refugees, building capacities to government officials and other stakeholders and facilitated attainment of durable solutions. For example, in 2014 UNHCR and partners facilitated naturalization of more than 162,000 former Burundian refugees and from September 2017 to

\textsuperscript{674} British Council, CIVIPOL, Expertise France, GIZ, Italian Department of Public Security (IDoPS) and the United Nations Office on Drugs and Crime (UNODC).
\textsuperscript{676} Ibid.
February 2019, assisted more than 61,000 Burundian refugees to return voluntarily.  
Similarly, as of December 2018, UNHCR facilitated resettlement of 3,999 refugees in Uganda to third countries including USA, Norway, Canada, Australia, Sweden, Netherlands, France and Finland.

4.4.2 Secondary Institutions

The trans-boundary and multi-dimensional nature of irregular migration necessitates participation of other agencies dealing with or affected by some aspects of migration. In all the three countries, there are national institutions and departments with limited mandate on migration governance. Migration issues form part of their broad agenda including collection and processing of population statistics, security, foreign relations, labour, training and research.

4.4.2.1 Police and Defence Forces

Since irregular migration takes place in violation of security and other criminal laws, it becomes the duty of police forces and other security and intelligence units to cooperate with immigration departments in exercise of their duties. Also, as indicated above, irregular migration governance mechanisms involve patrol, search, arrest, detention and prosecution where mostly police officers and other security personnel take part.

The Tanzania Police Force and Auxiliary Services Act clearly states the duties of the Police Force to include preservation of the peace, maintenance of law and order, prevention and detection of crime, apprehension and guarding of offenders and

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protection of property. By this provision, it can be argued that the general duty to safeguard borders, detect, apprehend and prosecute persons who contravene the law rest with police force in collaboration with other state organs. The counterpart law in Kenya expressly mentions provision of border patrol and border security to be one of the core functions of Kenya Police Service.

Further, police departments render support to government agencies charged with migration control through exchange of intelligence information, liaising with Interpol and coordinating with security bodies from other countries. Certainly, it is through this backdrop that immigration departments and police services in Kenya, Tanzania and Uganda fall under ministries responsible for internal affairs. Lastly, since irregular migration is considered as a threat to national security and endanger territorial sovereignty of states, defence forces of all the three countries are duty bound to safeguard national borders against that threat.

4.4.2.2 Ministries of Foreign Relations and Labour

The ministries responsible for foreign affairs are basically tasked to define and manage foreign policies, enter into bilateral and multilateral agreements, and liaise with foreign governments, regional and international organisations. Likewise, in all the three countries the responsibility to coordinate and protect diaspora affairs abroad and at home lies with Ministries of Foreign Affairs. Regulation and issuance of work permit to foreigners is done by ministries responsible for labour in collaboration with other government institutions. This include carrying out inspection at working places to detect irregular migrant workers who either do not possess required permit or have overstayed.

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680 S. 27(e) of the National Police Service Act, Act No. 11A of 2011.

681 See Art. 241(3) (a) of the Constitution of Kenya; Art. 147(2) of the URT Constitution and Art. 209(a) of the Constitution of Uganda.
4.4.2.3 Statistics Agencies

Governance of irregular migration entails production, dissemination and the use of accurate data. This in turn, affects policy making and informs appropriate administrative and practical intervention measures. In all the three countries, laws establish official statistical Bureau responsible for collecting, analysing and disseminating statistical data. Also, the laws designate the Bureaux as official data coordination agencies. It is significant to note that, the laws in Kenya, Tanzania and Uganda, categorically include migration among the matters within the jurisdiction of the Bureaux. Regrettably, census and other survey reports by national bureaux of statistics generally lack information on irregular migration.

Apart from the above special national statistical bureaux, the survey indicates that police departments, labour offices, and immigration departments produce some useful data on irregular migration. This include, the number of irregular migrants arrested, detained and prosecuted. Other important organizations with operations in Kenya, Tanzania and Uganda playing crucial role in this regard are IOM, UNHCR and UNODC.

4.4.3.4 Capacity Building Institutions

Since 2008 Tanzania has been hosting the Regional Immigration Training Academy (TRITA) in Moshi region. The Academy was established with a view to addressing migration governance issues through offering specialized training and professional skills. Trainings are offered to immigration officials from Tanzania, EAC countries, SADC countries and beyond. Further, the Academy offers short courses on border

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682 S. 6(1) of the Statistics Act, No. 9 of 2015 (Tanzania); S. 4(1) of the Statistics Act, No. 4 of 2006 (Kenya); and S. 4(1) of the Uganda Bureau of Statistics Act, No. 12 of 1998 (Uganda).
683 Ibid, First Schedule (Kenya); Third Schedule (Tanzania) and Fourth Schedule (Uganda)
security, counter and anti-terrorism, and national security and intelligence management.\textsuperscript{685}

Another important institution in the area of capacity building which has benefited EAC Partner States is the IOM-ACBC. Established in 2009 at the request of IOM African Member States, the Centre is hosted by TRITA and enhances capacities of States in migration management through promotion of comprehensive migration governance. Also the Centre facilitates diverse range of immigration and border management projects and training courses.\textsuperscript{686} ACBC, in close partnership with TRITA, enhances migration governance capacity of States through offering training, operational, technical and administrative support.

In December 2018, Kenya launched the first migration studies institute – Kenya Institute of Migration Studies (KIMS) hosted at the University of Nairobi. Speaking during the launching, Dr. Fred Matiang’i, Cabinet Secretary Ministry of Interior and Coordination of National Government confirmed that the Institute will train immigration officers on migration issues and border security.\textsuperscript{687} Generally, the training at the Institute aims at improving migration management and strengthening the capacity of institutions responsible for migration and border management in Kenya and neighbouring states.\textsuperscript{688}

Having demonstrated the policy, legislative and institutional frameworks on irregular migration governance in Kenya, Tanzania and Uganda in the next section the study provides a comparative analysis of irregular migration governance systems in the three countries.

\textsuperscript{685}\textit{Ibid.}
4.5 Comparative Analysis of Irregular Migration Governance Systems

Apart from comparing and contrasting the existing irregular migration governance systems in selected countries the section also weighs the said systems against the established regional and international yardsticks.

4.5.1 Comprehensiveness of Laws and Policies

The rules and procedures on irregular migration governance in all the three countries of Kenya, Tanzania and Uganda are contained in scattered laws, regulations, administrative circulars and international instruments with domestic legal force.\(^689\)

Common to all three countries is the fact that there is no specific legislation on irregular migration governance; instead, general laws and policies regulating regular and irregular migration, citizenship and those restricting aliens are applied.

Except for Kenya, the laws in Tanzania and Uganda do not contain express provisions on smuggling of migrants. This means, Tanzania and Uganda have not fully implemented the Smuggling of Migrants Protocol especially the provisions which require State Parties to adopt legislative and such other measures necessary to criminalize smuggling of migrants when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit.\(^690\) Another important measure is provided under Article 5 of the Protocol that requires migrants who have been object of conduct of smuggling in the manner prescribed above, not to become liable to criminal prosecution.

Also, the Global Compact on Migration calls upon states to include enhanced penalties for smuggling of migrants under aggravating circumstances.\(^691\) According to Article 6(3) (a) and (b) of Smuggling of Migrants Protocol, aggravating circumstances are conditions endangering or likely to endanger the lives or safety of the migrants

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\(^{690}\) Art. 6(1).

\(^{691}\) Objective 9 para. (d).
concerned and inhuman or degrading treatment including exploitation of such migrants. In Kenya, at least, the law defines smuggling and includes traffickers to prohibited immigrants list and extends conditional immunity against criminal liability to victims of smuggling.692

The survey of policy and strategic documents in all the three countries has distinctly revealed absence of coherent and all-inclusive policies on irregular migration governance. Only a few aspects of irregular migration governance can be inferred from national policies on diaspora, foreign relations, demography, development and employment. Nevertheless, the on-going process of drafting migration policies in Kenya and Uganda is promising. It has been observed that among the reasons towards drafting of the said policies in Kenya and Uganda is the implementation of IGAD initiatives on migration governance in which both countries are participants.

Reading through irregular migration policy and legal frameworks in Kenya, Tanzania and Uganda, the conclusion is that they are more restrictive in nature towards irregular migrants and less clear. Further, there is, in all the three countries, the case of inadequacy of both normative rules and policy guidelines to cover some important aspects of irregular migration governance. Indeed, in Tanzania and Uganda, there is absence of rules addressing transit migration and smuggling of migrants.

4.5.2 Reasons for Irregularity

Generally, the laws in Kenya, Tanzania and Uganda are almost identical with regard to grounds which render a person an irregular migrant. Some categories are created based on underlying conditions. Category one includes persons who are classified irregular immigrants based on their health condition, moral and criminal records. The second category includes migrants who are declared irregular migrant by the order of the Minister or the Court. The last one involves persons who become irregular migrants for entering or residing in the country without requisite documentation or holding

forged documents. Largely, this similarity is shaped by historical factors discussed earlier in this chapter.

In Kenya, the Citizenship and Immigration Act provides wider and open-ended grounds for irregularity. In response to security and political challenges faced by the country, the law included terrorists and perpetrators of ethnic, racial and regional hatred in the list of prohibited and inadmissible persons.\textsuperscript{693} In the same vein, unlike the laws in Tanzania and Uganda, the Kenyan immigration legislation expressly declares persons engaged in human trafficking and smuggling of migrants to be prohibited immigrants.\textsuperscript{694} The desire of the legislature to keep the status of prohibited and inadmissible immigrants flexible is expressed under section 33(8) of the Citizenship and Immigration Act. This provision vests powers in the Cabinet Secretary to review from time to time and in consultation with the Committee the status of prohibited and inadmissible immigrants.

4.5.3 Criminalization of Irregular Migration

International human rights and other instruments emphasize that a person should not be criminalized for irregular entry or exit. Nonetheless, perpetrators of smuggling of migrants and human trafficking must be subjected to criminal laws. In all the three countries, irregular entry is an offence punishable by imprisonment and fines. Further, the laws impose criminal liability on both migrants and facilitators of irregular migration.

Also, similar to all three countries is the fact that refugees and victims of trafficking are exempted from criminal liability for irregular entry. This is in line with international standards applicable to refugees and victims of trafficking. Particularly,

\textsuperscript{693} S. 33(1) (j) and (p).
\textsuperscript{694} S. 33(1) (b) and (c).
the UN Convention Relating to the Status of Refugees\textsuperscript{695} clearly bars States from imposing penalties on refugees on account of their illegal entry or presence.\textsuperscript{696}

With respect to smuggled migrants, Kenya is ahead of Tanzania and Uganda by incorporating Article 5 of the Smuggling of Migrants Protocol which extends immunity against criminal prosecution to migrants who have been the object of conduct of smuggling. However, it is important to note that this immunity against criminal prosecution for victims of smuggling is not absolute in Kenya. For the victim to enjoy the said immunity two conditions must be met. First, the victim must have identified the smuggler and second, the victim must be willing to act as a witness in the prosecution of that smuggler.\textsuperscript{697}

4.5.4 Anti-Irregular Migration Measures

The analysis of migration legislation in Kenya, Tanzania and Uganda has revealed several mechanisms put forward for governing irregular migration in the respective countries. Common mechanisms to all the three countries include operations and patrols, search and arrest, detention, prosecution, imprisonment/fines and deportation. Generally, the existing rules are heavily based on reactive and penal measures. Consequently, provisions imposing criminal liability and severe fines to carriers, employers and learning institutions prevail in all the three countries.\textsuperscript{698} In Kenya, the law further extends obligation to owners of accommodation business to ask customers to produce identification of their citizenship before admission. Also, they are obliged to maintain records of customers who are foreign nationals and report weekly to authorities.\textsuperscript{699} This trend is not surprising since irregular migration in these countries is regarded as an offence against state security and calls for combative mechanisms to fight it.

\textsuperscript{695} Of 28 July 1951.
\textsuperscript{696} Ibid. Art. 31.
\textsuperscript{697} The Citizenship and Immigration Act Ibid. S. 53(4).
\textsuperscript{698} Out of the three countries, Kenya heavily fines carriers. The sum stands at a million Kenyan Shillings for every passenger brought into or transited trough the country irregularly. See S. 44(3) (e).
\textsuperscript{699} Citizenship and immigration Act, S. 47(1)-(3).
The dominance of combative mechanisms in counteracting irregular migration in these countries was also confirmed during interview with key informants from Immigration Departments and Police Services. Patrol, arrest, detention, prosecution, imprisonment or fine followed by deportation were the most cited irregular migration governance mechanisms in the region. In a few instances informants mentioned proactive solutions such as public awareness raising, inter-state migration information sharing and a range of programmes aimed at tackling root causes from political, social and economic dimensions. It was revealed that immigration and other security departments tend to use reactive measures than proactive measures in addressing irregular migration due to focusing on enforcement of the existing legal framework which prescribe the prohibitions and requirements to be adhered to under the law.

In Tanzania, at least, the law provides for some proactive measures in line with international and regional ideals. Following the amendments effected to the Immigration Act in 2015, the law now includes cooperation and coordination with other national, regional and international agencies and security organs; sharing of information and public awareness campaign as crucial measures in governing irregular migration.

Although the laws in Kenya and Uganda do not expressly mention about sharing of information, outreach programs and cooperation with national, regional and international agencies, the practice from the Immigration Departments indicates a growing tendency of combining reactive and proactive mechanisms of governing irregular migration. Even so, implementation of the proposed proactive measures is faced with a number of challenges including lack of human and financial resources, absence of formal and integrated data management and sharing system, and technological challenges. Also, historic cultural ties of people in the region and

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700 An interview with Tanzania Immigration Officer-HQ, supra.
701 Ibid.
malpractices among some leaders of local communities have compounded the problem.\footnote{This was revealed during interview with Senior Immigration Officer-in-Charge of Tanzania Mutukula Border Post (26\textsuperscript{th} July 2019); and during an interview with Immigration-HQ Dar es Salaam, (6\textsuperscript{th} September 2018).}

With regard to information sharing, the official information from the Immigration Departments in Tanzania and Uganda revealed that little has been done with respect to exchange of information. In fact, there is no officially established system for managing and sharing immigration information and data between EAC Partner States.\footnote{An interview with Principal Immigration and Labour Officer at the EAC Secretariat, September 2018, EAC Headquarters Arusha-Tanzania.} The current practice involves requests and exchange of some criminal intelligence information on case by case basis and such cooperation hinges on bilateral agreement between individual states.\footnote{Personal interview with Senior Immigration Officer-in-Charge of Tanzania Mutukula Border Post, (26\textsuperscript{th} July 2019) and Ugandan Immigration Officer at Uganda Mutukula Border Post, (26\textsuperscript{th} July 2019).}

4.5.5 Human Rights of Irregular Migrants

Since irregular migrants deserve to enjoy fundamental rights regardless of their migration status, the laws in Kenya, Tanzania and Uganda entitle migrants to some rights. For instance, the Constitutions of Kenya, Tanzania and Uganda guarantee to irregular migrants, as they do to citizens, the right to access justice, the right to be presumed innocent until proved otherwise by competent legal authorities, and the right to humane treatment and respect of human dignity. The right to access justice is paramount with overriding impact towards enjoyment of other rights. Bearing this in mind, the laws in Kenya and Uganda guarantee irregular migrants the right to seek review and appeal to courts.\footnote{S. 57(1) and (2) of Kenyan Citizenship and Immigration Act; and S. 60(7) of the Ugandan Citizenship and Immigration Control Act.} The position in Tanzania is that reviews and appeals by an aggrieved person of any decision made under the immigration and refugees laws
can only be lodged to the Minister responsible for Home Affairs and his decision becomes final. 707

Equally, the right of irregular migrants to be informed of the reason for arrest, search or detention is protected across all the three countries. In Tanzania the right to be given reasons for arrest, search or detention does not extend to decisions pertaining to being declared an irregular migrant or deportation. 708

With respect to detention the laws in Kenya present a more coherent provision where some conditions are set. First, arrested persons are to be held separate from persons serving sentences and be brought to justice within twenty-four hours after arrest. 709 Second, deportation orders must be executed within a period of ninety days and further detention must be authorized by the court for not more than thirty days. In Uganda the law sets forty-eight hours limit against prolonged detention. 710 The position in Kenya and Uganda is clear compared to that of Tanzania where the phrases “reasonable time” and “as soon as practicable” are used. 711 Lack of time limit in the law plus other factors have caused prolonged detention of irregular migrants in Tanzanian prisons awaiting prosecution or deportation. 712

Despite that the laws in Kenya and Uganda are clear with regard to procedures and conditions for arrest, detention, prosecution and deportation of irregular migrants, the practice indicates violation of those rights by some government authorities. For instance, it was evident in Mohochi’s case 713 that the Ugandan authorities deliberately refused to accord Mr. Mohochi, the alleged irregular migrant, the due process of law and fair administrative process before he was arbitrarily deported to Kenya. Also, the

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707 S. 23 of the Immigration Act; and Ss. 9(8) and 12(6) of the Refugees Act.
708 Immigration Act, S. 36(2).
709 S. 49(1) and (4) of Citizenship and Immigration Act.
710 Art. 23(4) Constitution of Uganda.
711 S. 31(6) of the Immigration Act and S. 17(1) of the Immigration (Amendment) Act.
712 See for example, MTF Report, P. 18.
713 Samuel Mukira Mohochi v. Attorney General of the Republic of Uganda, EACJ, Reference No. 5 of 2011
High Court of Kenya found in *Republic v CS, In Charge of Internal Security & 3 others*\(^{714}\) that some state officials entrusted with powers to curb irregular migration, mainly the immigration and police, engage in corrupt or criminal practices. It was also found that sometimes decisions to arrest, detain or prosecute alleged irregular migrants are maliciously made. The court specifically remarked:

> …the police and prosecutors are expected to be professional in the conduct of their investigations and prosecutorial duties and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. In this case, the applicant’s damning evidence on oath that the respondent’s officers made implied overtures to her to “sanitise” her stay in the country has not been denied at all in the replying affidavit. That damning testimony remains largely uncontroverted.\(^{715}\)

Further, it is the position of law and practice among all the three countries that police posts and prisons are commonly used to hold irregular migrants. The findings of study reveals that in Uganda immigration detention facilities are only available at immigration Head Quarters in Kampala. In the rest of places common police posts are used to detain irregular migrants.\(^{716}\) In Tanzania, only interrogation rooms are available in some immigration offices. Thereafter, irregular migrants are handed to police posts for custody.\(^{717}\)

The law in Kenya requires immigration holding facilities to be established at entry and exit points and other immigration operation areas.\(^{718}\) However, it is the practice in all the three countries that apart from holding facilities at airports and a few immigration

\(^{714}\) High Court of Kenya at Nairobi, Misc. Appl. No. 271 of 2015.

\(^{715}\) Ibod, paras. 33-34.

\(^{716}\) Interview with Senior Immigration Officer at Uganda Mutukula Immigration Offices held on 26\(^{th}\) July 2019.

\(^{717}\) This was revealed during interview with Senior Immigration Officer-in-Charge of Tanzania Mutukula Border Post, (26\(^{th}\) July 2019).

\(^{718}\) S. 50 of Citizenship and Immigration Act.
offices mainly located in major cities, normal police posts and prisons are used to detain suspects of irregular migration awaiting prosecution or deportation.

All the three countries have specific legislation protecting the rights of refugees and victims of human trafficking. Generally, much attention is paid to most vulnerable persons – children, women, elderly and persons with disabilities. However, there are variations with respect to clarity and details of those rights. For instance, the law in Kenya entitles refugees and their families to all rights contained in international Conventions to which the country is a party.719 However, there are some instances where these rights are denied or being violated by government authorities. For example, in the case of Kituo cha Sheria & 8 Others v. Attorney General,720 the High Court of Kenya declared that the government Directives to move all refugees in urban areas to Dadaab and Kakuma refugee camps and to stop reception, registration and close registration centres was in violation of refugees’ fundamental rights and freedoms. The Court further remarked that such actions would infringe freedom of movement, right to dignity, right to fair administrative action and is a threat to the non-refoulement principle and a violation of the State responsibility to persons in vulnerable situations.721 Emphasizing protection of the rights of child irregular migrants, the Kenyan High Court in Shukri Muhudin & 12 Others v. Republic nullified the prison sentence for a minor irregular migrant and ordered that child offenders should be kept under custody as provided for under section 191 of the Children’s Act and not in prison.722

On its part, the Refugees Act of Uganda in addition to the rights contained in international instruments contains more specific and detailed provisions on refugees’ right to work, education, fair and just treatment, free access to court and legal

719 S. 16(1) (a) of the Refugees Act.
720 [2013], HC, Petition Nos. 19 & 115 of 2013.
721 Ibid, paras. 94-100.
722 High Court of Kenya at Garissa, Criminal Appeal No. 68 of 2015, eKLR, p. 5.
assistance, freedom of movement and the right to be issued with travel documents. Such provisions are proactive in nature to refugees in Uganda.

4.5.6 Institutional Structure and Capacity

In all the three countries, governance of irregular migration is basically a role entrusted to immigration departments organized under ministries for internal affairs. Specifically, the departments are tasked to combat irregular migration through a number of administrative and practical measures. The survey carried out above reveals existence of several other state and non-state actors whose activities address somewhat irregular migration governance. This is a clear sign that irregular migration cannot be managed by a single agency. The challenge, however, remains with ensuring inter-agency cooperation and coordination. This has in turn affected efficiency and capacity of institutions in governing irregular migration. Even where cooperation is forged, it takes place out of any formalized arrangement and mostly leads to duplicity of activities among institutions.

While Tanzania lacks migration coordination mechanisms among stakeholders, it was observed that there are some notable efforts in Kenya and Uganda to address horizontal inter-agency coordination challenges through establishment of National Coordination Mechanism on Migration (NCM). The NCM offers a platform for coordination and information sharing among key government and non-government stakeholders on migration. However, the sustainability and effectiveness of NCM model in addressing cooperation and coordination issues in migration governance remain to be seen.

Common to all the three countries is the lack of institutional and technical capacity to govern irregular migration. This is attributed to, among other reasons, limited staff to service long and porous borders. Some interviewed respondents from immigration departments pointed out deficiency of budget allocated among the serious issues faced

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723 Ss. 28-30.
by the departments.\textsuperscript{724} This complement the findings of the survey carried out in 2005 by IOM under the Capacity Building in Migration Management Programme for East Africa (CBMM) where it was concluded that budgetary constraints is among the major factors leading to inefficient migration management in Kenya, Uganda and Tanzania.\textsuperscript{725} As a result, departments rely on assistance from international agencies and partners to implement most of capacity building programs and supply of information and technology facilities.

### 4.6 Conclusion

The foregoing examination has revealed that existence of irregular migration governance systems in Kenya, Tanzania and Uganda predates modern normative rules and institutional set-ups. Though of different types and purpose, migration restrictions have existed in Kenya, Tanzania and Uganda since colonial times. It has emerged clearly during the discussion that the drive behind immigration and emigration restrictions imposed by colonial powers was to further their imperialism. It was during this period that terminologies like ‘prohibited immigrants’, ‘deportation’ and ‘free movement of labour’ were introduced to control migration in territories.

The independent Kenya, Tanzania and Uganda inherited colonial migration governance system but now the rationale behind migration restrictions was to safeguard independence and territorial sovereignty, ensuring security, building nationalism and the economy. This was reinforced through enactment of national migration legislation, establishment of defunct EAC by Tanzania, Kenya and Uganda and implementation of executive orders. Progressively, all the three countries have

\textsuperscript{724}Interview with an officer at Tanzania Immigration Department (HQ) Dar es Salaam, (6\textsuperscript{th} September 2018); Interview with Ugandan Immigration Officer (anonymous) at Mutukula Border Post, (26\textsuperscript{th} July 2019); an interview with Senior Immigration Officer-in-Charge of Tanzania Mutukula Border Post (26\textsuperscript{th} July 2019).

developed normative rules, policy documents and institutions to govern migration, including irregular migration.

With regard to the nature of the current irregular migration governance frameworks in Kenya, Tanzania and Uganda, the analysis has shown that there exist in all the three countries rules on grounds for irregularity and measures for controlling irregular entry, stay and transit. Also rules regarding governance of refugees and human trafficking are well established.

However, the frameworks present a considerable number of disparities from one country to another, in both scope and coherence, and somewhat inconsistent with regional and international standards. Further, rules and policies do not adequately address themselves to some pertinent migration governance issues like transit migration, drivers of irregular migration, cooperation and coordination, as well as durable solutions. In all the three countries there exist national organs with general mandates on migration governance. However, these institutions are generally characterized by poor coordination and lack of technical and financial capacity to effectively govern irregular migration.

Having underscored about irregular migration governance frameworks at EAC and national levels made in two preceding chapters, the next chapter proceeds to explore the impacts of governing irregular migration through the EAC.
CHAPTER FIVE

STRATEGIES AND IMPACT OF GOVERNING IRREGULAR MIGRATION THROUGH THE EAST AFRICAN COMMUNITY

5.1 Introduction

Governance of irregular migration through RECs involves multiple measures ranging from legislative, structural to operational ones. In some regions and sub-regions, the emphasis has been placed on the role of consultative processes and informal multilateral platforms for enhancing cooperation among stakeholders. In others, a specific agency for policy and operation coordination has been set up. Moreover, agreements connecting the sending, transit and receiving zones and countries have frequently been resorted to. Basically, these regimes aim at enhancing cooperation in addressing common security challenges, safeguarding the rights and interests of migrants and states, as well as harnessing economic potentials through addressing migration-development nexus. As such, it follows that governance of irregular migration becomes a necessary means to achieve REC’s objectives. This creates necessary conditions to be fulfilled at different levels of implementation by a range of stakeholders.

With respect to EAC, the Treaty, Protocols, Community Acts and the Summit and Council Directives stipulate some obligations to be fulfilled by the Community and Partner States in realizing the Community objectives towards combating irregular migration. They include enhancing cooperation in handling cross-border crimes, establishing common communication facilities for border security and exchanging information on national mechanisms for combating criminal activities. Along the same line, the Protocol on Peace and Security calls for the establishment of a regional database on cross-border crimes, training of personnel and sharing information on the modus operandi. However, expression of aspirations in normative and soft

726 Art. 2.
documents is one thing and effective implementation of the same is completely a different thing.

This chapter examines the nature and scope of obligations imposed on EAC organs and Partner States to realize the Community objectives on irregular migration governance. Also, it discusses the impacts of EAC socio-economic and political policies to migration and irregular migration governance in particular. Lastly, the chapter offers some experiences from selected RECs for EAC to draw some lessons.

5.2 Regional Migration Governance Strategies

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

5.2.1 Strategies on Intra-regional Mobility

Governance of intra-regional mobility is central to every integration process. Its centrality rests on the fact that regionalization processes are driven by interactions between people where regular and irregular cross-border movements take place adding to economic, social and cultural ties. It has been indicated earlier that majority of the international movements take place within regions. In turn, regional blocks have developed frameworks to govern mobility of citizens of participating states for the purpose of realizing regional socio-economic agenda. It is common to witness proliferation of formal and informal regional arrangements on free movement of persons, joint border patrol and information sharing agreements and protection of forcibly displaced people.
Movement of persons, especially those involved in production sectors, constitutes an important factor for actualization of common market in the EAC. It is something expected to see the EAC regime limiting freedom of movement to specified categories of persons. However, the Community has progressively expanded the scope to include visitors, students, persons in transit and persons seeking medical treatment. Indeed, Community rules provide for removal of visa restrictions, common travel documents, capacity building and exchange of information. Also, there are a number of mutual agreements between Partner States on movement of citizens especially those residing in border communities. Bilateral arrangements are usually entered to maintain the existing social and cultural ties across EAC. In totality, these make up a regional regime on management of intra-regional movements of citizens of the Partner States.

5.2.2 Strategies on International Migration

Strategies on international migration comprise common rules defining the regional position on migration matters of inter-regional and international concern. These strategies entail regulation of both regular and irregular international migration as opposed to intra-regional mobility. Regional policies in this category are often driven by security discourse, economic partnerships, humanitarian and human rights norms, among others. In this regard, trans-regional dialogue and programmes geared towards enhancing partnership between regions and individual states are initiated and implemented.

EAC regime contains, albeit sketchy, provisions which seek to address international migration. Persuaded by human rights and security agendas, the Community has developed guidelines to govern some aspects of irregular migration. Among the areas which have attracted the attention of the Community include human trafficking, smuggling of persons, terrorism and asylum.\footnote{Art. 124 of the EAC Treaty; Art. 12 of EAC Peace and Security Protocol.} In spite of the importance of international migration towards achievement of a safe and economically prosperous
regional integration, EAC lacks coherent formal and informal strategies to govern international migration.

5.3 Major Features of Regional Migration Governance Strategies

Regional strategies on migration governance are organised in different formalities, driven by different motives and are set to achieve varying objectives across regions. However, it is common in all regions surveyed that the adopted strategies acknowledge the importance of collective actions as opposed to the self-rule approach. This confirms the argument that governance of international migration is among the global aspects that transcend geographical boundaries and call for state solidarity.

5.3.1 Formal and Informal Structures

The assessment of regional migration governance systems in the EAC reveals concurrence of formal and informal structures. A formal structure comprises binding migration rules expressed through treaties, protocols and series of bilateral agreements, as well as a range of institutions to oversee implementation. The scope of formal regional rules on migration covers a range of themes. Generally, formal rules and institutional structures in the EAC are primarily developed to enhance regional mobility through liberalizing movement of persons. \[728\] Simultaneously, the scope extends to cover other aspects including social and economic rights and control of transnational crimes and irregular migration. However, formalization and implementation of regional rules providing for social rights of migrants has remained a critical challenge to EAC as does to other RECs. \[729\] In terms of structures, EAC has exhibited an administrative structure which is based on the intergovernmental model. This means, governance of irregular migration is primarily overseen by institutions of Partner States.

\[728\] This is also the case with EU, ECOWAS, ASEAN, NAFTA, MERCOSUR and IGAD.
Beside formal systems of norms and institutions for governance of intra-regional mobility, regional migration governance entails informal strategies like forums and trans-governmental processes. These strategies aim at facilitating international cooperation in addressing cross-cutting migration issues including irregular migration. They normally take the form of Regional Consultative Processes and Inter-regional Forums and offer a forum of consultation between states and regions. The decision reached through this approach to migration governance does not bind on Member States. Supported by IOM and other partners, Regional Consultative Processes (RCPs) and Inter-regional Forums (IRFs) are the most preferred approaches towards irregular migration governance. In the EAC, exists quasi informal forum called the Chief of Immigration Officers’ Meeting. Despite its weaknesses identified earlier, the meeting serves RCP purposes for the region.

This tendency of devoting formal rules to governance of intra-regional mobility while governance of extra-regional migration is chiefly left to informal processes and initiatives justifies economic motives behind mobility. Again, by accepting binding regional norms to govern international migration would raise a number of implications to states. Important is the fear to abrogate the prerogatives of states embodied under the principle of state sovereignty.

5.3.2 Economic and Security Driven

Basically the EAC regime on free movement of persons was introduced primarily to meet regional economic desire of creating bigger market zone. The justification for introduction of mobility regime in EAC could be found deep in economic bounds rather than other dimensions. The mobility of persons taking place within defined regional integration frameworks has been regarded as a facilitating factor of liberalization of economy through movement of factors of production – goods, persons, capital and services. It is because of economic considerations that regional

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frameworks on mobility initially target specific categories of people including skilled workers, tourists, professionals, business people and students.\textsuperscript{731}

Apart from migration being seen as a catalyst for realization of common market agenda, the orientation slowly changed by also looking at migration from security and human rights angles. It is from these migration narratives that EAC has, to certain extent, developed rules on rights of labour migrants, asylum seekers and refugees. Also, it has designed frameworks on security and control of irregular migration especially human trafficking and smuggling of persons. Certainly, this too explains the reason why migration governance is part of security agenda of the EAC. Further, this clearly demonstrates the causal link between migration, economy and security.

5.3.3 Multiple Levels of Implementation

Implementation of regional migration policies and laws involves a three-tier system. For intergovernmental regional arrangements, the first level of implementation of rules and programs on migration depends on state’s actions. This includes ratification of treaties and protocols followed by domestication processes where regional rules lack direct application and effect to member states. Similarly, states implement migration policies through harmonisation or approximation of domestic laws and practices to comply with regional standards. States play a critical role in a number of programs coordinated under the Chief of Immigration Officers’ Meetings. The second level of implementation takes place within EAC structure. Since EAC lacks a specific regional institution designated to oversee various migration governance programs, some aspects are implemented under broader mandates of the Secretariat, Committees, EALA and the Council.

The last level is built on execution of migration governance strategies through partnership with multi-actors. This level covers the partnership between EAC and

individual non-member states, inter-regional forums and agreements, and the role played by migration lead agencies. Therefore, it should be noted that implementation of regional migration policies (both formal and informal) engages states, regional institutions and other actors. Regardless of levels of implementation, the objectives behind regional migration frameworks are generally heterogeneous in nature.

5.3.4 Heterogeneous Objectives

Regional frameworks governing different forms of migration are motivated by a combination of factors. Apart from strengthening the economy and security, the analysis of factors leading to regional migration policies indicates mixed motives. It is also imperative to mention that those objectives tend to change reflecting on the present conditions. For instance, to the Global North, especially Western Europe, North America and developed countries of Asia migration governance policies are oriented towards the control of immigration through imposing strict visa policy, border fencing and patrol, as well as readmission agreements. Also, a number of measures aiming at governing South-North migration have been taken through supporting economic, social and political reforms in the migrant source countries and regions.732

In the least developed regions and sub-regions, the principal objective of most migration policies is to promote economic growth through easing mobility, technology transfer and encouraging remittance as a source of foreign exchange. Therefore, mobility regimes are being considered crucial component of regional economic strategies in EAC.

The desire to safeguard the rights of migrants and address challenges associated with migration and irregular migration in particular have also motivated the development of migration governance policies and programs in the EAC. This partly explains the

motive behind regional frameworks on transnational organised crimes especially human trafficking and smuggling of persons, protection of asylum seekers and refugees. To ensure realization of these objectives, EAC legal frameworks contain obligations and outline a number of mechanisms to be implemented at different levels by various actors.

5.4 The Nature and Scope of Obligations

A close look at the EAC legal and policy documents reveals existence of a dual system of mandates towards implementation of rules on irregular migration governance. Irregular migration governance obligations are directed either to the Community or Partner States. Likewise, implementation of some provisions and programs call for actions of actors at both levels. The obligations imposed on Partner States and institutions of the Community correspond in nature to the general classification of state obligations under international law. This entails obligations requiring some conducts in form of action or an omission (obligation of conduct); or those requiring achievement of particular results without stipulating the means of achieving them (obligation of results). 733

5.4.1 Obligation to Cooperate

According to Black’s Law Dictionary, “cooperation” entails voluntary, coordinated and joint action of two or more states aimed at achieving particular objectives. 734 Given the intergovernmental nature of EAC where execution of Treaty provisions and Directives made by policy organs largely depends on cooperation, imposing obligation on Partner States to cooperate is necessary. Thus, the Treaty defines “co-operation” as follows:

the undertaking by the Partner States in common, jointly or in concert, of activities undertaken in furtherance of the objectives of the Community as provided for under this Treaty or under any contract or agreement made thereunder or in relation to the objectives of the Community.\footnote{735 EAC Treaty, Art. 1(1).}

Due to its importance, cooperation is among the fundamental principles guiding EAC whose Partner States are obliged to adhere to throughout the integration process.\footnote{736\textit{Ibid., Art. 6(f).}} The dependence on cooperation as the means to achieve the Community agendas is clearly and extensively articulated in a number of Treaty provisions and reiterated in Protocols and Council Directives. As a result, Partner States, Community Organs and Institutions are generally obliged to cooperate in fulfillment of their Treaty obligations.

On the same basis, the Treaty emphasizes that the realization of Community objectives specifically maintenance of peace and security, which are pre-requisites to social and economic development, can be possible through cooperation and consultation.\footnote{737\textit{Ibid., Art. 124(1).}} Therefore, actualization of Community policies and programs governing irregular migration is dependent on cooperation between Partner States, Organs of the Community and other stakeholders. With respect to governance of irregular migration in the region, cooperation is called in different areas of intervention including technical support, handling of cross border crimes, exchange of information, joint operations and patrols.\footnote{738\textit{Ibid., Art. 124(3) and (5).}} Moreover, cooperation and consultation are necessary for capacity building, counter-terrorism initiatives, and achieving common solutions.\footnote{739\textit{Ibid., Art. 124(1) and (6).}}

The Treaty further extends the obligation on Partner States to cooperate with AU, UN and its Agencies, and other international organisations interested in the objectives of the Community.\footnote{740 Art. 130(4).} This implies the duty on Partner States to participate in programs and implement policies initiated by named organisations including those institutions
targeting migration governance. Within this logic, Partner States are reminded of their obligations to implement binding and non-binding instruments which they undertake particularly with AU, UN, ILO, UNHCR and IOM. These and many other regional and international organisations have shaped migration governance through development of binding norms, non-binding instruments and guidelines, facilitation and coordination of programs.

Similarly, the EAC Protocol on Peace and Security reiterates that the Community efforts to combat transnational and cross border crimes including human trafficking and illegal migration, management of refugees and combating terrorism are reliant on commitment by Partner States to cooperate.\textsuperscript{741} This position in the EAC reflects the global trend about cooperation on migration governance as expressed in the Global Compact,\textsuperscript{742} the 2030 Agenda for Sustainable Development (SDGs),\textsuperscript{743} and the GCIM.\textsuperscript{744} However, achieving effective State cooperation on migration governance at the regional level, as at other levels, is a challenge. Micinski and Weiss have identified divergent interest between receiving and sending countries, nationality, hostile public opinion and disagreement on burden sharing as among the critical barriers towards effective cooperation on migration.\textsuperscript{745} The section on challenges which faced the realization of EAC anti-irregular migration strategies reveals similar tendencies in the region.

Migration policies of Partner States covered in this study occasionally acknowledge the importance of cooperation between national institutions and regional bodies as a necessary mechanism for governing irregular migration. In Tanzania, the Immigration Act and the Foreign Policy expressly mention cooperation with immigration

\textsuperscript{741} Art. 2(3).
\textsuperscript{742} See particularly para. 15(b).
\textsuperscript{744} Para. 69-70.
departments of other countries and international organisations as essential mechanism in combating irregular migration.\textsuperscript{746} In Uganda, apart from the Draft Migration Policy which extensively covers the matter, the duty to cooperate with regional bodies can elusively be inferred from the Constitutional provision pledging respect of international law and treaty obligation.\textsuperscript{747} Kenya guarantees cooperation with other countries, regional and international organisations through the Foreign Policy.\textsuperscript{748} Cooperation on irregular migration governance among EAC countries basically takes place under inter-state bilateral agreements.

5.4.2 Obligation to Develop Policies, Laws and Institutions

Governance of irregular migration at regional and sub-regional levels requires setting up of policy both binding and soft rules and institutional systems. The rules and institutions are developed to guide harmonious implementation of a range of programs at the Community and Partner States levels. The EAC is not an exception to this global trend. In line with this, the EAC Treaty imposes a broad duty on Partner States to conclude Protocols in each area of cooperation to spell out the objectives, scope and corresponding institutional mechanisms.\textsuperscript{749} Also, being a policy organ of the Community, the Council has a duty to initiate and submit bills to the Assembly, issue directives and make regulations.\textsuperscript{750}

Implementation of the obligation to develop policies, laws and institutions has witnessed development of policies and institutions which in one way or another impacts on irregular migration governance. The policies and laws include the Common Market Protocol, Protocol on Peace and Security, One Stop Border Posts Act, Anti-Trafficking Bill, Child Rights Policy and Gender Policy to mention but a few. In spite of their weaknesses, regional policies and laws focus on areas of intra-regional

\textsuperscript{746} Ss. 12(1) (h) and (l) of the Immigration Act (2015), and Para. 31 of the New Foreign Policy.
\textsuperscript{747} Art. XXVIII (i) (b) of the Constitution of Uganda.
\textsuperscript{748} See particularly Pp. 16, 19 & 29.
\textsuperscript{749} Art. 151(1).
\textsuperscript{750} Art. 14(3) (b), (c) and (d) of the Treaty.
mobility, smuggling and trafficking, human rights of migrants, border security and refugee management. The EAC Peace and Security Protocol is the most important Community instrument that recognizes development of policies and laws as an essential mechanism of governing irregular migration. On this, article 12(2) (f) provides:

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

Given the nature of the current policy, legal and institutional systems at the EAC and in the Partner States, it is clear that the implementation of this obligation largely remains a challenge. Since irregular migration is among the issues which require collective intervention, one would expect EAC organs to take lead in developing necessary common policies and institutions to guide the matter.

The obligation of the Community to develop policies and programmes aimed at widening and deepening cooperation among Partner States in all fields of cooperation is clearly provided for under the Treaty. The Community rules direct Partner States to cooperate in taking measures including developing policies and programs on irregular migration. However, the area of irregular migration governance has received little joint efforts. Remarkably, even implementation of most of the available Community mechanisms set to govern migration largely depends on individual actions by Partner States. This tendency of trying to implement common agenda through individual state actions reflects the shortcomings of the intergovernmental model to RECs. It is submitted that this defeats the logic of seeking collective solution and thus the objectives of the Treaty.

751 See Chapter Three for detailed discussion on EAC migration policies.
752 Art. 5(1).
Contrary to the position in the EAC, the Treaty establishing the European Union is clear on handling of matters requiring collective actions such as immigration policy and asylum. First, the Treaty requires that Member States inform and consult one another within the Council with a view to coordinating their actions. Second, the Council may adopt joint position and promote cooperation, adopt joint action in so far as the objectives of the Union can be attained better by joint action than by the Member State acting individually.753 Further, the spirit of collective action through the Council is expressed in the area of cooperation in foreign and security policy. In this regard, the Treaty provides that “whenever it deems it necessary, the Council shall define a common position. Member States shall ensure that their national policies conform to the common positions.”754

5.4.3 Obligation to Harmonise Rules and Practices

Harmonisation of laws and practices is another important mechanism through which common migration governance systems can be realized. The term “harmonisation” stems from the word “harmony”, or its verb form “harmonize”. According to Black’s Law Dictionary harmonization refers to agreement, accord or conformity.755 Harmonisation literally denotes a process leading to harmony or conformity. According to Kitonsa harmonisation of laws in the EAC context “implies bringing together in proximity common areas of agreement for a state of peaceful co-existence; identifying and ironing out areas of divergences in the laws, all aimed at providing an environment that would support effective operation and smooth management and development of the Community”.756 Perhaps, it is from this context that the word

753See Art. K.3 (1) & (2).
754Art. J.2 (2).
“approximation” is often used interchangeably with harmonisation in spite of the inherent technical differences underlying them.757

Harmonisation of policies and integration of programmes is indeed imperative towards achieving objectives of RECs.758 Thus, EAC Partner States undertook under Article 126(2) (b) of the Treaty to, through their appropriate national institutions, take all necessary steps to harmonise all their national laws pertaining to the Community. This means, the obligation to harmonise and align national laws primarily lies with national authorities. The EAC Treaty, Protocols and Acts of the Community call for harmonisation of laws, standards, policies, regulations and procedures in many areas of cooperation.759 In an attempt to implement the Treaty obligation enshrined under Article 126(2) (b), the Council established a Sub-Committee on Harmonisation of National Laws in the EAC Context (hereinafter Sub-Committee). The Sub-Committee is led by the Law Reform Commissions of Partner States and it works under the Sectoral Council on Legal and Judicial Affairs. In fact, the creation and roles of this Sub-Committee trace their roots from the then Tripartite Committee of National Expert on Harmonisation.760

The Partner States’ laws and policies on immigration, refugee and labour form part of the EAC strategic areas in which harmonisation of the same is required. The logic


758 The emphasis on harmonisation as a guiding principle in implementation of RECs objectives is contained in a number of RECs instruments. For example, see Art. 3(c) of the Treaty Establishing the African Economic Community, 1991 (Abuja Treaty); Art. 7(a) & (b) of the Agreement Establishing IGAD; Arts. 3(2) and 4(c) of ECOWAS Treaty.


behind harmonisation of these laws and policies is that the inconsistencies of laws and policies between Partner States on the one hand, and between Partner States and the Community on the other hand could hamper realization of integration agendas particularly on common market and peace and security. Thus, apart from Article 126(2) (b) of the Treaty, the requirement to harmonise migration laws, policies and programs is reiterated in a number of EAC instruments. The most important is Article 47(1) of the Common Market Protocol under which Partner States undertook to approximate their national laws and to harmonise their policies and systems. In order to ensure intra-regional mobility of EAC citizens and enhance effective border management, the Regulations on Free Movement of Persons oblige States to consult and advise the Council on harmonisation of immigration procedures.\textsuperscript{761} The EAC Peace and Security Protocol is another Community law that considers harmonisation of Partner States’ law, policies, strategies and programmes among the important mechanisms to ensure governance of migration. However, the Protocol restricts this mechanism to refugee management alone leaving aside irregular migrants.\textsuperscript{762}

With respect to labour policies and standards, the Treaty categorically calls for Partner States to harmonise their labour policies, programmes and legislation.\textsuperscript{763} The realization of Common Market Protocol provisions related to movement of labour basically depends on harmonisation of laws, standards and programs of Partner States.\textsuperscript{764} Hence, the Sub-Committee identified priority areas in the immigration and labour laws of Partner States impeding intra-regional mobility of EAC citizens and thus affecting realization of Common Market Protocol. Some of the areas where harmonisation is at different stages include residence and work permits, standard travel documents, issuance of National Identity Cards, reciprocal opening of borders crossing points, free visa regime and conditions and classification of passes. In this context, in 2015 and 2016 Tanzania reviewed her laws and regulations on immigration, passport

\textsuperscript{761}Reg. 8(f).
\textsuperscript{762}Art. 10(2).
\textsuperscript{763}Art. 104(3) (e).
\textsuperscript{764}CMP, Arts. 5(2) (c) and 12(1).
and travel documents, citizenship and anti-trafficking. Kenya enacted the Citizenship and Immigration Act and its Regulations in 2011 and 2012 respectively. On her part, Uganda tabled in 2014 the Immigration (Amendment) Bill. In the eyes of the Sub-Committee, immigration laws of Partner States are proximate enough regarding categories of irregular migrants, conditions of entry and immigration offences. It is submitted that this conclusion is not realistic considering the discrepancies and contradictions observed in the foregoing chapter. The impact of this conclusion by the Sub-Committee can be seen in the measures proposed to prevent irregular migration as opposed to those intended for management of refugees.

So far, four main approaches have been used to achieve harmonisation of laws in the EAC. The first and perhaps common approach is the approximation method. EALA report aptly summarizes this approach as undertaken by the Sub-Committee in the following paragraph:

In undertaking its activities, the Sub-Committee considers/analyses national laws to ascertain their convergences and divergences from one Partner State to another. Also, the Sub-Committee determines whether national laws are in line with the Treaty for the Establishment of the East African Community and its Protocols. After the analyses, the Sub-Committee makes specific recommendations to Partner States to amend their national laws to address the discrepancies identified. The recommendations of the Sub-Committee are later discussed by the Council of Ministers which makes the directives to Partner States to implement the recommendations of the Sub-Committee.

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766 EAC Peace and Security Protocol, Arts. 12(2) and 10(2) (a) & (b) (respectively).
Other approaches to harmonisation include development of model laws, implementation of Council Directives and passing of Community Act.\textsuperscript{768} The development of model laws was preferred as an appropriate approach towards harmonisation of contract and intellectual property laws of Partner States.\textsuperscript{769} It is also important to recall that Council Directives bind Partner States, organs and institutions of the Community (other than the Summit, EALA and the EACJ).\textsuperscript{770} When Directives require legislative measures can be used to speed-up harmonisation. Also, according to Article 14(3) (a) of the Treaty, the Council is bestowed with powers to make decisions for the efficient and harmonious functioning of the Community.

The last approach involves the role of the EALA in passing Community Acts which create common binding standards. The enactment by the Assembly of the One Stop Border Posts Act offers a practical example of harmonisation of immigration and border practices of Partner States through the Community Act. Apart from the above four named approaches, EACJ is also said to play an instrumental role to harmonisation of policies in the Partner States. This is made possible through harmonious interpretation and application of the Treaty and other Community laws, thus contributing to the development of regional jurisprudence.\textsuperscript{771}

Within Partner States, the exercise of harmonisation of national laws affected by EAC laws is mainly coordinated by Ministries responsible for EAC, Law Reform Commissions, offices of Attorneys General, other sector ministries and National Assemblies. In spite of the available frameworks to guide and coordinate harmonisation of Partner States’ laws in the EAC context, the realization of this Treaty obligation is faced by numerous challenges. Worried by this situation, once the EALA

\textsuperscript{769} Ibid.
\textsuperscript{770} Arts. 16 of the Treaty.
had a view that existing challenges of harmonisation of Partner States’ laws appertaining to the Community can be dealt with through enactment of a Community omnibus law. Challenges which faced the realization of this Treaty obligation comprise poor coordination, slow pace in implementation of Directives and decisions, differences in Partner States legal systems, conflicting commitments, technical and financial deficiency.

5.4.4 Obligation to Coordinate Implementation

Achieving effective implementation of policies and programmes intended to govern irregular migration requires well-coordinated and concerted efforts among the responsible actors. The role of coordination in ensuring realization of objectives of RECs in Africa through coordination of their activities in all sectors is well stated under the 1991 AU Treaty establishing the African Economic Community (Abuja Treaty). Without proper coordination of implementation, the developed Community laws and strategic policies would be a dead letter.

An analysis of EAC normative and policy documents shows that the obligation to coordinate implementation of different mechanisms for governance of irregular migration and management of refugees rests with Community organs and Partner States. It is the Partner States who are bound by the Treaty to assume obligation under the Pacta sunt servanda rule to implement it in good faith. For that reason, EAC Partner States undertook under Article 8(1) (a) the general obligation to implement the Treaty. Equally, Partner States have obligation to coordinate, through the institutions

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774Art. 28(2). All Kenya, Tanzania and Uganda are signatories to this Treaty. Also the EAC Treaty under Art. 130(2) regards the Community as a step towards the achievement of the objectives of the Treaty Establishing the African Economic Community.
of the Community, their policies to the extent necessary to achieve the objectives of the Community.\textsuperscript{776} In turn, in order to ensure effective coordination of Community activities, the Treaty requires each Partner State to designate a Ministry for EAC affairs.\textsuperscript{777}

At the Community level, the Secretariat is tasked to oversee and coordinate policies and strategies, initiate studies and research related to implementation of Community programmes, and mobilize funds amongst others.\textsuperscript{778} In other words, being the executive organ of the Community, the Secretariat is responsible for overseeing the implementation of the Treaty and coordination with Partner States, institutions and organs of the Community. In the course of executing its obligations, the Secretariat is supposed to coordinate with Partner States through the Co-ordination Committee.\textsuperscript{779} Indeed, it is the obligation of the Secretariat to initiate fact finding on infringement or failure to fulfill provisions of the Treaty by a Partner State and refer the matter to the Council or, if unresolved, to the Court.\textsuperscript{780} The inaction by the Secretariat following violation of Treaty provisions by a Partner State has, in more than one incident, been declared by the Court to amount to failure to fulfill its obligations.\textsuperscript{781}

Equally, the Secretariat is tasked under Article 71(1) (l) of the Treaty to coordinate implementation of Decisions and Directives of the Summit and the Council. This is due to the fact that, by their nature, implementation of such Directives and Decision cannot be possible without effective coordination by the Secretariat. On the contrary, the Council observed at its 30\textsuperscript{th} meeting that a number of Directives and Decisions issued by the Summit and the Council to Partner States have largely remained

\textsuperscript{776}EAC Treaty, Art. 8(1) (b).
\textsuperscript{777}Ibid., Art. 8(3).
\textsuperscript{778}Ibid., Art. 71(1).
\textsuperscript{779}Ibid.
\textsuperscript{780}Ibid., Art. 29.
\textsuperscript{781} See James Katabazi and 21 Others v. Secretary General of the East African Community and the Attorney General of the Republic of Uganda [Reference No. 1 of 2007] EACJ (Katabazi’s Case); East Africa Law Society vs. The Secretary General of the East African Community [Reference No. 7 of 2014] EACJ.
unimplemented due to the lack of coordination by the Secretariat. 782 Consequently, the Council directed the Secretariat to always coordinate the implementation of the Summit Decisions/Directives to the Council and the Council Decisions/Directives to the Partner States as a whole. 783

There is another challenge impeding implementation of some Treaty obligations. It is that of imposing obligations on Partner States for region-wise initiatives which ought to be coordinated by the organs of the Community. In this regard, the Community organs especially the Secretariat, the Council and Committees are expected to take lead in coordinating implementation of such obligations. This controversy, for instance, was noted during the 38th Ordinary Meeting of the Council of Ministers where a previous Council’s decision directing Partner States to establish a Regional Technical Working Group on Harmonisation of National Laws 784 was deferred through Council Directive (EAC/CM 38/Decision 01).785 Similar interpretation can be attributed to obligations imposed on Partner States but which require the coordination of EAC organs if they are to be jointly implemented. They include obligations to adopt common mechanisms for management of refugees, develop joint training, establish systems for sharing information, establish a regional database on cross-border crimes and undertake joint operations. These and similar obligations expressed under various Community instruments cannot be individually or collectively realized without effective coordination by EAC organs and institutions.

Coordination by the Secretariat is lacking in a number of areas affecting implementation of strategies and programmes on irregular migration governance. For example, in 2016, the Heads of EAC National Anti-Narcotics and Anti-Human Trafficking Units urged the Secretariat to initiate development of a basic regional

Also, the meeting observed that, as a result of weak or absence of coordination by the Secretariat, the region lacks region-wise cross-border surveillance mechanism, capacity building to law enforcers and other stakeholders, and strategy and Plan of Action to combat human trafficking. Any meaningful measure aimed at implementing strategies on irregular migration should be grounded on a thorough study of the nature of the problem and solution required. Being alert of the absence of studies on cross-border crimes, the EAC Council at its meeting held in January 2019 directed the Secretariat to undertake a study on the state of child smuggling and trafficking in the region.

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

5.4.5 Obligation to Protect and Promote Human Rights of Migrants

It is a settled principle under international human rights law that all human beings are entitled to the same universal human rights and fundamental freedom regardless of their status. Fundamental human rights include the right to life, equality before the law, the right to human dignity, freedom from slavery or servitude, torture, cruel,
inhuman and degrading treatment or punishment. States are under international obligation to promote and respect such rights. It is from this understanding the EAC Partner States have undertaken, under Article 7(2) of the Treaty, to maintain universally accepted standards of human rights as one of the operational principles to guide the achievement of the Community objectives.

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

Besides Treaty provisions, there are some EAC soft law documents that impose obligation on Partner States to protect and respect human rights of migrants. The documents include the Child Rights Policy and the Gender Policy. These policies address specific risks faced by migrant children and women. Further, as part of

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791 See Arts. 2 throughout 12 of the Charter.
792 For cases where Article 6(d) and 7(2) of the Treaty were held to constitute obligation on Partner States see Mohachi’s Case, P. 16-19; Democratic Party v. Secretary General of the East African Community & 4 Others, [Judgment of 29th November, 2013] EACJ, para. 43; and Venant Masenge v. Attorney General of the Republic of Burundi, [Judgment of 18th June, 2014] EACJ, Pp. 16-19.
793 See the discussion in Chapter 3, item 3.3.2 above.
policy actions, the documents impose specific obligation on Partner States and the Secretariat. For example, the EAC Gender Policy categorically calls for the Partner States to develop and implement effective mechanisms to address migrant trafficking and smuggling and establish rehabilitation and reassurance conditions for women and girls who have been victims of smuggling and trafficking. There is also a need to strengthen gender-sensitive observance of migrants’ rights during and after migration episode and integrate gender perspectives into migration management policies and strategies. The Secretariat is required to mainstream gender throughout migration management policies and strategies and develop common guidelines for externalization of labour to third parties.

The efforts by EALA members to legislate on human rights and human trafficking through private Bills are yet to yield positive results as the process is protracted since 2011 and 2016 respectively. This present a critical challenge because the EACJ also lack explicit jurisdiction to address cases involving individual rights. The Treaty subjects such jurisdiction to adoption of a special Protocol extending the Court jurisdiction or the Council Directives. Nevertheless, it suffices to mention that the Bills seek to impose obligations on Partner States relating to protection of special groups including victims of trafficking and smuggling. One would say that the limited regional human rights framework is attributed to unwillingness by Partner States to effectively institutionalize human rights into integration agenda. Lack of considerable codification of relevant rights and corresponding obligations is one thing but installing institutional structure necessary for realization of those rights is critically another different thing.

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794 EAC Gender Policy, p. 39.
795 Ibid.
796 Art. 27(2) of the EAC Treaty.
5.5 The Impact of EAC Socio-Economic and Political Processes on Migration Governance

Apart from migration specific frameworks and programmes, an array of socio-economic and political policies and practices in the EAC are expected to affect migration patterns in the region. This is true because drivers of human migration, whether taking regular or irregular form, are not mutually exclusive; and usually cross-cut between natural and man-made factors. It is from this reason the evaluation of EAC integration pillars and initiatives with the aim of identifying their implications on causes and governance of migration becomes necessary. It is submitted that the statement by Betts that “[u]nderstanding the politics of each area of migration is important in order to identify the ‘boundaries of the possible’ for change, and the nature of the cooperation problems that need to be overcome” is correct. Indeed, there are socio-economic and political policies and practices in the EAC that are expected to affect migration patterns in the region.

5.5.1 Political Federation

In spite of the challenges impeding its realization, the ultimate goal of the EAC integration process remains the attainment of a Political Federation. Since its re-establishment, EAC has taken several measures aimed at actualizing this goal. Notably, in 2004 there was established a Committee on Fast Tracking East African Federation, famously known as “the Wako Committee”, to examine ways and means to fast-track the regional integration process. This was followed by a wider national consultation in the Partner States between 2007 and 2009. Later on, the Council studied the matter and recommended to the Summit to adopt a Confederation as a transitional model of EAC Political Federation. The Summit adopted the Council’s

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799 Arts. 5(2); and 123(1) of the Treaty.
recommendations at its 18\textsuperscript{th} Ordinary Meeting and directed the Council to initiate the process of making a Constitution for the EAC Political Confederation.\textsuperscript{801} As a result, the Team of Constitutional Experts was constituted, drawing three members from each Partner State, two being experts in constitutional matters and one in legislation drafting. Currently, the process of preparing a Draft Constitution and development of Common Foreign and Security Policies is underway.\textsuperscript{802} The Treaty identifies Common Foreign and Security Policies as key pillars towards realization of a Political Federation. Particularly, the Treaty states that:

\begin{quote}
In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty particularly with respect to the eventual establishment of a Political Federation of the Partner States, the Partner States shall establish common foreign and security policies.\textsuperscript{803}
\end{quote}

Despite the fact that the areas to be covered under the envisioned EAC Political Confederation will be stipulated by the Constitution, it is potentially correct to argue that the outcome of the process could have significant implications on governance of irregular migration. This anticipation finds justification in a parallel process of developing common policies in the areas of security and foreign relations. Certainly, the finalization of these policies will trigger ceding of state sovereignty in some specified areas. The policies of Partner States which are most likely to be affected by this situation include those on border management, citizenship and foreign relations. Since the experience from other RECs demonstrates that governance of international migration is mainly defined under common security and foreign policies, it is expected that EAC will borrow a leaf from them. Generally, it is anticipated that federalism would lead to strengthening of regional bodies with more executive authority to make and implement decisions and programmes. However, it remains to be seen whether the

\textsuperscript{801} See the Summit Directive (EAC/SHS 18/ Directive 06) in the Report of 18\textsuperscript{th} Summit of EAC Heads of State, 20\textsuperscript{th} May 2017, Dar es Salaam, Tanzania (Ref: EAC/SHS 18/2017).
\textsuperscript{802} Report of 38\textsuperscript{th} Extra-Ordinary meeting of the Council of Ministers: Enhancing the Economic, Social and Political Integration of the East African Community, 30\textsuperscript{th} January, 2019, Arusha, Tanzania (Ref: EAC/ExCM/38/2019), Pp. 88-9.
\textsuperscript{803} Art. 123(1).
confederation or federation model would seriously create regional superstructures with full executive mandate on most jealously guarded State-prerogatives like migration control, foreign affairs, defence and security, among others.

There are arguments on the possible negative implications a political federation/confederation can cause to migration governance and border security in particular. For instance, Mshomba argues that “a political union may spread terrorism to areas that were initially relatively safe, as borders become more porous.” 804 Also, worries have been expressed with regard to governance of some areas likely to concurrently fall under both competencies of the federal government and constituent states like citizenship. 805 Lastly, the effectiveness of the proposed confederation to implement matters to be conceded to confederal authorities is questionable. Unlike the federation, Partner States under confederation retain executive powers and dominate the confederal institutions. 806 This is more or less the same as the current state of EAC. Thus, without ceding of Partner States’ sovereignty common governance of migration issues under regional arrangements will remain impractical.

5.5.2 Good Governance Programmes

There is a causal relationship between good governance and irregular migration. Both conceptual and empirical evidence suggest that most of the push-pull factors behind international migration are largely influenced by governance dynamics of economic, political, social and environmental activities. It is a settled fact that poor governance, corruption, politically-motivated conflicts, weak economy, poverty and unemployment, human-influenced environmental disasters and injustices, among others, have fueled irregular emigration. On the contrary, good governance, prosperous economic systems, stable political environment coupled with rule of law and respect

805 EALA, Report of the Committee on Legal, Rules and Privileges on the Assessment of Adherence to Good Governance in the EAC and the Status of the EAC Political Federation, 2nd – 6th September 2013, Kampala, Uganda, p. 11.
for human rights attract immigrants. 807 From this construction, it is obvious that
development, human rights and good governance are inseparable determinants of
human migration. Based on this relationship, this subsection tries to foresee the likely
implications of EAC policies and programmes on good governance to irregular
migration.

Emulating the fundamental and operational principles of the Community, the EALA
Committee on Legal, Rules and Privileges describes good governance as “a process
whereby public and private institutions manage resources in a manner that promotes
development, human rights, justice, peace, accountability, responsiveness,
inclusiveness, democracy and adherence to the rule of law.” 808 According to the
Treaty, 809 adherence to principles of good governance by Partner States is very
important towards realization of integration objectives. Moreover, adherence to
universally acceptable principles of good governance is among the basic conditions to
be met by any foreign country applying to join the EAC. 810

Apart from the Treaty, EAC has endeavored to promote pillars of good governance
through the Draft Protocols on Good Governance and Preventing and Combating
Corruption. According to the Draft Protocol on Good Governance, good governance
in the EAC context entails fundamental principles including consolidation of
democracy, rule of law and respect for human rights and fundamental freedoms;
preserve peace and peaceful resolution of disputes; strengthen transparency,
accountability and fairness; equitable access and sharing of opportunities and popular
participation, among many others. 811

808 EALA, Report of the Committee on Legal, Rules and Privileges on the Assessment of Adherence to
809 Contained under Article 6(d) and 7(2) of the Treaty.
810 Article 3(3) (b) of the Treaty.
811 See Arts. 2 & 3 of the EAC Draft Protocol on Good Governance.
The EAC through its organs has taken some decisions and pursued some activities aimed at enhancing good governance in the Partner States. Significant measures taken so far in this area include establishment of regional electoral support programme, establishment of different sectoral forums, and the Nyerere Centre for Peace Research. Other measures include initiation of the EAC Annual Conferences on Good Governance, establishment of the EAC Early Warning Centre, and the envisaged EAC Panel of Eminent Persons and EAC Governance Unit within the Secretariat. According to EAC Development Strategy, these measures aim at, inter alia, creating “a platform for national institutions of governance to exchange information and share experiences and dialogue on policies, strategies, laws and programs, with a view to developing regional standards”. Likewise, they offer opportunity for discussing challenges and best practices related to policy formulation, conflicts prevention, rule of law and access to justice and thus contribute to a culture of dialogue among governance stakeholders.

Despite the significant progress made, the challenge that remains is that of taking bold steps to implement passed decisions. For example, EAC is criticized for taking neutral position during post-election violence in Kenya and Burundi in 2008 and 2011 respectively. The indecisiveness by EAC was also observed during the political crisis in Burundi following the attempted coup d’état of 13th May 2015. The series of Council and Summit decisions, and the proposals by EAC facilitator to Burundi peace dialogue, the former Tanzanian President Benjamin Mkapa, were neither complied nor coupled with sanctions. Instead, restrictions that compelled compliance with good governance principles were imposed by external donors mainly GIZ, USAID and

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813 Finalization of the Unit is dependent entry into force and operationalization of the Protocol on Good Governance.
815 Ibid.
EU. All these add to the concerns about readiness and commitments by EAC Partner States to genuinely adhere to pillars of good governance in the region. Thus, as the capacity to effectively address factors inducing irregular migration is undermined, influx of irregular migrants is likely to intensify.

5.5.3 Socio-Economic Policies

EAC is primarily a regional economic block with a view to achieving socio-economic development of Partner States which is expected to raise the standard of living and improve the quality of life of their populations. All regional development initiatives in the areas of infrastructure, investment, services and industries are intended to achieve equitable, sustainable and balanced socio-economic development. Further, the Common Market Protocol places realization of socio-economic development of Citizens in the Partner States on free movement of goods, persons and labour, rights of establishment and residence and the free movement of services and capital.

Since among the primary objectives of the EAC is to realize socio-economic development of its citizens, the realization of this objective attracts a number of implications on irregular migration governance. First, it is clearly understood that migration and development interlink in a number of ways. Low level of socio-economic development tends to increase irregular emigration in search for better life opportunities. However, in some circumstances, increased household income also promotes realization of long-awaited aspirations to migrate. Viewed in this perspective, the on-going and future EAC socio-economic development programmes are likely to cause macro-structural changes. In turn, this may accelerate intra-regional mobility as well as international migration. These migratory processes are very likely to take place outside the migration policies of Partner States and of the Community.

816 The Republic of Burundi and the Republic of Southern Sudan are the EAC Partner States that faced restrictions from external donors. See the Report of the 37th Meeting of the Council of Ministers, 2nd – 8th May, 2018, Arusha, Tanzania (Ref: EAC/CM/37/2018), p. 97.
817 See Art. 5 of the Treaty.
818 See for instance Arts. 5(3), 79, and 80 of the Treaty;
819 Art. 4(2) (a).
This explains, in part, the reservations by some EAC Partner States, particularly Tanzania, about the implications of EAC free movement of persons’ policy to local labour markets.

5.6 Experience from other RECs

Most of the features underlying migration governance systems in the EAC are also common to other RECs. However, it is important for the EAC to emulate some best migration governance practices found in other RECs and avoid replication of incompatible ones. The first area where experience can be learnt from other RECs concerns ensuring intra-regional mobility while governing irregular migration. In this regard, EAC can learn from the EU model where the Schengen Agreement guarantees to EU citizens the equal treatment and the right to free entry, residency, employment and family reunification. Also there are established common rules and standards on return, external border control, employers sanction and use of Integrated Border management (IBM) system.

In North America, the North American Free Trade Agreement (NAFTA) focuses on trade-related mobility of people, while the Regional Consultations on Migration (Puebla Process) offers multilevel platforms for discussing measures on irregular migration governance including migration policy and management, human rights and migration and development. It is also commended for systematic involvement of civil society representatives via the Regional Network for Civil Society Organizations on Migration. This regional consultative forum was initiated in 1996 by Central

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820 The Treaty on European Union, commonly known as the “Maastricht Treaty” 1757 UNTS 3 (entered into force 1 November1993).
821 Art. 3(c)
America states, Mexico, Canada and the United States. It has granted observer status to Argentina, Colombia, Ecuador, Jamaica and Peru. EAC needs to learn from Puebla Process on how to building a strong and informal regional migration consultative forum.

Further, EAC can learn a lot from ECOWAS long experience of governing intra-regional mobility. Provisions on free movement of persons were part of the founding Treaty and were restated, yet in broader scope, in the Revised ECOWAS Treaty of 1993.\textsuperscript{824} Aimed at creating borderless West Africa by facilitating intra-regional movement of nationals, a Protocol on Free Movement of Persons, Residence and Establishment was adopted in 1979.\textsuperscript{825} The Free Movement Protocol and its Supplementary Protocols,\textsuperscript{826} among other things, guarantee ECOWAS citizens the right of entry, residence and establishment. To this end, a number of measures were taken including a decision in 1985 establishing Common Travel Certificate,\textsuperscript{827} a decision in 1990 requiring Member States to establish a harmonized immigration and emigration form,\textsuperscript{828} and the establishment of ECOWAS uniform passport in 2000. With regards to governance of irregular migrants who are ECOWAS nationals, the Protocol and its Supplementary Protocols contain useful provisions on, \textit{inter alia}, refusal of entry for inadmissible migrants, expulsion and repatriation procedures, cooperation and coordination between states and ECOWAS organs, measures to fight smuggling of persons and human trafficking, employers sanction and rights of

\begin{flushleft}
\textsuperscript{824} Arts. 3 and 59.
\textsuperscript{825} ECOWAS, Protocol A/P.1/5/79.
\textsuperscript{826} The Supplementary Protocol A/SP.1/7/85 (on the Code of Conduct for the Implementation of the Protocol); the Supplementary Protocol A/SP.1/7/86 (on the Implementation of Right of Residence); the Supplementary Protocol A/SP.1/6/89 (Amending and Complementing the Provisions of Article 7 of the Protocol); and the Supplementary Protocol A/SP.2/5/90 (on the Implementation of the Right of Establishment).
\textsuperscript{827} Decision A/DEC.2/7/85. The validity of travel certificate is two years subject to renewal for further two years.
\textsuperscript{828} Decision C/DEC.3/12/92.
\end{flushleft}
irregular migrants.\textsuperscript{829} These are among the critical aspects which are either totally lacking in the EAC legal frameworks or need to be improved upon.

IGAD is another REC where EAC can draw a lesson on governance of intra-regional mobility. Organized as an intergovernmental body, IGAD initiatives on migration governance take the form of soft approach. The regional policy guidelines on migration and displacement are contained in the Regional Migration Policy Framework (RMPF)\textsuperscript{830} and Regional Migration Action Plan (MAP). Together they outline various priority areas of intervention and aim at creating an enabling environment for comprehensive migration management mechanisms at regional and Member State levels. Specifically, the documents envisage free movement of people and a coherent regional system for countering human trafficking and smuggling.\textsuperscript{831} The IGAD approach on migration governance can best suit in EAC context since both communities subscribe to intergovernmental model. As noted early, IGAD strategies on migration governance has influenced policy chance to some EAC Partner States who are also IGAD members.

The second area where EAC can learn some lessons from other RECs concerns governance of international irregular migration. In this aspect, EAC need to learn how regional approach involving bilateral and multilateral agreements, diaspora programmes, Regional Consultative Processes and externalization measures have worked successfully in governing international irregular migration in other regions. Particularly, the EU and ECOWAS can offer best experiences in this area of migration governance. In a bid to address challenges caused by mass influx of irregular migrants and asylum seekers, the EU has engaged in a number of programs aimed at governing international migration. It has developed a common external migration policy and

\textsuperscript{829} See Art. 4 and 11 of the Protocol; Art. 3 of the 1985 Supplementary Protocol; and Arts. 13, 14, 15, 16, and 22 of the 1986 Supplementary Protocol.

\textsuperscript{830} It was adopted by IGAD Council of Ministers in 2012.

\textsuperscript{831} Eva, D & Benjamin, S., \textit{Loc. Cit.}
abolished internal borders. Through its external policy, EU adopted the Global Approach to Migration and Mobility (GAMM) and the European Neighbourhood Policy (ENP). Together with Common European Asylum System, the GAMM and ENP encompass common approaches towards regular and irregular migration at EU’s external borders. Triandafyllidou lists ‘tools of externalisation’ of migration governance between EU and migrant sending countries to include information exchange, capacity building, readmission agreement and development assistance. With the said programs, the EU has also established Frontex and European Asylum Support Office (EASO) to coordinate the implementation of migration and asylum policies and programs.

In 2008, ECOWAS through its Commission defined a Common Regional Approach on Migration (ECAM) covering a range of measures. They include, strengthening dialogue, cooperation and collaboration between ECOWAS, host, and transit countries; information and awareness campaigns for potential migrants on the danger of irregular migration and smuggling networks; and setting up a regional system for monitoring migration flows inside and outside ECOWAS. Other pertinent areas covered include the role of Diaspora in migration and development nexus, protection of the rights of migrants, ensuring legal migration channels towards other regions and harmonizing bilateral agreements and policies.

5.7 Conclusion

The discussion in this chapter aimed at identifying various mechanisms used by EAC to govern irregular migration, their major features and the motives underpinning them.

835 Ibid. pp. 2, 10.
837 Ibid. Paras. 23(1) and 2.4(1), (2).
838 Ibid. Paras. 1.2(2), (4); 2.2(3) and 2.5.
Also the chapter discussed the nature and scope of obligations arising out of EAC migration governance strategies. The implications of EAC socio-economic and political processes on migration governance were also examined. Lastly, the chapter has indicated from other RECs some areas where EAC can draw lessons for effective governance of both intra-regional and international irregular migration.

It has been observed that both formal and informal mechanisms of governing irregular migration are resorted to by EAC. Formal mechanisms take the form of binding regional rules, bilateral and multilateral agreements. A typical example is the development of policies governing intra-regional mobility of persons, regional rules proscribing human trafficking and smuggling of persons, and common policy on refugee management. Also, EAC has engaged informal mechanisms and non-binding processes like RCP to address some issues pertaining to governance of irregular migration. It is further observed that EAC policy on free movement of persons has never been intended to reduce irregular migration by easing legal migration. Instead, the policy aims at promoting business and investment through movement of factors of production and widening of markets.

Further, it has been established that realization of EAC strategies on irregular migration governance depends on State Parties to cooperate and coordinate with each other; harmonise their laws and practices; and make policies. In spite of the promising endeavors by EAC organs and Partner States, it has been revealed that effective realization of the proposed strategies is confronted by a number of challenges including weak and improperly coordinated institutional structure; scant, conflicting and fragmented policy frameworks and unwillingness by Partner States to create supranational structure. Finally, it has been argued that for sustainable governance of irregular migration in the region, there is a need to employ all-catching strategies which respond to social, economic and political dimensions and realities at all levels of intervention.
CHAPTER SIX
SUMMARY OF MAJOR FINDINGS, CONCLUSION AND RECOMMENDATIONS

6.1 Summary of Major Findings

This study has dealt with governance of irregular migration. Specifically, the study examined the laws, policies and institutions of the EAC and the selected Partner States on the question of irregular migration governance. The hypothesis underlying the study was that the laws, policies and institutions governing irregular migration in the East African Community and its selected Partner States of Kenya, Tanzania and Uganda are inadequate and ineffective. In order to prove this assumption, the study employed both doctrinal and interdisciplinary methodologies of qualitative research to collect and analyse evidence from traditional sources of law, public policies, academic literature, various reports, as well as views from key informants.

This section presents a summary of the major findings based on the set objectives of the study. These findings cater for both national level and community level frameworks. They include: First, at both national and regional levels the study identified inadequacy of laws and policies especially with regard to the scope of irregular migration issues covered. The study found that comprehensive legislation or policy documents describing irregular migration are lacking at both levels. The analysis of EAC instruments revealed that a few aspects of irregular migration governance are provided for under the Treaty, Protocols and the Community Acts. These set of normative instruments are supplemented by the Council Directives and recommendations from consultative forums. The study established that the focus of EAC migration provisions is to achieve internal mobility of citizens of Partner States, a prerequisite to attainment of common market agenda.

The study found that EAC legal and policy instruments partly cover, under its peace and security discourses, issues like human trafficking, smuggling of persons, and
propose a number of mechanisms to govern transnational crimes in general. Still, the instruments are inadequate since they do not address some important aspects to be considered in irregular migration governance such as transit migration, human rights of migrants, return and readmission procedures, cooperation framework and regulation of inter-regional migration. Second, the study found that the regional frameworks on irregular migration governance are inadequate and ineffective since they do not address themselves to root causes and durable solutions to irregular migration. Generally, the study observed that the EAC frameworks are intended to govern regular migration (internal mobility) with a few provisions attempting to address irregular migration through considering the same as peace and security problem.

This trend was also found in the selected Partner States where normative rules do not cover some important aspects of irregular migration governance. Despite the fact that in all three countries exist legislation proscribing irregular migration, a number of issues are not addressed. For instance, there is absence, in Tanzania and Uganda, of rules addressing transit migration and smuggling of migrants. Also in spite the notable progress in Kenya and Uganda, the study confirmed absence of coherent and all-inclusive policy guidelines on irregular migration governance. Only a few aspects of irregular migration governance can be inferred from national policies on, *inter alia*, diaspora, foreign relations, demography, development and employment.

Third, the rules governing irregular migration are scattered in a number of normative and policy documents. This leads to incoherency due to inconsistence and sometimes contradictions from one legislation or policy to another. At EAC level, the study found provisions on free movement of persons contradictory since in practice movement of EAC citizens is subjected to a number of conditions. Inadequacy and ineffectiveness of laws, policies and institutions governing irregular migration was also noted in EAC Partner States. In all the three countries surveyed, irregular migration is governed under disjointed set of laws, policies and institutions. This means, there is no specific legislation on irregular migration governance, instead, general laws and policies
regulating immigration and emigration, citizenship and those restricting aliens are applied.

Also, the study has revealed inconsistencies between Partner States’ laws and policies and that of the Community. For example, while the EAC frameworks anticipate common approaches such as cooperation and mutual coordination towards governance of irregular migration, the laws and practice in the Partner States do not reflect this spirit. In fact, save for a few sporadic operations, governance of irregular migration is executed solely by individual states.

Lastly, the study found that the EAC and Partner States’ institutions are ineffective to warrant efficiency in addressing irregular migration. This conclusion is supported by the findings that institutions responsible for irregular migration governance at EAC and Partner States’ level are fragmented, poorly coordinated and under resourced. The study has demonstrated that institutions lack technical capacity to govern irregular migration. This is attributed to a number of reasons including limited staff to service long and porous borders. Further, the challenge remains with ensuring inter-agency cooperation and coordination. This has in turn affected efficiency and capacity of institutions in governing irregular migration. Even where cooperation is forged, takes place out of any formalized arrangements and mostly lead to duplicity of activities among institutions. While Tanzania lacks migration coordination mechanisms among stakeholders, it was found that there are some notable efforts in Kenya and Uganda to address horizontal interagency coordination challenges through establishment of National Coordination Mechanism on Migration (NCM).

6.2 Conclusion

The conclusions made in this study were drawn based on the findings which affirm the hypothesis and its elements and thus, achieve the objectives of this study. Throughout this study it has been confirmed that the East African region is not spared of the problem of irregular migration. Indeed, it is clear that the region is the place of origin,
transit and destination of irregular migrants. Conflicts, search for economic opportunities, social and cultural ties, increasing role of smuggling and trafficking networks are among the key drivers of irregular migration in East Africa. The study has maintained throughout that if irregular migration remains ungoverned it will continue to cause adverse impact to the economy, security and wellbeing of individuals as well as communities involved in the entire migratory cycle. Among the important mechanisms to achieve governance of irregular migration, is development of adequate and effective legal, policy and institutional frameworks. Also, this can be achieved through harmonization of existing disparities in the rules and practices between Partner States and against the Community.

With regard to the nature of the EAC and selected Partner States’ laws, policies and institutions governing irregular migration, the hypothesis of this study has been proved that the said frameworks are significantly inadequate and ineffective to govern irregular migration. The study found a number of issues (as presented in findings section) leading to a conclusion that the legal, policy and institutional frameworks, at both levels, are inadequate, incoherent and ineffective to guarantee efficiency in irregular migration governance.

The study further proved the elements of the hypothesis that the existing legal, policy and institutional framework at both Community and selected Partner State’s level pose substantial challenges towards effective governance of irregular migration. The common challenges include lack of cooperation, poor coordination, proliferation of smuggling and trafficking networks and violation of fundamental rights of migrants. Also, data scarcity, lack of common information sharing system and protracted detentions and unlawful deportations form part of the critical challenges caused by the existing legal, policy and institutional frameworks.
6.3 Recommendations

It has emerged clearly from the findings of this study that a number of actions need to be taken if EAC and its Partner States want to adequately and effectively govern irregular migration in the region. Also, realization of regional strategies set by EAC to govern irregular migration implies recourse to a number of necessary actions at both Partner State and Community levels. Based on these premises and the study objectives, this study advances the following recommendations to Partner States and the EAC.

6.3.1 Recommendations to Partner States

In order to address the challenges related to inadequacy and ineffectiveness of laws, policies and institutions on irregular migration governance, Partner States may consider to:

(i) Engage national Parliaments, Law Reform Commissions and other stakeholders to amend or enact new legislation which address the challenges identified in this study. Specifically, the legislation should take a liberal approach by comprehensively addressing, *inter alia*, the drivers of irregular migration, fight organised criminal networks, increase legal migration opportunities and uphold solidarity and accountability among actors. Also, the reform should focus on proactive and durable anti-irregular migration measures as opposed to the current ones which are predominantly reactive and penal in nature.

(ii) Continue fulfilling their Treaty obligations assumed under Article 126(2)(b) of the EAC Treaty by prioritizing and speeding-up the exercise of harmonization of laws and policies affecting migration governance in the region. It is recommended that harmonization of national laws should be guided by a Community Act or model law as opposed to approximation process. To this end, Partner States should work to resolve challenges impeding the exercise of harmonization of laws including conflicting
commitments, technical and financial deficiency, poor coordination and slow pace in implementing Directives and Decisions. This will solve the problem of disparities of rules and practices throughout the region.

(iii) Kenya and Uganda should work hard to finalize the on-going process of making comprehensive migration policy. Tanzania, which does not have a migration policy, should learn from her neighbours by initiating the process for making a national migration policy. Policy development should be guided by the philosophy that migration needs to be governed/managed and not controlled.

(iv) Strengthen the capacities of Immigration Departments by increasing budgets for training of immigration officers, supply working facilities which are commensurate with contemporary technology and install necessary software for data capturing, storage and sharing. This will contributes to capacity building to officials, increase efficiency in surveillance activities and counter smuggling and trafficking networks.

(v) Strengthen cooperation and coordination among multi-stakeholders. This should involve partnership between Immigration Departments across EAC Partner States, horizontal cooperation between Immigration Departments (as lead agencies) and other departments in the sectors of, for instance, economy, security, population, social welfare and justice. Also, inter-institutional networks and partnerships with the private sector, diaspora communities, association of employers and owners of accommodation business, academic and trade unions should be established.
6.3.2 Recommendations to EAC

At the Community level, we recommend the following:

(i) The EAC Peace and Security Protocol and EAC Protocol on Foreign Policy Coordination should clearly provide the means to achieve various common measures, strategies and programmes they outline. Particularly, amendment to these Protocols should seek to ensure establishment and implementation of a common system for managing and sharing migration information.

(ii) Obligations related to development of common policies, measures and strategies; establishment of regional database on cross border crimes; establishment of cross border and inter-state communication system; regional migration coordination mechanism, and entering agreements with third countries and other regions and sub-regions be born collectively under the auspice of EAC. In this aspect, the EAC can learn from EU model.

(iii) Solidarity between EAC, Partner States, international organizations and countries of origin, transit and destination is imperative towards achieving repatriation programs for the apprehended irregular migrants. This will help in reducing the burden which usually is borne by the deporting country.

6.3.3 Recommendations for Further Research

Irregular migration and its governance attracts different research designs, contexts, themes and it is exposed to many theories. For example, a study trying to understand the factors for internal and international irregular migration can be approached differently from sociological, historical, political, demographic and economic perspectives. The scope of this study was limited to examining the adequacy and effectiveness of EAC and selected Partner States’ laws, policies and institutions towards governance of irregular migration in the region. This means, other aspects were not addressed exhaustively or they fell-out of our study completely. Therefore, it
would be important to have more studies with broader scope encompassing different dimensions of irregular migration. Specifically, we recommend further studies on:

(i) Cross-border demographic trends and the causal factors underpinning them. This will help to explain the nature, trends and forces behind intra- and extra-regional movement of people in the EAC territory. Considering the breadth of such study, we recommend that it should be done by a team comprising members drawn from different disciplines.

(ii) There is a need to study the state of human trafficking and smuggling in the EAC region. This will re-assess and update the existing studies on evolving issues in irregular migration. For example, a current study on the modus operandi used by traffickers and smugglers and the socio-economic impact of trafficking and smuggling in the region will help policy makers and legislators in their efforts to govern transnational crimes. For the purpose of capturing broader picture of the trends, the study should reflect both rural and urban situations. Since the nature of such studies require technical and financial capacities, we recommend partnership between IOM, UNODC, EAC Secretariat and States’ authorities.

(iii) A study on the impact of irregular migration to asylum process and access to refugee protection and the state of migrant rights in general. This study has revealed that in some instances measures aimed at governing irregular migration threaten enjoyment of protection extended to refugees under the 1951 Convention. Also, some irregular migrants and their criminal agents tend to misuse asylum channel in attempts to circumvent immigration procedures. Particularly, the study should find out the extent anti-irregular migration measures have contravened the principle of non-refoulement of refugees and affected a range of refugee rights. The findings from such a study would help to avoid indiscriminate measures which affect persons who deserve international protection.
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218


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