EQUALITY OF TREATMENT IN SOCIAL SECURITY: CASE OF MIGRANT WORKERS IN THE EAST AFRICAN COMMUNITY

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A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY OF THE OPEN UNIVERSITY OF TANZANIA

2018

CERTIFICATION

The undersigned certify that they have read and hereby recommend and approve for acceptance by the Open University of Tanzania a thesis entitled "**Equality of Treatment in Social Security: Case of Migrant Workers in the East African Community"** in fulfilment of the requirement for the award of the degree of Doctor of Philosophy (PhD) of the Open University of Tanzania.

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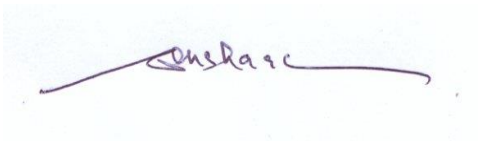

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……

Signature

……

Date

DEDICATION

To my beloved son Baraka Ombeni Rindstone Bilabamu, my wife Rose, my Mom Peresiah and my Father Ezekiel for their strong love and prayers for me.

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Any errors, mistakes, omissions or any shortcomings arising from this thesis remain my sole responsibility.

ABSTRACT

This thesis investigates the extent to which the legal framework in the EAC comply with international law and regional instruments applicable in enforcement of the right to equal treatment of migrant workers and nationals in the area of social security. The thesis uses Kenya and Tanzania as case studies. The research questions that guided the study are: Do the EAC social security legal frameworks comply with and promote the international and regional standards of equality of treatment in social security for migrant workers? Which specific conditions existing in both Kenya and Tanzania that affect the rights to equal treatment in social security for migrant workers? What model fits EAC context for implementation of the right to equal treatment in social security for migrant workers? The methods used were doctrinal legal scholarship that applies normative analysis of legal content; the human rights research methodology as emerging discipline that examines the impact of international human rights treaties on domestic jurisdictions; comparative legal analysis and some empirical methods. The results show that legal framework of EAC countries and the Community have inefficient compliance with international and regional instruments relating to equal protection migrant workers and nationals in social security. The EAC law and international norms lack direct and effective application in national jurisdictions of Partner States and these cause inefficient compliance with international standards in social security. The thesis recommends, among other, adoption of strong supranational legislation that permits EAC legislation and ratified international instruments to directly and effectively apply in national jurisdictions of all EAC Member States where national laws appear devoid of remedy. Also, a clear policy is required to compel all Partner States to ratify all international instruments impacting on EAC Treaty objectives such as observance of equal treatment, human rights, social justice, and rule of law. A common strategy for effective domestication of international treaties and facilitation of harmonisation of social security laws is recommended so as to realise the objectives of the Common Market. Finally, possible model Agreement on social security for equal treatment of migrant workers is recommended for EAC countries to emulate.

TABLE OF CONTENTS

CERTIFICATION ii

COPYRIGHT iii

DECLARATION iv

DEDICATION v

ACKNOWLEDGMENTS vi

ABSTRACT xi

TABLE OF CONTENTS xii

LIST OF LEGISLATION xvii

LIST OF ACRONYMS AND ABBREVIATIONS xxv

CHAPTER ONE 1

1.0 INTRODUCTION 1

1.1 Background 1

1.2 Statement of the Research Problem 3

1.3 Research Objectives 8

1.3.1 General Objective 8

1.3.2 Specific Objectives 8

1.4 Significance of the Study 9

1.5 Research Questions 12

1.6 Research Methodology and Sources 12

1.7 Scope and limitation of the Study 19

1.8 Literature Review 22

1.9 Thesis Outline 47

1.10 Conclusion 48

CHAPTER TWO 50

2.0 CONCEPTS AND THEORIES OF EQUALITY OF TREATMENT IN SOCIAL SECURITY IN INTERNATIONAL LABOUR MIGRATION 50

2.1 Introduction 50

2.2 Concepts relating to social security rights and labour migration 50

2.2.1 Equality of Treatment 50

2.2.2 Migrant Worker 53

2.2.3 International Labour Migration 54

2.2.4 Social Security 58

2.2.5 Harmonisation 61

2.2.6 Co-ordination 64

2.3 Theoretical Framework 69

2.3.1 Theories of Equality of Treatment 69

2.3.2 Theories of International Labour Migration 73

2.3.3 Theories of Social Security 80

2.4 Relevance of concepts and theories to the research 86

2.5 Conclusion 89

CHAPTER THREE 91

3.0 LEGAL FRAMEWORK FOR EQUALITY OF TREATMENT IN SOCIAL SECURITY FOR MIGRANT WORKERS 91

3.1 Introduction 91

3.2 Protection of Migrant Workers under International Law 91

3.2.1 Protection of Migrant Workers Under International Human Rights Law 92

3.2.2 Protection of Migrant Workers Under International Labour Standards 100

3.3 Protection of Migrant Workers under Regional Instruments.....110

3.3.1 Europe 110

3.3.2 Latin Americas.....125

3.3.3 Africa 136

3.4 Conclusion 151

CHAPTER FOUR.....152

4.0 LEGAL FRAMEWORK FOR PROTECTION OF SOCIAL SECURITY RIGHTS OF MIGRANT WORKERS IN THE EAC.....152

4.1 Introduction.....152

4.2 Political History 152

4.3 Population and Migration 155

4.4 Rights to social security for labour migrants during Colonial Era 159

4.5 Principles of Equality of Treatment in Social Security for Migrant Workers.....161

4.5.1 EAC Treaty Provisions 161

4.5.2 National Constitutions 182

4.6 Harmonisation of Social Security Laws in The EAC 188

4.6.1 Foundation of Harmonisation 188

4.6.2 Aims and Processes of Harmonisation of Social Security Laws 194

4.6.3 Challenges of Harmonisation of Social Security laws.....199

4.7 Conclusion 208

CHAPTER FIVE 210

5.0 EQUALITY OF TREATMENT IN SOCIAL SECURITY FOR MIGRANT WORKERS IN KENYA **210**

5.1 Introduction 210

5.2 Political History 210

5.3 Labour Migration 212

5.4 Social Security Policies 214

5.5 Kenya Treaty Practice 221

5.6 Legal Framework for Protection of Migrant Workers 226

5.7 Compliance to International Law on Equality of Treatment in Social Security for Migrant Workers 252

5.7.1 Compliance to ILO Instruments Concerning Social Security 252

5.7.2 Compliance to Human Rights Treaties relevant to Social Security 259

5.7.3 Compliance to Regional Instruments 273

5.8 Conclusion 286

CHAPTER SIX 287

6.0 EQUALITY OF TREATMENT IN SOCIAL SECURITY FOR MIGRANT WORKERS IN TANZANIA 287

6.1 Introduction 287

6.2 Political History 287

6.4 Social Security Policy Framework in Tanzania Mainland 294

6.5 Tanzania Treaty Practice 298

6.5.1 Concept of Treaties and Some Theories in International Law 298

6.5.2 Post-Independence Succession to Multilateral Treaties and Current Treaty Practice in Tanzania 304
6.6 Legal Framework for Protection of Migrant Workers 306
6.6.1 Constitutional Guarantee to Equality of Treatment in Social Security 306
6.6.2 Legislation Impacting on Protection of Migrant Workers' Rights to Equal Treatment in Social Security 310
6.7 Compliance to International Law on Equality of Treatment in Social Security for Migrant Workers 331
6.7.1 Compliance to ILO Instruments Concerning Social Security 331
6.7.2 Compliance to Human Rights Treaties relevant to Social Security 345
6.7.3 Compliance with Regional Instruments 357
6.8 Conclusion 371
CHAPTER SEVEN 373
7.0 SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATION 373
7.1 Introduction 373
7.2 Summary of Findings 373
7.3 Conclusion 393
7.4 Recommendations 396
7.5 Future Research Agenda 405
BIBLIOGAPHY 407
APPENDIX 439

LIST OF LEGISLATION

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LIST OF TABLES

Table 5.1: Selected legislation impacting on rights to equal treatment between nationals and migrant workers in Kenya since colonial era up until October, 2017 439

Table 5.2: Kenya's status of ratification of ILO conventions impacting on social security for Migrant workers up until October, 2017. 442

Table 5.3: Kenya's ratification of international human rights instruments which indirectly or directly impact on the right to social security for migrant workers up until October, 2017 443

Table 5.4: Kenya's Ratification of Regional Treaties impacting on the Equality of treatment and right to social security for migrant workers up until October 2017 444

Table 6.1: Summary of status of current Tanzania's legislation on treatment between nationals and migrant workers.....445

Table 6.2: Status of Ratification of selected ILO Conventions impacting on Social Security for migrant workers in Tanzania up until 2017 448

Table 6.3: Tanzania's ratification of selected international human rights instruments impacting on equality of treatment in the right to social security for migrant workers up until 2017.....449

Table 6.4: Tanzania's status of ratification of selected regional instruments impacting on equality of treatment and right to social security for migrant workers up until 2017 450

LIST OF ACRONYMS AND ABBREVIATIONS

AC	Appeal Cases
ACHPR	African Charter on Human and Peoples' Rights
ACP	Africa, Caribbean, and Pacific Regional Cooperation
AG	Attorney General
AHRLR	African Human Rights Law Reports
AHRLJ	African Human Rights Law Journal
AIDS	Acquired Immunodeficiency Syndrome
All ER	All England Law Reports
AMADPOC	African Migration and Development Policy Centre
ATS	Antarctic Treaty System
AU	African Union
CAP	Chapter
CARICOM	Caribbean Community
CEDAW-OP	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee of Economic Social and Cultural Rights
CETS	Council of Europe Treaty Series
CFR-EU	Charter of Fundamental Rights of the European Union
CHF	Community Health Fund
CJEU	Court of Justice of the European Union
CLPE	Comparative Law and Political Economy
CMP	Common Market Protocol
CMS	Common Market Scorecard

CRNM	Caribbean Regional Negotiating Machinery
CSME	CARICOM Single Market and Economy
COMESA	Common Market for East and Central Africa
CRC-OP-II	Optional Protocol II to the Convention on the Rights of the Child
CRC- OP	Optional Protocol to the Convention on the Rights of the Child
CRPD- OP	Optional Protocol to the Convention on the Rights of Persons with Disabilities
CTC	Counsel to the Community
DANIDA	Danish International Development Agency
DFID	Department for International Development
DOC	Document/Documented
EA	Eastern Africa Law Reports
EAC GFS	East Africa Community General Services Fund
EAC CMP	East African Community Common Market Protocol
EACJ	East African Court of Justice
EADB	East African Development Bank
EC	European Community
ECOWAS	Economic Community of West African States
ECJL	European Community Law Journal
ECR	European Court Reports
Edn	Edition
Eds	Editors
eKLR	Electronic database Kenya Law Reports
ESA	Economic and Social Affairs

ETS	European Treaty Series
GEPF	Government Employees Pensions Fund
GSF	General Services Fund
HIV	Human Immunodeficiency Virus
HRQ	Human Rights Quarterly
HURIPEC	Human Rights and Peace Centre
ICCPR	International Covenant on Civil and Political Rights
ICCPR OP-1	Optional Protocol I to the International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICESCR-OP-I	Optional Protocol (I) to the International Covenant on Economic, Social and Cultural Rights
ICESCR- OP	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
ICPRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IDP	Internally Displaced Person
IGAD	Intergovernmental Authority on Development
IJRASS	International Journal of Research in Arts and Social Sciences
I. L. C	International Labour Conference
ILO	International Labour Organisation
IMISCOE	International Migration, Integration and Social Cohesion in Europe

IMR	International Migration Review
IOM	International Organization for Migration
ISSA	International Social Security Association
JCMS	Journal of Common Market Studies
LAPF	Local Authorities Pensions Fund
LDCs	Least Developed Countries
LLRN	Labour Law Research Network
KAIS	Kenya AIDS Indicator Survey
KDHS	Kenya Demographic and Health Survey
KHRC	Kenya Human Rights Commission
KIHBS	Kenya Integrated Household Budget Survey
KNASP	Kenya National AIDS Strategic Plan
MDG	Millennium Development Goals
MERCOSUR	Mercado Comun del Cono Sur/Mercado Común Sudamericano (Spanish) (Southern Cone Common Market)
MOMS	Ministry of Medical Services
MOPHS	Ministry of Public Health and Sanitation
NASCOP	National AIDS/STI Control Program
NESRI	National Economic and Social Rights Initiative
ND	No date
NSSF	National Social Security Fund
NHSSP	National Health Sector Strategic Plan
MLC:	Maritime Labour Convention
NCMs	Non-Conforming Measures

NHIF	National Health Insurance Fund
NO	Number
NTBs	Non-Tariff Barriers
NZJPIL	New Zealand Journal of Public and International Law
OAU	Organization of African Unity
O.J.C	Official Journal of the European Community
OECD	Organisation for Economic Co-operation and Development
OSHA	Occupational Safety and Health Act
OSHC	Occupational Safety and Health Convention
Para	Paragraph
PPF	Parastatal Pensions Fund
PSPF	Public Service Pensions Funds
PWD	Persons with Disability
QJE	Quarterly Journal of Economics
R	Republic
R.E	Revised Edition
RECs	Regional Economic Communities
Ref	Reference
RESC	Revised European Social Charter
Reg.	Regulation(s)
Revd	Revised
Rev.Ed	Revised Edition
SADC	Southern African Development Community
SA Merc. LJ	South African Mercantile Law Journal

SPS	Phytosanitary Standards
TBTs	Technical Barriers to Trade
Supp	Supplement
U.K	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNTC	United Nations Treaty Collection
UNHCR	United Nations High Commissioner for Refugees
U.S	United States
USA	United States of America
UCL HR	Union for Civil Liberty Human Rights Review
UHC	Universal Health Coverage
V	Versus
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
WCF	Workers Compensation Fund
WHO	World Health Organization

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background

The subject of freedom of movement, provision of social security, and the right to equal treatment of migrant workers and nationals in social security benefits provisioning are among important ingredients of international labour standards and international human rights law. They are amongst key issues forming the agenda for speedy improvement of standards of living of the peoples in the world. The subject of equality of treatment in social security for migrant workers is equally relevant in the far-reaching and wide-ranging integration objectives in the East African Community (EAC) countries (hereinafter referred to as "the EAC"). Different legal rules in different EAC Partner States constitute a risk because, common policy choices may not be efficiently implemented because of lack of standard or uniform harmonisation and concrete regulation on coordination rules regarding the right to social security within EAC regional economic Community. The EAC strives to build a strong, sustainable and balanced common market that also aims at protecting workers participating in intra-regional labour mobility.

While the freedom of movement across national borders does generate significant numbers of migrants, more often than not, these migrants enjoy limited social security rights and protection in many parts of the world including in the EAC. Quite often, migrant workers find that they have very little to show at home after their lifetime of hard work. While that is seen to be the case, international migration cannot and should not be curtailed or stopped for reasons of social economic

insecurity. That is because freedom of movement is an internationally recognized human rights issue under international human rights law.[1] Equally, social security is recognized as an important element of international human rights law.[2]

Some common push and pull factors for intra-region labour migration in the EAC include conflict prone environments, unemployment in these countries, and poverty. It is important to mention that, increased migration for employment across national borders has always tended to produce, among other things, a range of socio-economic challenges pertaining to the right to work and equal treatment in social security in a foreign territory. The legal rights to social security and equality of treatment between nationals and migrant workers in the EAC are interpreted differently and implemented differently within individual Member States. Concerns exist among EAC countries particularly worrying that if foreign workers are allowed to take up employment and utilise social services on equal footing with nationals without strict control, it may lead to complaints among local workers and general citizens. This kind of concern exists because majority of nationals in each Partner States are unemployed. Moreover, over 90 percent of the population does not benefit from existing formal social security schemes which are largely employment based contribution schemes.

There are some apprehensions that, migrant workers are likely to turn into permanent residents and this will likely in long run, put added pressure on limited government

[1] See Seatzu, F., "The Right to Social Security under Article 9 of the International Covenant on Economic, Social and Cultural Rights", *Chinese (Taiwan) Yearbook of International Law and Affairs*, 2010, Vol. 28 No.191, p. 35.

[2] ILO, Social security and the rule of law: General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (articles 19, 22 and 35 of the Constitution), ILC, 100th Session, 2011, pp.5-61.

resources of host countries.[3] Most often, nationals of host states tend to believe that, migrant workers will compete with nationals for the use of social services, social welfare systems such as hospitals, schools, housing, and social security benefits, leave alone competing for employment. These peoples' perceptions continue to create some mixed political feelings in the EAC. Some of the feelings manifest themselves in some various forms of political pressures surrounding the perception depending on different categories of people.

Despite the fact that, the concept of equality of treatment is a noble concept among common humanity, in practical terms, it seems to contribute to scaring millions of unemployed people in respective countries of the EAC. To what extent a foreign worker enjoys equal treatment upon getting the right of residence is an issue to be investigated particularly in context of the rights to social security. This research attempts to investigate and establish to what extent the EAC countries comply with international principles of equality of treatment in social security for migrant workers. A profile of compliance is sought to be drawn and gap identified for possible amelioration of the state of social insecurity for migrants community in the EAC region.

1.2 Statement of the Research Problem

According to the Treaty establishing the EAC of 1999 , it is provided in Article 104 that the Partner States have agreed to adopt measures to achieve the free movement of persons, labour (workers) and services and to ensure the enjoyment of the right of

[3]See Oucho. L.A, *"Kenyan and Tanzanian Citizens' Perceptions of and Attitudes toward their Diasporas",* A report of a study presented to the Joint African Migration and Development Policy Centre (AMADPOC) & British High Commission, Seminar held in Nairobi, 12 June 2012, pp.1-12.

establishment and residence of their citizens within the Community. This includes harmonising their labour policies, programmes and legislation including those on occupational health and safety and to maintain common employment policies. Also, Article 130 (1) of the EAC Treaty, 1999 provides that in honouring the international organisations and development partners, Partner States shall honour their commitments in respect of other multinational and international organisations of which they are members, of which most international human rights instruments emphasize the observance of rule of law by national States.[4]

Equally, the EAC Treaty, 1999 in Article 6 stipulates that observance of the rule of law is one of the fundamental principles for promoting social justice, equal opportunities, as well as the recognition, promotion and the maintenance of universally accepted standards of human rights protection as provided in Article 6(d) and Article 7(2) of the Treaty. The Partner States have undertaken in the Treaty to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones, which means national laws should subordinate to EAC law as provided in Article 8 (4) of the EAC Treaty. This works together with the undertaking made by Partner States in Article 8(2b) of the Treaty to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in the Treaty, the force of law within its territory by securing enactment of effective laws for efficient implementation of the objectives of the Community.

[4] See *Treaty for Establishment of EAC, 1999* (as amended in 2006 and 2007), Art.130 (1).

Among core principles of existing regional organisations in the world is compliance to the principle of equality of treatment of nationals of Partner States in all matters falling under the integration[5]. This principle exists also in Article 6d and 7(2) of the EAC Treaty, 1999. The EAC CMP, 2009 also provides in Article 3(2b) that Partner States shall accord treatment to nationals of other Partner States that is not less favourable than treatment accorded to third parties. Also it provides in Article 3(2a) that Partner States shall observe the principle of non-discrimination of nationals of other Partner States on grounds of nationality. The latter includes cooperation in the implementation of the rights to social security for benefits of nationals of Partner States. However, there is unclear state of the unity or harmonisation of applicable legislation particularly as to whether the social security rights of EAC nationals participating in intra-regional labour migration are effectively provided for in national laws. It is unclear as to whether the rights of EAC citizens, particularly rights of migrant workers in the area of social security in the course of intra-regional labour migration are legally protected in national jurisdictions. Whether there exists efficient legislation or common legal instruments to facilitate the EAC regional wide coordination and harmonisation of social security for achieving equality of treatment of migrant workers and nationals across national borders of the Partner States remains unclear.

Consequently, the problem that arises is to what extent migrant workers crossing national borders for employment can be uniformly guaranteed of legal protection in

[5]See McCrudden, C., and Prechal, S., "*The Concepts of Equality and Non-Discrimination in Europe: A practical approach",* (European network of legal experts in the field of gender equality), Report prepared for the use of the European Commission, Directorate-General for Employment, Social Affairs and equal Opportunities, European Commission, 2009, pp.3-4.

social security benefits accessibility within the legal framework of the EAC Treaty, 1999 and its protocols in compliance to international labour and human rights norms. Equality of treatment between nationals and migrant workers in social security will remain incomplete if there is no strong common legal mechanism for regulating cross-border social security benefits provisioning and coordination of social security systems in the EAC on equality principle. Certain legal conditions that exist within EAC countries hosting or sending migrant workers determine the nature of guarantee of migrants' rights to social security and legal protection. This is viewed in terms of status of legislative compliance with international labour and human rights standards concerning equality of treatment in social security for migrant workers.

According to Sabates-Wheeler[6] social protection for international migrants consists of four main components. These components may be described as: labour market conditions for migrants in host countries and the recruitment process for migrants in the origin country; access to informal networks to support migrants and their family member; access to formal social protection which implies social security and social services in migrants' receiving (host) countries and migrants' sending (origin) countries; and portability of vested social security rights between migrants' receiving(host) and sending (origin) countries.

In the context of the research problem stated in this sub-section, there is a need for in-depth investigation of the EAC Member States' profile of compliance with

[6] Sabates-Wheeler, R., *"Social security for migrants: Trends, best practice and ways forward",* ISSA Working Paper No. 12 on Examining the Existing Knowledge on Social Security Coverage Extension, ISSA, Geneva, 2009, pp. 1-25.

international labour standards, human rights and EAC regional instruments concerning the right to equal treatment of migrant workers and nationals in the subject of social security within the EAC. This has been triggered by the fact that the extent to which the EAC partner States have in place common and uniform or co-ordinated legal frameworks or legal mechanisms for enforcement of social security rights of migrant workers remains unclear. Social security schemes among the EAC countries remain fragmented and internally un-harmonised.

Regional wide instruments for effective and comprehensive implementation of cross-border coordination of social security benefits remain unclear. Apparently, it is unclear if at all there are specific and consistent operating regional wide legal rules or principles of enforcement of social security rights across the EAC based on equality principle. This apparent gap is microscopically viewed through various legal provisions in different national social security legislation of EAC countries. But also gap is viewed in the context of status of compliance with international human rights instruments, international labour standards, and EAC regional instruments that have a bearing on the right to equal treatment in social security as between nationals and foreign labour migrants. This research investigates, among other things, the EAC regional and national legal framework and related conditions pertaining with compliance to standards of legal protection of labour migrants in social security rights based on application of equality principles in conformity to international legal norms.[7]

[7] See Stahl, C., "*Trade in Labour Services and Migrant Worker Protection with Special Reference to East Asia", International Migration*, 1999, Vol. 37 (545-68) at p. 548.

1.3 Research Objectives

1.3.1 General Objective

The aim and general objective of this study is twofold; first to establish as whether there is clear common EAC social security legal framework (if any) that governs social security rights and its administration to migrant workers in the region. Secondly, it is to examine challenges facing the EAC countries in aligning national laws with international labour standards and UN human rights instruments and East Africa regional instruments impacting on the right to social security in the promotion of equality of treatment of migrant workers in the EAC region.

1.3.2 Specific Objectives

In order to achieve the above stated general objectives of the study, the following important specific objectives will guide this research.

i) To examine and ascertain the legal framework concerning protection of social security for migrant workers in the EAC and assess as to whether it complies with and promotes international labour and human rights standards.

ii) To investigate the nature of national policies and legal framework that regulate the right to equal treatment in social security for migrant workers in the countries of Kenya and Tanzania and establish if they comply with international labour and human rights standards and ratified EAC regional instruments.

iii) To explore a possible model of legal framework for equality of treatment in social security for migrant workers that be emulated by EAC countries in addressing the challenges of compliance with international standards and regional instruments.

1.4 Significance of the Study

The justification or significance of this study and its nature lays in the reason that, within the EAC, the movement towards reaching comprehensive harmonisation or coordination of laws for free movement of labour, goods, services and capital as well as the right of residence and the right of establishment have created the wave of migrant workers in the region. However, the desire to attain full harmonisation of laws has not seen much progress in place regarding harmonisation of national laws towards comprehensive legal framework for social security rights across or beyond the EAC borders for advantages of migrant workers.

Moreover, there have been some apprehensions among the citizens of the Community that, migrant workers in the EAC countries are, *inter alia*, not treated as equals with nationals in social security benefits accessibility in individual countries in benefits exportability, qualifying for long term benefits and other benefits. Some complaints among EAC citizens crossing borders for doing business in Partner States suggest a state of unstable EAC economic integration due to continued impediments arising from non-tariff barriers and continued failure by Partner States to abolish work permits across the EAC region. There are still impediments to the free movement of goods, labour and services, as Partner States continue to erect non-tariff barriers despite the Common Market Protocol having come into force since July 2010. Some of these challenges retard the EAC integration. Some of these challenges make harmonization of laws of Partner States a difficult endeavour to achieve.

To what extent migrant workers are legally protected under national social security systems and social assistance programmes of the EAC countries is presented in the context of national policies of the selected countries in the study. The outcome of this study has added knowledge on the nature and extent of existing gap within the social security legal frameworks of both Kenya and Tanzania pertaining equal social security benefits provisioning for migrant workers in relation to treatment of national workers. It has also shed light on the EAC's regional bloc's state of compliance with international standards on social security and human rights principles. Social security principles (the principle of solidarity fund, principle of replacement of income, and the principle of equality)as enshrined in various international human rights instruments and international labour conventions have been shown to have a bearing on equal social security rights between migrant workers and nationals.

Since the EAC countries have agreed to promote free movement of labour, persons, capital, goods and services and the right of establishment and residence within the region, this study is significant as it has shed light on the state of legal compliance with the EAC regional treaties. The extent to which Kenya and Tanzania have attempted to review their social security laws towards harmonisation in line with EAC law has been demonstrated. However, the study has shown the state of continued predominance of application of national social security laws.

Although the Treaty for the Establishment of the EAC of 1999 and the EAC Common Market Protocol of 2009 have been on gradual implementation in the Partner States, yet Member countries have not sufficiently harmonised their social security laws to conform to those of the Community. Partner States have not

adequately implemented their treaty obligations as contained in the harmonising instruments of the Community. As a result, the EAC regional wide policy and law are trailing too slowly toward superseding country‑specific policies and laws. Therefore, primacy of EAC law is yet to be realised.

This study will be useful because it has established existing social security legal frameworks for extension of social security benefits to migrant workers among some EAC countries and apparent hurdles toward implementation of international standards of protection of migrant workers. The study has shown substantial weaknesses or gaps in compliance aspects among EAC countries. The presented national profiles of compliance with relevant international labour standards, UN human rights instruments and regional treaties have shown existing national legislative and implementation gaps impacting on migrants' rights to social security at individual country level and at the EAC regional level.

This study is significant because expenditures for social security programmes for migrant workers within the EAC have not yet been comprehensively examined to allow any specific account of how much money these countries spend in social welfare programmes. National social welfare budgets for provision of social security benefits to migrant workers in the EAC countries in any fiscal year are not ascertainable because there is absence of accurate, reliable and well-established comprehensive national and regional wide statistical data concerning EAC migrant workers.

The EAC appears to have no reliable data on exact number of migrant workers who receive social security benefits within the Community of Member States and beyond

national borders. Reliable data on cross-border payment of labour immigrants' contributions to their respective national social security schemes in host States remains un-coordinated within the Community. Therefore, this study will be useful for policymakers, law makers, social security schemes administrators, researchers and anyone interested in understanding the EAC social security systems and labour migration challenges within the region.

1.5 Research Questions

Three research questions have guided the researcher in reaching to the answers to the problem of this study.

i. Does the legal framework in the EAC countries comply with and promote the principle of equality of treatment in social security for migrant workers under international labour, human rights and regional instruments?
ii. What are specific conditions in Kenya and Tanzania that affect the rights to equal treatment in social security for migrant workers?
iii. What is the appropriate model or framework of implementation of equality of treatment in social security for migrant workers that can be adopted by the EAC countries?

1.6 Research Methodology and Sources

In order to accomplish this study, a number of methodologies and sources have been utilized. A traditional doctrinal legal scholarship which applies various legal concepts in the subject, values and norms, and other precepts for this specific study, have been used. The researcher analysed the primary legal authorities which are

basic constitutions, statutes, authorized statements of law issued by governmental and regional bodies, treaties, conventions, protocols, charters, codes or subsidiary legislations or regulations or rules, orders, decided cases (court opinions and other similar documents that carry the force of law.

These primary authorities which can be either mandatory (binding) or persuasive (non-binding) were critically analysed in order to generate a synthesized qualitative report. Thus, doctrinal legal research provided an understanding of the basic types of law, legal resources, and subject terms that aided the process of interpretation.[8] Doctrinal legal research is the methodology most used by legal scholars and it may be combined with non-doctrinal (socio-legal) research methodology[9]. This combined or mixed method of research is essentially an intellectual and practical synthesis based on qualitative research.

Mixed method research recognizes the importance of traditional research but also offers a powerful third paradigm choice that often provides the most informative, complete, balanced, and useful research results. Johnson, Onwuegbuzie and Turner [10] have argued that doctrinal research is otherwise known as library-based research. Thus, legal research is the search for authority that can be applied to a given set of facts and issues. The universe of potentially useful authority is vast, and good

[8] See McConville, M. and Wing, H. C (Eds), *Research Methods for Law*, Edinburgh University Press, Edinburgh, 2007, pp. 3-5; Rubin, E. L., "The Practice and Discourse of Legal Scholarship", *Michigan Law Review*, 1988, Vol.86, pp. 1835-1905.

[9] See Dobinson, I., and Johns, F., "Qualitative Legal Research", in: McConville, Mike and Wing, Hong Chui, (Eds), *Research Methods for Law*, Edinburgh University Press, Edinburgh, 2007, pp.17-19.

[10] Johnson, R.B., Onwuegbuzie, A. J., and Turner, L.A., Toward a definition of mixed methods research", *Journal of Mixed Methods Research*, 2007, Vol.1, No. 2, pp.112-133 at 129.

researchers have well-developed analysis skills in addition to an understanding of the techniques and efficiencies of doing legal research using special tools and techniques, both print and electronic.

Analysis of important classes of legal secondary sources of law which include received laws, international law (treaties, charters, conventions, and protocols issued by United Nations bodies), international reports, legal periodical articles, bills, guidelines, legal treatises, restatements, and loose-leaf services, were employed. All these provided insights to the author while addressing the aim and objectives of the study. Also, the doctrinal legal scholarship[11] approach involved critical examination or intellectual analysis, which involves clarification of key legal instruments including the use of electronic research systems that offer tremendous advantages to researchers by offering large databases of both primary sources and secondary sources.

In doing this study, the secondary sources of legal materials included, among others, experts' commentary on the various but relevant laws, court decisions, legal opinions, treatises and such similar authentic explanations by renowned jurists. The author used secondary sources for three different purposes: firstly it was so educative to the researcher about the law and practice in different contexts, secondly it directed the researcher to the primary law, and thirdly it served as persuasive authority. Another legal research methodology that was used in this research is the comparative legal analysis as understood in comparative law. Comparative law may be defined as:

[11]Singhal, A. K. and Malik, I., "Doctrinal and socio-legal methods of research: merits and demerits", *Educational Research Journal*, 2012, Vol. 2, No.7, pp.252-256,

> *"a method of study of various legal phenomena and various legal systems that lays out an important role in the interpretation of legal norms pertaining to various legal systems, as well as in the adaptation of one socio-legal system to another".*[12]

Therefore, the comparative legal analysis was used by making comparisons on the status of relevant legal instruments under the legal frameworks of the EAC regional bloc and individual countries under investigation. Also, it became necessary to offer a comparison between the legal frameworks of the EAC regional bloc and individual countries and the international conventions and treaties and other regional models in as far as they are relevant and apply in the jurisdictions under investigations in the context of this study. Comparative legal analysis was mainly done at the EAC regional level in relation to individual EAC partner states under the present case studies. This was done with a view to detecting any positive trend among individual countries under case study towards complying with international labour and human rights standards as well as ratified regional treaties or instruments regarding legal protection of migrant workers in social security in the EAC region.

Occasionally, a comparative legal analysis approach was utilized drawing experience from prototype regional organisations in the developing and developed social security legal systems that have implemented the principles of equality of treatment in social security for migrant workers for a long period of time. Such systems include those existing under the EU social security coordination law[13], the Caribbean and Latin America countries as well as the ECOWAS model. All these have

[12] See Bashkir,K.D. I.,"Comparative Law: Method, Science or Educational Discipline?" ECJL, 2003, Vol. 7, No. 3, pp.1-7; Wilson, G., "Comparative Legal Scholarship", in McConville, Mike and Wing, Hong Chui, (Eds), *Research Methods for Law*, Edinburgh University Press, Edinburgh, 2007, Chap.4.

[13] See ILO, *Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No 883/2004*; see also *EC Implementing Regulation No 987/2009/2010*, retrieved at < http://ec.europa.eu/ social/>, accessed 20 March, 2015.

provided insights and understanding on how they deal with the regional-wide harmonisation and co-ordination of social security benefits provisioning. This was done while examining the implementation of the principle of equality of treatment in social security for migrant workers.

Comparative legal analysis method was used because it involved studying foreign law, domestic law, international law, and regional integration law. This was helpful in making value judgment on issues of national legislative and constitutional trends in the context of treaty practice of countries under case study in this thesis. In so doing, it was also possible to make comparisons of social security legislations and constitutions of both Kenya and Tanzania. Although comparative legal analysis approach does not deal with analysis of a body of rules and principles of substantive law, the method was primarily used to provide the researcher with a way of looking at constitutional problems and national social security legal frameworks in entrenching social security and equality of treatment as human rights issues.

The methodology provided insights on features of different social security institutions under different national legal frameworks and problems in the context of national legal systems of the EAC countries, particularly in the selected case studies of Kenya and Tanzania. By using the comparative legal analysis method in addition to other methodology already described, it became possible for the researcher to gain considerable critical insights on compliance challenges facing the EAC countries. Such gained insights were useful to the author when making considered opinions and recommendations on way forward. This opportunity would have been denied to the

researcher if he had to limit his study purely to the law of a single country. The objective of applying comparative legal scholarship methodological approach in addition to other research approaches was to lay down a comparative platform that would form the basis for the EAC countries to make self-evaluation of their national social security legal frameworks and regional-wide gaps in portability of benefits. This was helpful in shaping the researcher's recommendations.[14]

As regards data analysis, the researcher used rules of statutory interpretations, various forms of legal reasoning such as deductive reasoning *(from general to particular legal principles)* and inductive reasoning *(from particular to general or particular to particular).* Each one of these methods was applied in specific appropriate circumstances in this study, where it became useful. Since the right to social security and equality of treatment of migrant workers are also the subjects falling under the broader theme of international human rights law, the *human rights research methodology* was employed as well.[15]

The *human rights research methodology* is akin to evidence gathered for a legal argument rather than analysis in the tradition of social science. The human rights reporting approach aims at documenting global and national patterns of human rights violations. It actually exposes the perpetrators, institutions, policies and systems of

[14] See also such comparative study by Ackson, T., "The role of the law of regional organisations in reforms of social protection systems: Portability of social security benefits in the East African Community", in Bender, K., Kaltenborn, M., andPfleiderer, C. (eds.), *Social protection in developing countries: Reforming systems*. Routledge, London and Oxford, 2013, pp.74-82.

[15] See Weissbrodt, D., "Human Rights Missions: A Study of the Fact-Finding Practice of Non-Governmental Organizations by Hans Thoolen and Berth Verstappen- Book Review",*HRQ,* 1988, Vol.10, No.1, pp.134-137.

laws that facilitate the human rights abuse. This method was used in examining relevant international human rights instruments and labour standards instruments impacting on social security as a human rights issue with particular focus to migrant workers. In addition, selected regional human rights treaties were examined, albeit briefly as to how they are implemented in the national legal systems of Member States of regional organisations in as far as they are relevant in the context of this study.

McClintock, M.,[16] has posited that human rights research methodology is an emerging discipline applied in development studies where human rights are appearing as increasingly important. Through this methodological approach, the researcher focused on examining the treaty practice among the EAC Partner States on how they have worked towards compliance with their international human rights treaty obligations through signing, ratification or accession, and domestication of relevant instruments that concern legal protection of international migrants, particularly in the area of social security. Both the treaty practice and ratification status of both Kenya and Tanzania were examined and relevant information from materials obtained was generated and analysed.

The overall implication of findings was systematically presented and explained in the context of this study. Selected relevant ILO conventions and Human rights treaties as well as regional instruments were reviewed to illustrate areas of

[16] See McClintock, M., "Tensions between Assistance and Protection: A Human Rights Perspective", in Larry M., and Weiss, T.G., (eds), *Humanitarian Action: A Transatlantic Agenda for Operations and Research*, Occasional Papers, No.39, Watson Institute, Brown University, 2000.

compliance, non-compliance, controversy or convergences and unilateralism whereby Kenya and Tanzania were assessed in their treaty practice. The trend of compliance with international norms surrounding the practice of equality of treatment in social security rights of migrant workers in these two countries was examined.

Therefore, a variety of research methods explained above were used in establishing causal linkages between existing state of affairs in the municipal constitutions and social security legislations of the EAC countries concerning legal protection of migrant workers and their relationship with their treaty practice and domestic policies towards ratification of international human rights instruments and international labour standards, as well as regional conventions and protocols. All these methods have enabled the researcher to achieve the objectives of this research.

1.7 Scope and limitation of the Study

This research measures the selected EAC Partner States' legal compliance with the provisions of the ILO conventions and human rights instruments and the EAC regional instruments particularly regarding the domestication of the EAC Treaty and the CMP provisions concerning equality of treatment in social security for migrant workers. It does not measure practical implementation of those provisions in practice; rather it assesses the alignment of the national social security and employment laws in order to conform to the international instruments and the EAC law. The study explores the legal compliance by the two EAC countries of Tanzania and Kenya that have been selected and used as case studies within the EAC.

The choice of Tanzania and Kenya was based on various factors. Kenya was selected because it is the biggest economy within the EAC that has been named as having joined the group of middle income countries since 2014. Further, Kenya is considered as a hub of international migration within the EAC and the horn of Africa and has a relatively large number of labour immigrants working in the EAC countries. Kenya is also the biggest investor in Tanzania.

Moreover, in 1969 President Uganda expelled over 30,000 Kenyan workers from Uganda on the reason that there were more financial remittances going to Kenya from the earnings of unskilled Kenyans working in Uganda than from a similar category of Ugandans in Kenya. It was considered of interest for this study to examine how social security systems and legal regimes of such a middle income economy like Kenya is positioned to treat migrant workers based on principles of equality in social security given its past experience.

Also the existence of established contact persons in Kenya was among the reasons for choosing it because of ease of getting required information and data. The accessibility of literature in English language and mostly on-line legal materials and statutes and policies as well as literature was also considered among the reasons for choosing Kenya. The ease with which the researcher would reach Kenya too, influenced the researcher's choice of Kenya as one of the case studies.

On the other hand, Tanzania has been selected because it is the second biggest economy in the EAC and she has got a big volume of Foreign Direct Investment

(FDIs) due to her reforms and privatization policies and investment incentives programmes that commenced since 1990s. Due to the FDIs and expansion of foreign investment in Tanzania, there has been an influx of foreign labour forming a growing number of migrant workers coming from all over the globe. Yet, Tanzania has unclear legal framework on enforcement of social security rights for migrant workers based on equality of treatment principles. Also, the status of ratification and implementation or enforcement of relevant ILO conventions concerning social security for migrant workers and other relevant UN international human rights instruments remains questionable.

Rwanda and Burundi were not selected because of language barriers. These two countries use French language as official language, while Rwanda in addition uses Kinyarwanda while Burundi uses Kirundi. Although Rwanda is currently pursuing a bilingual system of education whereby she has adopted the use of both French and English languages, most literature and laws are still largely in French language. Even the population of the two countries is comparatively small compared to those of Kenya, Tanzania and Uganda.

Although Uganda is Anglophone country like Tanzania and Kenya, it was not selected as one of the case studies because of its geographical location in the far North-West of Tanzania while the researcher is based in the Coastal city of Dar es Salaam along the Indian Ocean. Also, the historical and economic conditions between Uganda and Kenya are similar as they originate from capitalist system as opposed to that of Tanzania which originates from socialist system. Thus, any one of the two countries between Kenya and Uganda would suffice for this study. This

study, therefore, only considers laws, regulations, and treaties that have a bearing on the Partner States' national compliance with principles of equal treatment of labour migrants in the subject of social security.

1.8 Literature Review

There is a dearth of literature that specifically deals with detailed legal analysis and discussion on equal treatment in social security for migrant workers in the EAC countries. Scanty literature remotely discusses some practices of individual countries of the EAC in the context of international labour standards and international human rights instruments. Apparently, the subject of social security right for migrant workers and the concept of equality of treatment have not attracted much interest of many researchers in the EAC countries. The relevant literature review discussed below is clustered into four clusters according to main thematic areas.

The first cluster of authors provides the general meaning and understanding of principles of social security, its role in society, its coordination and its application in African context. In this category, Tungaraza, et al, have argued generally that, social security is an equity issue, and it denotes fairness or social justice.[17] They contend that, peoples' needs, rather than social privileges, should guide the distribution of opportunities for well-being. They argue that, equity requires reducing unfair disparities as well as meeting acceptable standards for everyone. They contend that, pursuing equity in social security means that trying to reduce unfair and unnecessary gaps in social security while working efficiently to achieve the greatest

[17]Mchomvu, A.S.T., Tungaraza, F.S.K. and Maghimbi, S., "Social security systems in Tanzania", Journal of Social Development in Africa, July 2002, Vol. 17, No 2.

improvements for all.[18] The authors, however, do not discuss the EAC social security aspects related to equality of treatment as envisaged under international labour standards and the UN international human rights instruments concerning social security.

Tulia Ackson has written a thesis from the perspective of comparative legal analysis between the South African Social security system and that of Tanzania. The author explains the concepts of non-discrimination in social security and briefly discusses coordination issues. She argues that, equality of treatment is the main principle of coordination encompassing non-discrimination clauses based on nationality.[19] For purposes of social security coordination, discrimination is "applying different rules to comparable situations or applying the same rule to different situations.[20]

The author argues that, non-discrimination in social security is one of the fundamental human rights which were promulgated by the Universal Declaration of Human Rights, 1948. Article 22 provides that *"Everyone, as a member of society, has the right to social security"*. The author also refers to the *Minimum Standards (Social security) Convention,* 1952[21] in which it is provided that non-national residents shall have the same rights as national residents[22] but this right will be subject to existence of bilateral or multilateral agreements providing for reciprocity.

The principle of equality of treatment in social security oscillates in many social security issues including the coordination of social security between schemes of

[18] Ibid, p.15.
[19] Ackson.,T, note 14, at p.72.
[20] Ibid, 72.
[21] ILO Convention 102, 1952.
[22] Ibid, Art. 68.

different countries. Tulia, A., argues that, the Equality of Treatment (Social Security) Convention of [23] was passed in order to guarantee equality of treatment of stateless persons, refugees and migrant workers who cross national borders and live in different sovereign territories other than their own. Further, Ackson, A.,[24] has argued that there are coordination problems across borders in Tanzania. Absence of bilateral and multilateral agreements in respect of portability of social security benefits acquired is real. Social security benefits are therefore non-transferable across national borders for purposes of migrant workers' social security rights.

According to Ackson, as of year 2007, Tanzania had no single bilateral agreement for reciprocal enforcement of social security rights in force with any country. It was the author's conclusion that, absence of such reciprocal social security arrangements affects both Tanzanians working in foreign countries and also migrant workers working in Tanzania. However, the author does not investigate to what extent the legal framework of the EAC countries complies with international labour standards and international human rights instruments concerning social security for migrant workers. This study intends to come up with detailed finding on how the EAC countries comply with international labour standards and human rights instruments as well as regional protocols and treaties impacting on the rights to equal treatment in social security for international labour migrants and national workers.

From Eastern Africa perspective, Masabo, J., has written on unblocking the barriers particularly focusing on making the EAC regime beneficial to female migrant

[23] ILO Convention 118, 1962.

[24] Tulia, A., Social Security Law And Policy Reform In Tanzania With Reflections On The South African Experience, Thesis Submitted For The Degree of Doctor of Philosophy in The Department of Commercial Law, Faculty of Law University of Cape Town. May 2007, pp. 17-19.

workers. The author discusses women in international migration and the EAC legal framework on free movement of workers. The discussion focuses on women labour migrants under the EAC Common Market Regime and explores the available options and opportunities. The author argues that, although the EAC has made notable progress in facilitating the free movement of workers within the sub region, there are myriad factors limiting the mobility of female migrants.[25] It is the contention of the author that, the EAC labour migration framework is gender neutral, but this framework is coupled with stratified and male-biased admission policies all of which inhibit the ability of women to access the opportunities available in the sub region's labour market.[26]

Masabo continues to argue that there is, among other things, gender segregation in domestic labour markets. Although this author describes the problem of discrimination as obvious in the EAC labour market, she does not address the problems of social security and legal framework for coordination of social security benefits. The author does not investigate the status of reciprocal social security agreements and gaps in enforcement of international labour and human rights standards concerning social security for migrant workers in the EAC countries.

Diakite, A. R., has written on managing African migrant workers from the perspective of Sub- Saharan Africa. He uses Nigeria and South Africa as case studies.[27] The author argues that, universal principles of non-discrimination are best

[25]Masabo, J., Unblocking the Barriers: Making the EAC Regime Beneficial to Female Migrant Workers, Working Paper No. 4, Oxford Human Rights Hub, University of Dar es Salaam, 2015, p.32.
[26] Ibid.
[27] Diakite, A. R., Managing African Migrant Workers: A Comparative and Critical Analysis of State Management of Migrant workers in sub-sharan Africa: the case of Nigeria and South Africa., LL.M Thesis, Lund University, 2006, pp.7-8.

realised by developing democracies that adjust their constitutions to include protections already featured in their customary law.[28] However, to advance his thesis, Diakite uses two rights namely "*right to association"* and "*right of recognitionas a person"*. The author in his comparative study neither he discuss the right to equality of treatment of migrant workers in social security nor does he discuss the EAC legal framework of social security regulation for migrant workers.

Kapindu,R., has argued from Malawian perspective that, social security entails legal access to basic essential health care, income security for children, access to nutrition, education and care, a measure of social assistance to poor or unemployed persons. It also entails ensuring income security through basic pension for old or disabled persons. In his views, the preceding affairs constitute what is considered as a basic social security package[29]. However, Kapindu falls short of a detailed discussion on equality of treatment in social security and extension of benefits to migrant workers based on international labour standards and international human rights instruments. The author does not discuss how a migrant worker can be legally enabled to access social security benefits on equal footing with nationals in a foreign territory in the context of EAC countries.

The second cluster of literature or authors address the aspect of enhancement of the right to social security for migrant workers and their equality of treatment through social security agreements in the EAC region. McGillivray has written on strengthening social protection for African migrant workers through social security

[28]Ibid.
[29]Kapindu, R. E, "Social Protection for Malawian Migrants in Johannesburg: Access, exclusion and survival strategies", *AHRLJ*, 2011, Vol.1, 2011, p.2.

agreements from general African perspective. McGillivray defines social security from the ILO perspectives thus:

> *"Social security is the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children".*[30]

The author provides a detailed outline of the state of conclusion of bilateral social security agreements between African States and shows that, the East African States of Kenya, Uganda and Tanzania do lack reciprocal social security agreements among themselves. Also the author argues that,[31] there is a general need for strengthening social security for African Migrant workers through social security agreements.

McGillivray maintains that, while information is available on migrant stocks, not on current migration flows, in order to benefit the largest number of migrant workers it seems desirable to focus on social security agreements between neighbouring countries with compatible social security schemes. The author suggests that, this could involve a sub-regional approach, for example, in the EAC and the Southern SADC. He argues that, taking an example of the EAC, it may be more important to focus on schemes in Burundi, Rwanda and Tanzania since Kenya and Uganda have provident funds. This may have ancillary effect of encouraging reforms to the provident funds in Kenya and Uganda.

[30]McGillivray, W., Strengthening social protection for African migrant workers through social Security agreements, International Migration Paper No. 100 International Migration Programme, International Labour Office: Geneva, 2010.p.1ff.
[31]Ibid, p.46.

However, McGillivray leaves the gap which should be filled because he does not examine specific legal regulatory framework of social security for migrant workers in the EAC countries of Kenya, Tanzania, Uganda, Rwanda, Burundi and South Sudan. Further, the author does not examine comparative legal framework of the EAC countries in relation to international labour standards and international human rights instruments concerning social security for migrant workers. Further, McGillivray's work was published in 2010 and it shows that Rwanda and Burundi concluded some social security agreements between themselves and the DRC in 1978,[32]but since then, there has not been concluded any such agreements. The author does not discuss specific legal conditions existing in the EAC countries which affect conclusion of such bilateral agreements and the rights to equality of treatment in social security for migrant workers.

Kulke, U.,[33] has presented a study on the practical problems linked to the extension to migrant workers and their families of social security coverage and entitlements. The author argues that, there are difficulties facing migrant workers regarding social security. These difficulties are mainly due to the fact that social security systems are established under national legislation. Social security systems are also either linked to periods of employment, economic activity, principle of nationality and exportability of benefits. Also the principle of unity of applicable legislation, territoriality principle of social security and migrants' residence affect the rights of labour migrants. Kulke says national social security laws often contain features that

[32] Ibid, pp.34-36.
[33] Kulke, U., *Filling the Gap of Social Security for Migrant Workers: ILO's Strategy*, ILO, Geneva, 2010, pp.6-14.

are to the disadvantage of workers who migrate from one country of employment to another as compared with nationals who only work in their country of origin[34].

Kulke argues that the principle of nationality leads to exclusion of migrant workers from coverage or entitlement to social security benefits.[35] The principle of territoriality limits scope of application of social security legislation to territory of a country. Kulke argues that lack of bilateral or multilateral social security agreements through which the acquired social security rights in one country are maintained creates even greater chances of deepened inequality[36]. Similarly, Kulke does not offer any specific detailed discussion on whether developing countries in Sub-Saharan Africa such as the EAC can embark on bilateral or multilateral social security agreements for reciprocal enforcement of social security rights. The author's focus is not the EAC countries and does not address any specific manner in which equality of treatment of labour migrants and national workers can be achieved in the EAC if Member countries do not ratify and domesticate relevant international labour and human rights instruments.

Butcher, P., and Erdos, J., have researched on international social security agreements by looking at the U.S experience and found that social security agreements have been in place long before the United States first considered them.[37] The authors appreciate the importance of social security agreements and argue that

[34] Ibid, p.7.
[35]Kulke, U., The Role of Social Security in Protecting Migrant Workers: ILO' Approach, Regional Conference for Asia and the Pacific, New Delhi, India, November 2006, ILO Geneva, 2006, See Kulke, "Filling the Gap of Social Security for Migrant Workers: ILO's Strategy in Globalization, Migration and Human Rights", *International Law under Review*, 2007, Vol. II, Chetail, V. ed., Bruyland, Brussels, pp.8-9.
[36]Ibid.
[37] Butcher, P., and Erdos, J., "International Social Security Agreements: The U.S. Experience", *Social Security Bulletin*, 1988, Vol. 51, No. 9, p.6.

in 1919, Italy and France became the first countries to conclude an agreement providing for the totalization of coverage credits to determine social security eligibility. However, their study was conducted in 1988 before the re-establishment of the EAC. Also the study is from the context outside Africa, hence, there is no discussion which is directly concerning the EAC countries. This being an old study conducted in 1988, it lacks new developments concerning equality of treatment in social security.

Thus, Butcher and Erdos they neither address issues facing the EAC countries nor discuss issues that are directly connected to enhancing the effective implementation of protocols on the free movement of persons within the EAC. Although the authors discuss the need to coordinate the social security systems of the regional organisation's Member States, they do not discuss how to aid the EAC countries in the removal of regional restrictions on the provision of social security benefits.

Olivier, M.P and Govindjee, A., have contended that since the advent of 20th century, virtually all the countries of Western and Central Europe have strived to enter into social security agreements. Nevertheless, the social security status and labour law protection afforded to migrant workers in many parts of the world is complicated by the fact that immigration laws and policies are often effectively superimposed on other guiding legal principles.[38] The authors argue that, the immigration framework may be geared towards restricting access, controlling movement and regulating presence in the host country.

[38]Olivier, M., Marius, G.O., and Avinash, G., "*Labour rights and social protection of migrant workers: In Search of a Co-ordinated legal response"*. A paper presented at the Inaugural conference of the Labour Law Research Network (LLRN), Barcelona, 2013, pp.1-10 & pp.16-23.

They contend that, immigration framework of many countries do not tend to work towards honouring a human rights approach. Many of them do not encourage and support migration. As a result there is often inappropriate social security coverage or labour protection for non-citizens. They also discuss the problem of implantation of bilateral agreements and argue that, immigration laws and policy generally tend to focus on the effects, rather than the underlying causes of migration and an increasingly forceful line on enforcement has been adopted in parts of the world.[39]

Also, Olivier and Govindjee have argued that the social security position and protection of migrants in many parts of the word tends to be much weaker developed than the labour law framework. They contend that in many parts of the developing world existing labour law and social security regimes have traditionally been unable to offer effective responses to the present situation.[40] They put it that, bilateral and multilateral social security agreements do not address this deficiency, given the limited focus of these agreements[41].

However, the authors do not address questions of whether the EAC countries have in place any multilateral or bilateral social security agreements and any strong labour law framework as well as social security legislation framework that enable effective conclusion and implementation of social security agreements for protection of migrant workers. The authors do not discuss if at all it is justified or relevant for EAC countries to conclude bilateral or multilateral agreements for reciprocal enforcement of social security rights for migrant workers within the EAC even in situations where they have concluded the EAC treaty and the EAC Common Market

[39]Ibid.
[40] Ibid, p. 1.
[41] Ibid, p. 40.

Protocol that provide for harmonisation of national laws for compliance to the EAC law.

The third cluster of authors falls under human rights approach to social security and universality of social security. This group of authors advocates for the principle of prohibition of every discrimination between persons of different nationality. Nagel, S.G and Kessler, F.,[42]have argued that social security is a category of human right, and as such, a human right is a universal moral right, something which all men, at all times ought to have and something which no one may be deprived of without grave affront to justice.[43] They argue that, social security is something which is owing to every human being simply because he is human. This right inheres in human being by virtue of humanity alone.[44]

In their view, social security falls in socio-economic rights,[45] and that social security has not been stated in various national constitutions as a right in an enforceable form. They argue that some constitutions refer to social security as directive principle of state policy. However, once this human right in form of socio-economic right is inserted in any constitution of any state, it becomes enforceable human right. However, the authors do not make any legal analysis of the conditions prevailing in the EAC region. They do not provide any finding on actual legal framework for enforceability of social security right for migrant workers in the EAC countries. Also they do not address issues that impact or affect the state of compliance with

[42] See Kessler, F., "*Social Security as a Fundamental Right in Social Security Law"*, Council of Europe, Strasbourg, 28 October 2010, p.7; Nagel, S.G., and Kessler, F., *International Encyclopaedia of Laws, Social Security Law,* Supplement 72 Council of Europe, Wolters-Kluwer international, The Netherlands, 2010, 7ff.
[43]Ibid.
[44] Ibid, p.31.
[45]Ibid, p. 35; See also *European Social Charter*, 1961 (revised in 1996), Arts. 6.1 and 12; ICESCR 1966, Art.19.

international social security standards by the EAC countries.

Similarly, Sepulveda and Nyst in their report[46] set out to elaborate and promote a human rights framework for social protection and identify best practices. They argue that central human rights principles of the human rights framework are equality, non-discrimination and accessibility, acceptability, affordability of rights, transparency and accountability. They contend that, in a human right approach to social security, ensuring adequate legal and institutional framework and adopting long-term strategies to social security expansion requires a deeper study and analysis of existing social security legal systems and the capacity to provide the benefits on equality principles.[47]

Thus, the right to social security within the system of the United Nations has been researched on by many prominent lawyers for some years now.[48] As regards the application of the rights-based approach to social security in international labour migration, Dupper, O., has contended that, within the UN system, the mandate of setting standards on migrant workers falls squarely within the ILO's sphere of competence.[49] He contends that the ILO alone among UN organisations has the constitutional mandate to protect the interests of workers when employed in countries other than their own.[50]

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[46] Sepúlveda, M., and Nyst,C., *The Human Rights Approach to Social Protection*, Ministry for Foreign Affairs of Finland, Erweko Oy, 2012, pp. 1-72.

[47] Ibid, p. 20; See also Stamm, I. Riedel, E., "The human right to social security: some challenges", in Riedel, E (ed), *Social security as a human right drafting a general comment on article 9 ICESCR some challenges* , Springer, 2007.

[48] See Stamm, p.23-33, note 47.

[49] Dupper, O., "Migrant Workers and The Right To Social Security: An International Perspective", *Stellenbosch Law Review*, Vol. 18, No. 2 (pp. 219-254), at p.226.

[50] See Bohning, W.R., "The ILO and the New UN Convention on Migrant Workers: The Past and the Future", *International Migration Review*, 1991, pp.698-700.

Dupper argues that, surprisingly and in an unusual circumventing style and for a variety of reasons which may have been political then or otherwise, the UN in 1990 adopted the international migrant workers Convention (ICPRMW). Constituted into a total of 93 articles, the ICPRMW may be seen as an epitome of international human rights forming one of the seven fundamental human rights instruments that define basic and universal human rights. It adds to ensuring the explicit extension of human rights including the right to social security to vulnerable groups worldwide.[51]

Arguing from a *rights-based* perspective, Langford, M., has posited that, the right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately and it is a right to be progressively realised as economic conditions of countries evolve and improve.[52] He argues that, social security right is the right to equal enjoyment of adequate social protection from social risks and contingencies.[53]Under the rights-based approach, there is universality of social security which means basic rights of human beings are considered universal, and therefore, the approach conceives of social security as a human right.

The summary of universality of social security as a human right is traced from Articles 22 and 25 of the Universal Declaration of Human Rights, 1948.[54] Also, the rights-based approach to social security conceives of social security as a human right as enshrined under Articles 9, 11 and 12 of the International Covenant on Economic,

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[51] See Dupper, O., p.226, note 49.
[52]See Langford, M.,"The Right to Social Security and Implications for Law, Policy and Practice", in Riedel, E.H. (ed.), *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR-Some Challenges*, Springer, Berlin, 2007 (29-54) at pp.32-38.
[53] Ibid.
[54] See the UDHR, 1948, adopted on 10th December, 1948 by UNGA Resolution.

Social and Cultural Rights (ICESCR).[55] The theory of rights revolves around social security rights of all including social security rights of migrant workers in the framework of international human rights law. The approach looks at internationally accepted labour standards and human rights principles concerning social security rights for migrant workers.[56]

Hagemejer, K.,[57]has argued that the right to comprehensive social security received its precise formulation through the ILO *Social Security (Minimum Standards) Convention* in 1952.[58]Thus, the rights-based approach to social security is built under the framework of this Convention and it extends to involve the interpretation and application of other relevant international human rights instruments. For example, social security pensions designed to provide income security in old age or incase of disability or the loss of a family breadwinner forms part and parcel of key aspects of minimum social security package. Convention 102[59] read together with other ILO conventions[60] do specify the rights to social security benefits at the age of retirement. The latter benefit is otherwise known as old-age pensions.[61]It also includes disability benefits (disability pensions).[62]

In case of loss of the breadwinner the Convention sets survivors' pensions as offered benefits.[63] Transposing these social security rights into legal treatment of migrant

[55]See ICESCR, 1966.
[56]See Stack, M., "Meaning of Social Security", *Journal of Comparative Legislation and International Law*, 1941, Vol. 23, Parts 1 and 4 (pp. 113) at p. 129; Watson, P., "Equality of Treatment in Social Security", *Maastricht Journal of European and Comparative Law*, 2015, Vol. 22, No. 1, pp. 120-127.
[57] Hagemejer, K., "Rights- based Approach to Social security Coverage Expansion," in Holzmann,R., Robalino, D.A., and Takayama, N. (eds.). *Closing the Coverage Gap: The role of Social Pensions and other Retirement Income Transfers*, 2009 (57-72) at pp.57-60.
[58] No. 102.
[59] See Convention 102, particularly Parts v, ix, and x.
[60] For example, the *Invalidity, Old-Age and Survivors' Benefits Convention*, 1967(No.128).
[61] Hagemejer, pp.57-59, note 57.
[62] Ibid.
[63] Ibid.

workers in the area of equality of treatment involves looking at national and international policies, as well as international law and national legislation. Tomei has used the social justice conceptual model to examine if there is discrimination or equality of treatment as basic pillars of assessing human rights values.[64]According to Lamarche,[65] the historic roots to social security originate from the ILO, and subsequent to the creation of ILO, social security was promulgated in the Philadelphia Declaration in 1944, in which it was stated that, labour is not a commodity, and hence, social security is equally not a commodity.

Tomei, M., argues that social security is not a commodity to be bought and sold.[66] One can comprehend the effects of the provisions of *Equality of Treatment (Accident Compensation) Convention of 1925*[67] in paras 3 of Preamble and in Article 1(1) and (2) and Article 2 and Article 9. These provisions carry the intention of putting a legal framework for equality of treatment of nationals and foreign workers with respect to their compensation for accidents sustained abroad in colonies, protectorates, trust territories, or in administrative regions that were under colonial administration. It thus laid down the foundation for the principle of equality of treatment of migrant workers.

Barrientos, A.,[68] argues that the right to social security includes the protection of workers and their households from contingencies threatening their basic living

[64] Tomei, M., Discrimination and Equality at Work: A Review of the Concepts ". *International Labour review*, 200, Vol. 142, No. 4, (401-418), at pp.410-415.
[65] Lamarche, L., "The right to social security in the international covenant on economic, social and cultural Rights", in Russel, S. and Chapman, A., (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*. Intersentia, Antwerp-Oxford-New York, 2002, p. 103.
[66] Ibid.
[67] No.19.
[68] Barrientos, A., "*Social Protection and Poverty"*, Social Policy and Development Programme Paper Number 42, United Nations Research Institute for Social Development, January 2010, p.1 & pp.8-9.

standards.[69] Thus, the right to social security for every person is, by implication, extended to cover migrant workers. Holzmann, R., and others have argued that security of income and medical care constitutes part of the rights to social security. Therefore, these rights are human rights issues that should be available for all[70]. It is contended that workers often face some compelling circumstances that make them lack sufficient accumulation of contribution periods and amounts of contribution in social security schemes.

Consequently, they end up living desperate life at retirement.[71] All successful human societies and economies have employed some strategies of development whereby social security systems have played some key role to reduce poverty and provide economic security. Such strategies help people to cope with life's major risks or contingencies.

In addressing some challenges of human rights through a social work perspective, Ife, J., contends that there are arguments that justify the granting of equal protection to migrant workers in the subject of social security and other which oppose this doctrine[72]. Perceived rights of migrant workers in foreign countries form contending arguments around the world. In other countries migrant workers are seen as a threat to national employment to indigenous citizens. Migrants are seen as likely to

[69] Ibid.

[70] See Holzmann, R., Rabalino, D.A., and Takayama, N., (eds.), "*Closing the Coverage Gap: The Role of Social Pensions and Other Retirement Income",* The IBRD/The World Bank, Washington DC, 2009, pp. 67-69.

[71] Ibid.

[72] See Ife, J., "Cultural relativism and community activism", in Reichert, E. (Ed.*), Challenges in human rights: A social work perspective,* Columbia University Press, New York, 2007, pp. 76-96.

endanger the existing social security schemes and welfare systems that are not sufficiently developed to cover the whole population. Sometimes migrants are seen as likely to depress national social welfare systems and may worsen jobs availability and consume social services intended for indigenous citizens[73].

Gyot, C., has argued, among other things, that the German legal system offers good work opportunities to migrant workers if they have the 'right national origin' and 'qualification' and thus probably does not differ from any other country's system. But migrant workers who do not fit the needs of the German economy are not welcome and hence forced to illegality.[74] Whether migrant workers are treated as equals with nationals in various countries of the world in granting social security benefits, it may be appropriate to adopt the rights-based approach to social security.

Some countries that have written Constitutions do not entrench the right to social security in their national Constitutions as part of basic human rights. Maydell, B. has stated that, in the context of international labour migration, wherever freedom of movement across the border is guaranteed, national social systems must urgently be coordinated in order to avoid the disadvantages that people suffer in their social rights when moving from one State to another.[75] Thus, Maydell's proposition has made the author of this thesis to investigate if the EAC countries have such coordinated national social security legal systems in the context of freedom of

[73] Ibid.
[74] Gyot, C., "Migrant Workers in Germany", *Comparative Labour Law and Policy Journal*, 2009-2010, Vol. 31, No. 37, pp.47-66, pp. 62-66.
[75] von Maydell, B., "Perspectives on the future of social security", *International Labour Review*, 1994. Vol. 133, No.4. (501-510), p.506.

movement beyond national borders for benefits of migrant workers.

There is assumption that the migrants generally fall in the list of vulnerable groups depending on the country or region of origin and destination and driving factors for migration. This categorisation of migrants forms one of the basis or justification for their social security inclusion in international legal instruments for protecting them from abuse. Some basic social security inclusionary principles or rules exist. Watson, P., has discussed these four basic principles that have been universally recognised in international social security law and which apply to alien workers or citizens. They include: equality of treatment; the principle of single applicable legislation only; maintenance of acquired rights or those in course of acquisition; and the payment of benefits abroad (portability).[76] These principles or rules apply to all branches of social security covered by the ICPRMW.

From a historical point of view, it was stated in the ILO Constitution of 1919 that "*universal and lasting peace can be established only if it is based upon social justice*.[77] The *theory of rights* of migrants at work recognizes the fact that, there are justifiable economic and other reasons for migration world-wide and that international human rights law framework offers protection to these migrants. Within this framework, a transnational legal process of interaction, interpretation, and internalization of global norms can provide both the secondary rules and the rules of recognition that may be used to harmonize the international legal order.

[76] See Watson, P., "Equality of Treatment: A Variable Concept?" *Industrial Law Journal*, March 1995, Vol. 24, pp. 33-48.
[77] See the Preamble to ILO Constitution.

Harold, H. K.,[78] has theorized that transnational actors do in theory obey international law. Therefore, even equal protection of alien workers is in itself the obedience to international law. It would, therefore, follow that, doing the contrary or arbitrary treatment and exclusion of migrant workers from protections established under international labour standards and under human rights systems is sheer disobedience to international law.

The theory of rights recognizes various economic risks which often face migrant workers which may include unemployment, retirement, invalidity, occupational injury, sickness, deaths and other related economic vulnerability, among other things. These contingencies require state obligations towards economic, social and cultural rights[79]. However, Gyot, Maydell and Harold in their discussions demonstrated above, they do not address specific social security enforceability problems or challenges and the state of unclear legal framework governing compliance with social security standards for migrant workers in the EAC countries.

Dex, S.,[80] has written on the costs of discrimination against migrant workers using a human rights approach to social security and argues that, there are some moral reasons for treating all human beings equally and that, the reasons appear to be intuitive. Dex argues that, these reasons are regularly cited by politicians as

[78] See Koh, H. H., "Why Do Nations Obey International Law?" *Yale Law Journal*, 1996-1997, Vol. 106, pp. 2599-2659.
[79] See Ssenyonjo, M., "Economic, social and cultural rights: an examination of state obligations", in Joseph, S., and McBeth, A., (eds), *Research Handbook on International Human Rights Law*, Edward Elgar Publishing Limited, UK, 2010, pp.36-70.
[80] Dex, S., The costs of discrimination against migrant workers: an international review, ILO, Geneva, 1992, p.6.

justifying a specific policy, or signature of a human rights instrument. However, the author does not address the status and relevance of social security agreements among the EAC countries given the current free movement of labour, goods, services and capital, in the common market and a move towards single currency.

Graser, A., has written from an international, South African and German perspective about the subject of inclusion vis-à-vis exclusion in social security. He argues that, equal access to social security for non-citizens is a step forward in the fight against discrimination and this can be tested in Courts of law[81]. However, the author does not demonstrate how the security legal systems or models of the EAC countries are aligned to implement social security as a human right. Graser does not discuss how this right is legally enforceable by migrant workers in the individual national courts of law or in the EAC regional judicial forums.

Onyango, O., has written on equal opportunity, age-based discrimination and the rights of elderly persons in Uganda. He argues that, there are difficulties of social security coverage for all and the paradox of social security inclusion and exclusion of migrants. He argues that in Uganda, older persons have been considerably left without social protection, leave alone failure to benefit from existing social security schemes, and that, this is the general African landscape affecting older persons living with children, and older-headed households.[82] The author does not discuss the legal framework for social security and transferability, coordination or portability of social

[81] Graser, A., 'Taking Inclusion Seriously: An Outside Perspective on the Khosa Decision of the Constitutional Court of South Africa', in Becker, U., and Olivier, M, (eds), Access to Social Security for Non-Citizens and Informal Sector Workers: An International, South African and German Perspective, African Sun Media, 2008, pp.90-152.

[82] Onyango, O. J., Equal Opportunity, Age-Based Discrimination and the Rights of Elderly Persons in Uganda, HURIPEC Working Paper Series, November, 2008, pp.8-9.

security benefits as a universal right for migrant workers in the EAC countries. No policy framework of equality of treatment in social security is discussed.

Barya, J.J., argues from Ugandan perspective that the social security reforms in initiated in 2009 were doubtful because, a very poor country like Uganda cannot provide good social security for all its citizens.[83] He views the universality of social security for Uganda as a difficult subject to implement. The author argues that Uganda can only more appropriately address the social security of those in the formal employment.[84] Those in the rural areas, self-employed, unpaid family labour and the so-called informal sector will still be problematic. He argues that, even if social security is a universal right, the same cannot be provided to everybody because of poor economic conditions.[85] However, Barya does not discuss any comparative aspects of compliance by EAC countries to the EAC Treaty and international labour conventions and human rights instruments impacting on social security rights and equal treatment of international labour migrants.

The fourth thematic area of this literature review falls in the principle of institutional managements and the problem of financing of social security schemes. There is no specialised literature that is specifically relevant to the EAC on institutional managements and the problem of financing of social security schemes. From the UNDP perspective, Cecchini, S.,[86] has argued that, modern global trends of social

[83] Barya, J.J., Interrogating the Right to Social Security and Social Protection in Uganda, HURIPEC Working Paper Series, No. 23, January, 2009, p.30.
[84] Ibid.
[85] Ibid.
[86] Cecchini, S., "Do CCT Programmes Work in Low-income Countries?" *International Policy Centre for Inclusive Growth One Pager*, July 2009,Vol. 90, p.1. Retrieved from http://www.ipc-undp.org/pub/... accessed 30 March, 2015.

security provision for wider coverage require the establishment of comprehensive legal regime and information management system that is capable of registering the beneficiaries and effect timely payments of the benefits. The author argues that existing social security information management systems in many parts of developing countries are weak in protection of social security of migrants.

Moore, C., has studied the African countries and the Latin Americas regarding cash transfers and says that, a formidable and comprehensive legal and institutional framework as well as national strategy is an essential prerequisite to ensuring long-term institutionalised commitment to providing adequate financial and human resources to social protection programmes for social security schemes. Moore points out among other things, the absence of long-term funding commitments to these social security schemes for every beneficiary and every citizen.[87]

However, both Cecchini and Moore do not address how the formal and informal social security systems in the EAC countries can be integrated in this modern information management system for extension of social security so that to include equality of coverage and treatment of migrants. They do not provide discernible common social security system capable of being enforceable within the local context of the EAC countries. Wheeler and Feldman[88] argue that migrants not only face similar risks and hazards as host populations do but also face migrant specific

[87]Moore, C., "Why Sources of Funding for CCTs Matter in Honduras and Nicaragua," in *Poverty in Focus: Cash Transfers, Lessons from Africa and Latin America* (Brazil; international Poverty Centre for inclusive Growth), 2008, p. 11.

[88]Wheeler, S.R. and Feldman, R., "Introduction: Mapping Migrant Welfare onto Social Provisioning". In: Sabates-Wheeler, R., and Feldman, R. (eds), *Migration and Social Protection: Claiming Rights beyond Borders*, Palgrave Macmillan, New York, 2011, (3-35), at p.10.

vulnerabilities, which are risks that arise by virtue of an individual having migrated, where even the network of informal social self-help assistance are virtually absent. The authors discuss virtually nothing on the East African conditions.

Olivier, M.P., argues that in cross border migration and the portability of social security benefits there are questions about the non-compliance of some aspects of current internal laws and regulations with human rights standards in the SADC region.[89] He also argue that in South Africa, for instance, despite having contributed to a provident fund or a workmen's compensation fund, a migrant worker suffering an industrial injury or retiring and going back home, often runs the risk of falling in poverty due to the inability to access minimum income to which he or she is entitled as a right. Impoverished families in their home countries are left to care for those who come back home.[90]

Avato, J., argues from European perspective on portability of social security and health care benefits in the United Kingdom and says that the modality under which social security through portability of benefits is implemented is through various regimes[91]. "Regime I" refers to access to social security benefits and advanced portability that is regulated by bilateral agreements between the migrant-sending and receiving country. In this case it is assumed that migrant workers should not

[89] See Dialogue Report on Cross Border Migration and the Portability of Social Security Benefits conducted by Centre for International and Comparative Labour and Social Security Law (CICLASS), ILO, Southern Africa Trust on Keynote address given by Maurus Olivier on 25th March, 2011 at Southern Sun Hotel, Pretoria, p.7.

[90] Ibid, p 6.

[91] Avato, J., "*Portability of Social Security and Health Care Benefits in the United Kingdom*", Human Development Network-Social Protection and Labour, The World Bank Background study, Washington, D.C., March 2008, (1-60), at p.6.

encounter any discrimination with regards to social security benefits as a matter of standard practice and principle. Transferability of acquired social security rights should be guaranteed[92]. The caution in this case is that, not all bilateral social security agreements cover all benefits. Some countries often select certain benefits for reciprocal bilateral arrangements and even the degree of portability may vary within this regime.

Under "Regime II" covers the access to social security benefits in the absence of bilateral agreements[93]. In this case, the national social law of the migrants-receiving country (host State) alone is the one that has to determine if and how benefits can be accessed after a migrant returns to his home country. The national social law of the migrant-sending country may exercise the discretion to grant social security benefits to a migrant worker when he returns home[94]. Avato contends that, most legal migrants who do not benefit from bilateral agreements fall under this category.

Under "Regime III", Avato argues that particular provisions in national social laws of some countries justify the *"no access to portable social security benefits*".[95] Finally, "Regime IV" deals with undocumented but also legal migrants who participate in the informal sector of the host country.[96] The regime recognizes the fact that high income countries have developed social security agreements. However, poor countries have less or completely do not have enforceable social security agreements for benefits for migrant workers due to their underdeveloped nature of

[92]Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Ibid.

their economies and national social security systems.[97]

Also, Avato, Koettl, and Sabates-Wheeler[98] discuss the social protection for migrants particularly by looking at formal and informal social protection provisions. They do so, in terms of latest global data on the social protection status on the documented and undocumented migrants. They draw upon recent studies from the Southern African Development Community (SADC) and show that, migrants in poorer countries have very limited access to formal social protection. Social security systems and legal protection frameworks are far from making benefits portable. Labour migrants have to rely on informal social protection through migration itself that constitutes a form of social protection for migrants and their families.[99] The authors recommend that in order to make migration safer for low-income migrants, it is vital to allow them to benefit from their migration experience and to ultimately enhance their social protection.[100]

Avato, Koettl, and Sabates-Wheeler continue to argue that access and exportability of benefits for international migrants at the national level is mostly a matter of national legislation.[101] Host countries regulate what benefits a labour migrant have to access and under what conditions. Principally, national laws define what benefits can be received by a labour migrant after leaving the country. However, the authors use the EU benefits portability model which is the most advanced and complex system of portability of social security benefits. Under the EU portability model, the EU

[97] Avato, J., note 91, pp.5-8.
[98] Avato, J., Koettl, J., and Sabates-Wheeler, R. Definitions, Good Practices, and Global Estimates on the Status of Social Protection for International Migrants, World Bank, Washington, D.C., May 2009, pp.1-7.
[99] Ibid, pp.1-6.
[100] Ibid.
[101] Ibid.

nationals enjoy full non-discriminatory access to all and portability of most social benefits. However, the authors do not offer a suggestion on a compatible portability model for developing countries like EAC Partner States given their levels of social security systems, economic development and legal systems.

1.9 Thesis Outline

Chapter one has introduced the background to the research and has stated the research problem arising from legal systems of the EAC countries of Kenya and Tanzania. This is with regard to compliance with international human rights, labour standards, and regional instruments relevant for protection of migrant workers and their rights to social security. It also defines the research questions of this thesis. In chapter two, various concepts and theories or approaches to equal treatment in social security are discussed. There are also provided some theories and concepts that impact on migrants' rights to social security in the context of international labour migration.

Chapter three presents the international and regional legal frameworks for equality of treatment in social security for migrant workers. The discussion takes both the human rights and the ILO approaches to social security. Critical insights are drawn from normative standards derived from international legal materials and relevant conventions, treaties and protocols concerning legal protection of social security rights for migrant workers. Foundational principles for scholarly analysis of development of protection of social security rights in international labour migration are laid down.

Chapter four investigates the legal framework for protection of social security rights of migrant workers within the EAC. Among other things, the chapter examines the history, development, and state of compliance to EAC regional integration treaties and other relevant human rights norms and labour standards instruments regarding labour migration and social security instrument. In chapter five it is presented an investigation of Kenya's status of implementation of equality of treatment standards established under relevant social security conventions concerning migrant workers and international human rights instruments. The Kenya treaty practice towards domestication of ratified international and regional instruments is also examined.

Chapter six examines the Tanzania's profile of compliance with international labour standards and international human rights treaties alongside regional treaties that bear upon the implementation of the principle of equality of treatment in social security for migrant workers. Tanzania treaty practice is briefly investigated so as to show how it contributes to the present state of implementation of international labour and human rights norms as well as the EAC treaty obligations. Hurdles to compliance with international obligations under relevant international treaties are examined. Chapter seven concludes the research findings and offers considered recommendations and options for future research.

1.10 Conclusion

Chapter one has built the base upon which the thesis has proceeded and endeavoured to underscore the statement of the research problem by introducing key issues involved in social security and international labour migration in the context of the study. It has introduced the research questions and stated the justification or

significance of the study. Background information has been provided alongside a review of existing literature in the area of social security rights and international labour migration. Methodological approaches have been explained alongside reasons for their adoption in this study and the scope and limitations of the study alongside the thesis outline have been provided. In chapter two the researcher presents an array of relevant concepts and theories in international labour migration and social security as far as equality of treatment of migrant workers is concerned. The description is done in the context of existing literature.

CHAPTER TWO

2.0 CONCEPTS AND THEORIES OF EQUALITY OF TREATMENT IN SOCIAL SECURITY IN INTERNATIONAL LABOUR MIGRATION

2.1 Introduction

In this chapter, different concepts and theories as they apply in the field of social security in the context of international labour migration are discussed. Some of the concepts included in this chapter include: migrant worker; international migrant worker, theory of international migration for employment; theory of initiation of international labour migration; theory of continuation of international migration flows; theory explaining anti-immigration attitudes; theory or doctrine of harmonisation and coordination law; theories of social security, and the rights-based approach to social security. All these concepts and theories are briefly discussed and structured according to their relevance to this study.

2.2 Concepts relating to social security rights and labour migration

2.2.1 Equality of Treatment

The Cambridge advanced learner's dictionary defines equality as the right of different groups of people in a community or society to have a similar social position and receive the same or similar treatment.[102] The concept of 'equality' is described well in terms of a principle. Thus, the "equality principle" is described in philosophical, moral, and legal doctrine by asserting that all human beings are equal and that they ought to be treated "equally" under the law.[103] This definition remains

[102]See *Cambridge Advanced Learner's Dictionary & Thesaurus*, Cambridge University Press, Cambridge, 2017.

[103]See equality standards in Niessen, J., "Construction of the Migrant Integration Policy", in Niessen, J., and Huddleston, T., (eds.), *Legal Frameworks for the Integration of Third Country Nationals,*

debatable as there are different answers regarding perceptions as to, in what respect are people "equal?"

Equality of treatment concept has generated a lot of controversial legal scholarship surrounding it. Thus, the traditional concepts of consistent treatment (procedural aspects) that have been used over a long period of time in various countries in their Constitutions as well as in legal instruments such as those found in the European Community law embody a perception of matters of procedural justice instead of substantive justice[104].In actual fact, it is improper to generalize the application of the concept of equality because it is highly likely that procedural justice may not necessarily guarantee any particular outcome that can be called substantive equality.

Conceptually, there is indirect discrimination if by applying objective criteria to the same situation in which persons are found in but the results tend to become that of discriminatory treatment. Thus, equality of treatment is not merely acting in the same way all the time or treating people alike in appearance just for the sake of equal treatment because the same treatment may not necessarily achieve the intended equality desired by the law. Qualifications are, therefore, necessary in order that type of inequality of treatment or the undesired discrimination can be eliminated by proper application of the principle of equality of treatment.

Differentiation between two equal human beings may be necessary if non-differentiation would result in unlawful discrimination. If there are intentional

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Martinus Nijhoff Publishers, Leiden, Boston, 2009, pp.1-9; Dworkin, R., *The Theory and Practice of Equality*, Harvard University Press, Cambridge, Massachusetts, London, 2002, pp.11-285.

[104]See Hepple, B., and Barnard, C., "Substantive Equality", *Cambridge Law Journal*, 2000, Vol. 59, No.3, pp.562-585 at p. 583.

positive affirmative steps that must be taken for the purpose of removing differences in treatment at any time and any place when they arise, then equality of treatment may mean positive discrimination. Watson, P., in his treatise titled *"Equality of Treatment: A Variable Concept?"* has contended that equality of treatment is known to be a general principle available in European Community law which is invariably provided in a number of EC Treaty provisions.[105] It may be added that the principle is also implied in the *EA Treaty*, Article 6, Article 8, Article 40(3), Article 48 and Article 119.The principle demands that identical or comparable situations must be treated alike, while different situations must accordingly be treated differently.[106]

Unfortunately, Hepple and Barnard have concluded that, the concept of equality has been as vague as confusing subject of investigation both in moral and political philosophy.[107] Watson, P., has also contended that even court decisions in the European Court of Justice seem to show that the case law and EC legislation are not moving in any clear direction in as far as interpretation and application of the principle of equality is concerned.[108] There is still deep-seated conceptual confusion and a lack of consistency in interpretation and application of the concept of equality. Nevertheless, a legal framework to decide on the legitimacy of discriminatory practices facilitates the acceptance of intervention not only by the judiciary, but also by others who know the law and can prevent discriminatory actions by referring to it.

[105] Watson, P., pp.33f. note 76,
[106] Ibid.
[107] See Hepple, B., and Barnard, C., pp. 583-585, note 104.
[108] Watson, P., note 76, pp. 33-48.

2.2.2 Migrant Worker

The dictionary meaning of the term "migrant worker" simply states that it is a person that travels to a different country or place, often in order to find work.[109] person who moves from place to another within a country (internal labour migrant) or movement of a person from one country to another country (international labour migrant) in order to find employment opportunity.[110]

As such, a migrant worker may be seasonal or temporary worker or a long term labour migrant.[111] Such migrant worker may be described as an economic migrant involving a person leaving his/her habitual place of residence for the purpose of settling outside his/her country of origin. A migrant worker therefore has a purpose of improving his/her standard or quality of life. A migrant worker moving internally has no restrictions as the one crossing national borders. Consequently, a migrant worker may lawfully or unlawfully cross national borders and get lawfully or unlawfully employed in the country of destination. As such a migrant worker may be illegally residing in a foreign territory thereby acquiring the status of illegal or irregular migrant or may lawfully engage in employment and therefore acquire the status of lawful migrant worker.

Persons entering a country without legal permission or persons settling outside their home country for specified period such as during agricultural season, or any seasonal activity are described as seasonal workers who frequently cross frontiers[112]. All these

[109] See Cambridge Advanced Learners Dictionary, note 102.
[110] Oxford Advanced Learners Dictionary, Oxford University Press, Oxford, 2017.
[111] Boyd, M., "Family and Personal Networks in International Migration: Recent Developments and New Agendas."*The International Migration Review*, 1989, Vol. 23, No. 3, Special Silver Anniversary Issue: International Migration an Assessment for the 90's, pp. 638-670.
[112] Glossary on Migration, *International Migration law*, IOM, Geneva, 2004, p.41.

workers are generally referred to as migrant workers. Therefore, internal migrant workers face different risks and difficulties from international labour migrants because of application of territoriality rules, international law and human rights principles in the course of transnational migration mainly due related abuses facing migrant workers crossing national borders. This leads to a discussion of the concept of international labour migration; same concept of migrant workers is used in an international setting.

2.2.3 International Labour Migration

The concept of *international labour migration* is defined by the International Organisation for Migration as the international movement of persons from their home State (country of origin) to another State (country of destination) for the purpose of employment[113]. The IOM states that worldwide, the international labour migration has been statutorily addressed by countries in their national laws governing immigration. Countries which put stringent conditions in regulating outward labour migration from their own countries inhibit the rate of emigration of nationals seeking employment opportunities abroad, but those countries supporting and facilitating their nationals for possible employment opportunities abroad increase the rate of migration to other countries .

In the context of international law, both the concepts of "migrant worker" and "international labour migration" are used in the United Nations *International Convention on the Protection of the Rights of All Migrant Workers and Members of*

[113]Al-Ajlani, R., The Legal Aspects of International Labour Migration: A Study of National and International Legal Instruments Pertinent to Migrant Workers in Selected Western European Countries, A Thesis Submitted for the Degree of PhD, Faculty of Law and Financial Studies, University of Glasgow, 1993, p.3.

Their Families, (ICPRMW) 1990[114]. The convention has defined the term '*migrant worker'* in the international legal framework as "*a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'*.[115] The *Eurofound* has provided the term '*cross-border worker'* and defined it as someone who is employed in one Member State but resides in another, where he/she returns at least once a week.[116]

The EU legislation has sometimes described cross-border labour mobility which is the source of migrant workers in the Union as being the result of posting of workers, which is itself a peculiar form of within the context of the freedom to provide services within a Community. This is only partly covered by the right of equal treatment of Union citizens.[117] The Organisation for Economic Co-operation and Development (OECD) on the other hand has described the term *'Migrant worker'* to refer to foreigners admitted by the receiving State for the specific purpose of exercising an economic activity remunerated from within the receiving country.[118]

The 1998 UN recommendations on the statistics of international migration has difined the *international migrant* as any person who changes his or her country of usual residence[119]. The ILO *Protection of Migrant Workers (Underdeveloped Countries) Recommendation*[120] has defined the term "migrant worker" as:

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[114] See Part I.
[115] See the ICPRMW 1990, Art. 2(1).
[116] Retrieved from *https://www.google.com/*, accessed 18 January 2017.
[117] See EU Posting of Workers Directive 96/71/EC).
[118] Lemaitre, G., *"The Comparability of International Migration Statistics Problems and Prospects*", Statistics Brief-OECD, No. 9, July 2005, p.2, retrieved from https://www.oecd.org/migration/pdf, accessed on 19 March, 2017.
[119] Ibid.
[120] See ILO Recommendation No. 100 of 1955.

> *'any worker who is participating in such migratory movements either within the countries and territories or from such countries and territories into other countries or territories, whether he has taken up employment, or is moving across the border of his own country in search of employment or is going to arranged employment, and irrespective of whether he has accepted an offer of employment or entered into a contract…"*[121]

In appropriate cases, the Recommendation provides that the term *migrant worker* also means any worker who has returned home or is returning temporarily or permanently during or at the end of such employments. There exist numerous literatures on the concepts and theories surrounding the term "migrant worker" in the context of "international migration". However, there is no commonly accepted generic or general legal concept of the term *"migrant worker"* in international law. The type of international migration and citizenship determine the rights of nationals and migrants in any given sovereign territory.

Bosniak, S.L., has postulated that, the question of citizenship is normally a matter regulated by domestic laws on immigration.[122] Based upon the principle of "territorial sovereignty", it is generally accepted that a State has the power to exercise exclusive control over its physical domain, subject to limitations imposed by international law.[123]

The author contends that, States' power to refuse entry into its territory and to expel aliens (migrants), and also their discretion to confer nationality has been treated as an integral part of nations' territorial sovereign power since the late nineteenth

[121]Ibid, Art. 1(2).
[122]Bosniak, S.L., "Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention", *International Migration Review*, 1991 (737-770), at pp.742ff.
[123] Ibid, pp. 742-744.

century.[124] Bosniak subscribes to the notion that if a state is not free to decide who will enter its territory according to its own laws which set criteria for entry into its territory and the regulations or conditions of such inflow of foreigners, its sovereign function will be severely impeded. This is likely to render its governing authority of the territory questionable.[125] It is therefore, a right of each State Party to any international treaty or convention to establish the criteria governing admission of migrant workers and members of their families.[126]

On another front, Olivier, M and Govindjee, A have argued that immigration law does operate within national legal framework and therefore other national laws such as the employment law, and laws governing security considerations are applicable. The authors contend that governments do retain control over the process of immigration of foreigners.[127] Through country immigration laws, particularly in some developed countries, deliberate attempts are sometime made to regulate the contribution of foreigners in the labour market in a manner which does not affect existing labour standards and the rights and expectations of citizens.[128]

The authors argue that, modern immigration legislation has shifted towards the balancing attempts to prevent illegal immigration and control of migration.[129] This is done while fully cognisant of basic human rights in an attempt to build a human rights-based culture of enforcement of immigration law. In controlling illegal

[124] Ibid, p. 743f.
[125] Ibid.
[126] Ibid.
[127] Olivier, M., Marius, G.O., and Avinash, G, note 38, pp.4-10.
[128] Ibid.
[129] Ibid, pp.4-6.

migration countries are encouraged to work towards prevention of xenophobic tendencies while maintaining compliance with international human rights law.[130]

2.2.4 Social Security

One of the oldest definitions of the concept of social security was given by Pierre Laroque in 1966 in which he stated that social security is:

> *"A guarantee by the whole community to all its members of the maintenance of their standard of living, or at least of tolerable living conditions, by means of a redistribution of incomes based upon national solidarity."*[131]

Prior to this definition given Laroque, the author had attempted to define the province of social security when leading the government efforts to extend social protection to the entire population of France. Therefore, the actual national social security system was set up in France in 1946. After passage of several decades since the formulation developed by Laroque in 1966, another scholar called Vrooman, J.C adopted what he called *'narrow approach theory'* to defining social security in 2009 in which he defined social security as:

> *"....the entire body of government provisions aimed at providing a cushion for private households which as a result of specific events or circumstances have ended up in a weak income position".*[132]

Vrooman argues that, there are some elements which commonly characterise the interpretation of social security. He argues that, the objective of social security is to offer a certain degree of income protection through the instruments that are

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[130] Ibid, p.4.
[131] Laroque, P., "Social security and social development", in: *Bulletin of I.S.S.A*, 1966, Vol.19 (3-4). 83-90, at p. 84.
[132] Vrooman, J.C., *Rules of Relief: Institutions of social security, and their impact*, Institute for Social Research, The Hague-The Netherlands, 2009, p.110.

ordinarily used to achieve this goal, and that these include social insurance and national provisions regulated by law.[133] He posits that, the implied mechanism of provisions of social security benefits to those in need in form of money or in kind is the major means of intervention. Therefore, for him, social security focuses on specific, clearly defined risks.[134]

Robert Walker has defined social security in the context of American social security system to mean:

> *"...cash benefit systems that are run or sponsored by government and funded primarily from contributions of workers and their employers with payments being made to needy people based on their contribution records."*[135]

Walker, R., continues to argue that, in Great Britain the word 'social security' is used interchangeably with words "social insurance schemes" or "contributory benefits." In addition to social insurance schemes, the term "social security" does embrace both the 'means-tested' and 'non-contributory benefits' such as social assistance.[136] Means-tested" social security benefit has been in other words described as "social assistance" in some social security systems. Walker postulates that **'**means-tested benefits' generally refer to social insurance schemes whereby people under it are entitled to claim for benefits if their income and other resources fall short of a prescribed standard.[137]

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[133] ibid, pp. 110-212.
[134] Ibid.
[135] Walker, R., *Social Security and Welfare Concepts and Comparisons*, Open University Press, Berkshire, New York, 2005, p.4.
[136] Ibid, pp.4-6.
[137] Ibid.

"The author argues that in many countries social assistance is nationally restricted because a person in need of social assistance may become a burden on the public finances of the host Member State during his period of residence. What appears common in both the contributory and non-contributory types of schemes is that they are generally funded from general taxation. Walker has also argued that "social assistance" is the term commonly used throughout continental Europe and by international agencies such as the Organization for Economic Cooperation and Development (OECD) and the ILO to refer to means-tested benefits.[138]

Sabates-Wheeler and Feldman have defined '*social security'* as:

> *"…public policy measures aimed to protect members of society against social and economic distress in relation to sickness, economic insecurity, unemployment, disability, poverty, old age, death of breadwinner, maternity and other similar risks".*[139]

The concept of social security offered above is broader and inclusive in the context of the world community's discourse around international human rights system. The definition of social security offered by Sabates-Wheeler and Feldman is similar to the international labour standards definition,[140] as adopted by Taha, Messkoub and Siegmann who have also adopted the context of the ILO to define social security as:

> *"the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner.*[141]

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[138] Ibid.

[139] Sabates-Wheeler, R., and Feldman, R., "Introduction: Mapping Migrant Welfare onto Social Provisioning", "in" Sabates-Wheeler, R. and Feldman, R. (eds), *Migration and Social Protection: Claiming Rights beyond Borders,* Palgrave Macmillan, New York, 2011, pp.3-35.

[140] See ILO: *Extending social security to all: A guide through challenges and option*, Social Security Department-ILO, Geneva, 2010, p. 10.

[141] Taha, N., Messkoub, M., and Siegmann, K.A., "*How portable is Social security for Migrant workers?A Review of the Literature"*, International Institute of Social Studies, Erasmus University Rotterdam, The Hague, 2013, p. 5.

Although the terms *'social security'* and 'social protection' are used interchangeably in this thesis, the clear distinction lays in the fact that 'social protection' refers to all forms of support aimed at preventing, managing, and overcoming situations that adversely affect people's well-being. In that regard social protection systems broadly encompass both 'social security benefits' and 'social assistance'. Most often, migrant workers receive less protection or suffer diverse forms of social exclusion from enjoying equal protection among national social security legal systems of many countries around the world.

From the context of perceived and real world-wide discrimination of international labour migrants, the approach that has been taken to address the concept of equality of treatment in social security for migrant workers in this study takes both the ILO approach and the human rights approach to the right to social security. Since 2001 the ILO internationally recognized the right to social security for everyone as a basic human rights issue that is widely accepted in international human rights law and international labour standards.[142]

2.2.5 Harmonisation

The concept of harmonisation of social security laws has been variably explained by a number of scholars including Wedel, J., and Sakslin, M., to refer to a mechanism for ensuring that the social security of citizens who migrate to other countries for employment is legally protected, maintained and promoted.[143] Harmonisation is

[142] See for example, the Universal Declaration of Human Rights, 1948, Art.22 and the International Covenant on Economic, Social and Cultural Rights, 1966, Art.9.

[143] See Wedel, J., "Social Security and Economic Integration I: Freedom of Movement and the Social Protection of Migrants", *International Labour Review*, 1970, Vol.102, pp. 455-474; Sakslin, M.,

often described as an important feature of modern legal system taking much shape in the regional integration studies.[144] Harmonisation of social security laws is a system whereby by legal instruments are structured to conform to agreed set of principles, institutions and objectives in order to realize intended benefits.

Pennings, F., describes various approaches to harmonisation ranging from "standard harmonisation" to "minimum harmonisation".[145] Standard harmonisation is that type of harmonisation that requires that all national social security systems of Member States in a regional Community should adopt the same standards. This type of harmonisation does not allow Member States to deviate from the regionally set standards.[146] Standard harmonisation of social security systems is said to become approximately to unification of social security schemes of Partner States whereby the result of interpretation of harmonised laws must be the same to ensure that harmonising instruments work in practice and provide a foundation for developing harmonising legislation in member countries of a regional integration.[147]

Moles, R., argues that *standard harmonisation* works with other agreed co-ordinating methods of application and through adopting concordant policies to arrive at the effective internationalisation of social security for benefits of migrant

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"Social Security Co-Ordination: Adapting to Change", *European Journal of Social Security*, 2000, Vol.2, No.2, pp.169-187.

[144] See Sakslin, M., The Concept of Residence and Social Security: Reflections on Finnish, Swedish and Community Legislation, *European Journal of Migration and Law, 2000.* Vol.2, pp.157-183, at 158-159.

[145] See Pennings, F., *Introduction to European Social Security Law*, (3rd edn.), Intersentia Limited, Cambridge, 2003, pp.288-291; Pennings, F., (ed.), "Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law", Kluwer Law International, The Hague, 2006; Pennings, F., "Inclusion and Exclusion of Persons and Benefits in the New Coordination Regulation", in Dougan, M., and Spaventa, E., (eds.), *Social Welfare and EU Law*, Hart Publishing, Oxford, 2005.

[146] Pennings, F., *Introduction to European Social Security Law*, note 145, pp.288-89.

[147] Ibid, pp.288-291

workers.[148] In a regional Community (such as the EU or EACOWAS or the EAC), it is required that governments of the Partner States should re-orient their domestic legislation and actions towards conforming to the Community law and systems or institutions through harmonisation of social security laws, policies, and systems among other things. In doing so, the Partner States are also required to decide the type or nature of harmonisation towards achieving common objectives of integrated common market.

The second type of harmonisation is described by Pennings as *minimum harmonisation*.[149] This is the degree of harmonisation envisaged by a regional integration body or Community which advocates for setting a threshold which national social security systems must meet in order to be regarded as compliant with requirements of a regional cooperation that follows harmonisation as part of its path to reaching integration objectives.[150] Under minimum harmonisation model, Member States are at liberty to exceed the prescribed social security minimum thresholds or standards as set in their social security harmonising instruments. Under harmonisation, the international or regional treaties or conventions impose a duty upon Member States to adopt conform their legislation to international or regional instruments and ensure that the domestic legal order does not contradict international or regional legal system and legal rules[151].

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[148] Moles, R.R., "Social Security for Migrant Workers in Latin America", *International Labour Review*, March-April 1982, Vol. 121, No. 2 (155-168) at, p.167.

[149]Penings, F., p.289, note 145.

[150]Ibid, pp. 288-29; see also Mpedi, L.G., "Harmonising social security systems within the Southern African Development Community", *Journal of Southern Africa Law*, 2009 (697-708), at p.699.

[151] Sakslin, M., "Social Security Co-Ordination: Adapting to Change." *European Journal of Social Security*, 2000. Vol.2, No.2, pp. 169-187, at p.169f.

Moles, R., has argued that, in order to be effective in domestic legal systems of Member States, any multilateral or international instruments or agreements should be capable of harmonizing and co-coordinating the laws, legal rules, regulations and administrative provisions of Member States.[152] The general objective of harmonization is, among other things, to solve the persistent problem of unilateral application of national social security legislation that is founded on the principle of "territoriality" while the affected persons are under different legal regimes and have rights that must be determined under agreed applicable law.[153]

The territoriality principle has in many cases stood as the main limitation in respect of acquisition, maintenance and recovery of entitlement to social security benefits for migrant workers. Thus, in principle, the process of harmonizing and coordinating social security systems contributes in helping to eliminate differences in the coverage of insured persons in different countries under different schemes but also coverage of the family members of migrants in respect of social security benefits. Also, harmonisation serves to expedite the legal formalities for obtaining benefits earned under different legal regimes. It also helps in determining steps that need to be taken in order to guarantee migrant workers and their families, the entitlement to benefits that fall due.

2.2.6 Co-ordination

The terminology of social security carries with it the concept of coordination of social security that operates in the context of diversity of territoriality and national

[152] Moles, R. R., pp.155-168, note 148.
[153] Ibid. p.166.

diversity of social security. In that situation, the right to social security becomes an international phenomenon governed by different international legal instruments of coordination. Therefore, co-ordination as a concept in social security refers to:

> "rules intended to adjust social security schemes in relation to each other (as well as to those of other international regulations), for the purpose of regulating transnational questions, with the objective of protecting the social security position of migrant workers, the members of their families and similar groups of persons."[154]

As a result, Overmeiren, F., in writing about '*general principles of coordination of social security'* and Nickless, J., and Siedl, H., in writing about '*coordination of social security in the council of Europe'* they all argue that in order for social security coordination to take effect in regulating transnational questions, the same should be governed by four common principles[155]. These principles include: the principle of determination of the applicable law[156], the principle of maintenance of acquired social security rights,[157] the principle of equality of treatment,[158] and the principle of exportability of benefits.[159]

The material scope of social security co-ordination is described by Saskalin, M., who postulates that, 'social security coordination' is the legal and administrative mechanism for ensuring that social security benefits of persons moving from one Member State of the Community to another are protected, maintained and

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[154] Pennings, F., p.6, note 145.
[155] Nickless, J., and Siedl, H., *Coordination of Social Security in the Council of Europe: Short Guide,* Council of Europe Publishing, Strasbourg, 2004, p.12; Van Overmeiren, F., "General Principles of Coordination of Social Security: Ruminating *Ad Infinitum*?", European Union Studies Association, Biennial Conference, Los Angeles, 23-25 April 2009, pp.4-5.
[156] Ibid.
[157] Nickless, and Siedl, p. 13, note 155.
[158] Ibid, p.12.
[159] Ibid, p. 13.

accessed.[160]This is so irrespective of the individual's place of residence or employment in the Community. Therefore, the principle of *exportability* of benefits aims at eliminating the clauses on residence requirement so as to enable a migrant worker who worked in different countries within the Community to access his accrued social security benefits anywhere in the Community.

Nickless, J., and Siedl, H., have argued that the principle of *aggregation* of periods of insurance or contributions (or *"totalization of periods*") considers adding-up earned benefits by a migrant worker in different countries.[161] However, all the described principles can only function if national laws establishing respective social security schemes have incorporated the clauses on conclusion of bilateral or multilateral social security agreements. Also, countries in the regional bloc must take steps to conclude such agreements which are to be based on ratification of relevant ILO conventions in the first place in order to enable implementation of reciprocity.

Thus, coordination leaves the competence to legislate on social security matters in the hands of national parliaments. Sakslin, M argues that in essence the doctrine of coordination aims at securing the possibility of maintaining a variety of different national social security systems.[162] Thus, coordination is based on the understanding that disparities in legal systems are always expected and after all they must exist among Member States in the Community. These disparities, however, should not be allowed to create unnecessary obstacle to free movement of workers within a given regional Community.

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[160] Sakslin, M., Social security Coordination, p.169f, note 151.
[161] See Nickless, J., and Siedl, H, p.14, note 155.
[162]Sakslin, M., *The Concept of Residence and Social Security*, pp.158-159, note 144, see also Sakslin, M., "Social Security Co-Ordination, pp. 169-187, note 151.

Further the coordination of social security benefits operates within a particular material scope at hand. Therefore, when considering the practical material scope of social security co-ordination that should be adopted there are specific aspects to be examined. The extent of use of a particular social security coordination instrument in regulating social protection systems need to be assessed. Countries must decide if the co-ordination of social security is to be extended to all social benefits including benefits such as social assistance, or should such benefits be excluded from the province of social security co-ordination. The substantive scope of social security coordination defined must be categorically defined.

Legislations of the regional Community must also be clear and comprehensible to all Member States. This requires putting in place sustainable review mechanism for assessing the Community legal framework from time to time, and where applicable, to introduce needed reforms. This is so important because there are always changing legal and social environment which take place both in the national legislation of the Member States and in Community law. Roberts, S., argues that, co-ordination of social security systems often requires each of the member countries to sign a plethora of international social security agreements that may be designed to overcome some of the disadvantages experienced by international migrants.[163]

[163] Roberts, S., "Our view has not changed': the UK's response to the proposal to extend the co-ordination of social security to third country nationals," *European Journal of Social Security*, 2000, Vol. 2, No.2, pp.189-204, at p.190.

Social security co-ordination is not without challenges[164]. At the same time, the history of coordination law shows that the concept of residence and the administrative practices for determining in which country a person has resided and is entitled to benefits based on residence have been tested long time ago among old Nordic cooperation[165]. These countries had in place an intensive cooperation which was so exceptional due to similarities of the legal, cultural and social environments, but the mechanism failed to become sustainable. However, Sakslin, M., continues to argue that, coordination turned out to be not possible to overcome the divergences in interpretations of legal norms regulating social security rights of migrant people[166]. Therefore, even in the EAC countries there are likely challenges of interpretation of EAC law and national legislation and agreements governing coordination.

As to protection of international labour migrants, it is not yet settled as to whether more harmonised legislation can work or less harmonized one can abolish the prevent losses of social security rights caused by divergence of legal systems. Saskalin contends that norms of competences and the applicability of national legislation should be adopted and emphasized. It means, instead of harmonising substantive norms, Member States may need to try to draft clear procedural norms defining who has the competence to decide whether a person is subject to the social security legislation of the Member State in which he or she resides.[167] These norms may prescribe how to determine the national legislation that is applicable and based on this, decisions on the place of residence should be made.

[164] See Sakslin, M., pp.182-183, note 144, and note 151.
[165] Ibid.
[166] Ibid.
[167] Ibid.

Nickless, J., and and Siedl,H., maintain that social security co-ordination instruments are a result of creation of international agreements and treaties which may be bilateral or multilateral agreements or multilateral conventions such as those drafted under the auspices of the ILO and the UN and regional instruments (supra-national law)[168]. Thus, supra-national law is another source of social security coordination law because supra-national bodies such as the European Union or the EAC or the EACOWAS have acquired an international recognition to produce supra-national laws are imposed upon Member States that join the Community. Other Community laws makes a State lose freedom of choice to decide either to ratify it or not to such as it is the case with EU social security coordination law.[169]

2.3 Theoretical Framework

2.3.1 Theories of Equality of Treatment

Equality of treatment in social security has been approached and analysed using different theoretical approaches provided by a number of theorists describing the meaning, relationships and application of equality of treatment in various socio-legal context. However, a description of only some theoretical approaches is just sufficient for purposes of this study. The first theory is *John Rawls' theory of justice* in which he states that:

> *'as a matter of principle of equality in justice distribution each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties of others".*[170]

5[168] Ibid.
[169] See Nickless, J., and Siedl, H., p.14, note 154.
[170] Rawl, J., *A Theory of Justice*, Harvard University Press, Cambridge and Massachusetts, 1971, pp. 24-79.

Rawl states in his theory of equality of treatment that, 'there must be preferential principle of treatment of people based on their degree of vulnerability as opposed to the perceived generalisation of equality irrespective of conditions of people in question'.[171] Rawl's theory dictates that, it may be imperative for equality to mean that the category of worst-off people (perhaps more vulnerable) should form the basis for justification for their special consideration compared to those who are relatively better off. This may be interpreted to mean that people in dire state of need of services or goods or in state of hopelessness may be the reason and reason alone for their preferential treatment compared to those in relatively better condition. Such people deserve absolute priority before any others because of their disadvantaged situation. In many countries around the world, migrant workers are vulnerable in many respects including uncertainties in accessing social security rights in migratory conditions. This is owing to application of different municipal laws in different countries that create tensions with international human rights law.

The second theory is stated by Weitman, S., that…*equality of treatment demands that identical or comparable situations must be treated alike while different circumstances must be accordingly treated differently*. [172] Weitman's model supports differentiation of treatment but based on justifiable grounds and in a consistent pattern. His theory of equality is complemented by similar theory of equality postulated by Barnard, C., and Bob Hepple[173] who attempt to argue from traditional

[171] Rawl, J., *The Law of Peoples: With, the Idea of Public Reason Revisited, Michigan:* Harvard University Press, 1999, p.65.
[172] See Weitman, S., "Discrimination on Grounds of Nationality", inHepple and Szyszczak (eds), *Discrimination: The Limits of the Law*, Kluwer, London, 1992, Chapter 12.
[173] Barnard, C., and Hepple, B., p. 585, note 104.

understanding of non-discrimination principles towards arguing a kind of substantive equality in that what constitutes equality of treatment in substance may not necessarily require the same treatment of individual persons in order to achieve the desired equality.

The third theoretical model as to what is equality of treatment is stated by Dworkin, R., who begins by posing the question as to: *whether equality does matter*. He states that equality does not exist and if it exists, then that equality is indeed the endangered species of the political ideals. [174]

Dworkin's "theory of equality" states that, equality is in many respects utopian goal to achieve in any given political society because in practice, it appears vague and unsettled. He contends that it is difficult to attain absolute equality of treatment among all people in society.[175] However, the author states that no government is legitimate that does not show equal concern for all the citizens over whom it claims dominion and from whom it claims allegiance[176]. Equality of treatment prohibits direct acts of discrimination or indirect discrimination but still when objective criteria are employed to the same situation; it may still result in discriminatory treatment of people. This is particularly so if there are no mechanisms to prohibit resultant discriminatory consequences in any purported objective criteria.

[174] Dworkin, R., *Sovereign Virtue: the Theory and Practice of Equality*, (4th Reprint), Harvard University Press, Cambridge, London and Massachusetts, 2002, pp.11-64.
[175] Ibid.
[176] Ibid.

The fourth theoretical model explaining equality of treatment is propounded by Wissenburg, M., who uses a *liberal theory of social justice* to describe the imperfection and impartiality among human beings. Wissenburg states that:

> *"Justice demands that we treat equals equally and un-equals in proportion to their inequality, so we need a measure for (in)equality, a basis of desert or a criterion for eligibility as a recipient of justice…"*[177]

The preceding description of justice demands that equals get an equal treatment and that 'un-equals' are treated in proportion to their inequality. To Wissenburg, equality of treatment is part of the theory of distributive justice but he says, it is a complex phenomenon that forms one of the elements of justice.[178] However, equality as a constitutive element of justice has been so open to contingent circumstances, divergent in its practical application and there is much overriding unpredictable ramification in varying political circumstances because in practice, treating all human beings equally remains a controversial aspect.

The fifth group of theorists on equality of treatment include McCrudden, C., and Prechal, S., who have given a "*legal theory of equality"* which states:

> *"…save where there is an adequate justification, like cases must not be treated differently, and different cases must not be treated in the same way. This implies that where two categories are treated differently, the first issue is whether the categories involved are similar or not. If they are not, there is nothing wrong with treating them differently. If they are, the question is whether the difference in treatment can be justified. In this first meaning of equality, the justification that is required in order to be accepted may often be highly deferential to decisions taken by public bodies: if the action taken is 'rational', that may be enough."*[179]

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[177] Wissenburg, M., *Imperfection and impartiality: A liberal theory of social justice*, UCL Press Limited (Taylor & Francis Group), London, 1999, p.123.

[178] Ibid.

[179] McCrudden, C., and Prechal, S., "*The Concepts of Equality and Non-Discrimination in Europe: A practical approach",* Report prepared for the use of the European Commission, Directorate-

The above theoretical model of equality described by McCrudden and Prechal tends to explain and define equality to mean the absence of discrimination or exclusion. The theory contends further that equality essentially requires that where the exercise of governmental power results in unequal treatment, it should be properly justified, particularly in the consistency of its application, and in existence of persuasive and acceptable criteria.[180]

2.3.2 Theories of International Labour Migration

Three clusters or typology of explanation serve to underscore the dynamics of international labour migration dynamics. They include: the theories of initiation (causation) of international labour migration; theories of continuation (perpetuation) of international migration flows; and theories explaining anti-immigration attitudes.

The fist cluster concerns *theories of initiation of international labour migration.* Under this typology, there are several theoretical models of international labour migration that have been advanced to explain partially the initiation or causes of international migration phenomenon. A description of only some of these theories serves the purpose of this study. Massey et al [181] and Schoorl[182]distinguish

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General for Employment, Social Affairs and equal Opportunities, European network of legal experts in the field of gender equality, European Commission, 2009, at p. 11.

[180]Ibid, pp. 11-12.

[181] Massey, D. S., Arango, J., Hugo, G., Kouaouci, A., Pellegrino, A., and Taylor, J. E. "Theories of international migration: A review and appraisal", *Population and Development Review*, 1993, Vol.19, No.3, pp. 431-466. See also Lebhart, G., "Migration theories, hypotheses and paradigms: An overview", in Fassmann, H., Kohlbacher, J., Reeger, U., and Sievers, W., (Eds.*), International migration and its regulation*, IMISCOE, Amsterdam-Netherlands, 2005, pp. 18-28.

[182]Schoorl, J.J., "Determinants of international migration: Theoretical approaches and implications for survey research", in Van der Erf, R., and Heering, L., (Eds.), *Causes of international migration*, Office for Official Publications of the European Communities, Luxemburg, 1995, pp. 3-14.

theoretical approaches as to the causes of international migration into two categories: theoretical approaches explaining the initiation of migration and theoretical approaches explaining the continuation of migration.

Some of the theories explaining the *initiation (causes)* of international labour migration include: neoclassical economic theory, dual labour market theory, the new economics of labour migration, and world systems theory.

The *neo-classical migration theory* as described by Jennissen,[183] and De Haas, H.,[184] is the oldest theory of migration which states that wage differences between regions are the main reasons for initiation of labour migration. Borjas[185]; Massey et al.[186]; Bauer and Zimmermann[187] are some of the advocates for this theory. The other one is the *"dual labour market theory of migration"* which states that international labour migration is caused mainly by pull factors in the developed migrant-receiving countries. The theory states that, segments in the labour markets in developed countries may be distinguished as being primary or secondary in nature.

The primary segment is characterized by capital-intensive production methods and predominantly high-skilled labour, while the secondary segment is characterized by

[183] Jennissen, R., "Causality Chains in the International Migration Systems Approach", *Population Research Policy Review*, 2007, Vol. 26, pp.411-436, at p.411f.
[184] De Haas, Hein., *Migration and Development: A Theoretical Perspective*, International Migration Review, 2010, Vol 44, No. 1, pp.227-254
[185] Borjas, G. J., "Economic theory and international migration", *International Migration Review*, 1989, Vol. 23, No.3, pp. 457-485.
[186] Massey et al, pp.18-28, note 181.
[187] Bauer, T., and Zimmermann, K. F., "Modelling international migration: Economic and econometric Issues", in Van der Erf, R., and Heering, L. (Eds.), *Causes of international migration*, Office for Official Publications of the European Communities, Luxemburg, 1995, pp.95-115.

labour-intensive methods of production and predominantly low-skilled labour. Dual labour market theory assumes that international labour migration stems from labour demands in the labour-intensive segment of modern industrial societies (receiving countries). The "dual labour market theory of migration" is advocated by several scholars including Piore, M.J.[188]; Massey, D.S., Arango, J., Hugo, G., Kouaouci, A., Pellegrino, A., and Taylor, J.E.[189]

The "*relative deprivation theory"* is another theory advocated by Stark, O., and Taylor, J.E., which explains the *initiation* of international labour migration. The theory states that, awareness of other members (or households) in the countries or societies that are sending labour migrants particularly awareness on matters relating to income differences is an important factor in initiating migration.[190] The incentive to emigrate is relatively higher in countries or societies that experience much economic inequality.

Another theory that explains the *initiation* of international labour migration is the *"world systems theory"* which is also subscribed to by Amankwaa.[191] The *world systems theory* states that, according to globalization trends, international labour migration occurs due to international trade between countries with weaker economies and countries with more advanced economies which in turn results to

[188]See Piore, M. J. *Birds of passage: Migrant labour in industrial societies*, Cambridge University Press, Cambridge, 1979, pp. 10-240.
[189] Massey et al, note 181.
[190] Stark, O., and Taylor, J. E. "Relative deprivation and international migration", *Demography,* 1989, Vol. 26, No.1, pp.1-14.
[191] Amankwaa, A. A. "The world economic system and international migration in less developed countries: An ecological approach", *International Migration*, 1995, Vol. 33, No 1, pp.95-113.

economic stagnation of weaker economies thereby occasioning poor living conditions in these weak economies which then becomes an incentive for migration. The advocates of this theory include Chase-Dunn, Hall, T.D.[192], Wallerstein, I., and Nyang'oro.J.E,[193] Jennissen, R.,[194] and Amankwaa, A.A.[195]

The second cluster explains the *theories of continuation or perpetuation of international migration* flows. These theories are many but for purposes of this study, only some are explained. These include: *Institutional theory*[196], *Modern international systems theory or approach,*[197]*Network theory*[198], *Cumulative causation theory*[199], and *Social capital theory*[200].

The *institutional theory*[201]of international migration tries to explain why international migration is continuing (ongoing). This theory unifies different theories and state further that economic point of view accounts for a considerable part of the theoretical background of international migration and its continuation.[202] This theory is advocated by Massey, D.S., and several other scholars who state that, where there are established institutions for assisting in physical mobility of labour migrants and

[192] Chase-Dunn, C., and Hall, T. D., "The historical evolution of world-systems", *Sociological Inquiry*, 1994, Vol. 64, No. 3, pp.257- 280.
[193]Wallerstein, I., *Historical capitalism*, Verso Publishers, London, 1983, 100p; Nyang'oro. J.E, " A Review *Historical Capitalism* by Immanuel Wallerstein and *The Emergence of African Capitalism* by John Iliffe, *African Studies Review,* Vol. 27, No. 3, pp. 111-113, Cambridge University Press, London, 1984.
[194] Jennissen, R., *Causality Chains in the International Migration Systems Approach*, Springer Science+Business Media B.V., 2007, pp.1-2.
[195] Amankwaa, note 191.
[196] Ibid.
[197] Massey et al., 1993, note 181.
[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] Ibid, note 181.
[202] Ibid.

their settlement (whether legal or illegal), these institutions will strengthen cultural linkages between countries.[203]Consequently, labour migrants will be settled comfortably and will be free from psychological costs. The latter is due to the assimilation in the receiving society and due to the ease with which they can go back to their home countries to visit and return to their jobs in foreign territory.[204] This explains why international labour migration is likely to continue and increase among countries experiencing this phenomenon.

The *"modern world international systems theory* or *Approach* of continuation of international labour migration was propounded by Wallerstein, I. in 1974.[205] The theory states that migration follows the dynamics of market creation and structure of the global economy. According to this theory, strong immigrant labour demand in global cities acts as a 'pull force' to migration. Also, historical reasons such as economic and political disruptions and dislocations in peripheral parts of the world due to past colonialism have had long term impact on future migration tends and patters globally. On another front, the theory states that capitalist expansion of neoclassical governments and multinational corporations are among causes of continued international labour migration.[206]

The weakness of the *"modern world international systems theory* is that, there are more diverse individual driving (push and pull) factors that cause continuation of

[203] Massey et al., 1993, note 181.
[204] Ibid.
[205] Wallerstein, I., *The Modern World-system*, Academic Press, New York, 1974.
[206] Ibid.

international migrations which are not taken into account by this theory.[207] Moreover, this theory is a re-defined theory by Kritz, M.M., and Zlotnik, H.[208] The latter authors in 1992 argued that, the central idea of the international migration systems approach is that, the exchange of capital and people between certain countries takes place within a particular economic, social, political and demographic context.[209]This re-defined theory admits that politics matter in international migration. This is because laws of nation states are the result of the relative power of different internal political contending forces or interest groups. These groups shape the national legislation governing migration, and hence may determine where to be a destination of labour migrants.

The *network theory* of *continuation or perpetuation* of international migration states that existing migrants' networks tend to help potential migrants to be attracted to migrate, for instance, by contributing to financing the journey and helping them to find jobs or appropriate accommodation or by giving information about appropriate education possibilities or access to social security. Goss, J., & Lindquist, B., have argued that, migrants' networks can be both a chance but also a threat to a potential migrants[210]. Migrant networks are complimented with external migrant institutions ranging from people smugglers to recruiting agents and humanitarian NGOs. These

[207]*Push and Pull Factors of International Migration: A Comparative Report*, European Commission, Luxembourg, 200,179p.
[208]Kritz, M. M. and Zlotnik, H., "Global Interactions: Migration Systems, Processes, and Policies", in Kritz, M., Lim, L. L., and Zlotnik, H., (eds.), *International Migration Systems A Global Approach.* Clarendon Press, Oxford, 1992.
[209]Ibid.
[210] Goss, J., and Lindquist, B., "Conceptualizing International Labour Migration: A Structuration Perspective", *International Migration Review,* 1995, Vol. 29, No. 2 (317-351).

also help to perpetuate the flows of migration. This theory explains why there is continuation or perpetuation of international labour migration.

The third cluster of migration theories describes *'theories explaining anti-immigration attitudes'*. One of these theories is the *group conflict theory* propounded by Lancee, B., and Pardos-Prado, S.[211] The *group conflict theory* predicts that:

> "Socio-economically vulnerable individuals are more likely to articulate negative attitudes toward immigration due to a perception of ethnic competition for scarce resources such as jobs, housing, economic benefits, and social services."[212]

A number of scholars in this field of anti-immigration attitudes have suggested that the literature on the causes and effects of anti-immigration attitudes is still growing.[213] The *group conflict theory* essentially suggests that real changes in economic conditions such as the actual economic vulnerability or a change in the distribution of material scarce resources that a country has for its citizens, is likely to generate or increase interethnic hostility across different social strata. This may affect immigrants, particularly migrant workers more seriously as they are likely to become the target of hatred or xenophobia based on assumed benefits they get from national social welfare programmes.

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[211] Lancee, B., and Pardos-Prado, S., "Group Conflict Theory in a Longitudinal Perspective: Analyzing the Dynamic Side of Ethnic Competition", *International Migration Review(IMR)*, 2013, Vol.47, No. 1, pp.106-131.

[212] Ibid, p.106.

[213] See Kehrberg, J. E., "Public Opinion on Immigration in Western Europe: Economics, Tolerance, and Exposure." *Comparative European Politics*, 2007, Vol.5, No.3, pp.264-281; Gorodzeisky, A. "Who are the Europeans that Europeans Prefer? Economic Conditions and Exclusionary Views toward European Immigrants", *International Journal of Comparative Sociology*, 2011, Vol. 52, Nos.1-2, pp.100-113.

2.3.3 Theories of Social Security

Justification for social security models have been explained by different scholars. Numerous theories of social security exist but a description of some useful theories in this study is sufficient. The first theory may be taken from Mullligan, C., who has stated the *efficiency theories of social security* in which the theory of '*social security as solution to the prodigal Father problem'* is propounded. The theory states that social security takes care of the elderly because some of them engaged in prodigal behaviour when they were young and did not save enough to support themselves later in life.[214] There are two versions of this theory.

Version one is "*myopic prodigality"* theory which assumes that parents were not looking forward enough when they were young. It is argued that people tend to err when they are young and they save too little. There are assumed several possible reasons for this situation. It is stated that people may lack the information necessary to judge their needs in retirement, but also they may be unable to make effective decisions about long-term issues because they are not willing to confront the fact that one day they will be old. Also, Diamond, P., argues that people may simply fail to give sufficient weight to the future when making decisions. This means that they may act "myopically"[215], hence leading the Government to act as a guardian that forces citizens to save part of their income in form of social security contribution.

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[214] Mulligan, C.B., and Sala-i-Martin, X., "*Social Security in Theory and Practice (II):Efficiency Theories, Narrative Theories and Implications for Reforms",* NBER Working Paper Series, No.7119, National Bureau of Economic Research, Cambridge Press, Chicago & Cambridge, 1999.

[215]See Diamond, P., "A Framework for Social Security Analysis", *Journal of Public Economics*, Vol. 8, No.3, December, 1977, pp. 275-98.

Version two of the theory of *prodigal Father Problem'* is described by Laitner, J., as the "*rational prodigality theory"* which is exactly the opposite of myopic prodigality theory. The *rational prodigality* theory states that parents were forward looking to such an extent when they were young that they anticipated not only their needs for retirement, but how their children and others in society would react to those needs[216]. Feldstein suggests that, the optimal solution to the *prodigal father problem* involves means-testing (rational) and a low level of retirement benefits[217] that is fully funded social security program that needs not be administered by the government.

The second theory of social security is described as *"residual social welfare theory of social security*" that was stated by Titmus, R.M. Briefly, the theory states, among other things, that the individual persons or the wider social network to which persons belong such as family, community or household, have basic responsibility for the financial repercussions of ensuing social risks.[218] The benefits provided under the social security scheme should function as a social safety net and therefore, as a rule, they should be minimal, of temporary nature, and they need to be accompanied by a means test to identify and ascertain to what extent there is inadequacy of income of individuals and perhaps some assets.[219] This theory is relevant for this study because it underscores the collective nature of social security which involves both the Government schemes and individuals or solidarity groups in society which are typical features among the EAC countries.

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[216] See Laitner, J., "Bequests, Gifts, and Social Security", *Review of Economic Studies*, 1988, Vol. 55, No. 2, pp. 275-99.
[217] Feldstein, M., "The Optimal Level of Social Security Benefits", *QJE*, Vol.10, No. 2, 1985, pp. 303-20.
[218] Titmuss, R. M., Social *policy: an introduction*, Allen & Unwin, London, 1974, p.210.
[219] Ibid.

The third theory of social security is described by Titmus as *'industrial achievement-performance model of social policy'* which states that the government has the primary responsibility for income protection of its citizens through social welfare institutions which are the adjuncts of the economy.[220] He contends that, social needs should be met on the basis of merit, work-performance and productivity and therefore, socio-economic risks resulting from let say unemployment, old age, invalidity, sickness and injuries, among others, are supposed to be covered in proportion to the individual's contribution to the collective scheme related to labour productivity. As such, certain social security benefits shall depend on labour performance, employee's contribution history, employment history, and occupational status[221].This theory explains some employment related social security systems existing in the EAC countries which register migrant workers for social security contribution.

The fourth social security theory is known as the '*institutional redistributive model of social policy*, also explained by Titmus, in which he describes social security as a redistribution of social goods aimed at achieving a just society. The theory describes social security as a means of expressing the collective responsibility for individual welfare based on the reason that in present day societies the families and the free market forces are no longer able to provide adequate and fair coverage of social risks.[222] Thus, national governments through their institutions are charged with a duty to adopt redistributive approaches for provision of coverage against risks

[220] Ibid.
[221] Ibid.
[222] Vrooman, p. 211, note 132.

through a range of benefits. However, the theory does not address the application of the theory to transnational labour migrants in the framework of equality of treatment under international normative standards.

The fifth theory is described as *"the social-democratic welfare states theory of social security* "developed by Esping-Andrsen in 1990s.[223]The theory states that, high levels of social security benefits and social protection services should be provided by the State as part of its welfare programme. This is stated so because, the society's several strata are incorporated under the one universal insurance system whereby private sector is forced to provide pensions and other similar social services which ultimately make the sector crowded. As a result, the State opts to assume direct responsibility of caring children, helpless, the aged and so on in form of provision of social assistance as kind of social security.[224]

The sixth theory describes social security in international legal dimension and states that *social security is a human rights issue*. This ILO and international human rights approach to social security[225]states social security right as a human rights issue as developed from extensive provisions of relevant ILO conventions and international human rights instruments. The rights based approach stems from the Constitution of the ILO[226] which constitutes a chapter of the Treaty of Versailles of 1919 that ended

[223]See Esping‐Andersen, G. *The three worlds of welfare capitalism*, Polity & Princeton University Press, London, 1990, pp.1-264.
[224]Ibid.
[225] Egorov, A., and Wujczyk, M., (eds.), *The Right to Social Security in the Constitutions of the World: Broadening the Moral and legal space for social Justice*, ILO Global Study, Vol. 1, Europe, ILO, Geneva, 2016, pp. xv-xvi.
[226] Preamble to the Constitution of the International Labour Organization, 1919.

the First World War and set the agenda of social welfare development for all human beings in the course of building the world peace.

As already stated, the rights-based approach to social security is two-pronged; firstly, the ILO approach and international human rights approach to social security. The latter affirms that the right to social security has been strongly affirmed in international law while the former approach recognizes the fact that, the human rights dimensions of social security are traceable from the Declaration of Philadelphia of 1944 which called for the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care. The Declaration concerned with the aims and purposes of the ILO and these aims were made annex to the Constitution of the ILO, 1919 under section III (f). Several decades later in 2001, the ILO affirmed that social security is an indispensable part of government policy because it was declared a fundamental human right intended to build human dignity, equity, and social justice.[227]

Under the international human rights framework, social security is recognized as a human right in the *Universal Declaration of Human Rights* in which it is stated that *"everyone, as a member of society, has the right to social security*"[228]. The UDHR also provides that everyone has the "right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[229] The right to social security was subsequently incorporated in

[227] Egorov, A., and Wujczyk, M., (eds.), note 225, pp. xv-xvi, also see Preface.
[228] UDHR, 1948, Art. 22.
[229] Ibid, Art. 25(1).

a range of international human rights treaties which are currently in place.[230]The evolving practice has been that, even the regional human rights treaties have been formed following the international human rights framework.

Under the observation of the Committee on Economic, Social and Cultural Rights made in the *UN General Comment No. 19, para. 2*, the right to social security includes the right to access and maintain benefits. These benefits may be in cash or in kind. The same have to be provided without discrimination in order to secure protection from lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member and several other contingencies.

The CESCR has also defined some minimum core content of the right to social security described as ensuring access to a social security scheme that provides a minimum essential level of benefits. This should enable beneficiaries to acquire at least essential health care, water and sanitation, basic shelter and housing, foodstuffs, and the most basic forms of education.[231] Another minimum core content of the right to social security is to ensure the right to access to social security systems or schemes on a non-discriminatory basis mainly for disadvantaged individuals and groups in society[232]; c) To respect existing social security schemes and protect them from unreasonable interference.

The rights-based approach involves applying the concept of equality in assessing the

[230] See the ICERD, Art. 5 (e) (iv); CEDW, Art.11 para. 1 (e), Art. 14 (2c); CRC, Art.26.
[231]See CESCR, *UN General Comment No. 19, para. 2.*
[232] Ibid.

treatment of migrant workers at country level of a host state through examining as to whether the policies, constitutions and legislations of foreign countries have included the aspects of equality of treatment of migrant workers. This is done by applying the concept of equality as recognition of diversity model.[233] Manuela Tomei considers social security as a constitutional guarantee.[234] The author describes the third model of equality from the perspective of a rights-based approach to social security of migrant workers, and calls it the procedural or individual justice model.[235]

Under individual justice model of equality, Tomei[236] argues that, the realisation of social security rights by non-nationals or migrant workers is assessed to establish as to whether, such rights can be pursued, accessed and adequately obtained through national legal mechanisms of a host State in judicial machinery that are capable of treating the national and the non-national equally both in terms of procedures to be followed and the substantive law to be applied to migrant workers.

2.4 Relevance of concepts and theories to the research

The selected concepts and theories so far discussed in this chapter have been chosen as relevant for purposes advancing the course of this study. However, not every theory and every concept so far exposed is intended to be used in assessing the state of compliance with international standards and regional instruments concerning the subject of equality of treatment of migrant workers in social security. Also, in no way the researcher claims that the described concepts and theories are exhaustive. The discussed conceptual models and theories are, however, sufficient for making

[233]Tomei, M., pp.410-415, note 64.
[234]Ibid.
[235]Ibid.
[236]Ibid.

basic foundation upon which the objective of this study is met.

This research could neither accommodate each and every relevant concept and theory in an attempt to answer the research questions so far posed in this thesis. Also, the researcher could not pretend to utilize each and every theory discussed in this study. The author has, therefore, selected only the concepts and theories that serve to lay ground for understanding better the diverse discourses and approaches to tackling the underlying controversies in answering the research questions of this thesis.

Based on understanding of the various concepts and theories built in this chapter, the researcher has been able to establish the theoretical justification and foundation upon which existing multiple national social security legislations and systems or schemes of the East African Community countries of Kenya and Tanzania are explained. The establishment of social security and protection mechanism under the EAC law is part of obligations stemming from international labour standards within the bounds of international law and principles of human rights. The international legal framework for human rights protection of migrant workers applies the principles of treatment as understood under the framework theories of equality.

The relevance of equality principles in social security for migrant workers is translated into actual regional wide enforcement under the EAC legal framework in Article 6d and Article 7(2) of the EAC Treaty which provide for observance human rights principles, social justice, equality of treatment and enforcement of the African Charter on Human rights. Not only that, but also, some principles of equality of

treatment in social security, concepts such as coordination of social security and harmonisation of social security laws, theories of equality and human rights approach to social security are utilised in examining the legal conditions existing among the EAC Member States. These principles are entrenched in various EAC regional harmonising instruments such as the EAC Treaty, 1999 and the EAC CMP, 2009 and other Community regulations enforcing the Treaty provisions and Common Market Protocol.[237]

Therefore, the conceptual framework and theories explained in chapter two of this thesis have provided required insights into understanding the basis of national social security legislations of EAC Member States, particularly those of Kenya and Tanzania. The state of social security co-ordination and harmonisation of social security laws under the EAC legal framework is investigated in chapters 4, 5, and 6 in order to establish if there is any type of regional wide administration of portability of benefits for migrant workers in the framework of the EAC Common Market Protocol. Understanding relevant concepts and theories explained in this chapter has helped the researcher in critical examination of challenges of compliance to international labour and human rights standards and EAC regional instruments in as far as protection of migrant workers in the subject of social security is concerned.

Migration theories discussed in this chapter are equally relevant in this study because in the EAC there has been increased intra-region labour migration across national borders. Some of the causes or initiation and continued regional wide labour migration and some anti-migration attitudes are explained by these international

[237]See the EAC Treaty, 1999, Art. 6 and Art. 7; EAC CMP, 2009, Art. 3, Art. 5 sub-articles (2) (c) and (3 (f), Art. 10(4); Art. 12 (2), and Art.13 (2) etc.

migration theories. Consequently, nationality condition for entitlement to social security benefits has gradually continued to lose its strict constitutive confinement or connection to particular legal regime of EAC sovereign States due to a requirement of harmonisation of laws. This implies that, the tradition of linking the right to social security to the status of nationality condition of employed or self-employed person is gradually fading away.

Theories explaining the anti-immigration attitudes have provided understanding as to why some countries have legal regimes that are restrictive against immigration or employment of foreigners, or restricting foreign migrants from enjoying equal social welfare benefits with nationals. The EAC countries have different social security policies and legal frameworks that manage social security rights provisioning. Whether at national level they have appropriate social welfare policies and comprehensive legal framework that protects social security rights of all migrant workers without discrimination regardless of their nationality is subject of this investigation in subsequent chapters. The rights-based approach to social security is adopted in this study, as a model that best explains and interprets compliance to international treaties and regional legal framework in the EAC countries on equality of protection of international labour migrants.

2.5 Conclusion

Chapter two has looked into the conceptual and theoretical framework of international labour migration and social security as they impact on application of principles of equality of treatment of migrant workers. Various concepts of social security, equality of treatment and theories of initiation and continuity of

international labour migration have been described. Conceptual problems involved in understanding social security models and its implementation in the context of international labour migration have been underpinned.

Among others, the chapter has shown that the right to social security remains obscure as a human rights issue. This is because it is largely endorsed as a social welfare issue mainly aimed at old age or retirement even if it caters for any imminent contingence. The researcher attempts to assume that social security is a human rights issue and therefore a rights-based approach to social security is adopted as the mainstream research approach for this work. This has advantages of inviting broader approaches to social security provisioning within reaches of governments. The next chapter presents an international and regional legal framework for equality of treatment in social security as between nationals and international migrant workers.

CHAPTER THREE

3.0 LEGAL FRAMEWORK FOR EQUALITY OF TREATMENT IN SOCIAL SECURITY FOR MIGRANT WORKERS

3.1 Introduction

The chapter starts with a brief introduction followed by a discussion on the legal framework for protection of social security right of international migrant workers in international law. This is particularly presented in framework of international human rights law and international labour standards. The chapter then proceeds to discuss the legal framework for protection of social security rights of migrant workers under regional human rights instruments from the perspectives Europe, Latin America, Africa, Arab States and the ASEAN Nations. Finally, a discussion of the legal framework for protection of human rights of migrant workers under the framework Commonwealth of Independent States is presented followed by a Conclusion.

3.2 Protection of Migrant Workers under International Law

The main theme that governs this study is social security with particular emphasis on equality of treatment of migrant workers. This is pursued through examination of legal provisions of selected international human rights instruments and international labour standards instruments that have a bearing on the concept of equality of treatment in social security. Among various international human rights instruments and international labour standards that present the concept of equality of treatment in social security and act as standards-setting instruments in the perspective of international human rights law and ILO approach are analysed under this part. The instruments examined below do invariably contain legal provisions entrenching

social security rights for migrant workers at different lengths and depths. The discussion presents these instruments on how they attempt to set legal framework for equality of treatment in social security for migrant workers.

3.2.1 Protection of Migrant Workers Under International Human Rights Law

The first instrument is the Universal Declaration of Human Rights (UDHR), 1948. Although the Declaration has nothing specific concerning migrant workers, its preamble categorically states that, there is an inherent dignity and of the equal and inalienable rights of all members of the human family. The equal and inalienable rights of all members of the human family are considered as the foundation of freedom, justice and peace in the world. Under the UDHR, all human beings are all collectively classified as members of one human family and they are all entitled to enjoy their human rights without distinction of any kind, such as national or social origin, birth or other status…, among others.[238] Concerning the equality of treatment and the right to social security, Article 22 of the UDHR provides that:

> *"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.*[239]*(Emphasis added).*

Article 22 requires that all Member Countries to the UDHR have to give meaning to the words 'national efforts and international co-operation' in ensuring that irrespective of national borders and nationality condition, every human being has the right to enjoy social security. In addition, Article 25 [240] of the UDHR provides that:

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[238] See UDHR, Art. 2.
[239] Ibid, Art. 22.
[240] See UDHR, Art. 25 (1).

> *"Everyone has the right to [...] security in the event of unemployment, sickness, disability, widowhood, old-age or other lack of livelihood in circumstances beyond his control". Under this article, it is provided further that "motherhood and childhood are entitled to special care and assistance".*[241]

Consequently, the exclusion of national borders and nationality condition in enjoyment of the rights to social security entitles every human being including a migrant worker to enjoy equal protection under the rules of international law.

The *International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966*[242] is one of the UN human rights instruments that sets, among other things, the additional international human rights system for social security rights of migrant workers as enshrined in Article 9, Article 11 and Article 12.[243] The Covenant guarantees a comprehensive range of substantive rights including the social security rights of migrant workers on foreign territory. The ICESCR provides for the rights to self-determination as found in Article 1 of the Covenant.

Under this article, sovereign States have obligations to provide in their legislative framework the fundamental economic freedoms to the individual as part of economic rights to every person including the non-nationals as provided for in Article 2 and Article 6 of the ICESCR. The migrant workers' right to work is provided for in general terms in Article 6 of the Covenant. Specifically, the right to social security and social insurance are provided for in Article 9 in which it is stated that: *The States Parties to the present Covenant recognize the right of everyone to social security,*

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[241] Ibid, Art. 25(2).
[242] See United Nations, *Treaty Series* 3 (1976) ATS 5/6.
[243] The ICESCR in Article 9 states that "*The State Parties to the present Covenant recognise the right of everyone to social security including social insurance".*

including social insurance."[244]

The right to social *protection* and *assistance* for the family is provided for in Article 10 of the ICESCR. As such, the protection offered by the ICESCR against hunger is contained in Article 11 where adequate food and housing may be given in form of social assistance. The right to health care is also part of social security and this is provided for in Article 12 which, among other things, provides for the right to medical treatment against occupational and other diseases. The Convention imposes obligations upon States to create conditions which would assure to all people without discrimination, the medical services and medical attention in the event of sickness.

The third instruments that elaborates specific standards on international protection of migrant workers and their families is the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW)*[245] *of 1990*. The treaty elaborates particular standards addressed to comprehensive international protection of migrant workers' rights and members of their families. The Convention entered into force on 1st July, 2003[246], however, the instrument has not been widely ratified by many countries as by December, 2016 only 39 countries had become signatories and 49 had become states Parties. The disappointing feature though, regarding ratification is that none from the most developed countries are party to the ICPRMW.[247] The rest of the EAC countries have not ratified this Convention with the exception of Rwanda which acceded to this Convention on 15th

[244] See ICESCR, Art.9.
[245]United Nations, *Treaty Series*, vol. 2220, p.3, https://treaties.un.org/pages/...accessed 17 September, 2015.
[246]The International Convention on Migrant Workers and its Committee- Fact Sheet No. 24, Rev.1, United Nations: New York and Geneva, 2005, p.1, retrieved at http://www.ohchr.org/…accessed 29 December, 2015.
[247] As of December 2016 ratifications (signatories) to ICPRMW was 39 States and 49 States Parties, retrieved from https://treaties.un.org/Pages/…accessed 28 December, 2016.

December, 2008 and Uganda that which acceded to this Convention on 14th November 1995. Article 7 of the ICPRMW provides:

> *"States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status."*[248]

Thus, migrant workers and members of their families deserve all rights provided under the ICPRMW in granting, promoting, and protecting these rights without any distinction based on nationality condition**.** As far as the freedom of movement of migrant workers is concerned, Article 8(1) of the ICPRMW provides:

> *"Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.*[249]

This means that article 8(1) permits migrant workers and members of their families to freely move across national borders pursuant to national laws, and that these laws should be unreasonably restrictive to migration. Accordingly, Article 24 of the ICPRMW provides that *"Every migrant worker and every member of his or* her family shall have the right to *recognition everywhere as a person before the law."*This forms the basis for the application of the principles of equality of treatment in social security as a human rights issue as expanded by the UN General Comments No.19 on the right to social security under Article 9 of the ICESCR

[248] ICPRMW, Art. 7.
[249] Ibid, Art.8 (1).

adopted on 23 November, 2007. Thus, the ICPRMW provides for social security in Article 27 (1) as follows:

> *"With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm."*[250]

The doctrine of bilateral and multilateral social security agreements is also reinforced under this convention. In recognition of problems relating to the principle of territoriality of the applicable legislation for implementation of social security rights for migrant workers, the ICPRMW under Article 27(2) provides:

> *Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.*[251]

The Convention recognizes the fact that there are countries whose applicable legislation does not allow migrant workers and members of their families to get access to social security benefits. In such circumstances migrant workers in such precarious situation deserve the reimbursements of their contributions based on governing laws applicable for similar cases involving nationals. Also, the ICPRMW under Article 28 provides:

> *"Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any*

[250] ICPRMW, Art. 27(1).
[251] Ibid, Art 27 (2).

irregularity with regard to stay or employment."[252]

Thus, under Article 28 where there are specific categories of persons who on account of their vulnerable position in society, they need special or additional protection, such emergency care should not be unreasonably withheld. Like all other international human rights instruments, this convention sets standards for the laws and the judicial and administrative procedures of individual States to guarantee protection of international migrants. Governments of States that ratify or accede to this Convention undertake to apply its provisions by adopting necessary measures to ensure that migrant workers whose rights have been violated may seek an effective remedy.

The fourth instrument that sets some general principles of equality of treatment and non-discrimination relevant to migrant workers is the *International Covenant on Civil and Political Rights*, (ICCPR)[253]*1966*. The purpose and objects of the ICCPR is to establish fundamental principles for persons' participation in affairs of political and civil rights without discrimination and on equality principles. The ICCPR provides for the right to life and human dignity in Article 6(1) while the freedom or liberty of movement in and outside the country is stipulated in Article 12(1).

The ICCPR in Article 16provides that: "*everyone shall have the right to recognition everywhere as a person before the law"*. The wording 'everyone' connotes non-

[252] See the ICPRMW, Art. 28.

[253] Passed by the UNGA Res. No. 2200A on 16 December 1966, available at < http://www.ohchr.org/en/>, accessed 8 November 2015.

exclusion but inclusion of protection of every human being including migrant workers and members of their families. Article 2(1) of the ICCPR is one among the Articles providing for the non-discrimination of human beings. Also, the Covenant in Article 26 prohibits discrimination based on national or social origin, property, birth or other status, race, colour, sex, language, religion, political or other opinion.

The ICCPR in Article 26 provides for equality of *all persons* before the law without any discrimination. Impliedly, all State Parties to this Convention guarantee to 'all persons' equal and effective protection against discrimination. The wording 'all persons' connects every human race. It means that nationality condition or social origin or birth or any 'other status' are, among grounds that are prohibited from being applied in defining human rights. Under the ICCPR, the right of movement of a person and to choose his residence is provided for under Article 12.Therefore, under the ICCPR, any form of discrimination of human beings based on nationality is prohibited.[254]

The fifth instrument that provides some general principles of equality of treatment and non-discrimination relevant to the protection of international migrant workers is the *Convention on the Elimination of All Forms of Racial Discrimination (CERD) of 1965.* The Convention creates mechanism of entitlement to equal protection of the law against any discrimination. The preamble to the CERD[255] provides to the effect that the convention promotes the principles of the dignity and equality inherent in all

[254] Pellonpaa, M., "Rights of A liens Under the International Covenant on Civil and Political Rights", in Hakapaa, K., (ed.), *Essays in Honour of Voitto Saario and Toivo Sainio*, 1983, Vol. 70, No.3.

[255]The ICERD was passed by General Assembly resolution 2106 of 21 December 1965, retrieved from http://www.ohchr.org/...CERD/, accessed 17 September 2015.

human beings as under the Charter of the United Nations. The preamble provides that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination. According to article 1(1) of the CERD, the definition of racial-discrimination which is technically the concept of inequality of treatment, states:

> *"In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."*[256]

The principle of universality of human rights in which the right to social security belongs is echoed in this treaty. Article 5 of the CERD provides for compliance with the fundamental obligations laid down in Article 2 of the Convention. Article 2(1) provides for equality before the law notably in the enjoyment of the human rights. The CERD provides to the effect that each State Party is required to take effective measures to prohibit discrimination. This can be done by review of governmental, national and local policies, and by amending, rescinding or nullifying any laws and regulations which have the effect of creating or perpetuating racial discrimination in society wherever it exists.[257] The CERD provides for the economic, social and cultural rights including the right to social security covering medical care, public health, and social services.[258] The next discussion presents the international legal framework for protection of migrant workers under international labour standards.

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[256] The ICERD, Article 1(1).
[257] Ibid, Art.2 (1) (c).
[258] See the ICERD, 1965, Art. 5(e) (iv).

3.2.2 Protection of Migrant Workers Under International Labour Standards

Under this sub-part, there are highlighted various principles and general rules that lay relative legal framework for international protection of labour standards for migrants moving from one country to another for employment. Depending on conditions which exist in countries that host migrant workers (migrants' receiving countries) and legal conditions in home countries (labour migrants' sending countries) the implementation of equality of treatment becomes heavily reliant on political will to ratify relevant ILO conventions, conclusion of reciprocal social security agreements and domestication of the same in municipal laws.

a.) Elaborating equality of treatment under the Minimum Standards social security Convention

The primary international instrument that sets general principles of social security and lays a foundation for equality of treatment standards for international migrant workers under the ILO framework is the *Social Security (Minimum Standards) Convention, 1952*.[259] It establishes minimum standards for all nine branches of social security, namely: medical care benefits;[260] sickness benefits;[261] unemployment benefit;[262] employment injury benefit;[263] family benefit;[264] maternity benefit;[265]survivors' benefit;[266] Old-age pension benefit;[267] Invalidity benefit.[268]

[259] ILO Convention No.102 of 1952.
[260] Ibid, Arts.7-12.
[261] Ibid, Arts. 13-18.
[262] Ibid, Arts. 19-24.
[263] Ibid, Arts. 31-38.
[264] Ibid, Arts. 39-45.
[265] Ibid, Arts. 13-18.
[266] Ibid, Arts. 59-64.
[267] Ibid, Arts. 46-52.
[268] Ibid, Arts. 53-58.

As regards *"medical care benefits"*, the legal framework is provided for under Articles 7 to 12 of Convention 102. The qualifying conditions for medical care are periods of contributions of an employed person, duration of employment or residence which should be sufficiently long. Each country should have medical insurance system with well defined scope and sustainably regulated so as to prevent abuse. More specific provisions for qualifying persons including migrant workers are provided under the *Medical Care and Sickness Benefits Convention, 1969* which came into force on 27 May 1972. Article 32 of this Convention provides:

> *"Each Member shall, within its territory, assure to non-nationals who normally reside or work their equality of treatment with its own nationals as regards the right to the benefits provided for in this Convention."*[269]

The *"Sickness benefit"*[270] is another branch of social security which within the terms of Article 14 of Convention 102, requires Member States to this instrument to enact national laws pursuant this treaty to cover for incapacity for work due to sickness and resulting loss of earnings .The incapacity to be covered should have been caused by a morbid condition (illness) or departure from a state of physical or mental health as a result of occupational diseases or injury which results in the suspension of earnings.[271] This benefit may not cover incapacity relating to maternity and birth because any resulting risks with respect of the latter are covered under the contingency of maternity.[272]

The *"unemployment benefit"*[273] is another branch of social security under ILO convention 102 that covers the contingency of loss of earnings of an individual due

[269]See the ILO Convention 130 of 1969.
[270] See Convention 102, Arts.13, 14,15,16,17, and 18 under Part III.
[271] See ILO Convention 102, Art. 14 and Arts. 15-18.
[272] See particularly the *Maternity Protection Convention (Revised), No.* 183 of 2000.
[273] Convention 102, Arts.19, 20,21,22,23 and 24.

to unemployment. A person is able to work but has been involuntarily rendered jobless[274]. The minimum qualifying conditions for this benefit include sufficiently long contribution periods, employment, or residence. it provided in Article 22(2) that unemployment benefit is subject to a means test, [275] but where possible, it should cover all residents.[276]

The *"Old-age benefit*" [277] is otherwise referred to as *retirement benefit*. This is another branch of social security established under Convention 102 which covers survival beyond a prescribed age of not more than 65 years or such higher age as may be fixed by the competent authority with due regard to the working ability of elderly persons in the country concerned.[278] The minimum standards for *retirement benefit* puts the duration of old-age benefit to be for life. The latter condition may be subject to suspension on account of re-employment.

The *"family benefit"* is another branch of social security established under Convention 102 in Articles 39 to 46.[279] The qualifying conditions for this contingency are 3 months of contributions or employment, or 1 year of residence.[280] In Article 42 (a) the amount of benefits includes cash payments[281] and payments in kind,[282] or both periodical payment and payment in kind. It is provided in Article 1(1) (e) of the Convention that the duration of benefits is during childhood, up to age

[274] Ibid, Arts. 20- 24.
[275] Ibid, Art. 22 (2) read together with Art. 67.
[276] Ibid, Art. 24 (1) (b).
[277]Ibid, Arts. 25, 26, 27, 28, 29 and 30 under Part.
[278] Ibid, Article 26 (2).
[279] Ibid, Arts. 39, 40, 41, 42, 43, 44, and 45 under Part VII.
[280] Ibid, Art. 43.
[281] Ibid, Art. 42 (a).
[282] Ibid, Art.42 (b), and in articles 46-52.

of 15 years, or below school-leaving age if that age is lower.

The *"maternity benefit*[283] established under Convention 102 covers pregnancy and confinement for female workers and wives of male worker which results in loss or suspension of earnings as defined by national laws or regulations.[284] The qualifying conditions for this benefit are period of contributions, employment, or residence which should be sufficiently long, considering the scope of the system, presumably to prevent abuse. Any female employed worker is entitled to this benefit irrespective of nationality, but a short term migrant worker would fail to meet the qualifying conditions.

The "*invalidity benefit"* is another branch of social security established under ILO Convention 102.[285] The inability to engage in any gainful activity or employment must be likely to persist after the exhaustion of sickness benefit.[286] The qualifying conditions include, among others: 15 years of contributions or employment and 10 years of residence.[287] The benefit must be paid throughout the contingency or until the recipient either becomes entitled to an old age pension or recovers their capacity for work. Migrant workers often fail to fulfil these qualifying conditions due to their migratory conditions.

The *"survivors' benefit"* is another branch of social security established under the provisions of Articles 59-64 of Convention 102 covering the presumed incapacity of

[283] Ibid, Arts.46, 47, 48, 49, 50, 51 and 52 under Part VIII.
[284] Ibid, Art.47.
[285] Ibid, Part IX Arts. 53-58.
[286] Ibid, Art. 54.
[287]Ibid, Art. 57(1) (a).

widow and orphan children for self-support due to death of a breadwinner which leaves dependants without any means of support.[288] The qualifying conditions for this benefit include: 15 years of contributions or employment; 10 years of residence[289]; or where all gainfully occupied are covered, half the yearly average number of contributions.[290] Each States' party to this convention is required to comply with equality of treatment of nationals and non-residents. Convention 102 requires that equality of treatment between nationals and migrant workers may be made subject to the existence of a *bilateral or multilateral agreement providing for reciprocity*.[291]

b.) Principles of equality of treatment in social security under the Migration for Employment Convention

The *Migration for Employment Convention (Revised)*(No.97) of 1949 was adopted by the ILO on 1st July of 1949 to set an international legal framework for protection of migrant workers including equality of treatment in social security, among others. The Convention defines the term "migrant for employment" to mean:

> *"a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment."*[292]

This convention excludes "(a) frontier workers; (b) artists and members of the liberal professions who have entered the country on a short-term basis; and (c)

[288] Ibid, Art. 60(1).
[289] Ibid, Art. 63 (1) (a).
[290] Ibid, Art. 63 (2) (b).
[291] Ibid, Art. 68 (2); see also Alvarez, J.E., "Multilateralism and Its Discontents," *European Journal International Law*, 2000, Vol. 11, pp.393- 394 on some critical challenges facing the legal enforceability of multilateral treaties.
[292] Ibid, Art. 11(1).

seamen." It places obligation upon States' parties to implement equality of treatment of both nationals and migrant workers according to the human rights standards of treatment of migrant workers. The convention in Article 6(1) provides that the treatment to non-national workers in employment should not be less favourable than those applicable to nationals. Any discrimination or any unfavourable treatment based on nationality is prohibited under the Convention.

Convention 97 provides for equality of treatment in maternity benefits for all entitled nationals including protection of migrant workers as may be discerned from Article 6(1) (b) which prohibits any discrimination based on nationality condition. However, various studies have shown that labour migrants experience notorious conditions of ill-treatment among many countries in the world.[293] For example, a migrant worker may fail to maintain acquired social security benefits and those in the course of acquisition under the convention because of conditional requirement for existence in place appropriate administrative arrangements for maintenance of such rights.[294] Absence of such arrangements between migrants sending and receiving countries makes the minimum protection of migrant workers illusory.

The ILO Convention 97 was supplemented with the *Migrant Workers (Supplementary Provisions) Convention of 1975*[295] which primarily focuses on migrations in abusive conditions. The convention creates an international framework

[293]See Kapur, R., "The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion or Inclusion", in *Theoretical Inquiries in Law*, 2007, Vol. 8, pp. 537-569; Tock, A., "The Dark Side of the Dunes: The Plight of Migrant Labourers in the United Arab Emirates, Relative to International Standards Protecting the Rights of Migrant Workers", *UCL Human Rights Review*, 2010 Vol.3 pp.109-149; Chuang, J.A., "Achieving Accountability for Migrant Domestic Worker Abuse", *North Carolina Law Review, 2010*, Vol. 88, pp.1627-1656; d'Orsi, C., "Which Legal Protection For Migrants In Sub-Saharan Africa?", *NZJPIL,* 2011, Vol. 9, pp.83-118.

[294] Such requirement exists under Convention 97, Art. 6(1) (b) (i).

[295]No. 143 of 1975.

that covers matters related to promotion of equality of opportunity and treatment of migrant workers. Articles 1-9 address the migration in abusive conditions while articles 10-14 cover equality of opportunity and treatment. Article 9(1) of Convention 143 provides:

> *"Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits."*[296] *(Emphasis added).*

The Convention acknowledges the fact that migrant workers must be controlled through following legal rules of countries concerned. However, countries are encouraged to protect migrants' rights in social security by creating conducive legal environment for better management of problems that occur in accessing social security benefits among international migrant workers. The convention discourages negative attitudes towards free movements of workers in search for employment and xenophobic tendencies in some countries. The instrument leaves room for conclusion of multilateral or bilateral agreements with a view to resolving problems which may arise during its enforcement.[297]

c.) Entitlement to equal treatment under the Equality of Treatment (Accident Compensation) Convention

The wording of the Preamble to the Convention in Para 3 read together with Article1 (1), (2); Article 2 and Article 9 of the Equality *of Treatment (Accident*

[296] Ibid, Art. 9(1).
[297] See ILO Convention 143, Part III, Art. 15.

Compensation) Convention, 1925[298] shows that the instrument was promulgated to cover important aspects of equality of treatment of foreign workers as regards workmen's compensation for accidents sustained by migrant workers in colonial and trust territories, protectorates or administrative regions that were under colonial administration.[299]

Article 1(1) provides that, any ILO Member State that ratifies this convention has to grant to the nationals of fellow Member State who suffer personal injury due to industrial accidents happening in its territory, the same treatment in respect of benefit of worker's compensation as it grants to its own nationals. In sub-article (2) of Article 1, the convention requires migrant workers' sending and receiving countries to put in place necessary legal regulatory mechanisms or special arrangements so that migrant workers who cross national borders obtain their occupational injury benefits abroad. The convention did not carry the subject of social security for migrant workers as its major and specific concern. However, it laid down the foundation for application of a broader principle of equality of treatment of all human beings even if the practical reality of this subject in the context of colonial rule by then remains questionable.

d.) Protection of Migrant workers under Equality Treatment [Social Security] Convention

The *Equality of Treatment [Social Security] Convention, 1962*[300] was adopted in Geneva on 28 Jun 1962 as central instrument that contains international legal

[298] No. 19 of 1925.
[299] See ILO Convention 19 of 1925
[300] No.118.

framework guiding the implementation of international labour standards in social security impacting on migrant workers. One among reasons for passing this Convention was lack of social security coverage and discriminatory tendencies that pervaded the national legal framework for provision of social security benefits in many countries around the world.

Each member that has accepted the obligations under Convention 118 in respect of the branch or branches of social security concerned is required to guarantee equal treatment to its own nationals and to the nationals of any other Member[301]. However, such member State must have accepted the obligations of the Convention in respect of provision of *invalidity benefits*, *old-age benefits*, *survivors' benefits* and *death grants*, and *employment injury pensions* to nationals of Member States while residing within and abroad.

In terms of Convention 118 in Art. 3 (1) equality of treatment of nationals and non-nationals has to be ensured as regards coverage and as regards the right to benefits covering every branch of social security for all countries that have accepted the obligations under the Convention. The convention requires that if a State Party to this Convention has enacted a legislation concerning provisioning of a particular branch of social security, but does not grant equality of treatment in that particular benefit to the nationals of other Member State, her own nationals working in that other foreign State shall accordingly receive similar treatment with respective to that particular benefit.[302]

[301] Convention 118, Article 5(1).
[302] Ibid, Art.3 (1) (2) (3).

e.) Principles of equality of treatment under the Maintenance of Social Security Rights Convention

The Maintenance of Social Security Rights Convention of 1982[303] was adopted on 21 June, 1982 and it came into force on September 11, 1986. The instrument falls under the UN category of classification under the subject of social security. It was established to provide rules for the adoption of national legislation implementing the principles of the maintenance of rights in the course of acquisition and of acquired rights for migrant workers. Convention 157 in sub-articles (1) and (2) of Article 3 and in Article 4 sub-article (1) recommends coordination of social security benefits for advantages of migrant workers.

Coordination of social security is made possible through conclusion of a network of mutual bilateral or multilateral social security agreements between migrant sending and receiving countries.[304] It establish principles of *maintenance of acquired rights* and the *rights in the course of acquisition* that require a migrant worker not to lose his acquired social security rights or benefits in the course of acquisition simply because of migration to another country for employment.[305] The objective of this Convention is to promote a flexible and broad form of "*coordination"* between national social security schemes which are governed by different national legislation.

A migrant worker may contribute to a social security scheme in his home country or country of destination but often such migrant may not receive corresponding benefits

[303] No. 157.
[304] See ILO Convention, 157, Arts. 3(1), (2) and 4 (1).
[305] Ibid, paragraph 3 and 4 of the Preamble to Convention 157; see also Arts. 6, Art.7, and Art.8

on equal footing with nationals. This may be due to lack of transnational portability of benefits resulting from national legal constraints coupled with lack of ratification of relevant social security conventions. Long term residence requirement in order to qualify for benefits has left temporary labour migrants without protection.

The *Maintenance of Social Security Rights Recommendation,* 1983[306] supplements convention 157 by setting model Agreement for coordination of bilateral or multilateral social security instruments.[307] The model Agreement (Annex II) to the Recommendation provides that coverage by the provisions of each instrument binding on two or more Contracting Parties should be extended to the nationals of any other Contracting Party. The model recommendation focuses on equality of treatment and exportability of social security benefits. The instrument also covers refugees and stateless persons. In the next part it is presented the regional legal framework of equality of treatment in social security for migrant workers.

3.3 Protection of Migrant Workers under Regional Instruments

3.3.1 Europe

Europe has passed through various stages of integration since the end of the Second World War in 1945. The institutions such as the European Union (EU), European Commission (EC), European Economic Community (ECC) and the Council of Europe were established at different stages marking landmark events of the coming together of European countries for the service of the people within Europe. The

[306]No. 167 of 1983.
[307] See ILO Convention 167, Annex II-Model Agreement for the co-ordination of bilateral or multilateral social security instruments.

philosophy behind this cooperation and unity is based on common unifying factors and broad objectives of member States and those wishing to join within the framework establishment.[308]

The concept of equality of treatment in social security for migrant workers within Europe has been dealt with under the legal framework of EU migration for employment. The European region has for decades passed a number of Charters and Conventions of both general and specific nature, as well as various EU directives and regulations concerning social security for migrant workers in the region. The discussion of selected European instruments show how the discussed treaties, conventions, charters and European Codes have influenced States practices towards certain patterns of legislation concerning social security right and equality of treatment of migrant workers.

The *European Convention on Human Rights (ECHR)* is one such instrument that was passed in 1950 and subsequently amended through amending Protocol of 1970 that entered into force on 21 September 1970; through amending Protocol of 1971; amending Protocol of 1990; amending Protocol of 1994, amending Protocol of 1998 and amendments that came into force on 1 June 2010. Therefore, the recent developments in EU case law have been built on interpretation by the European

[308]The term "European Community" or "Communities" refers to three communities of cooperation formed by several Western European states in the years following World War II. These are: the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (EAEC). The EEC appears to be the most important of the three and has often been referred to simply as the EC. When the Maastricht Treaty (Treaty on European Union) was approved, the European common market has been referred to as the European Union (EU).

Court of Human Rights established under Article 19 of the European Convention on Human Rights, 1950 (as amended). The latter recognizes social security as deemed human right. Therefore, discrimination based on grounds of nationality is among prohibited grounds of discrimination under Article 14 of the ECHR.

Although there is no direct mention of social security rights for migrant workers under the ECHR, there is a clear positive judicial activism that has emerged in various judgments made under the provisions of the Convention. This development has impacted the national legislations of EU member States in that they have been forced to effect legislative amendment to their national laws for compliance with judicial decisions as promulgated by the European Court of Human Rights.

Another instrument relevant to equality of treatment in social security is the *European Social Charter, 1961* that was passed by Member States of the Council of Europe in 1961 to supplement the *European Convention on Human Rights* in the field of economic and social rights.[309] The Charter of 1961 was later revised in 1996 and became the *Revised European Social Charter 1996* which gradually replaced the initial 1961 Treaty.[310] The legal framework for social security and equality of treatment under the Charter of 1961 is provided for under Article11 in which it is provided that every person deserves highest standards of health which by extension it includes migrant workers.

[309] European Social Charter, 1961, ETS 35, see Preamble.
[310] See European Treaty Series, 163, Part V, Art. E.

In Articles 13 and 14 of the Charter it is provided that every person has the right to social assistance and medical assistance as well as the right to social welfare services. In this, migrant workers are without exclusion as all workers and their dependents have the right to social security. Any person who has no adequate resources has the right to social and medical assistance.[311] Migrant workers who are nationals of a Contracting Party and their families have the right to protection and assistance in the territory of any other Contracting Party.[312]

The *Revised European Social Charter, 1996* enshrines a whole body of rights that encompass housing, health, education, employment, social protection, the free movement of individuals and non-discrimination. Essentially, Part II of the Revised Social Charter, particularly in Article 12, the right to social security among citizens of the Union is entrenched. In order to ensure effective exercise of the right to social security, Member States have agreed to establish or maintain a system of social security at a required satisfactory level.

The revised Social Charter in Art.12 (4) (a) charges upon Partner States to progressively improve their system of social security to a higher level. Equal treatment between citizens or nationals of host State and those of other Parties in respect of social security rights should be ensured.[313] In Article 12(4) b) the Charter states that migrants should be granted maintenance and resumption of their social security rights including the accumulation of insurance or employment periods

[311] See European Social Charter, Art.13, note 309.
[312] Ibid.
[313] Ibid, Art.12 (4) (a).

completed under the legislation of each of the Parties.[314] Also, Article 13 of the *Revised European Social Charter* recognizes a right to social and medical assistance, and it also prohibits discrimination against persons who receive such assistance.[315] Therefore, social security rights of migrant workers are protected in the Revised European Social Charter which opened for signature on 3 May 1996.

Another Europe's instrument is the *Charter of Fundamental Rights of the European Union (EU) of 2000* which brings together in a single document the fundamental rights protected in the EU. In its text, the Charter contains rights and freedoms under six heads. These include: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice, all combined in a total of 54 Articles plus the preamble. The Charter became legally binding on the EU Member States upon entry into force of the Treaty of Lisbon of 2007 in December 2009.[316] The provisions of the *Charter of Fundamental Rights of the European Union* are addressed to the institutions and bodies of the EU with due regard for the *principle of subsidiarity* and the *principle of proportionality* which are common principles of many economic communities.

The *"principle of subsidiarity"* simply means the principle which emphasises multi-level participation of a wide range of participants in the process of economic integration as provided in Article 5 (3) of the *Treaty on European Union, 1992.*[317] The principle of subsidiarity also applies to the national authorities only when they

[314] Ibid, Art. 12 (4) (b).
[315] Art.13(2)
[316]See Treaty of Lisbon of 2007 that amends both the Treaties establishing the European Union (EU) and the European Community (EC).
[317]See for example the Treaty establishing the European Community ("Nice" consolidated version), 1992 or Treaty on European Union, Art. 5 (3).

are implementing the EU law and when national action in the Member States is slow on any issue of legal and jurisdictional concern to the EU. The "principle of subsidiarity" states that: "*…In all cases, the EU may only intervene if it is able to act more effectively than EU countries at their respective national or local levels."*[318] The "principle of subsidiarity" also aims at bringing the EU and its citizens closer by guaranteeing that, action is taken at local level (in the Member States) where it is proved to be necessary.[319]

Concerning social security rights for migrant workers, Article 34 (1) of the *Charter of Fundamental Rights of the European Union* provides that, the European Union recognizes and respects the entitlement to social security benefits and social services. The risks that are protected include maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules that are laid down by European Community law and national laws and practices. It is further provided in Article 34 (2) of the *Charter of Fundamental Rights* that "everyone person" residing and moving "legally" within the European Union is entitled to social security benefits and social advantages in accordance with European Community law and national laws and practices."[320] Equality of treatment of every person is covered under Articles 20-26 of the Charter. Specifically, Article 21(2) provides that:

> *"Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to*

[318] Ibid.
[319] Ibid.
[320] See Charter of Fundamental Rights of the European Union, 2000, Art.34 (2).

> *the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.*[321]

The *Charter of Fundamental Rights of the European Union* further provides in Article 34(3) that it is the policy of the European Union in the area of social security and social assistance to prevent social exclusion in social welfare benefits and economic development of persons, even those who have no means due to poverty. In order for a migrant worker to be protected from discrimination based on his nationality under the provisions of Article 21(2) of the Charter of Fundamental Rights of the EU, that migrant must be "legally residing" or "legally working" in the EU member states within the meaning of Article 63a (1) of the *Treaty of Lisbon of 2007.* The referred Article 63(a) of the Treaty of Lisbon requires the EU to take into account the national interests of any EU Member State whose social security systems would be affected in terms of financial costs and balance as well as in terms of scope as a result of implementation of the EU Treaty.

The Charter in Article 35 further provides that, everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. Where national laws violate the provisions of agreed EU standards in various EU instruments, the EU standards shall take precedence, and the principles of primacy of EU law and those of subsidiarity will apply.

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[321] Ibid, Art. 21 (2).

The *European Code of Social Security (Revised), 1990* is another modern European social security instrument after the original *European Code for Social security of 1964* was adopted at Strasbourg by the Council of Europe.[322] The 1964 Code was designed to provide higher social security standards than those stipulated in the branches of social security in the ILO Convention No. 102 of 1952. The original European Code for Social security of 1964 provided for general provisions,[323]medical care,[324] sickness benefit,[325] unemployment benefit,[326]old-age benefit[327]; employment injury benefit[328], family benefit,[329] maternity benefit[330], invalidity benefit[331] and survivors' benefit.[332] Common standards to be complied with by periodical payments of benefits are provided in Articles 65-67.[333]

The *European Code of Social Security* of 1964 was supplemented by the *Protocol to the European Code of Social Security* of 1964 and both instruments came into force on 17 March 1968. The Protocol was designed to put higher standards of social security above those of the EU Social Security Code 1964. On the other hand, the primary Code introduced higher standards than those of the Minimum Standards under Convention 102.

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[322] See European Code of Social Security, 1964, ETS No. 048. The Council of Europe was formed in 1949.
[323] Ibid, Arts. 1-6.
[324]Ibid, Arts.7-12.
[325] Ibid in Arts.13-18
[326] Ibid, Arts.19-24.
[327] Ibid, Arts. 25-30.
[328] Ibid, Arts.31-38.
[329] Ibid, Arts.39-45.
[330] Ibid, Arts. 46-52.
[331] Ibid, Arts. 53-58.
[332] Ibid, Arts. 59-64.
[333]The Convention contains common provisions in Articles 68-71 and miscellaneous provisions in Articles 72-76 while Final provisions are provided in Articles 77-83.

Today, the Revised European Code *of Social Security, 1990* is one of the legal instruments of the Council of Europe relating to minimum standards of social security provisioning which sets benchmarks to be observed by all States that ratify the Convention. The *European Code of Social Security* of 1964 was revised in 1990 by the European Code *of Social Security* (Revised) 1990. In Article 22 of the Revised Code 1990 provides that *unemployment benefits* in any given EU Member State may be provided subject to qualifying conditions set by national laws. However, the bottom-line is that such qualifying period should not be unnecessarily long so as to prevent abuse of labour migrants and other entitled beneficiaries.

The Preamble to the *Revised Social Security Code, 1990* provides in paragraph 3 that the EU Member States have been mainly concerned with harmonising the protection that is guaranteed by social security but also with costs related to the process of conformity with the European Standards. Therefore, the *European Code of Social security, 1964* as revised in 1990 sets standards for harmonising national laws of Member States. It also stands as an instrument upon which co-ordination of social security for purposes of cross-border labour mobility within the EU rights is implemented. The EU Member States have either to alter the substance of their social security systems and laws at national level by amending their national laws or establishing new laws.

The *Revised European Code of Social Security* requires EU contracting parties to work towards exceeding the stipulated minimum standards of social security.[334] This can be achieved through adopting the European social security model which is

[334] Ibid, Para 5 of Preamble.

basically much more inclined towards a coordination model rather than harmonisation model. It has been established that within the EU the 17 countries[335] have their national legislation structured in such a manner that makes it possible for third-country nationals (migrant workers) to export some of their social security benefits such as the old-age pensions to a third country[336]. However, exportability of benefits is possible only if the migrants generally permanently move abroad.[337] The EU Member States automatically do apply the same legal provisions that permit exportability of social security benefits to third-country nationals as they do to nationals of the respective Member States, hence the application of the principle of reciprocity.

Generally, the EU regulations on the coordination of social security law and systems form the most comprehensive multilateral agreement on social security coordination covering 27 member States of the EU. It also extends to cover other non-members such as Norway, Liechtenstein, Switzerland and Iceland. The regulations cover all nine branches of social security. All nationals of the participating States, refugees and stateless persons previously covered in the EU are protected by the EU multilateral agreement on social security coordination. Also, all members of families and survivors of described categories of insured are also covered. Different infrastructures are established under the Agreements in order to support the administration, implementation and regulation of the agreement. For example, there has been established an *Administrative Commission for the Coordination of Social*

[335]Cyprus, Czech Republic, Finland, France, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Slovak Republic, Spain, Sweden and United Kingdom.
[336] See European Commission, *Synthesis Report on Migrant access to social security and healthcare: policies and practice*, European Migration Network Study 2014, 111p, at p.49.
[337]See European Commission, *Synthesis Report*, pp.46-51, note 336.

Security Systems which is assisted by a technical *Commission for Data Processing and Audit Board*. A tripartite *Advisory Committee for the Coordination of Social Security Systems* is another organ that facilitates coordination of social security systems in the EU.

Taking an example of exportability of *health care* benefits for a migrant worker in countries such as Finland, Ireland, Italy, Sweden and Luxembourg under the EU Revised Social Security Code, the Synthesis Report of the European Commission published in 2014 says that it requires a migrant worker to have his residence permits valid for at least one year.[338] The lack of statutory restrictions created by the law permits any migrant workers insured in Luxembourg and now living abroad to be treated in another country and have the costs of treatment reimbursed by the National Health Fund.[339] In support of this legal practice in the EU, the cross-border medical care benefit has some case law.

The European countries have developed case law regarding reimbursement of medical expenses incurred in another country.

The decision of the ECJ on cross-border healthcare in the joined cases of *Geraets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep Zorgverzekeringen*[340] addresses the medical treatment abroad.[341] The ECJ began its decision by first confirming that although the EU Member States have a significant degree of discretion in the operation of their social security systems, this discretion is

[338] Ibid.
[339] Ibid, p. 48.
[340] (2001) ECR 1.5473.
[341] Nickless, J., "Smits/Peerbooms: Clarification of Kohll and Decker?" in *Eurohealth: lSE Health and Social* Care, 2001, Vol. 7, No. 4, at pp.7-10.

still subject to the rules on the free movement of goods and services. The ECJ determined the province of application of the EU law on the free movement of services in the EU. It held that health care is one of those services guaranteed under the Protocol of the EU on free movement of goods and services. In these cases, both Mrs Smits and Mr. Peerbooms were concerned Dutch nationals who were insured under the Dutch social system. They both secured treatment in Germany (Mrs. Smits) and in Austria (Mr Peerbooms) respectively.

As Mrs Smits and Mr. Peerbooms had returned home in the Netherlands, they claimed re-imbursements of their medical expense based on social security schemes under the EU co-ordination law. They were refused reimbursement of the costs of treatment because the healthcare services they received in foreign territory were not covered under the national law and on other grounds that were given. On referring the complaint to the ECJ, it was held by the Court that "by refusing to reimburse the treatment received by Mrs. Geraets-Smits and Mr. Peerbooms in another Member State, the Netherlands had violated the EU law (EC Treaty) on the free movement of services. In these joined cases, the ECJ expanded the province of implementation of the EU rights to freedom of movement of goods and services even when such rights may not exist under national law.[342]

The foregoing cited decision in Geraets-Smits and Mr. Peerbooms seems to depart slightly or even further from the previous case of *Kohll vs Union des Caisses des Maladies*.[343] In Kohll's case, the social security institution to which Mr Kohll

[342]Geraets-Smits v StichtingZiekenfonds VGZ and Peerbooms v Stichting Ca Groep Zorgverzekeringen, Case C-157 of 1999, Court of Justice of the European Communities (ECJ), decided on 12 July, 2001, pp. 1-62.
[343][1998] ECR I-01931, paragraph 41.

belonged refused authorisation for his daughter to travel to Germany for dental treatment. The ruling of the ECJ was to the effect that a rule under which reimbursement of the cost of dental treatment provided in another EU Member State is subject to prior authorisation does constitute a restriction to the freedom to services provision[344]. In the case of *Decker vs Caisse de maladie des employés privés*,[345] Mr Decker was refused reimbursement for spectacles that he had bought across the border in other EU Member States in Belgium. Decker had used a prescription issued in another EU Member State of Luxembourg but had no prior authorisation of the country of origin.

Upon hearing the complaint over refusal of reimbursement for medical costs, the ECJ decided that the rule of prior authorisation of the country of origin of beneficiary constituted a restriction to the free movement of goods, thus a violation of the EU law[346]. The ECJ recognised that in principle, such restriction could be justified if it were mandatory to ensure the social security scheme's budgetary requirements relating to financial balance. Also, the rule could be justified if it was intended to maintain a balanced medical and hospital service to all of its insured persons[347]. However, nothing of the latter sort of reasons was ever raised as a material reason justifying a refusal of reimbursement.

In both two cases of Mr. Kohll and Decker the required justification for refusal was not established at all. In Kohll's case the ECJ held that it is well established principle of law (case law) that a Member State can justify a restriction of the freedom of

[344] Ibid.
[345] [1998] ECR 1-01831 (originating from Case C-120/95).
[346]Ibid.
[347] Ibid.

services if such a restriction is necessary in order to maintain the balanced financing of the social security system.[348] At the time of the dispute, there was no comprehensive regulation governing cross-border healthcare under the EU instruments. However, this gap did not prevent the European Court of Justice (ECJ) to rule that EU citizens have a right to obtain planned medical and dental treatment in a Member State other than their home State (decision delivered on 28 April 1998).[349] Subsequently, in 2008 after a decade had passed, the European Commission published a proposal for a directive on cross-border healthcare in order to address the challenges raised in the two cases and other related cases or matters of similar concern.[350]

According to the 2014 Synthesis Report of the European Commission, it has been established that in order to enjoy exportability of various benefits, the national legal conditions are precedent in various EU countries. Migrant workers must live in the country for a prescribed minimum period ranging from six months plus one day or one year depending on the type of benefits.[351] It is important to note that the *EU Single Permit Directive No. 98 of 2011*[352] does allow Member States of the EU to exclude *family benefits* for Migrant workers of third-country from eligibility and exportability of such benefits. The Directive denies access to such benefits if migrant workers are authorised to work for less than six months or they may be restricted on the basis of a visa.[353] This explains how the principle of period of residence may be

[348]Ibid.
[349] Ibid.
[350]Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare (COM (2008)414) dated 2 July 2008.
[351]Ibid, p. 45.
[352] Ibid.
[353] Ibid, p. 46.

invoked to exclude migrant workers on temporary basis from enjoying certain types of social security benefits. This exclusion may occasion negative impact on migrant workers.

The principles of *Co-ordination* and *harmonization* of social security laws have been developed under the *Revised EU Code on Social Security, 1990* through (i) Regulation (EC) No. 883/2004 of the European Parliament and of the Council on the Coordination of Social Security Systems, as amended by Regulation 988/2009 (the new Regulation); (ii) Regulation (EC) No. 987/2009 of the European Parliament and of the Council of September, 2009 laying down procedure for implementing Regulation (EC) 883/2004 on the coordination of social security systems (implementing Regulation); and, (iii) the Council Regulation (EC) No. 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.[354]

These rules of co-ordination of social security schemes apply throughout the Union and they are founded on Article 39 of the EC Treaty that provides for the principle of Freedom of Movement of Workers. These regulations on coordination of social security systems aim at simplifying the implementation of EU law but also improve on provision of benefits. The EU social security coordination regulations described above have implications on the rights to benefits for migrant workers in the Union. Firstly, a migrant is covered by the legislation of one country at a time when such

[354]See New EU Social Security Co-Ordination Rules namely EC Regulations 883/2004 and 987/2009.

person only pays contributions in one country.[355] The implication here is that the decision on which country's legislation should apply to such migrant is made by respective social security institutions. Secondly, a migrant person has the same rights and obligations as the nationals of the country where that migrant is insured under that other country's social security scheme. This is known as the principle of equal treatment or non-discrimination.

Thirdly, when a migrant person claims social security benefit, his previous periods of contributions or insurance, work or residence in other countries are taken into account if necessary and this is known as the principle of totalisation or aggregation of periods of insurance. A migrant acquires, maintains, and combine claims from all countries where he has worked and acquired the benefits. Fourthly, a migrant person who is entitled to a cash benefit from one country may in principle receive the same even if that beneficiary is living in a different country within the EU. This is known as the principle of exportability of benefits.

3.3.2 Latin Americas

In the Latin Americas, there are several regional instruments that impact on human rights protection including protection of social security for migrant workers. The A*merican Declaration on the Rights and Duties of Persons (Man) of 1948*[356] is one such instrument. The *Declaration* in Article 16 provides for the right of every person to access social security. It protects all persons against any likely consequences of

[355]See Regulations 883/2004, Art.11 (1) provides that the EU coordination rules shall apply to persons governed by legislation of a single Member State only.
[356]Available at <http://socialprotection-humanrights.org/instru/, accessed 27 September, 2015.

unemployment, old age, and any disabilities arising from causes beyond his control that may make that person physically or mentally impossible for him to earn a living. However, the Declaration does not have any specific provision concerning protection migrant of workers.

The *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 1988[357]is another instrument laying foundation for treatment of migrant workers in social security rights. This protocol in Article 3 requires the Members to the protocol to guarantee the exercise of human rights without discrimination of any kind. Any exclusion related to national or social origin, economic status, birth or any other social conditions, among others is prohibited.[358]The Protocol in Article 9 provides:

> *9(1)-"Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents."*
>
> *"9(2)- In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave be-fore and after childbirth".*

A proper interpretation of the words, "*everyone shall have the right to social security*" would entail an understanding that social security coverage should be extended to include coverage of all migrant workers employed in the Americas.

[357]Adopted in San Salvador on November 17, 1988.
[358] Ibid, Art.3.

Third instrument in the Americas is the Southern Cone Common Market[359]. This regional cooperation instrument was established in 1991 and came into force in 2004 as the largest trading bloc in Latin America. It is constituted by the full member countries of Brazil, Argentina, Paraguay and Uruguay[360] and Venezuela which joined the block in 2006[361]but got suspended since December 1 2016. The bloc has other associate member states such as Suriname, Ecuador, Bolivia, Peru, Chile, and Colombia dealing with wide range of economic cooperation within the context of common market including issues of social security that affect migrant workers.

For benefits of migrant workers in the Latin Americas trading bloc, some middle income countries such as Brazil have developed a system of paperless exchange of information on social security benefits claims and (ex)-portability across the region of MERCOSUR countries.[362]This Brazilian social security model practice of paperless exchange of information on social security benefits is highly known to have significantly attracted other developed countries such as Japan and the Federal Republic of Germany.[363] Consistent to the principles of human rights and equality of treatment of all human beings, the MERCOSUR through the *1998 Social Labour Declaration* re-affirmed the principles of non-discrimination including equality of treatment of migrant workers, among other labour rights.[364]

[359]MERCOSUR *(Mercado Comun del Cono Sur/Mercado Común Sudamericano* or MERCOSUR in Spanish) was created through a Treaty of Asunciön of 1991, signed by Argentina, Uruguay, Paraguay; and Brazil. Venezuela joined in 2006.
[360]International Social Security Association, 2009b; MERCOSUR Economic Integration: Lessons for Singapore: Institute of Southeast Asian Studies, 2009, at p.3.
[361]See Byrnes, A., Hayashi, M., and Michaelsen, C., (eds.), International *Law in the New Age of Globalisation*, Martinus Nijhoff Publishers, Leiden-Boston, 2013, p.189.
[362] Ibid, p.188-190.
[363] Ibid.
[364]Ibid.

The fourth instrument providing for legal principles of equal treatment of international labour migrants is the Caribbean Community (CARICOM) multilateral Agreement on social security model. This is more specific instrument on social security across the regional bloc that was signed in Georgetown, Guyana on 1 March 1996 and entered into force on 1 April, 1997. It is formed of 15 Member States. [365] The Agreement has almost 20 years of operation and it is constituted into 65 Articles clustered into six parts. It is important to discuss some of its characteristic features.

The preamble to the CARICOM Agreement on social security in paragraph 3 says that, Contracting Parties affirm their commitment and undertaking to adhere to the principles of equality of treatment of the Community residents in their respective social security legislation. This includes maintenance of their social security rights acquired or in the course of acquisition. Protection and maintenance of acquired rights is enabled irrespective of change of countries of employment or residence within the bloc. It also affirms that all the adopted principles of equality of treatment stem from several Conventions of the International Labour Organisation.

The Agreement enables migrant workers within the regional bloc to apply for entitlement to benefits even if they are outside their home countries but within the Community.[366] In Articles 1 to 5 of the CARICOM Agreement on social security, there are provided some definitions, scope and general provisions.[367] But also, the

[365]These countries include Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Haiti, Jamaica, Grenada, Guyana, Montserrat, St. Lucia, Suriname, St. Kitts and Nevis, St. Vincent and the Grenadines, and Trinidad and Tobago.
[366]See the *CARICOM Agreement on social security.* Arts.1-65.
[367]Ibid, Part I in Arts. 1-5.

agreement contains provisions that determine the law to be applied to certain persons who are insured for social security benefits. The latter is provided in Articles 6 to 15[368]. Part III of the CARICOM Agreement which is constituted in Articles 16 to 24 provides for modality and qualifying conditions and manner of accessibility of invalidity, old age, retirement, survivors, and disablement pensions as well as death grants.

The mechanism of application of the CARICOM Agreement is provided in Part IV which covers Articles 25 to 51. It stipulates when and how each part of the Agreement will start to apply. Also, various requirements to be fulfilled by Contracting Parties in order to implement the social security principles impacting on the protection of the social security rights of migrant workers based on equality of treatment principles are enshrined under this part.

Rules on communication between competent authorities of Contracting Parties are provided in Articles 52 to 57 of the Agreement. This Agreement has regulations on non-discrimination where exemption from taxes and duties in payment of benefits is involved[369]. These rules provide time limit for submission of benefits claims and where applicable, the manner of conducting investigations and medical examination to establish some claims that require this procedure. The currency of payment of benefits and some dispute settlement issues are also provided.

[368] Ibid, Part II,
[369] See the *CARICOM Agreement on social security*, 1996, Arts. 52-57.

The CARICOM Agreement on social security has some final and transitional provisions (Articles 58-65) in which the question of entitlement to benefits before the Agreement is in force is regulated[370]. This Agreement regulates the entitlement to sign and ratify or accept or accede to the agreement. Also, there are provided matters of participation by other countries in the agreement, and modalities to be followed in case of amendment, review, denunciation, depositary and termination of the Agreement.

As regards to modality of application of the Agreement, the insured persons who work in more than one country of the CARICOM are enabled to qualify for long-term benefit for which they would not have otherwise qualified. Such long term benefits are provided in Articles 16 to 24 as invalidity, old age, retirement, survivors and disablement pensions and death benefits.

The Agreement establishes competent institutions under Article 27 to facilitate enforcement of the Agreement while enhancement of cooperation by institutions to recover wrongly paid benefits to non-beneficiaries is provided in Article 48. Cooperation in recovery of excess payments of benefits is provided in Article 49 whereby such benefits are to be deducted and withheld and later transferred back to the creditor institution.[371]

Also, the CARICOM Agreement has a modality of cooperation in recovery of advance payments made to beneficiary. This has to be deducted and transferred to

[370]Ibid, Part VI Arts. 58-65.
[371] Ibid, Art. 49.

the creditor institution of a Contracting Party in accordance to Article 50. Similarly, the Agreement provides for communication between competent authorities of Contracting Parties in matters pertaining implementation of the Agreement[372]. The implementation framework requires State Parties to be responsible to co-ordinate their social security institutions and to manage migrant workers from one country to another in order to promote intra-region employment and enabling payment of benefits across borders of Member countries within the bloc.

Within the terms of Article 16 of the CARICOM Agreement, it is required that qualifying conditions under different social security schemes of different CARICOM Member States should be established or determined for purposes of ensuring proper computation of benefits to be paid to migrant workers in different countries. This would require all countries to harmonise their social security legislation.

Some key features of the CARICOM social security model are summarised in this discussion. Firstly, every employed person under member countries of the CARICOM is required to register with a social security scheme of a Contracting State and pay contributions.[373] When a migrant worker chooses to leave a particular country before reaching sufficient contributions to qualify for benefits, the Agreement recognizes the fact that such person risks losing earned contributions. In recognition of this disadvantage, the Agreement secures the rights and obligations of such workers in different employment settings. For example, the Agreement has provisions on employees in transnational enterprises as provided in Article 7.

[372] Ibid, Art. 52.
[373] See Arts. 1 & 3 of the CARICOM Agreement.

Migrant workers employed in international transportation are protected as provided in Article 8(a) and Article 9. The rights to social security for persons employed on a ship are governed by stipulations in Article 10 while protection of workers employed in diplomatic missions, consulates and international organisations are governed by the provisions of Article 11. Migrant workers engaged in self-employment are regulated by the provisions of Article 12 of the CARICOM Agreement on social security.

The Agreement sets clear rules in Article 7(1) that govern a migrant worker who is employed in transnational enterprises and is insured while employed as such in one CARICOM Member State. In case the employer chooses to transfer that employee from one CARICOM Member State to another CARICOM Member State for a period not exceeding twenty-four (24) months, that employee will remain insured under the law and regulations of original country of employment while working in another country where he has been transferred.

The import of Article 7(ii) of the CARICOM Agreement on social security is that, for whatever reason, if the period of employment in the place of transfer exceeds the stipulated period of 24 months, the laws and regulations of original country of employment will still remain applicable until the work is completed. However, this will be possible only if the social security institutions of a second country of employment (host State) grant approval. In any case, this will require agreement between Contracting Parties to this effect.[374]

[374]See the CARICOM Agreement on social security, Art. 7 (ii).

Secondly, if a migrant worker is employed in the international transportation sector[375] and is insured and employed in any international transportation sector in two or more CARICOM Member States, the agreement directs that such migrant employee is to be insured in the country where the principal place of business is located.

Thirdly, the CARICOM social security Agreement model has selected to cover benefits and services involving the invalidity, disablement or occupational injury benefit, old-age or retirement, survivors' benefits and, death benefits. However, the Agreement has excluded portability, totalisation arrangements for unemployment benefits and maternity benefits as provided in Articles 16 to 24 of the Agreement.[376] The aggregation of insurance periods earned in different Contracting States has been provided for in contributory insurance in terms of Article 4 of the Agreement. This Article caters for determination of contribution periods for voluntary insurance. The CARICOM Agreement on social security in Article 17 concerns totalisation of contribution periods while the provisions of Article 32 provides for application of the principle of totalisation of benefits or aggregation of insurance periods.

Fourthly, in accordance with paragraph 3 of the preamble to the CARICOM Agreement on social security, when moving from one country to another under the Agreement the feature of equality of treatment is taken care of. Ensuring equality of treatment under the Agreement is intended to protect social security benefits entitlements and provide equality of treatment of CARICOM nationals when they

[375]Ibid, Art. 9 especially para (a).
[376] See Hamilton, W. Salas (ed.), Social Security in CARICOM (A Booklet), Bridgetown Barbados: The Caribbean Community Secretariat, 2010, pp.10-12.

migrate from one country to another.

Throughout the provisions of the Agreement from Articles 1 to 65, the use of the word applicable legislation is commonly applied. Member States have realised the fact that cross-border migrants who change jobs from one country to another are usually subjected to different legislation. These legislations create different qualifying conditions for social security benefits accessibility. Such migrant workers are at a disadvantage when they leave a particular host country without making sufficient contributions to qualify for benefits under respective national social security legislation.

Fifthly, the provision of mutual information and particulars of all insured persons who are entitled to benefits from one or more of the social security schemes in the various CARICOM member states for which they qualify is guaranteed under Article 52. This Article requires exchange or sharing of information on statistics concerning beneficiaries, the amount of benefits paid or to be paid, legislation which may affect the enforcement of the Agreement, measures taken by each Contracting Party for application of the Agreement, provision of mutual administrative assistance to each other, and such other similar matters of implementation of the Agreement. When a migrant worker makes a choice to move to another CARICOM Member State to work, the agreement requires that such a person should inform the directors of the social security fund in his home country and host country[377]. Notice of change of address is such relevant information that should indicate the departure date. A

[377] See CARICOM Agreement on Social Security, Art. 46.

relocating migrant should also supply the overseas contact address and other particulars as directed in the prescribed form[378].

Such details of a migrant worker are intended to enable the responsible competent authorities to obtain all relevant and accurate contribution information for processing payment of benefits while residing in the host country. Actually, the CARICOM model agreement requires that any subsequent change of address should also be notified to the social security institutions of Contracting States concerned. Accordingly, even upon returning to the usual place of residence, the migrant worker so returning should provide to the home social security institution the information of that return.

Managing social security benefits for a migrant worker who resides in more than two CARICOM Member States is provided in Article 12 (b) of the Agreement. The provision provides to the effect that if a migrant worker is self-employed person who lives in one CARICOM Member State, and that migrant worker ordinarily has occupation in two or more CARICOM Member States, then, that employee will remain insured in the country in which he ordinarily lives, provided that the said employee works partly in that country where he lives[379].

The CARICOM Agreement on social security recognizes c*ompulsory membership in insurance scheme* and *voluntary membership* as provided in Article 14 of the Agreement. Under the provisions of Article 14 (2), if a migrant worker does not live

[378]Hamilton, W. Salas (ed.), pp.10-12, note 376.
[379]Hamilton, W. S., note 376.

in one of the CARICOM Member States, he is required to be insured under the scheme of the country where that migrant worker last worked.[380]

Sixthly, the eligibility conditions or rules as to benefits payment constitute another feature of the CARICOM social security Agreement. These rules create a mechanism for the benefits payment. If a migrant worker has not paid enough contributions to qualify for benefits in the CARICOM Member State in which he resides, the contributions that were paid by that worker in other CARICOM Member States will be taken into account within the terms of Article 17 which provides for totalisation of contribution periods.

Seventhly, the CARICOM Agreement is a binding instrument that is capable of forming cause for arbitration before a tribunal under Article 57 of the Agreement and it has a termination clause Article 65. The Agreement in sub-Article (2) of Article 65 provides that in the event of a Member State withdrawing from the Agreement or termination of the Agreement, all rights acquired by contributing members to the insurance scheme will be maintained. Of course there will be negotiations for settlement of any rights in the course of acquisition by operation of the provision of the Agreement.

3.3.3 Africa

The African political and economic landscape has been moving towards deeper integration among different regional economic groupings such as the ECOWAS,

[380]Ibd, pp.4-12.

COMESA, SADC, EAC, IGAD and several other regional economic communities. Below is a discussion of important continental legal framework (the African Charter) and selected African sub-regional legal frameworks of the ECOWAS and the SADC that are considered relevant for discussion of models of implementation of equality of treatment in social security for migrant workers as part of observance of human rights principles.

a.) African Charter legal framework on social security for labour migrants

The African Charter on Human and Peoples' Rights (ACHPR) (The Banjul Charter, 1981 is a continental human rights instrument that was conceived and passed by the former Organisation for African Unity (OAU) which was replaced by the African Union (AU) in 1991. All AU Member States have ratified this Charter. This instrument is divided into three parts namely, part I provide for rights and duties: part II provides for measures of safeguard; and part III covers general provisions. The African Charter in Article 30 provides for establishment of the African Commission whose activities are provided in articles 30-63. The Charter contains a wide range of rights covering civil, political, social, economic and cultural rights including peoples' rights and duties.[381]

The legal framework for the enforcement of human rights is entrusted to the African Commission on Human and Peoples' Rights. Migrant workers under Articles 2 and 3 of the Charter do enjoy general human rights protection, equal treatment under the law and freedom from discrimination based on, among other things, nationality. In

[381]Evans, M.D., and Murray, R., (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006,* 2nd edn, Cambridge University Press, Cambridge, 2008, p. 23.

its principal text, the Charter has no express provisions recognizing the right of migrant workers to have access to social security as of right. One of the characteristic features of the African Charter is the extensive use of "claw-back clauses" that seem to make the enforcement of the human rights dependent on municipal law or at the discretion of the national authorities. Steiner and Alston have described this Charter as the newest, the least developed or least effective as well as the most distinctive and the most controversial of the regional human rights regimes.[382]

Some other aspects of the right to social security under the African Charter may be derived from article 16 which provides for the right to health. The Charter in Article 18 (4) provides for the right of the aged and disabled to special measures of protection or relief. The provisions of Article 30and Article 45provide to the effect that the African Commission is a quasi-judicial body with the mandate to interpret, promote and protect the human rights guaranteed byte Charter. In pursuit of its purported obligation to interpret the African Charter, the Commission had an opportunity to form the basis justifying the conclusion that the Charter had obvious limited list of socio-economic rights. The Commission addressed weaknesses of the Charter and enriched it with additional rights by issuing the *Guidelines and Principles on the Implementation of Economic, Social and Cultural Rights in the ACHPR*, issued at Nairobi, Kenya in 2010.[383]

[382]Steiner, H., and Alston, P., (Eds). *International Human Rights in Context: Law, Politics and Morals* (2nd Edn), Oxford University Press, Oxford, 2000, p. 354.
[383] See the Guidelines and Principles on the Implementation of Economic, Social and Cultural Rights in the ACHPR, Narobi, Kenya, 2010, retrieved at < http://www.escr-net.org>, accessed 23 March 2016.

A test to the African Charter was made in the case filed by the two non-governmental organisations one based in Nigeria and the other in New York in the United States. The case was *Social Economic Rights Action Centre* (*SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria* (popularly referred to as the "Ogoni Case") [384] challenging the unjustifiable denial and abuse of social economic rights (right to health, right to health environment, right to housing, and right to food) before the African Commission in 2001.[385] The Commission in its interpretation approach held the view that, the right to housing was a guaranteed right through a combined reading of articles 14 of the Charter which provides guarantee for the right to property. The African Commission opined that this right may only be encroached upon in the interest of public need or general community. If encroachment has to occur, the same should be done in accordance with the provisions of appropriate laws".[386]

Article 16 of the Banjul Charter provides for the right of every individual to have the right to enjoy the best attainable state of physical and mental health.[387] The Banjul Charter requires States Parties to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick and this is a matter of State obligation.[388] It should be stated here that the Charter does not provide anywhere in its provisions that a migrant worker lawfully or illegally

[384] The ACHPR Communication 155/96 (2001).
[385] See detailed treatise of the Ogoni case in Coomans, S., "The Ogoni Case before the African Commission on Human and Peoples' Rights", *International and Comparative Law Quarterly*, 2003, vol. 52, pp.749-760.
[386] See ACHPR, Art.14.
[387]Ibid, Art.16(1).
[388]Ibid, Art. 16 (1).

residing in another country should be denied basic social security rights and protection or treated by using lesser standards than those applicable to nationals.

The Charter in Article 18(1) provides for States' obligation to protect the family which is historically and fundamentally known to be the natural basis of every society. The minimum standards for treatment of migrant workers should be those recognized under international law. Countries may provide for better or higher benefits than those stipulated in various ILO conventions.[389] The Charter in Article 22 provides for "all peoples" to have the right to economic, social and cultural development and equal enjoyment of the common heritage of mankind and these rights must be provided by the States.[390] There is no doubt that the interpretation of the words "all peoples" cannot be taken to exclude migrant workers or foreign nationals from enjoying the guaranteed social economic and cultural rights under the Charter.

Due to lack of specific provisions for coverage of migrant rights' to social security, the African Commission produced the first guidelines and principles regarding the implementation of socio-economic rights.[391] The Commission also produced the second guidelines on socio-economic rights in which two important social economic rights were added to the list, and these were the right to social security and the right to water and sanitation.[392] However, Higgins, R., has established that there are

[389] Ibid, Art. 18(1).
[390] Ibid, Art. 22 (1), (2).
[391]See, Nkongolo, K. C., "The Justifiability of Socio-economic Rights under the African Charter on Human and Peoples' Rights: Appraisal and Perspectives Three Decades after Its Adoption", *African Journal of International and Comparative La*w, *2014, Vol. 22, No. 3,* (492-511). pp. 499-501.
[392]Ibid.

problems of 'claw back clauses' in the Charter that are the source of misuse and abuse by States.[393] African countries resort too easily to the limitations contained in "claw-back clauses" in the Charter instead of keeping the supremacy of international human rights law. The African Commission has opined that:

> *".....to allow national law to take precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provision of the Charter."*[394]

Any limitation on the rights established under the Charter must be in conformity with the provision of the Charter itself. Some of the social rights have been tested in Courts of law (such as the Ogoni case) both domestically and under the Charter through the African Commission. In effect, social economic rights have been found capable of being undoubtedly enforceable by way of judicial redress in courts of law. The next discussion examines how does the ECOWAS sub-region legal framework on protection of social security rights for migrant workers provides in its establishing instruments.

b.) ECOWAS Sub-Region Legal Framework

The Economic Community of West African States (ECOWAS) has a regional wide legal framework that has provided for legal mechanism for protection of migrant workers with regard to equality of treatment in social security. Historically, the original framework of ECOWAS was formed in 1975[395] and it was accordingly revised in 1993 upon the 16 Member countries adopting and ratifying the revised

[393]Higgins, R., "Derogation under Human Rights Treaties", *British Yearbook of International Law*, 1996-1997, Vol. 48, p. 281.
[394] See Evans and Murray, p.27, note 381.
[395] See Treaty Establishing the Economic Community of West African States, Lagos, 28 May, 1975.

ECOWAS Treaty of 1993. The original *ECOWAS Treaty,* 1975 in Article 27 affirmed a long-term objective to establish community citizenship that could be acquired automatically by all nationals of Member States.

The preamble to the former *EACOWAS Treaty of 1975* outlined the key objective of removing obstacles to the free movement of goods, capital and people in the sub-region. For this reason the ECOWAS Protocol on Free Movement of Persons and the Right of Residence and Establishment of May 1979 placed much weight on free mobility of labour. This Protocol on the Free Movement of Persons was ratified by Member States in 1980[396] and it guaranteed the immediate free entry without visa for ninety days thereby increasing free movement of ECOWAS citizens within member countries.

Under the "*revised ECOWAS Treaty of 1993"* in Article 4, the Member States have undertaken to recognize, promote, and protect human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights, 1981.[397] Fundamentally, the ECOWAS Treaty is a strategy for socio-economic development in West Africa that encompasses political coordination and market and regulatory harmonization.[398] The revised ECOWAS Treaty of 1993 marked an important change both in the structure and the character of West African cooperation. One of the objectives of the "*revised ECOWAS Treaty 1993"* states:

> *"The aims of the Community are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to*

[396]See Agyei, J., and Clottey, E., *Operationalizing ECOWAS Protocol on Free Movement of People among the Member States: Issues of Convergence, Divergence and Prospects for Sub-Regional Integration,* Ghana African Migrations Workshop, 2012.
[397] See the *Revised ECOWAS treaty of 1993,* Art.4 (g).
[398] Ibid, Art. 3 (2) (a) and (d).

> *raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations-among Member States and contribute to the progress and development of the African Continent."*[399]

Some studies have shown that the revised ECOWAS Treaty marked the shift to a more "people-centred organization" as opposed to the original ECOWAS that was seen as an "overly bureaucratic inter-governmental agency.[400] This is reflected in a new model of regional integration and today the revised ECOWAS Treaty emphasizes the need for putting in place much effort to harmonize, among others, labour legislation across all Member States.[401] The free movement of persons is considered to be a key component towards the economic growth of the ECOWAS. It is capable of enhancing the flexibility and availability of labour in the sub-region while enlarging opportunities for workers.[402] The revised ECOWAS Treaty in Article 59(1) provides that citizens are guaranteed of the right of residence and establishment throughout the sub-region. Since social security is a matter of national competence, migrant workers in the region often face risk of being excluded from work-related benefits particularly if there are no appropriate legal guarantees that are put in place between regional partners to address this concern.

Under the ECOWAS, it is established under Article 6 organ called the *Social and Cultural Affairs Commission* as one of the institutions of the Community.[403] This Commission initiated the draft General *Convention on Social Security* in 1993 to ensure the equality of treatment for cross-border workers and the preservation of

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[399]Ibid, Art. 3(1).
[400]Aryeetey, E. "*Regional Integration in West Africa,"* OECD Technical Paper, March 2001, *No*. 170, p.16.
[401] See Revised ECOWAS Treaty, Art. 3 (2) (a) and Art. 67.
[402] Ibid, Art. 3 (2d) (ii) and Art. 59.
[403] The ECOWAS Treaty (revised) in Article 6 establishes the institutions of ECOWAS.

their rights when living abroad. This was intended to address the problem of risk to the security of migrant workers in West Africa and to facilitate the flow of persons and labour across the sub-region. Removal of obstacles to the free movement of persons between Member States is one among the ways of promoting migrants' protection under ECOWAS Treaty.

The ECOWAS General *Convention on Social Security* reflects the substance of equality of treatment similar to the one envisaged under ILO Convention 118 of 1962. The General *Convention on Social Security* also reflects the substance of the Maintenance of Social Security Rights Convention, 1982 because it enhances the ECOWAS's mandate to play a greater role in addressing international labour standards issues including the rights to social security as part of the ECOWAS social dimension.

The rights of migrant workers as set out in the *1986 Supplementary Protocol on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Rights of Residence and Establishment* [404]are deemed in Article 25 to be non-derogable. The legal guarantee of equal treatment of migrant workers in the ECOWAS is also reflected in Article 24 of the 1986 Supplementary Protocol which provides:

> 24(1) No provisions of this Protocol may be interpreted to adversely affect more favourable rights or liberties guaranteed to migrant workers or members of their families by-
> a.) law, legislation or practice in a Member State, or
> b.) any international agreement in force vis-à-vis the Member State concerned[405].

[404]The ECOWAS Supplementary Protocol on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment of 1 July, 1986.
[405] Ibid, Art. 24.

Thus, in recognition of the rights to social security for migrant workers, the Authority of the ECOWAS officially signed the *General Convention on social security* for enforcement of the migrants' social security rights in July 2013. The ECOWAS *General Convention on social security* in its first recital states:

> *"RECALLING the objectives of the International Labour Organization on Equal Treatment, (1962, (No. 118) and on the Preservation of Social security Rights, (1982 (No.157), aimed at the effective realisation of equal treatment for migrant workers and the preservation of their social security rights;"*[406]

The ECOWAS's General Convention on social security, evidences the State Parties' undertaking to implement the international labour standards concerning equality of treatment in social security for migrant workers by adopting the Code for social security. This is clearly provided in Article 6 concerning equal treatment in which it states that:

> *"Persons who residing in the territory of a Contracting Party and to whom this Convention is applicable shall have the same rights and obligations under the legislation of every Contracting Party as the nationals of the latter party. The provisions of paragraph 1 of this Article shall not adversely affect the provisions of the legislation of any Contracting Party regarding the interested parties' participation in the administration or competent jurisdictions on social security."*[407]

The provision of Article 6 implies that Partner States of the ECOWAS must adjust their national laws through harmonisation of their social security laws so as to conform to the rights and protections guaranteed under the revised ECOWAS Treaty, 1993 and as implemented through the General Code on social security. Through this way, Member States will be able to guarantee the rights of the

[406] See the ECOWAS General Convention on social security, 2012.
[407] See ECOWAS Supplementary Act No.5 of July 2013 relating to the General Convention on Social Security of Member States of ECOWAS, passed at 43rd Ordinary Session of the Authority of Heads of State and Government, Abuja, 17-18 July, 2013.

Community citizens. Moreover, Article 2 of the ECOWAS *General Convention on Social Security* provides in its Supplementary Act of July 2013 that the Convention applies to all legislations of the Member States governing the branches of social security. The specified branches covered under the ECOWAS *General Convention* include: a) Disability benefits; b) Old-age benefits; c) Survivors' benefits; d) Occupational diseases and work-related accidents; e) Family benefits; f) Maternity benefits; g) Health care and Sickness benefits; h) Unemployment benefits.[408]

A study conducted in Nigeria in 2012 showed that there was no domestic law or policy in Nigeria that had been found addressing certain ECOWAS Protocol provisions on human rights and equality of treatment.[409] Nevertheless, 'the ECOWAS General Convention on social security and its Administrative Arrangements' that was adopted in 2004 and ratified by Member States in July 2013[410] has shown major landmark development in the field social security and equality of treatment of migrant workers. The ECOWAS General Convention on social security emphasizes the need for compliance with the ILO's social security instruments particularly those concerning equality of treatment and putting in place best practices by emulating the experience of other developed systems in other parts of the world. The Convention enables retired migrants who had worked in one of the ECOWAS Member States to exercise their right to social security in their country of origin.

[408] The ECOWAS *General Convention on social security,* Art. 2.
[409] See Taran, P., *A Review of Nigerian Legislation and Policy in view of the ECOWAS Protocols on Free Movement of Persons, Residence and establishment for promoting better management of migration in Nigeria*, IOM, 2015, pp.1-64 at pp. 24-28.
[410]See Draft Report of ECOWAS Meeting of Ministers of Labour, Employment and Social Affairs held in Dakar-Senegal, December, 2012, p.7.

Though, one important weakness of ECOWAS, among others, is that the EACOWAS Treaty in Article 11 established the ECOWAS Community Court of Justice (CCJ). Subsequently, in 1991 the details of the operation of the Court were laid down through the Protocol on the Community Court of Justice that came into force in 2000. However, for more than 35 years since 1975 when the first ECOWAS Treaty was signed, the Court has seen little or virtually no any legal activity in the determination of the social economic rights of the individual migrant workers in the ECOWAS. This is partly because the details of the operation of the CCJ were established later in 1991 through the Protocol on the CCJ that came into force in 2000. In practical terms, the CCJ had seen limited success in the area of exploring the justiciability of social economic rights.

The foregoing scenario was because fundamentally the ECOWAS Community Court of Justice for many years offered no effective remedy due to statutory restraint that was imposed on the Court from entertaining cases related to injustices committed against individual peoples in the Community. Originally, only Member States could bring actions before the Court on behalf of their citizens. This means that for many ears private individuals and corporations were prohibited or excluded from launching any suits without obtaining prior support from their own governments. However, later in 2005 ECOWAS Protocol that amended the previous 1991 Protocol to the ECOWAS Treaty gave the CCJ mandate to hear cases of violation of human rights including hearing disputes between individuals and their own member states under the provisions of Article 4 of the Protocol.[411]

[411] See ECOWAS Supplementary Protocol of January, 2005 Amending the Preambel and Articles 1, 2, 9 and 30 of Protocol of July 1991 relating to the Community Court of Justice, Also, Article 4 Paragraph 1 of the English Version of the said Protocol.

Therefore, the implementation of the ECOWAS Convention on social security requires harmonisation of laws of Member States for benefits of all peoples in the region. This has been the basis for drafting a regional wide statute to be implemented by all States Parties. The ECOWAS Convention on social security although uniform as it may be, it does not replace national legislation, instead, it entitles all citizens within the Community to equal treatment under the domestic laws of each Member State. Finally, at present, the ECOWAS has not yet crafted uniform laws across all countries that go much further and designed to replace national statutes with a single shared law in form of one uniform ECOWAS code. In the next part it presented a brief discussion of the SADC regional wide legal framework concerning equality of treatment in social security for migrant workers.

c.) SADC Sub-Region Legal Framework

The Code on social security in the SADC region is another regional instrument creating the right to social security impacting on migrant workers on foreign territory, among other things in the Africa sub-region.[412]The SADC Code was approved by the SADC Ministers in 2007.[413] The Code is in legal sense a non-binding instrument which provides guidelines to SADC Member States on ways to provide social security for everyone.

The Code in Article 1 provides various definitions of the terms social allowances, social assistance, social insurance, social protection and social security. In Article 2,

[412]See the *Code on Social Security in the SADC, 2007*. The SADC Member countries include: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.
[413] Ibid.

the Code provides the principles underlying the SADC provisions particularly variable geometry principle and solidarity and redistribution. In Article 3, the Code says it has the purpose of providing the SADC and member states with effective instrument for the *coordination, convergence* and *harmonisation* of social security systems in the region. The right to social security for everyone in the SADC is provided in Article 4 of the Code. The term social security is described by the Code as public and private, or mixed public and private measures that are usually designed to protect individuals and families against income insecurity which may be caused by various contingencies.[414]

The SADC Code provides in Article 4(1) that the right to social security should be accorded to everyone.[415] Also, Articles 5, 6 and 12 clearly require Member States to provide some kind of compulsory coverage in social security, either through public or private mechanism or through a combination of both mechanisms.[416] The Code also provides under Article 4(2) and (3)[417] that every Member State, though not legally bound, is urged to maintain its national social security system at a satisfactory level in accordance with the provisions of the SADC Social Charter. The Code recommends the standard to be at least equal to that required for ratification of ILO convention concerning minimum standards of social security provided in ILO Convention 102. The Code also emphasizes the need to extend social security to various vulnerable groups including migrants, foreign workers and refugees.[418]

[414] See The SADC Code of Social Security, Art. 1.5.
[415]Ibid, Art. 4(1).
[416] Ibid, Arts. 5, 6 and 12.
[417] Ibid, Art. 4 (2) and (3).
[418] Ibid, Art.13, Art.14, Art.15, Art.16, and Art.17.

The SADC Code provides for enabling mechanism for Member States to provide social assistance, social services, and social allowances as provided in Article 5. Member States are required to adopt relevant legislation for provision of social insurance as required under Article 6. The Code in Article 7 requires Member States to ensure and promote health provisioning mechanism and occupational safety and health in accordance with the provision of the Code and the Charter of Fundamental Social Rights in the SADC.

As regards maternity and paternity provisioning, the SADC Code recommends implementation of the ILO *Maternity Protection (Revised) Convention*[419]. In Article 9 the SADC Code requires Member States to provide for death and survivors benefits while Article 10 requires SADC Member States to provide retirement and old age benefits and cross-country aggregation of benefits among Member States through national law, bilateral agreements and other means.

The provisions of Article 17 of the SADC Code deals with the rights of migrants, foreign workers and refugees and it forms part of the law that envisages the coordination of social security systems between different countries governed by different social security laws. Thus, it calls member states to ensure that all "lawfully employed" immigrants are protected through the promotion of the core principles of coordination, namely equal treatment, the aggregation of periods, exportability of benefits and the determination of the applicable legislation. However, as to the Coordination of social security laws in the SADC region there is not yet established a legally binding comprehensive regional wide coordination of social security laws

[419] No.183 of 2000.

and systems. The latter is caused partly by little progress on ratification of relevant ILO instruments concerning social security for migrant workers. Also, each country has different national conditions which pose many challenges that require wide range of sectoral participation and political will from incumbent regimes.

3.4 Conclusion

The chapter has identifying two major routes of human rights-based approach and the ILO approach concerning social security rights and standards of protection for migrant workers. The overall position of international instruments is that they establish broad framework of international labour and human rights standards. Regional instruments derive their framework of protection of migrant workers from international framework of protection of migrant workers. The analytical description has shown that international instruments set minimum standards while countries may elevate these standards subject to their levels of economic development. Thus, effective compliance to international standards in guaranteeing the right to social security in national jurisdictions requires ratification of relevant instruments followed by transformation into legally enforceable national legislation.

CHAPTER FOUR

4.0 LEGAL FRAMEWORK FOR PROTECTION OF SOCIAL SECURITY RIGHTS OF MIGRANT WORKERS IN THE EAC

4.1 Introduction

Chapter four examines the legal framework for protection of social security rights of migrant workers in the EAC. The chapter commences the discussion with brief introduction followed by a short discussion on the state of population and labour migration in the EAC as a whole. Then, a brief political history of the EAC is presented followed by a discussion that highlights the state of Colonial labour migration and the right to social security in the former East African Community and the Revived East African Community.

The chapter proceeds to discuss some fundamental and operational principles of the Community in the subject of equality. Then, a discussion of the legal framework for free movement of workers under the EAC Common Market is presented. A highlight of Constitutions of EAC Partner States in the aspect of entrenchment of equality of treatment and social security is presented. The chapter proceeds to examine the aspect of harmonisation of social security laws in the EAC countries and related challenges in the framework of implementation EAC CMP, and finally it is offered a conclusion.

4.2 Political History

The present EAC is composed of six sovereign states which include: the Republic of Uganda, the Republic of Kenya, the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, and South Sudan. The East Africa region is

traditionally known to cover mainly the whole land or territories falling under the present Uganda, Tanzania, and Kenya. The present territory of Kenya was part of the East African Protectorate (British Protectorate) which was later made a colony in 1920 and got her independence on December 12, 1963. Uganda was also under British colonial rule and attained her political independence from the British colonial rule in December 1962.

Tanganyika was first colonised by the Germans and was later placed under the British mandate. Tanganyika was then made a trusteeship territory under Articles 76 and 77 of the United Nations Charter of 1945 which articles established the Trusteeship system after the end of World War II.[420] Tanganyika continued to be under British colonial administration and she attained her independence on 1st December, 1961. Rwanda attained her independence from Belgium on July 1, 1962. Similarly, Burundi got her independence on 01 July 1962 and legally changed its name from Ruanda-Urundi to Burundi.[421]

The former EAC was composed of only three countries of Uganda, Kenya and Tanzania by the EAC Treaty of 6 July 1967[422]. The original cooperation was in the area of common services under *East African Common Services Organisation Agreements of 1961 to 1966*.[423] The latter Agreements were abrogated in 1967 when the Treaty of establishment of the East African Cooperation was signed and the

[420] Sea also Seaton, E.E & Maliti, S.T., *Tanzania Treaty Practice*, Oxford University Press, Nairobi, Dar es Salaam, London, New York: 1973, p.13.
[421] See Burundi Independence Day<ttps://www.google.com/search?>, accessed 19 January, 2017.
[422] The *Treaty for the Establishment of the East African Cooperation, 1967*, 6th June 1967.
[423]By the 1967 EAC Treaty, the East Africa High Commission was formed and the first EAC was formed replacing the former East African Common Services Organisation.

Community became established.[424] The first EAC operated for almost 10 years and collapsed in 1977.

Subsequent to the collapse of the former EAC in 1977, some negotiations took place and eventually the *East African Community Mediation Agreement Act* dated 14th May, 1984 was signed to abrogate the former EAC Treaty.[425] After the dissolution of the former EAC, the three East African Countries signed the EAC Mediation Agreement of 1984 which paved the way for the division of the assets and liabilities of the former EAC. Modalities of distribution of assets and liabilities of the former EAC were reached and the Agreement went further by providing some green light for future cooperation on.[426]

The Mediation agreement was assented by the three countries in 1987. Each State was required to pay the pensions and other benefits to its nationals who were formerly employed by the EAC Corporations or GFS. Such employees were those who had retired from active service by the division dates[427] and whose benefits had fallen due on account of past employment.[428]

Pursuant to the above referred EAC Mediation Agreement, each former EAC State Party agreed to make enabling legal provision in domestic law for the payment of

[424] See the *Treaty for the Establishment of the EAC 1967*, Art. 97.
[425] The 1984 Mediation Agreement was signed on 14th day of May, 1984 at Arusha in Tanzania.
[426] See *The East African Community Mediation Agreement Act* of 14th May, 1984, Cap.4, Art. 14.02 and Art.16.00.
[427] Ibid, clause 10.05. Under the Mediation Agreement, the division dates for the assets and liabilities of the former EAC are: EA Railways- 30th June 1977; EAP & T- 31st December 1976; EA Airways 15th February, 1977; EA Ex-telecoms 31st March 1977; GFS 30th June, 1977; EA Harbours 30th June, 1977; EA Cargo Handling 31st December, 1976.
[428] See the EAC Mediation Agreement, 1984, note 426, and the EAC Mediation Agreement Act, No.7 of 1987, First Schedule, para (i).

pension rights or benefits accrued as of the assets and liabilities division date.[429] That provision was to be in favour of nationals who were in active service with such former EAC Corporations and the General Services Fund (GFS) as at the division date.[430] For example the EAC Mediation Agreement in clause 10.06 required each State to pay to members of staff formerly employed by the former EAC Corporations while excluding the nationals of fellow Partner States.

There are several reasons that led to the collapse of the former EAC in 1977, among such reasons include lack of strong political will, lack of strong participation of the private sector and civil society in the co-operation activities. Also, the continued lack of proportionate sharing of benefits of the Community among the Partner States contributed to the collapse of the former EAC. Differences in levels of development coupled with lack of adequate policies to address the inequality and other unsatisfactory situations contributed to the collapse of the former EAC.[431] The current EAC was re-established by the three countries of Kenya, Uganda and Tanzania on 30 November, 1999 almost more than 22 years after the collapse of the former EAC in 1977 and it came into force on 7 July 2000.

4.3 Population and Migration

According to the Trademark East Africa report, the EAC region has an estimated total population of more than 153 million people.[432] However, data on population in East Africa varies depending on the year of the report and statistics. According to the

[429] See the EAC Mediation Agreement, Art. 10.05 note 426.
[430] Ibid, Art. 10.05 (b).
[431] See Treaty for the Establishment of the EAC, 1999 (As amended on 14th December, 2006 and 20th August, 2007), para. 4 of the Preamble; See also Hazlewood, A. "The End of the East African Community: What are the Lessons for Regional Integration Schemes?" *JCMS*, 1979, vol. 18, No. 1, pp.40-58.
[432] https://www.trademarkea.com, accessed on 07 November, 2017.

2014 statistical report of the Africa Development Bank (AfDB)[433], the total population of the EAC countries depicts that: Burundi has 9.8 million people, Kenya has 43.2 million people, Rwanda has 11.5 million, South Sudan has 10.8 million people, Tanzania has 47.8 million people, and Uganda 36.3 million people. The *World Bank Population Report* of 2013 shows that the population of Kenya was estimated at 44.35 million people[434], the population of Rwanda was estimated at 11.07 million people[435], the total population of Burundi was pegged at 10.16 million people,[436] Tanzania 49.2 million people[437] and South Sudan 11.3 million people[438]. Other sources such as the United Nations forecast put the population at higher figures for each of these countries, for example Tanzania has been said to have 57.21 million people as of Monday 18, 2017.[439]

According to the reports produced by the UN DESA, 2015 and UNHCR, 2016 and the World Bank, 2015 as reproduced by the Maastricht University and the University of Oxford in 2017 through a study commissioned by the East Africa Research Fund and the DFID, and SIDA, the stock of emigrants in Burundi as of 2014 was pegged at 284,187 most of whom were booked going to Tanzania, Rwanda, DRC, Uganda, Canada, Malawi, South Africa, Sweden, Belgium, and The Netherlands.[440] As of 2015 Kenya had 455, 889 emigrants going to the United Kingdom, the United States, Tanzania, Uganda, Canada, South Africa, Australia, Germany, South Sudan and

[433]See Africa Development Bank: A Partner of Choice for the Eastern Africa we want, Africa Development Bank Group-East Africa Regional Resource Centre (EARC), Nairobi, 2014, p. 21.
[434] The World Bank Report, 2013.
[435]Ibid.
[436] Ibid.
[437]Ibid.
[438]Ibid.
[439]See Tanzania Population 2017, accessed from :< http://www.worldometers.info>, accessed 18 September 2017.
[440] See Samuel, H., *Understanding intra-regional labour migration in the East African Community- Literature Review*, University of Oxford, Oxford, 2017, p.7.

Switzerland. In the same year of 2015, Tanzania had 294, 531 emigrants going to Rwanda, Kenya, the United Kingdom, Uganda, Burundi, Canada, the United States, South Africa, Malawi, and Mozambique[441]. Rwanda posted 315, 866 emigrants going to DRC, Uganda, Burundi, Tanzania, France, Zambia, Malawi, Canada, and Belgium while Uganda posted 736,017 emigrants going to South Sudan, Rwanda, the United Kingdom, Kenya, the United States, Tanzania, Canada, South Africa, Sweden, and Australia[442].

Also, the available report produced in 2017 shows that the stock of immigrants in the EAC by 2015 indicates Burundi to have received 286, 810 immigrants[443], Rwanda received 441,525 immigrants[444], Kenya received 1,084, 357 immigrants[445], Tanzania received 261, 222 immigrants[446], and Uganda received 749, 471 immigrants at the close of the year 2015[447]. However, the existing literature shows that the nature of migration flows in the EAC is vaguely described such that the number of people engaged in labour migration is not easily estimated.[448] Even the labour migration data that are formally generated do not show breakdown of profiles of migrants based on categories, skills, industry. There is no EAC reliable statistics of intra-region migrant workers in the informal employment and in private sectors and self-employed and temporary cross-border labour migrants.[449] This makes it difficult to draw a comprehensive mapping of migration flows in the region.

[441] Ibid.
[442] Ibid.
[443] Ibid.
[444] Ibid.
[445] Ibid.
[446] Ibid.
[447]Ibid, p.7.
[448] Ibid, p.11.
[449] Ibid, pp. 1-42.

As regards social security contribution, around 33.2 per cent of Kenya's working population is actively contributing to a pension scheme. Burundi has only 5.6 per cent of the working population actively contributing to pension scheme while Rwanda is estimated to have 4.5 per cent. Tanzania has been approximated to have between 3.6 per cent of its working age population contributing to pension scheme while Uganda is estimated to have only 2.6 per cent[450].

The legal framework that regulates formal labour migration in the EAC is the CM Protocol signed by the Partner States in 2009 and which came into force in July, 2010. This protocol implements free movement of workers across the EAC countries under Article 10 of the Protocol. The CMP also provides for harmonisation of national social security laws, policies and systems in Article 12 (2). The protocol requires Partner States to extend social security coverage to the self-employed in the informal sectors based on the principles of equality of treatment of migrant workers in the Community without discrimination based on nationality condition.

In the first chapter of this study, a lack of comprehensive and reliable statistical data on cross-border labour migration (both regular or lawful and irregular or illegal) in the EAC is stated. The Partner States are at different levels of developing and compiling various population data and other statistics for on-going and future planning for cooperation and development.[451] This calls for the EAC Partner States to implement the provisions of Article 41(2) of the EAC CMP that provide for need

[450]See Otieno, J., "Few East Africa workers in pension schemes", *The East African,* retrieved at http://www.theeastafrican.co.ke/, accessed 21 January, 2017.

[451]See EAC Secretariat, Report on the Meeting of the Sectoral Committee on Statistics held at Kibo Palace Hotel Arusha-Tanzania on14th-16th March, 2012. Ref No: EAC/TF/230/2012) EAC Secretariat, Arusha, p.1; See also Masabo, J., *"Unblocking the Barriers: Making the EAC Regime Beneficial to Female Migrant Workers",* Oxfam Human Rights Hub, Oxford, 2015, p.17.

to develop and adopt harmonised statistical methods, concepts, definitions, and classification for organising statistical work while duly observing internationally accepted best practices. According to the KNOMAD Report on *Comparative Analysis of International Migration in Population Projections*,[452] the scenario of lack of comprehensive statistical data and reliable information on labour migration in the EAC resembles that of the world-wide trend particularly in many developing countries.

4.4 Rights to social security for labour migrants during Colonial Era

Migrant workers in the Eastern Africa region have existed before, during and after the formal colonial rule of former East African colonial territories.[453] Since the colonial occupation of these territories particularly from 1894 up to the eve of independence, internal and external labour migration existed in different forms. One of the hallmarks of the East African colonial labour policy was to have cheap labour for public works and for settler agriculture[454]. Formal social security schemes were introduced later in Uganda, Tanganyika and Kenya during the colonial era as a response to some social security needs of expatriate workers not for African labour force. Colonial migrant workers in East Africa depended on the family, clan members and the community members for assistance in times of social economic needs or on occurrence of social risks.[455]

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[452]Buettner, T., and Muenz, R., "Comparative Analysis of International Migration in Population Projections," *KNOMAD Working Paper Series No.10*, World Bank, March 2016, p.23.
[453] See Orde Browne, G.St.J. *Labour Conditions in East Africa*, H.M.S.O, London, 1946.
[454] Egerö, B., *"Colonization and Migration: A summary of border-crossing movements in Tanzania before 1967"*, Research Report No.52, The Scandinavia Institute of African Studies, Uppsala, 1979, pp.9-40.
[455]Cf. Kasente, D., Asingwire, N., Banugire, F. and Kyomuhendo, K., "Social security systems in Uganda", *Journal of Social Development in Africa*, 2002, vol.17, No 2.

From 1921 to 1950s several pieces of social security legislation were passed to cover Europeans and Asians 1927.[456] The Government Employees (Provident Fund) Ordinance of 1941[457] was established in Uganda to cater for some formal employees.[458] The Provident Fund (African Local Governments) Ordinance of 1950 was introduced by the British colonial Government in Uganda for benefit of employees of African local governments.[459] This type of African Local Governments Provident Funds was established by the colonial governments in each of the East Africa colonies for non-pensionable local government servants.[460] However, social assistance as a form of social security system was not introduced in the colonies even though it existed in Britain. It should be stated that it was during this period of 1921 to 1950s that in 1948 the *Universal Declaration of Human Rights* (UDHR) was passed by the United Nations. The UDHR in Article 22 provides that:

> *"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality".*[461]

As the right to social security assumed international human rights dimension, many governments around the world gradually began to move towards limited social security provisioning to some classes of workers in their overseas colonial territories such as Tanganyika, Uganda, Kenya and elsewhere in other colonies.

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[456]See the *Asiatic Officers' Pensions Ordinance* 1935, Cap. 8; the European Widows' and Orphans' Ordinance No. 2, 1921; and the Asian Widows' and Orphans' Pension Ordinance No. 6/1927.
[457] No. 1 of 1941.
[458] See Cap 53 of the Laws of Uganda, 1951.
[459] See the *Provident Fund (Local Government Act),* 1951, Cap. 75, Laws of Uganda.
[460] See Barya, J.J, note, 83.
[461] See UDHR, Art. 22.

4.5 Principles of Equality of Treatment in Social Security for Migrant Workers

4.5.1 EAC Treaty Provisions

The present EAC was established under *Treaty Establishing the East African Community of 1999*[462] that was adopted by the three countries of Kenya, Uganda and Tanzania. The Treaty has built the framework for implementation of foundational principles Community and its operational principles. Under Article 7 (2) of the EAC Treaty, 1999 the Partner States are under international legal obligation within the framework of binding regional instruments to implement the fundamental principles of the Community and operational principles. Observance of the stated principles includes adherence to the principles of good governance, democracy, and rule of law, social justice and the maintenance of universally accepted standards of human rights.[463] It is through these values that equality treatment of EAC citizens including cross-border migrant workers is promoted and protected as one of the key aspects of the cooperation in the Community.

The Preamble to the EAC Treaty confirms that the EAC Partner States undertake to implement the fundamental and operational principles of cooperation that are also shielded by the principles of international law governing relationships between sovereign states.[464] In order to attain the international recognition under the Vienna Convention[465] the EAC Treaty under Article 153 is registered with the United Nations, the AU and other international organizations. The Community enjoys

[462] As amended on 14th December, 2006 and 20th August, 2007.
[463] See the EAC Treaty, 1999, Art. 6 and Art.7.
[464]Ibid, Paragraph 10 (Recital) of Preamble.
[465] See the VCLT, 1969.

international legal personality within the terms of Article 138 of the EAC Treaty and it operates within the framework of international law as agreed under Article 130. The Treaty, among other things, binds Partner States to honour their commitments in respect of other multinational and international organisations of which they are members. Such bodies include the United Nations and the International Labour Organisation (ILO), among others.

The EAC treaty in Article 104 provides for free movement of persons, labour, services, rights of establishment, and residence.[466] The referred Article in sub-article 3 (e) provides that Partner States are required to harmonise their labour policies, programmes, and legislation including those on occupational health and safety so as to conform to the objectives of the Treaty and the Common Market. The Partner States have undertaken to implement the EAC Treaty and the CMP by enforcing the general principles enshrined in these instruments. However, it is equally necessary to state that these instruments do not constitute an autonomous legal order without being enabled by individual actions of Partner States within their domestic legal order as provided in Article 8 of the Treaty and Article 5(2) of the EAC CMP.

Under the current EAC legal framework, the Community may not intervene in national jurisdictions where a Member State is not effectively enforcing the EAC law. This appears to be the opposite of the EU law particularly from the provisions of Article 5(3) of *Treaty establishing the European Community ("Nice" consolidated version), 1992* or *Treaty on European Union.* This provision under the

[466] See EAC Treaty, Art. 104.

EU law permits direct intervention in EU countries where evidence is made clear that national legal process and actions are not satisfactory or are contrary to the EU law and therefore becoming a stumbling block to the enforcement of the EU law for the rights or benefits of EU mobile citizens.

The EAC Treaty in Article 104 provides the scope of co-operation of the Partner States and requires Member States to adopt measures to achieve the free movement of persons, labour and services, right of establishment and residence and implement equality treatment to all EAC citizens, among other things. Many other Treaty provisions show that the provisions of these harmonising regional instruments impose obligations to be fulfilled by the Partner States. This is the decentralised model of implementation of the provisions of the Treaty objectives whereby enforcement of the Treaty and CMP is dependent on each individual country's domestic actions and legislative mechanisms. This means that the EAC regional instruments lack direct effect in national jurisdictions because the implementation of obligations placed upon Member States by the Treaty and the Protocol is conditional.

4.5.2 The Common Market and Free Movement of Workers

The legal framework for free movement of workers in the EAC cascades from the provisions of Article 76 and Article 104 of the EAC Treaty, 1999[467]. The values and fundamental principles of the cooperation are entrenched in the EAC Common Market Protocol in Article 3 (1) and (2) which prohibit discrimination of nationals of other EAC Partner States on grounds of their nationality and emphasises equality of

[467] See Treaty for the Establishment of the EAC, 1999.

treatment of EAC citizens. The steps towards implementation EAC values and principles of the cooperation began with the signing of the Protocol in 2009 whereby under Article 76 of the Treaty, the Partner States are directed to conclude a protocol on a common market which, *inter alia*, creates the free movement of workers. The Protocol on a common market was therefore, concluded under sub-article 4 of Article 76 and pursuant to Article 104 of the Treaty. The CMP creates the framework for cooperation in wide ranges of sectors including the free movement of labour, goods, services, capital, and the right of establishment.[468]

In the context of cross-border labour migration in the EAC, the CMP recognizes the rights and realisation of the right to free movement of workers, persons, labour, goods, services and capital, right of establishment, right of residence.[469] The aim is to achieve the realisation of accelerated economic growth and development through the attainment of targeted rights.[470] The CMP in Article 2(4) points out the areas of cooperation under the guiding principles for free movement of labour[471], capital[472], goods[473] and services[474].

The CMP also provides for freedom of movement of persons under Article 2(4) (b) and the right of establishment under Article 2(4) (d) and the right of residence in Article 2(4) (e) of the CMP. Through harmonisation of labour and migration policies, labour laws, and other legislation, the freedom of movement of the EAC

[468] Ibid, Art. 76(1).
[469] See EAC CMP; See also Annexes I, II, III, and IV.
[470] The EAC CMP, para. 6 of Preamble.
[471] The EAC CMP, Art. 2(4) (c)
[472] Ibid, Art. 2(4) (g)
[473] Ibid, Art. 2(4) (a)
[474] Ibid, Art. 2(4) (f)

citizens is essential for the growth of the common market for deeper regional integration.[475]

The Treaty for establishment of the EAC defines the term “common market" as *the Partner States' markets integrated into a single market in which there is free movement of capital, labour, goods and services*.”[476] The concept of free movement of workers and other non-working persons in the EAC revolves around the understanding of limits of rights of citizenship of the Member States and citizenship of the East African Community. Citizenship in its classical sense would ordinarily involve duties as well as rights of people described as citizens of the Community from Member States. The EAC citizenship has not been defined by the EAC treaty but is simply taken to mean nationals of Partner Stated described by national laws as recognized by the Community laws.

The EAC Treaty and the CMP as legal instruments of the Community do not clearly put in place elaborate duties attached to the EAC citizenship for people who migrate for employment to other Partner States. At home, the citizens have rights and duties as provided in their national constitutions. The current EAC citizenship is still treated as merely additional to citizenship of the nationals of Member States. Both the Treaty and the CMP do not seem to replace the citizenship of the national States with the EAC citizenship. Consequently, the legal paradigm that operates in the EAC still indicates that it is the holding of the nationality of one of the Community Member States that automatically gives rise to citizenship of the EAC.

[475] Ibid, Art. 12 (2).
[476] Ibid, Art. 1(1), para.10.

According to Regulation 5 sub-regulations (1) to (6) of the Free Movement of Workers Regulations, Annex II, it is clear that there is still national control of migration from one Partner State to another. For example, as to entry, stay and exit of persons from one Partner State to another, each one of the EAC Member States continues to run national immigration laws and nationality affairs according to own domestic rules for the grant of nationality, right of establishment, right to free movement of workers, right of residence and other related rights[477]. This means that the EAC law has intrinsically permitted the Partner States to retain the perceived rights of controlling free movement workers, persons and services of each national from each partner State.

Any other protocol may be concluded by the Partner States under the provisions of Article 151 of the EAC Treaty as may be necessary in each area of co‐operation.[478] Therefore, Article 151 is primarily dealing with annexes and protocols to the Treaty which fundamentally forms an integral part of the Treaty.[479]The CMP has been implementing the objectives of the Treaty through four important regulations which include: regulations on *free movement of persons*[480]; regulations on *free movement of workers;*[481] regulations on the *right of establishment*[482]; and the *right of residence* regulations.[483] The free movement of workers in the EAC entitle a worker in cross-border labour migration. Enjoy the rights and benefits of social security as accorded to the workers of the host Partner State.

[477] See EAC Common Market (Free Movement of Workers') Regulations, 2009, Reg. 5(1) to (6) (Annex II).
[478] See EAC Treaty, Art. 151, paragraph 1.
[479] Ibid, Art. 151 (4).
[480]The EAC CM (Free Movement of Persons) Regulations (Annex I), 2009.
[481] The EAC CM (Free Movement of Workers) Regulations (Annex II), 2009.
[482]The EAC CM (Right of Establishment) Regulations, (Annex III), 2009.
[483]The EAC CM (Right of Residence) Regulations, (Annex 1V), 2009.

The EAC CMP provides for *coordination* and *harmonisation* of Partner States' social policies, laws, labour laws, programmes and occupational safety and health laws. This has the objective of promoting and protecting decent work and improvement of the living conditions of the citizens of the Partner States for the development of the common market.[484] Among other things, for example, the Partner States have agreed to harmonise their social policies in order to promote the right of persons with disabilities.[485]

By concluding the CMP the Partner States are under legal obligation to *coordinate* and *harmonise* their social policies relating to promotion and protection of human and peoples' rights as provided in Article 39(2) (b) of the CMP. Harmonisation of social policies aims at promoting decent work, improving living conditions of the citizens of Partner States for development of the common market through the implementation of the principles of good governance, rule of law and social justice as per the provisions of Article 39(2) (a) of the CMP[486]. Further, Article 12 of the CMP provides.

1. *"The Partner States undertake to harmonise their labour policies, national laws and programmes to facilitate the free movement of labour within the Community.*
2. *The Partner States undertake to review and harmonise their national social security policies, laws and systems to provide for social security for self - employed persons who are citizens of other Partner States."*

The provision referred to above holistically means that there are migrant workers across the Member States both in formal and informal (self-employment) sectors. Reviewing and harmonising the laws requires national laws of partner states to be

[484] See The EAC CMP, Art. 39(1).
[485] Ibid, Art. 39 (3) (j).
[486] Ibid. Art. 39 (2) (a).

either amended or new laws being passed so as to provide the right to workers from other Partner States to register and make social security contributions to the existing national soil security schemes of Partner States and access benefits even if in migratory situations without facing unfavourable conditions as compared to nationals.

While it is commonly understood worldwide that traditionally the group of migrant workers in the formal sector employment is the one that has for long period of time primarily benefited in one way or another from existing formal social security schemes (both public and private) of host states, the EAC CMP seems to have taken steps to break this tradition by including coverage of self-employed persons as provided in sub-article (2) of Article 12 of the CMP.[487] The free movement of workers regulations (Annex II) in Article 2 provides that the regulations have the purpose to ensure that the implementation of the provisions of Article 10 of the CMP is done.[488] The free movement of workers regulations aims at ensuring that there is uniformity among the Partner States in the implementation of Article 10 of the CMP by putting transparent, accountable, fair, predictable and consistent migration policy and laws controlling employment procedures so as to implement the provisions of the CMP.

In particular, Article 10 (1) of the CMP provides for the EAC States' obligation to guarantee the free movement of workers who are citizens of the other Partner States within their territories. The Partner States are duty bound within the terms of Article

[487] Ibid, Art. 12 (2).
[488] See EAC CMP (Free Movement of Workers) Regulations, (Annex II), Reg. 2.

10(2) of the CMP to implement the Community law that prohibits discrimination of the workers of the other Partner States (migrant workers) based on their nationality status. The latter is particularly in relation to employment, remuneration and other conditions of work and employment. The CMP in Article 10(3 (a) permits the free movement of workers in the whole region of the EAC.

Migrant workers are entitled to apply for employment and accept offers of employment actually made in any Partner States. The CMP permits migrant workers to move freely within the territories of the Partner States for the purpose of seeking and taking up employment as per Article 10(3) (b) of the Protocol. However, the entry, stay for employment of non-nationals and exit in each of the Partner States has been made subject to national immigration laws and employment laws of respective Partner States[489]. Some restrictive conditions against employment of non-nationals still exist and are variably implemented by each EAC Partner State.

The EAC CMP, Partner States undertook legal obligation to allow EAC migrant workers or nationals to cross borders and enter another Partner State for employment and take up employment in accordance with the executed contracts as well as pursuant to national laws of Member States. According to Article 10(3) (c)of the CMP, the citizens of other Partner States are legally entitled to be administratively treated in the manner the nationals are treated. This implies that workers of other Partner States in matters of employment, social security and other conditions of employment should be treated according to the principles of equality of treatment

[489] See EAC CM (Free Movement of Workers) Regulations, Annex II, Reg. 5 (1) to (6); the EAC CM (Right of Establishment) Regulations, Annex III, Reg. 5 (1) to (5).

without any discrimination pursuant to the EAC Treaty and CMP.[490]

Further, within the terms of Article 10(5) of the CMP, a migrant worker who is admitted for employment in another Partner State is allowed by the EAC law to be accompanied by a spouse and a child.[491] These two dependants are allowed to take up employment subject to the age limit and in accordance with the applicable legislation of respective country. Dependant persons may work in formal sector or in self-employed activity.[492] For that reason the Community law obligates the Partner States to facilitate the process of admission of such dependants of a migrant worker in accordance with the national laws of the Partner States.[493]

However, in order for a migrant worker to take up and pursue economic activities in host States as self-employed based on the principles of equality, such prospective migrant worker must apply for work permit. This is to be done through the relevant competent authorities of the Partner States. Such authorities include Ministries of labour and the immigration departments of the respective Partner states where the employment or the right of establishment is sought. Prior to commencement of business, there are some legal procedures for entry, stay and exit as provided under regulation 5 (1) to (6) of the EAC CM Free Movement of Workers Regulations.

Mobile workers intending to engage in business such as self-employment, investment, and other commercial activities should fulfil the requirements of the *Right of Establishment Regulations, Regulation* 5(1) to (5). Sub-regulation (2) of the

[490] Ibid.
[491] The EAC CMP in Article1 defines a "child" as: *a son or daughter of a worker or self-employed person under the age of eighteen years, who is a citizen.*
[492] See the EAC CMP, Art. 10(5) (a) and (b).
[493] Ibid.

referred Annex III requires a prospective self-employed person to be issued with a pass. The process described above paves the way for a worker to commence business processes and procedures that are laid down within the national laws. This pass entitles the self-employed person the right to enter the territory of the host Partner State for a period of up to six months for purposes of completing the formalities for establishment.[494]

It means that, a worker who is seeking to enjoy opportunities of the common market in Member State is required to seek and obtain legal authorisation in the form of work and residence permits. The procedure for acquiring work permits is provided for under regulation 6[495] of the *Free Movement of Workers Regulations,2009* (Annex II). Under these regulations, it is provided that the application for a work permit should be supported by a valid common standard travel document or a national identity card. Not all the EAC countries have the national identity card, but if these cards have been agreed by a Partner State to be used as a travel document, then the same should be accepted. In addition there should be produced the contract of employment and any other document as the competent authority of any Partner State may require.[496]

Where a worker secures employment for a period of not more than ninety days, the worker is required to apply for and be issued with a special pass which in other words is a temporary permit. The special or temporary pass serves to facilitate access to member States' labour markets.[497] It is provided under the *Free Movement of*

[494] See Annex III, Reg. 5(3).
[495] See the EAC CMP (Free Movement of Workers) Regulations, (Annex II), Reg. 6.
[496] See Annex II to the EAC CMP, Reg. 6 (2).
[497] Ibid, Reg. 6(4).

Workers Regulations (Annex II)[498] that the long term work permit may be granted to the applicant of work permit from the Partner State by the competent authority for an initial period of up to two years which may be renewed upon application.[499]

Therefore, the EAC law creates the requirement of possessing valid travel documents and work permits in order to enjoy the benefits guaranteed under the co-operation Agreements. These valid standard travel documents, business and other related licences and the registration will entitle the self-employed person to commence business activities in a Partner State after being certified by the competent authorities.[500] In many instances there may be other relevant permission that are required for establishment of particular type of business and there may be required a proof of sufficient capital for the purpose of self-employment within the terms of regulation 6 of the East African Community Common Market (Right of Establishment) Regulations.[501]

Under the Protocol, the EAC Partner States have undertaken to harmonise their social policies in order to promote the right of persons with disabilities. As regards to equal treatment in employment, and in accordance with Article 13 (1) (d) of the CMP, the Partner States are required to provide for regular labour inspections and any other appropriate measures to ensure that the same treatment is accorded to the workers from other Partner States as is accorded to the nationals of the Partner State with regard to contribution to a social security scheme.

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[498] Ibid, Reg. 6(7).
[499] Ibid, Reg. 6(7).
[500] See Annex III to the EAC CMP, Reg. 9.
[501] Ibid, Reg. 6(4) (c.)

The commitments contained in the EAC Treaty, the EAC CM Protocol and in the accompanying annexes on free movement of workers (labour), free movement of persons, right of establishment and right of residence have been under gradual implementation. The Schedule of implementation of the provisions on free movement of workers that is annexed to the Regulations on Free Movement of Workers (Annex II) has been variably implemented by the Partner states. This variation in implementation of the provisions on free movement of workers is due to the fact that each EAC Partner State has its own set of priorities depending on the national prevailing conditions and domestic labour markets. Under the schedule of implementation since 2010, a Member State has been given discretion to determine the timing and the type of opening of its doors to allow admission of migrant workers from fellow Member States.

Since the coming into force of the CMP, the Partner States under Article 24(1b) are under commitment to remove any discrimination based on the nationality or on the place of residence of the persons or on the place where the capital is invested. The Schedule of implementation of the provisions on free movement of workers under the CMP set the year at which each Partner state will be ready to implement the agreed commitment. This schedule expired in 2015 without every Partner State accomplishing all the targets in the schedule.

The provisions of Article 5(2) of the EAC CM Protocol on the scope of cooperation in the common market require Partner States to remove all restrictions that prevent the implementation of the Protocol. However, various EAC reports have sometimes reported complaints over lack of comprehensive implementation of general

principles of the CMP for effective and deeper integration. The state of non-conformity with the CMP and complaints over Member States' violations of the EAC Treaty are demonstrated in the Common Market Scorecard reports of 2014 and 2016.

Harmonisation of social security laws of the EAC countries is one of the ways of implementation of the EAC Treaty and the CMP. Harmonisation can be viewed as one of the modes of reducing the inequalities among the EAC mobile workers working in different EAC Partner States. Harmonisation of laws ensures that migrant workers within the EAC retain their social security rights at a level agreed by Parties which would be equal in all Partner States. The EAC Treaty in Article 6d and the CMP in Article 3(2a) and 3(2b) impose obligations on Partner States to observe the principle of non-discrimination of nationals of other Partner States on grounds of nationality. The EAC law also requires Partner States to accord treatment to nationals of other Partner States not less favourable treatment than that is accorded to third parties. Prohibition of discriminatory treatment of EAC nationals based on nationality is also provided in Article 17 and Article 18 of the CMP.

However, this study has established that treatment of EAC citizens engaging in trade, services, capital investment, and other business establishment has been discriminatory[502]. The 2014 common market scorecard revealed that a review of more than 500 key sectoral laws and regulations of the EAC Partner States applicable between 2010 and 2014 revealed at least 63 measures that were

[502]See World Bank/EAC Secretariat, *East African Common Market Scorecard 2014: Tracking EAC Compliance in the Movement of Capital, Services and Goods*, World Bank/EAC Secretariat, 2014, pp.3-5.

inconsistent to commitments to liberalize services trade within the EAC.[503] The review focused also on legislation governing other professional services which include architectural, legal, engineering, and accounting and other sectors.

Up to this date, the EAC countries still impose restrictive or non-conforming measures on freedom of movement of services against nationals of other EAC Partner States. Between 2010-2014 Tanzania counted 17 non-conforming measures in total and Kenya counted 16 restrictive measures based on nationality.[504] Rwanda was the third in the list counting a total of 11 non-conforming measures while Uganda was the fourth enlisting a total of 10 measures all based on nationality status.[505] Burundi was the last as it had 9 sectoral restrictions and this was explained as strong performance on the scorecard. However, lack of regulatory framework through sectoral legislation in Burundi was described as a reason for high performance. Investors and various traders or entrepreneurs would find no legal restrictions or regulatory framework in respective sectors.[506]

Further, the EAC Partner States have been falling short of commitment to advancing services liberalization and establishing a common services market because. For example, the EAC CMS 2014 shows that Partner States have not brought their laws and regulations to conformity with the EAC regional agreements. Notably, three fourths of the non-conforming new measures that have been identified in all the EAC countries relate to national treatment[507]. EAC countries still exercise direct and

[503] Ibid.
[504] See the EAC CMS 2014, pp.4-5, note 502.
[505] Ibid.
[506] Ibid, p.4.
[507] Ibid, p.4

indirect discrimination against services or service suppliers of the EAC Partner States in violation of Article 17 and 18 of the EAC CMP.[508] The report indicates that the rest of non-conforming measures concerned with violation of Article 18 of the EAC CMP on most favoured nation principle.

The most favoured nation principle prohibits unfavourable treatment of EAC citizens and suppliers, particularly prohibits preferences for service suppliers outside of EAC bloc. The findings of the CMS 2014 and CMS 2016 both point to the fact that removing restrictive conditions imposed by national laws against other EAC Partner States remains a challenge.[509] One would argue that, this is because the model of implementation of the EAC Treaty is by way of decentralisation. The latter means that it is heavily dependent on actions of individual Partner States.

The enforcement of the CMP through reliance on actions of individual Partner States points to the fact that in principle the EAC law is neither self-executing, nor can it be enforced directly in the Partner States, even if a Partner State was acting in violation of the Treaty. The EAC Treaty gives the primacy to the EAC law and requires the Partner States to ensure that the Community organs, institutions and laws are nationally registered and accepted as taking precedence over similar national ones on matters pertaining to the implementation of the Treaty pursuant to Article 8(4)[510].

The state of compliance with the EAC Treaty described in this sub-part has implications on enforcement of the principles of equality of treatment in social

[508] Ibid, pp.3-5.
[509]See World Bank/EAC Secretariat, *East African Common Market Scorecard 2016: Tracking EAC Compliance in the Movement of Capital, Services and Goods*, World Bank/EAC Secretariat, pp.112-212.
[510] Ibid, Art. 8 (4).

security for migrant workers in national jurisdictions. It means that the rights to equal treatment in social security enshrined under the CMP cannot be emphatically guaranteed and directly enforced through direct application of the EAC law in national jurisdictions. Such rights can only be enforced by individual EAC countries under the framework of their national legislation through effective harmonisation of their national laws that should conform to the EAC law.

The international legal framework creating justification for migrants' protection has been discussed in chapter 3 of this thesis. The right to social security has been shown to have assumed the human right status in international law. However, when it comes to compliance with the international law among the EAC countries, there are some challenges. The national constitutions of majority of the EAC Member States remain obscure concerning the entrenchment of the right to social security in their national constitutions under the category of Bill of Rights. The Constitution of Kenya, 2010 has entrenched the right to social security under Article 43 in the category of bill of rights.[511] The Constitution of the United Republic of Tanzania, 1977 does not entrench the right to social security as a hum rights issue but rather describes it as a directive principle of the State policy as provided within the terms of Articles 6-11. The Constitution of Tanzania in Article 7(2) prohibits any Court to investigate or determine as to whether the Government has omitted or failed to fulfil the directive principles of State policy to where social security belongs. Therefore, social security in Tanzania is not justiciable as would be the rights under the Bill of Rights in Article 12 to 29 of the Constitution of Tanzania.

[511] See the *Constitution of Kenya, 2010*, Art. 43.

The EAC Partner States are by virtue of the Treaty required to enact necessary domestic legal instruments to confer precedence over EAC organs, institutions and laws over similar national ones[512], while at the same time, they are to be solely guided by their national constitutions. Ideally, the concept of primacy of EAC law means that the Community instruments have to set general principles which require Partner States to implement the Treaty and the CMP, among other instruments for purposes of achieving the integration objectives. Among the objectives is attaining equal treatment of nationals of Partner States. These include migrant workers crossing borders for employment in other Member States. If the current model of enforcement of the CMP was sufficiently centralised, the EAC would have had jurisdiction to step into the jurisdiction of any Partner State that refuses, ignores, abandons or violates the provisions of the EAC Treaty and any other signed Protocols and enforce the guaranteed right of EAC citizens. However, this is not the case due to the lack of supranational legal laws to directly enforce the EAC law in national jurisdictions.

The EAC Partner States have frequently violated the provisions of the CMP by introducing and implementing inconsistent measures to the provisions of the CMP since 2010-2014[513]. The EAC countries have continued with similar violations during the period between 2014 and 2016[514]. These inconsistencies have been found in different sectoral legislation and in several other laws that cut across all sectors among Partner States.[515] The reports have shown that none of the Partner States have

[512] Ibid, Art. 8(5).
[513] See the CMS 2014, note 502; the CMS 2016, note 509.
[514] See the CMS 2016, pp.112-232, note 509.
[515] See the CMS 2014, note 502, p.3, item (10).

been complying with their obligation to regularly inform the EAC Council of any new laws and administrative guidelines that affect trade in service pursuant to Article 25 (1) of the EAC CMP[516].

A failure to provide regular notification has negative effect in the enforcement of the right to equal treatment in social security because there is interdependence of governing laws and related rights. Under Article 10(10) of the CMP, there is discretion upon the Partner States to choose to apply the provisions on the free movement of workers if the rights of workers so involved concern the public service. This means the Protocol has excluded the application of the provisions on free movement of workers in cases involving public service, unless national laws and regulations of a host Partner State so permit.[517]

Despite several challenges facing the implementation of the EAC CMP, the Community has made some substantial progress towards deeper integration by gradually putting in place some legal mechanisms for eliminating various obstacles in the way of free movement of labour, persons, goods, services and capital between the partner States. The provision of Article 2 (4) of the EAC CMP provides:

> (*4) In accordance with the provisions of Articles 76 and 104 of the Treaty, this Protocol provides for the following:*
> *(a.) N/A*
> *(b) the free movement of persons;*
> *(c) the free movement of labour;*

[516] Ibid.
[517] See the EAC CMP, Art. 10(10).

Concerning the free movement of persons, the EAC has in place since 2009 the *East African Community Common Market (Free Movement of Persons) Regulations*.[518] These regulations on free movement of persons are intended to implement Article 7 of the EAC Common Market Protocol which provides for free movement of persons in the Community. Specifically Article 7(2) of the CMP requires all Partner States to comply with the provisions regarding equality of treatment of all EAC citizens without discrimination in granting permission for travel, entry, stay and exit from any of the EAC Partner States.

The EAC CM (Free Movement of Persons) Regulations in Regulation 8 of provides for effective border management and directs the Partner States to ease border crossing for citizens of the Partner States.[519] The Partner States recognize that the free movement of persons requires harmonisation of domestic national immigration procedures, legislations and continuous evaluation of the implementation of border management recommendations and programmes.[520]

All the EAC Partner States have already removed the requirements of visa for entry and stay thereby allowing their citizens visa free admission in Member countries of the Community. However, numerous barriers still remain mainly in all three areas of free movement of capital, goods, and services within the EAC countries.[521] These barriers affect implementation of the EAC CMP which in turn hinders the enforcement of equal treatment of EAC citizens as they try to exercise their rights of

[518] See Annex I to EAC CMP.
[519] Ibid, Reg. 8(a).
[520] Ibid, Reg.8 (g) and (h).
[521] See the EAC CMS 2016, note 509.

self-establishment for doing business.[522] For example during the period between 2014 to 2016, the use of non-tariff barriers (NTBs) by Kenya doubled from 10 to 23 barriers while Tanzania imposed new more barriers which tripled from 7 to 24 NTBs[523]. This is the violation of Article 16 (5) of the EAC CMP, because the Protocol requires that the Partner States shall progressively remove existing restrictions and shall not introduce any new restrictions on the provision of services in the Partner States.

During the period between 2010 and 2014, there was no EAC country that had improved in terms of elimination of NTBs or removal of sanitary and phytosanitary standards (SPS) measures.[524] Each country was engaged in putting restrictions which caused significant impediment to the EAC regional integration. The subsequent Common Market Scorecard report of 2016 still shows similar lack of progress in elimination of NTBs because the scorecard indicates that the period between 2014 and 2016 depicts absence of improvement in terms of elimination of NTBs or use of sanitary and phytosanitary standards (SPS) measures among the EAC countries.[525] The increased tariff-equivalent charges including phytosanitary standards (SPS) and technical barriers to trade (TBT) are all non-conforming measures (NCMs) operating against the freedom of movement of goods and services. In other words, the "non-conforming measures" refer to all provisions of the laws and regulations that breached the EAC Partner States' obligations and stand as challenges and growing obstacles to free movement of goods and services.

[522]Ibid, pp.4-5.
[523] Ibid, pp.7-8.
[524] See the EAC CMS 2014, note 502.
[525] See the EAC CMS 2016, note 509.

The stated “non-conforming measures” significantly continue to decelerate the speed of regional integration even in other fields of cooperation such as social policies, harmonisation and coordination of social security laws for benefits of migrant workers in the region. As of 2017, there is no any specific commitment made by the EAC countries on a schedule of accomplishing the full harmonisation of social security laws in the EAC.

This study shows that there is no any clear or specific commitment[526] in the area of harmonisation of social security laws and policies by the EAC Partner States. Even the CM (Schedule of Commitments on the Progressive Liberalisation of Services), 2009 (Annex V) which entered into force on 25 October 2012 does not state social security as part of services to be liberalised within specified time frame.

4.5.2 National Constitutions

In the context of a regional integration, harmonisation of policies and laws has the aim of bringing equality of treatment of all human beings within Partner States. The national constitutions of EAC Member States are key foundation for protecting human rights of citizens. All the EAC countries are parties to various international human rights instruments and their national constitutions provide for certain degree of guarantee to equality and non-discrimination of citizens. However, the right to social security as a human rights issue is vaguely provided. Below is a brief highlight of some constitutional provisions of the EAC Partner States regarding the concepts of equality of treatment and the entrenchment of right to social security.

[526] Ibid.

The *Constitution of Rwanda 2003*(as revised in 2015)[527] has no any single provision on the right to social security. However, the constitution provides for equality before the law to all persons under Article 15. Protection from discrimination is provided for in Article 16, but it refers to prohibition of discrimination of Rwandans while there is no mention of any guarantee to person who is a non-Rwandan.

The *Constitution of Uganda 1995*[528] (as amended up to 2005) provides in Part VII that the State shall make reasonable provision for the welfare and maintenance of the aged but the right to *social security* for all is not specifically entrenchedin the Constitution. The Constitution in Article 21 provides for equality of all persons before and under the law in all spheres of political, economic, social and cultural life and in every other respect. All persons are entitled to enjoy equal protection of the law.[529] Prohibition of discrimination based on nationality is not specifically mentioned in the Constitution of Uganda particularly in Article 21 (2) which provides that:

> *"a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability"..*[530]

Although the Constitution of Uganda does not mention the right to social security, it provides in Article 45 that the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in the

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[527] Rwanda Official Gazette Special Number, 24/12/2015.
[528]Constitution of Uganda1995 with Amendments, retrieved from <https://www.constituteproject.org/ constitution/ Uganda2005.pdf?>, accessed 16 August, 2017.
[529] Ibid, Art. 21 (1).
[530] See

Constitution are not meant to be regarded as excluding others not specifically mentioned.[531]

The *Constitution of Burundi, 2005*[532] in Article 22 provides that all citizens are equal before the law, and this equality assures them an equal protection. In Article 59 it provides that any foreigner who finds himself in the territory of the Republic of Burundi enjoys the protection granted to persons and to assets by virtue of the Constitution and of the law. Migrant workers finding themselves in Burundi are entitled to equal treatment and guaranteed of protection of the law. The Constitution of Burundi does not, however, directly provide for the right to social security. But Article 52 provides that every person is entitled to obtain the satisfaction of the economic, social and cultural rights indispensable to their dignity and to the free development of their person. The Constitution is cognizant of the fact that the national efforts may not be sufficient in terms of resources which imply that welfare provisioning takes into account the conditions of economic development and availability of resources in the country.

The *Constitution of the United Republic of Tanzania, 1977*[533] in Article 12 provides that all human beings are born free, and are *all equal* and that *every person* is entitled to recognition and respect for his dignity.[534]The Constitution envisages the building of a nation of equal and free individuals enjoying freedom, justice, fraternity and

[531] See the Constitution of Uganda1995 (as amended), Art.45.
[532]See the Constitution of Burundi, 2005.(English Translation by William, S. H. & Co., Inc., 2012), retrieved from <www.parliament.am/library/sahmanadrutyunner/burundi.pdf>, accessed on 17 August, 2017.
[533] Cap 2 of the Laws, R.E. 2002.
[534] See the Constitution of the United Republic of Tanzania, 1977, Art.12 (1), (2).

concord. It abhors all forms of injustice, intimidation, discrimination, or favouritism among others.[535] The Constitution defines the word "discriminate" to mean using nationality, tribe, and place of origin, political opinion, colour, religion, sex or station in life as criteria to satisfy the needs, rights or other requirements of different persons.

Certain categories of people are regarded as weak, inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications[536]. Equally, the Constitution of Tanzania, 1977 does not mention social security as a right but Article 11(1) provides that:

> *"the state authority shall make appropriate provisions for the realisation of a person's right to work, to self-education and social welfare at times of old age, educational and other sickness or disability and in other cases of incapacity. Without prejudice to those rights, the state authority shall make provisions to ensure that every person earns his livelihood".*[537]

The *Constitution of South Sudan, 2011*[538] in Article 14 provides that *all persons* are equal before the law and are entitled to the equal protection of the law without discrimination as to *race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality or social status.* This Constitution does not mention as to whether discrimination based on nationality is prohibited or not. Article 14 does not use the word 'including', which means that the list of prohibited grounds of discrimination is closed, and incidentally, *nationality* condition is not mentioned.

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[535] Ibid, Art. 9(h).
[536] Ibid.
[537] Ibid, Art.11(1).
[538] See the *Transitional Constitution of the Republic of South Sudan*, 2011, Art.14.

The Constitution of South Sudan in Article 27 (2) provides for the rights to freedom of movement and residence whereby every citizen of South Sudan has the right to leave and or return to South Sudan. The latter conforms to the right to freedom of movement established under the EAC regional instruments. According to Article 45(2), the citizenship is the basis of equal rights and duties for all South Sudanese.[539] In terms of Article 1(5) of the Constitution of South Sudan the State is founded on justice, equality, respect for human dignity and advancement of human rights and fundamental freedom.[540]

As regards the *Constitution of Kenyan, 2010*[541], it is provided in Article 20 that equality and equity are key values that are protected and promoted in interpretation and application of the Bill of Rights. The Constitution further provides in Article 27(1)) that: *"Every person is equal before the law and has the right to equal protection and equal benefit of the law"*. The term equality of treatment of 'every person' under the Constitution of Kenya extends to include, among other things, the '*full and equal enjoyment of all rights…*'[542] Sub-Article (4) of Article 27 of the Constitution of Kenya provides:

> *"The State shall not discriminate directly or indirectly against any person on any ground, including, race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth".*[543] *(Emphasis added).*

Since the phrase in sub-article (4) of Article 27 of the Constitution of Kenya opens with the words: "*the State shall not discriminate directly or indirectly on any*

[539] Ibid, Art.45 (2).
[540] *Ibid*, Art. 1(5).
[541] *The Constitution of Kenya, 2010* (Revised 2012), Art. 20 (4) (a).
[542] Ibid, Art. 27(1) and (2).
[543] Ibid, Art.27 (4).

ground, including…" it is proper to argue that other possible prohibited grounds of discrimination may be contemplated of under clause (4) even if such grounds are not expressly stated. This is interpreted because of the use of the word *'including'*.

It should be pointed out, however, that the EAC Treaty is silent on possible harmonisation of the national constitutions of EAC Partner States. It would appear that national constitutions do not necessarily need to conform to the EAC Treaty provisions. But in principle the EAC Treaty and constitutions of respective Partner States impose obligations on countries and their subjects to observe human rights principles and values. This includes prohibition of *discrimination* of human beings and advocating for equality of treatment of all human beings. This is one of the reasons as to why on Wednesday, 7 September 2011 the *East African Community Human and Peoples Rights Bill, 2011* was read for the first time in the EALA and it was referred to the Legal Rules and Privileges Committee for scrutiny[544]. In the following year, the *Bill of Rights for the East African Community 2012* was passed during the April 16-26, 2012 session in order pave the way for possible creation of a law that gives effect to the provisions of the Treaty for EAC on Human and Peoples' rights.

Although the *Bill of Rights for the East African Community 2012* was passed by the EALA as a proposed draft Bill to be passed as part of EAC law, the same is not yet adopted by EAC countries. This proposed law is intended to enable the formation of

[544] See The EAC: The Official Report of the Proceedings of the EALA, 119th Sitting - Second Assembly, First Meeting, Fifth Session, retrieved from http://www.eala.org/media/2012/04/, accessed on 12 January , 2017.

an East African Community Human Rights Commission whose mandate is to ensure the protection of human and peoples' rights in the economic bloc. The law if adopted by governments of EAC will fill the gaps or omissions that are in the national constitutions of the EAC member states. Currently, some lacuna existing in the Constitutions of the EAC countries are not yet resolved because national constitutions are not harmonized and there are no common standards of protection of human rights across the national constitutions of the EAC sub-region.[545]

What is not clear though in the constitutions of EAC countries is the extent to which foreign labour migrants can, as of constitutional right, enjoy the right to equal protection and treatment in social security based on equal footing with nationals. Some national constitutions of EAC Partner States such as in Tanzania do not recognize social security as a justiciable human rights issue. Where national constitutions contain omissions of social security as a human rights issue and others do provide for the protection, then there is ultimate lack of harmonisation legal framework. The latter circumstances impede upon the full compliance with the EAC law, international labour standards and human rights instruments which set standards of treatment in social security for benefits of international labour migrants.

4.6 Harmonisation of Social Security Laws in the EAC

4.6.1 Foundation of Harmonisation

Existing scholarship in international social security law informs of harmonising and coordinating instruments in social security.[546] In principle, the social security

[545]See EAC Parliament, *Bill on Human Rights is passed by EALA*>http://www.eala.org/media/2012/04/> accessed on 6 December, 2017.
[546] See Nickless, J., and Siedl, H., p.11, note 155.

harmonising instruments place obligations on State Party to a regional Community to alter its national social security laws so that to conform to the Community law. Nickless, J., and Siedl have argued that harmonisation may involve unification of national laws of Member States with those of the Community which is otherwise referred to as *harmonisation by standardisation*[547]. The latter means that national systems of all Community Member States must adopt uniform legal rules.

There are some main sources of authority for the harmonisation of the social security systems of member states in the EAC. The general term of the source of harmonisation may be said to be the EAC law which constitutes the accumulated legislation passed by the EAC Partner States and other legal acts as well as court decisions of the East African Court of Justice (EACJ). Now, the first source for authority for harmonisation is the *Treaty establishing the EAC, 1999* which through Article 76 forms the basis for establishment of the Common Market among the Partner States. The legalisation of cross-border labour migration for employment in the framework of the CMP has created the obligation on Partner States to agree on the provision of social security to working migrant nationals of the Partner States.

Equally, Article 104 of the Treaty forms the basis for harmonisation because it creates the common market, and both the Treaty and the CMP which requires Partner States to harmonise their social security laws, policies, labour laws and programmes to conform to the EAC law. The Article provides for conclusion of protocol for free movement of persons, labour, services, rights of establishment, and

[547] Ibid.

residence. Sub-article (3) (e) directs the Partner States to harmonise their labour policies, programmes, and legislation including legislation on occupational health and safety. Among the fundamental principles of the Community include recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the ACHPR, the rule of law, social justice, equal opportunities and gender equality, among others, as provided in Article 6 of the Treaty. The Treaty in Article7 provides for the operational principles of the Community.[548]

The second basis of authority for harmonisation is the *EAC Common Market Protocol, 2009*. The Protocol puts a legal mechanism that regulates free movement of labour, goods, services, capital, and the right of establishment. Article 3 of the CMP establishes the principles of the Common Market. By ratifying the CMP, the Partner States have undertaken to comply with principles of the CMP which include; observe the principle of non-discrimination of nationals of other Partner States on grounds of nationality; according to nationals of other Partner States, not less favourable treatment than the treatment accorded to third parties; ensuring transparency in matters concerning the other Partner States; and sharing information for the implementation of the CMP[549].

The CMP in Article 4(3) has a framework law that guides Partner States in harmonisation of their domestic policies and laws for implementation of the protocol.[550] Also, the provision of Article 39 of the CMP requires Partner States to harmonise their social policies in order to implement the objectives of creating the

[548] See the EAC Treaty, Art. 7; the EAC CMP, Art.3 (1).
[549] See EAC CMP, Art.3 (2).
[550]Ibid, Art.4 (3).

common market. Sub-article 1 of Article 39 directs Partner States to *coordinate* and *harmonise* their social policies and protect decent work and improve the living conditions of the citizens of the EAC for the development of the common market.

Also, the CMP provides for harmonisation of social policies relating to promotion of the rights of persons with disabilities[551], while Article 39 (2a) provides for *coordination* and *harmonisation* of national social policies relating to good governance, the rule of law, and social justice. The Protocol requires the EAC Partner States to harmonise their social policies so as to promote and protect human rights and Peoples' Rights as provided in sub-article 2(b) of Article 39. The promotion of equal opportunities and gender equality is required to be harmonised by Partner States within the meaning of sub-article 2 (c) of Article 39.

While sub-article 3 (a) of Article 39 of the CMP requires Partner States to harmonise their laws so as to promote employment creation, the provisions of sub-article 3(b) provides for strengthening of labour laws of the Partner States. It also calls for improvement of working conditions through *harmonisation of social policies*. The CMP also provides for obligations upon the Partner States to harmonise their social policies so as to promote occupational and health safety at work places[552].

The foregoing includes harmonisation of EAC social policies, expanding and improving social protection pursuant to the provision of sub-article 3 (h) of Article 39. The CMP requires the Partner States *to approximate* and *harmonise* their

[551]Ibid, Art. 39 (3) (j).
[552] Ibid, Art. 39. 3 (d).

policies, laws and systems to come as close as to the EAC regional instruments for purposes of implementing the common market[553].

Actual steps that need to be taken by each Partner States towards harmonisation depend on directives of the Council of Ministers as the Protocol mentions the Council as a body that has powers to issue directives and make regulations on social security benefits within the terms of sub-article (3) and (4) of the CMP.[554] The CMP in Article 12 provides for *harmonisation of labour policies, laws and* programmes whereby in sub-article(1) the Partner States have agreed to harmonise their labour policies, national laws and programmes to facilitate the free movement of labour within the Community. Therefore, Partner States are required to review and harmonise their national social security policies, laws, and systems to provide for social security for self-employed persons who are citizens of the Partner States[555].

The CMP also provides another ground for harmonisation in Article 5 (2) (c). The provision provides the scope of co-operation in the common market by harmonisation of social security benefits provisioning mechanism.[556] The CMP calls for removal of all restrictions that impede on free movement of labour, and directs for harmonisation of labour policies, programmes, legislation, social services. It also calls for removal of restrictions on provision of social security benefits and directs for introduction of common standards and measures for association of workers and employers. This includes taking measures to establish employment promotion

[553] Ibid, Art. 47.
[554] Ibid, Art. 10(3) (4) and Art. 47 (2).
[555] Ibid, Art. 12 (2).
[556] Ibid, Art.5 (2) (c).

centres and eventually adopt common employment policy. The rights of EAC citizens to migrate from one country to another for employment or for undertaking any economic activity should accompany the right to enjoy social security benefits as accorded to workers of the host Partner State.[557]

The third source of authority for harmonisation is the *Community regulations* issued by the Council[558] and contained in annexes to the CMP that provide for the free movement of persons[559], free movement of workers[560], free movement of goods, services and capital[561], rights of establishment[562], rights of residence[563]. Article 16 of the *EAC Treaty* provides that the effects of *regulations, directives, decisions* and *recommendations of the Council* taken or given in pursuance of the provisions of the Treaty are binding on the Partner States. The Council's decisions are binding on all organs and institutions of the Community within their jurisdictions, and on those to whom they may be addressed under the Treaty. They are, however, not binding on the Summit, the Court and the EALA.

The foundation of harmonisation of social security schemes, health and safety standards at workplaces across the EAC region is also provided in Article 104 (3) (e) of the EAC Treaty, and in Article 39 (3) (d) of the CMP. The CMP provides an effective instrument for *convergence*[564] and *harmonisation* of social security systems

[557] Ibid, Art.10 (3) (f).
[558] The EAC Treaty in Art. 1 (1) interprets the word "Council" to mean the Council of Ministers of the Community established by Article 9 of the Treaty. Also see the EAC CMP, Art.1.
[559] Annex I to the EAC CMP.
[560] Annex II to the EAC CMP.
[561] Annex VI to the CMP (Schedule for Removal of Restrictions on Free Movement of Capital), 2009.
[562] Annex III to the CMP.
[563] Annex IV to the CMP.
[564] See O'Connor, pp. 112-243; Vas Os, Homburg, and Bekkers, pp. 269-270; Bouget, pp.6-9, note 599, infra.

in the region and gives a blueprint on social security *co-ordination* where instruments for coordination are applicable.

4.6.2 Aims and Processes of Harmonisation of Social Security Laws

One of the fundamental and operational principles of the Community is to attain equality of treatment of all EAC citizens and institutions through the harmonisation instruments in fulfilling the objectives of the regional integration. Harmonisation of social security systems has the purposes of ensuring that the Community migrants from member states retain their social security rights at a level agreed by parties which would be equal in each country. This approach of parties agreeing to a level of harmonisation may be described as *minimum harmonisation.*

Minimum harmonisation does not require a change in the structure of the various social security schemes that are in existence in the Community Member States but their conformity to the EAC laws is required[565].Harmonisation of EAC social security systems can be viewed as one of the modes of reducing the inequalities because one of the fundamental and operational principles of the EAC is to attain equality of treatment of all EAC citizens in intra-regional labour mobility.

However, both the EAC Treaty and the CMP neither define the term *"equality"*[566] nor do they define the phrase *"equality of treatment"*. They neither define *"harmonisation"* nor *"approximation"* but both these terms are used in the Treaty and the Protocol. Other words that are used without definition include: 'equality',

[565] See Pennings, F., note 145; Nickless and Siedl, note 155.
[566] See EAC Treaty, Art. 6(d).

'non-discrimination', 'direct' and 'indirect' discrimination,[567]'equal opportunities'[568] as the key terms in different circumstances.

In chapter 2, this thesis has argued that *"equality"* and *"non-discrimination"* are complex concepts with considerable debate on their meaning with deep-seated conceptual and methodological confusion on exact meaning of these terms. The EAC CMP emphasizes harmonisation of laws, policies, programmes and systems.[569] Both at the national and EAC regional level, there is a fair chance that the concepts of equality, discrimination and non-discrimination as well as harmonisation have certain limitations in their application in different situations. The CMP provides that: *"Partner States shall observe the principle of non-discrimination of nationals of other Partner States on ground of nationality."*[570] Impliedly, prohibition of discrimination is attached to the citizenship of the EAC Partner States, and resembles the guarantee to non-discrimination provided in the national constitutions of EAC countries. [571] However, still the EAC citizenship under the Treaty does not replace national citizenship.

In terms of compliance with international law and labour standards, the EAC Partner States have obligation as provided in the EAC CMP in Article 13 (11) to implement the EAC law by incorporating the international labour standards on social security and equality of treatment without discrimination as contained in the Community law. According to the CMP, the free movement of workers in the EAC is permissible

[567] See EAC CMP, Arts.3 (2) (a); Art. 10(2); Art. 12, Art.39; and Art. 47(1).
[568] See the EAC Treaty, Art. 6(d).
[569] See the EAC CMP, Art.3 (2) (b); Art. 10(2), (3f); Art.12 (1), (2) and (3); Art. 13 (3b); Art. 39 and Art. 47.
[570] Ibid, Art.3 (2) (b).
[571] See Annex II to EAC CMP, Reg. 13 (1) (d).

subject to certain limitations that may be imposed by the host Partner States on grounds of public policy, public security or public health[572].

Therefore, the EAC Treaty does not bestow on citizens of the EAC with a right to move and reside freely within the territory of the Member States without subject to national conditions. Equality of treatment the nature of movement, type and reasons for relocation, residence, and purpose of migration to another State as well as prevailing national conditions determine the type of restrictions that a State may impose on free movement of workers, persons, and the right of establishment.

Workers participating in intra-regional labour mobility face practical challenges of transfer of long term benefits and exportability of benefits. This includes aggregation of period of insurance and benefits earned in different countries. In the 2014 *EAC Report of the 30th Meeting of the Council of Ministers,* the Council referred the issue of developing regional laws on the various aspects of the CMP to the Sectoral Council on Legal and Judicial Affairs for consideration by 15th November 2014[573]. This was as per the *EAC/CM 29/Decision 08* owing to slow pace of compliance to EAC law and lack of adequate harmonisation of social security laws. Since then, the EAC Partner States have continued to work on both harmonisation and coordination towards creating best design practices to be adopted. To this date, there is yet to be agreed upon any model convention on region-wide portability of benefits across the EAC.

[572] Ibid, CMP, Art.13 (8) and Art. 10(11).
[573]See EAC: *Report of the 30th Meeting of the Council of Ministers* Nairobi, Kenya 20th-28th November, 2014, Ref: EAC/CM/30/CM/2014), EAC Secretariat Arusha, Tanzania, p.5.

The EAC CM on Free Movement of Workers Regulations (Annex II) in regulation 13 (1) (d) provides for equality of treatment between nationals and non-national workers in contribution to a social security schemes.[574] This implies that Partner States have a duty to put in place domestic legal mechanism that best implements the principle of *equal treatment* of all citizens in employment and social security benefits provisioning. Also, the subject of equal treatment is a right that extends to include the spouse or child of a migrant worker.[575] Therefore, dependants may seek to undergo training or to take up employment in another Partner State and they should also not be unreasonably restricted or discriminated based on their nationality, but rather treated equally as nationals of the host Partner State subject to the national laws relating to provisions on the age of the child in relation to legality to work.[576]

In principle, any difference in treatment of nationals and non-nationals would need to be objectively justified on grounds that did not relate to the nationality of the individual concerned. This is so because the practice of equality of treatment is one of the elements of justice. Cross-border labour migrants have the right to seek employment in any of the Partner States and to enjoy equal treatment with nationals in terms of employment conditions and the right to social security.[577] Discriminatory treatment of nationals of Partner States based on their nationality status is a violation of the EAC Treaty and other applicable Protocols such as the Common Market Protocol and regional instruments governing the EAC Partner States.[578]

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[574] See the EAC CMP Regulations, 2009 (Annex II), Art. 13(1) (d).
[575] Ibid, Reg. 13 (1) (2) & Reg. 6.
[576] Ibid, Reg. 6.
[577] EAC CMP, Art. 10 (2) and (4).
[578] Ibid, Art. 29(2) (b).

Consequently, the CMP provides under Article 10(9) that national laws and administrative procedures of a Partner State that have the principal aim or effect of denying equal employment opportunity to the nationals of other Partner States should not be made to apply in the recruitment process.[579] As such, whenever a Partner State has superficial type of the law the same should not be applied on matters of the EAC. The operational principles of the Community contained in Article 6(d) and 7(2) of the Treaty entrenches rule of law as one of the cardinal principles of equality of treatment that are provided in the CMP and implemented through the accompanying regulations to the CM Protocol. The rule of law, social justice and maintenance of universally accepted standards of human rights are also contained in several UN international human rights labour conventions.

The EAC Treaty under Article 130 makes Partner States contractually obliged to honour all their commitments in respect of various multinational and international organisations of which they are members. All the EAC countries are, for example, members of the UN and the ILO. The ILO Constitution in article 19 creates a number of obligations upon Member States adopting certain international labour standards. This includes the requirement to submit newly adopted standards to national competent authorities.

The national governments have obligation, in addition to report at regular intervals on measures taken to give effect to the provisions of un-ratified Conventions and

[579] Ibid, Art. 10(9).

Recommendations.[580] The EAC countries under the regular procedures provided in article 22 of the ILO Constitution are required to report after every two years on compliance in case of fundamental and priority conventions. For all other conventions the ILO Constitution stipulates the interval of reporting to be after every five years.

Although the Treaty for establishment of the EAC did not envisage social security right as a human rights issue, both the Treaty and the CMP and accompanying regulations provide for adherence to international human rights standards of practice and procedures. All national public policy issues and legal rules that impose restrictive conditions to accessing benefits based on nationality and which prohibit cross-border portability of benefits thereby restricting or excluding non-nationals from entitlements to pension rights on emigration and other social security rights, violate international legal rules and human rights standards.

4.6.3 Challenges of Harmonisation of Social Security laws

Harmonising social security schemes of Member States in the EAC has its challenges and pitfalls. As demonstrated in this study, and as documented in the EAC common market scorecards of both 2014 and 2016, one of challenges to the Community has been the unwillingness of the Partner States to relinquish most of their national legal rules, practices, and policies when implementing the CMP. All EAC countries continue to cling on their old legal rules and laws governing national social security schemes that are established under different national social security legislations.

[580] See ILO Constitution, Art. 19.

Lack of clear definition of both *harmonisation* and *coordination* of social security laws that is envisaged under the EAC Treaty and the CMP pose difficulties of establishing the type of harmonisation and model of coordination that are to be pursued. The word *'harmonisation'* in the EAC instruments remains devoid of specific meaning that is envisaged in the context of existence of various types of harmonisation. Moreover, compliance with harmonisation of social security laws among the EAC countries is still largely unimplemented leave alone the lack of definitions of harmonisation and coordination of social security laws. The study has shown that some national Constitutions of EAC Partner States such as Kenya expressly provide for the right to social security in the Bill of Rights and it is justiciable.[581]

However, majority of the Constitutions of EAC Partner States have policy statements on social welfare and protection of persons with disability, old age, and vulnerable groups. These constitutions do not entrench the right to social security in the category of Bill of Rights.[582] As a result, the EAC countries are at different levels of harmonisation or approximation of their social security laws. National political dynamics and national economic agenda sometimes slow down the compliance with the CMP.

Decentralisation model of implementation of the EAC Treaty makes it harder to achieve comprehensive harmonisation. Once any protocol is signed and ratified it forms an integral part of the Treaty. Article 151(3) says that each Protocol shall be

[581] See *Constitution of Kenya, 2010*, Art.43.
[582] See the *Constitution of Rwanda 2003* (as amended up to 2015); *Constitution of Uganda 1995* (as amended up to 2005), *Constitution of the United Republic of Tanzania, 1977* (as amended).

subject to signature and ratification by the parties. Sub-article 4 of the latter Article provides that the annexes and protocols to the Treaty form an integral part of the primary Treaty.[583] Inherently, both the Treaty and its implementing protocols appear to be primary laws. The Treaty is fundamentally the EAC primary law. However, it is apparently enforced or implemented by yet another ratified pieces of primary laws styled as protocols. The CMP enforces the Treaty by directing the Partner States to harmonise their social security laws and policies and to establish co-ordination mechanism or procedures. This process delays the enforcement of the Treaty obligations in the Partner States.

The EAC Treaty creates flexibility in the implementation of the Treaty objectives by application of the *principle of asymmetry* (Article 1). This principle permits Partner States to proceed at variable speed with each other in the implementation of measures towards economic integration for purposes of achieving common objectives.[584] This type of implementation of the EAC Treaty creates divergences in the approaches of implementation of the Treaty and in the harmonisation of laws.

Another challenge comes from the application of the *principle of variable geometry* that is provided in the EAC Treaty in Article 1(1). This principle permits flexibility among Partner States by encouraging progression in co-operation among a sub-group of EAC members in a larger integration scheme in a variety of areas and at different paces. The formation of a group of Partner States within the larger

[583] Other known primary laws under the Treaty include the *Protocol for establishment of EAC Customs Union Protocol, 2004*, the *Protocol on the Establishment of the EAC Common Market Protocol,2009*; and the *Protocol on the Establishment of of the EAC Monetary Union Protocol, 2013*.

[584] See the EAC Treaty, Art.1 (1).

integration scheme has been ironically referred to as the 'coalition of the willing'[585] . A group of countries that are left behind has been referred to as 'coalition of the unwilling'. This sort of self-branding and use of derogatory words over each other slows down the spirit of trust and cooperation in the whole integration process. Therefore, if the *principle of variable geometry* is not keenly implemented is likely to develop into divisions, distrusts, and differences due to some perceptions surrounding the formation sub-groupings of Member States.

Further, it is difficult to clearly understand the nature, degree or extent of operationalization of harmonisation of social security laws in the EAC. In international law, social security is a human rights issue and migrant workers deserve this right irrespectively of their nationality status. The EAC Partner States in Article 6d and Article 7(2) of the EAC Treaty have ascribed their desire and wish to implement the African Charter on Peoples and Human Rights. It is important to underscore the fact that the African Charter lacks specific provisions on equal treatment in social security with regard to migrant workers.

Lack of strong supranational EAC institutions and laws directly applicable in national jurisdictions poses another challenge. Where States Parties fail to act in conformity with their Treaty obligations the EAC law does not compel the Partner States failing to comply. This has resulted into weak implementation of the EAC law. Consequently, non-conforming measures and restrictive conditions to movement of persons, workers, goods, services and capital have been so common

[585] Ibid, Art. 7 (1) (e).

among EAC countries. Even national social security laws of EAC Member States remain fragmented.

The past experience of the collapse of the former EAC in 1977 reminds Member States of significant negative effects of the collapsed particularly on the old EAC Partner States of Tanzania, Kenya and Uganda. Some countries such as Tanzania have been acting with extreme caution and keenness so as not to repeat committing similar mistakes as in the first EAC which led to inequality in the benefits of the cooperation among Partner States. This contributes to delays in going for wide harmonisations of national laws and systems.

Internal political conflicts among some EAC countries pose challenges to harmonisation. Frequent civil wars in some EAC Member States, particularly in South Sudan and in Burundi[586] contribute to decelerate the pace of harmonisation of national laws of Member States, among others. Some occasional political mistrust of national leaders of Rwanda and Uganda in 2012 over clashes in Iturbi region in the DRC tended to sour relations.[587] Similarly, Rwanda and Tanzania were engulfed in political mistrusts over the non-tariff barriers imposed by Rwanda on Tanzania at the time of Tanzania's military operation in the DR Congo. Also, Tanzania was accused of meddling in Kenya's domestic affairs during presidential election campaigns in 2017. The seizure of cattle from Kenya by Tanzania and its eventual auctioning and several other incidences have tended to ignite some moods of conflict that threaten

[586]Khadiagala, G. "Regionalism and Conflict Resolution: Lessons from Kenyan Crisis." *Journal of Contemporary African Studies*, 2009, Vol.27, No.3, pp.431-444; Kipkemboi, C. P., "Tanzania's Dilemmas and Prospects in East African Community: A Case of Trepidation and Suspicion", *Developing Country Studies*, 2016, Vol.6, No.1, pp.27-35.

[587]Lansford,T., *Political Handbook of the World 2012*, SAGE Publications Ltd, London, 2012, p. 1483ff.

the EAC regional integration.[588] On the economic front, some newspapers have carried headlines such as: "*Kenya-Tanzania trade wrangle costs Kenyan firms 160 billion/-"*[589] and many such similar incidences.

The internal political dynamics of the Partner States determine the pace of internal harmonization of policies, social security laws, labour laws, systems and procedures. The political will to deal with harmonisation of laws depends on internal political and economic dynamics. However, the insufficiency of legislative measures on envisaged type of harmonisation creates another challenge. For example, currently, the EAC countries still lack uniform legal framework to govern multilateral cross-border portability of social security benefits. As a result, there are no known rules applicable to measure the attainment of equality of treatment of nationals and foreign labour migrants.

An attempt to present a draft bill on portability of social security benefits across the EAC was initiated in 2015. The draft was deliberated upon before the EALA where the East African Trade Union Federation (EATUC) and the Association of East African Employers Organisations (EAEO) presented it to the Legislative Assembly.[590] The campaign intends to enable passing the bill through the EALA into law so as to benefit citizens crossing borders with the EAC countries for employment so that they can carry their social security benefits. The diversity and multiplicity of social security laws in the EAC countries still create a lack of

[588]See"Government is not meddling in Kenya affairs: Mahiga, <http://www.thecitizen.co.tz/News/, accessed 18 August, 2017.

[589] See The Guardian Reporter, *The Guardian*, Monday 29 August, 2017, Issue No.7051 (Tanzania), p.1

[590]See "Butler, C., *"Workers campaign for portable benefits in East Africa"*March 24, 2016, retrivedat https://www.solidaritycentre.org, accessed 18August, 2016.

compliance to the CMP under agreed roadmap.[591]

The pace and manner of harmonisation of laws by each country pursuant to the provisions of various EAC Protocols remains in the remit of individual Partner States. Therefore, achieving speedier implementation of the CMP remains in the discretion of the individual Partner States because the EAC organs have no powers to determine the speed of harmonisation of laws within the sovereign jurisdictions of individual Partners States.

Another challenge to harmonisation of social security laws is lack of comprehensive region-wide law establishing a digitally accessible database of foreign labour migrants contributing in different social security schemes across all the EAC countries. This makes it is difficult for the national social security funds to develop a coordinated administration of cross-border transfers of benefits to other social security funds among different EAC countries.

Another challenge is that the EAC has no common framework for counting residence periods completed under the legislation of one Member State and upon migration to another Partner State. Other challenges include lack of standard approach towards the *choice of law* or identification of applicable legal system for benefit claims which in most cases as a matter of law is the law of the place of employment.[592] The latter principle aims at avoiding likely conflicts of laws and the undesirable consequences that might emerge through lack of protection of migrant

[591] See EAC Secretariat, *EAC Report on the Meeting of the Sectoral Committee on Statistics*, held on 14th-16th March, 2012 (Ref No: EAC/TF/230/2012), Arusha.
[592] See ILO Convention 157 of 1982, Art.5.

workers or as a result of undue double or multiple contributions.[593]

A difficulty of enforcement of the *principle of aggregation of insurance premiums* is another challenge of harmonisation of social security laws in the EAC.[594] For purposes of acquiring and maintaining the social security benefits and forming the basis of calculation and payment of benefits to migrant workers in different EAC countries, the process of harmonisation of laws is not guided by a common guiding principle upon which all Partner States' social security laws should converge.

Kenya and Tanzania have not ratified the *Maintenance of Social Security Rights Convention*[595]. This instrument provides for list of benefits that should be maintained as of rights to a migrant worker upon lawful intra-region labour migration and beyond[596]. The principle of maintenance of acquired social security rights provides to the effect that, even though the beneficiary does not reside in his home country, he is permitted to access benefits beyond national borders. This is made possible by modification and adaptation or amendment of various provisions of one or all applicable laws. Therefore, Tanzania and Kenya may not be held accountable for failure to guarantee equal right and treatment of international labour migrants because they are not party to Convention 157. This affects the process of harmonisation of social security laws among EAC countries.

[593]See ILO Convention 157 of 1982, Art., 5(1); Also see Holzmann, R., Koettl, J., and Chernetsky (note 115 above), pp. 15-17); Also Forteza, A.,(see note 111 above), pp.4-16.
[594] ILO Convention 157 of 1982, Art. 7.
[595] See Convention 157 of 1982, Appendix 1, Table 5.2 and Table 6.2 of this thesis.
[596] Note also that the rest of EAC countries have not ratified ILO Convention 157.

Differences in the levels of economic developments and different social, economic and political problems including governance problems contribute in delaying the process of harmonisation of social security laws. Burundi and South Sudan have been failing to meet their financial obligations towards financing the activities of the EAC secretariat in time pursuant to their obligations under the EAC Treaty.[597] Rwanda, Burundi, Uganda and Tanzania have sometimes remitted only portions of their financial obligations so belatedly while Kenya has been discharging her financial obligations promptly.[598] Therefore, compliance with the EAC Treaty, protocols, various agreements, directives, and provisions under the framework of EAC law remains inconsistent. This has an overall negative effect on harmonisation of social security laws, labour laws and other related laws and policies.

The EAC Treaty is not clear about how to bring "*convergence of social security systems* and social welfares systems and policies in terms of economic and institutional mechanisms. O'Connor, J. defines "convergence" to mean:

> *"…the adoption of policies to achieve jointly defined objectives for the development of social policies, designed to overcome the differences between the various schemes. Convergence is compatible with the continued existence of different bodies of legislation on the assumption that the effects are convergent in order to achieve previously defined objectives. One of these objectives may be to facilitate coordination between the various schemes."*[599]

Among other things, the EAC law lacks clear legal mechanisms of bringing into convergence of the existing national social security systems through policies and

[597] See Magubira, P., "EAC Integration under Threat: Secretariat resorts to austerity in cash crunch", *The East African*, Issue No. 1203, 18-24 November, 2017, p.4.

[598] See Ligami, C., "Poor timing could delay EA presidents retreat: A final decision on the joint trade deal with Europe was expected", The East African, Issue No. 1203, 18-24 November, 2017, p. 3

[599] See O'Connor, J., "Convergence in European Welfare Analysis: Convergence of What?", in Classen, J., and Siegel, N.A., *Investigating Welfare Change, 'The Dependent Variable Problem', in Comparative Analysis,* Edward Elgar, Cheltenham, UK, 2007, pp. 112-243.

effective laws for facilitating harmonisation of social security laws in the economic integration efforts. This pitfall is reflected in the failure of the EAC Partner States to comprehensively enact or conclude a regional wide agreement for portability of social security benefits in line with international standards and aligning their laws with those of the EAC. Therefore, the findings in this chapter have answered in the negative the first research question which had asked: *Does the legal framework in the EAC countries comply with and promote the principle of equality of treatment in social security for migrant workers under international labour, human rights and regional instruments*?

4.7 Conclusion

The foregoing analysis has examined and reviewed the EAC legal framework provisions on equality of treatment between migrant workers and nationals of the EAC Partner States in social security. Compliance to international law through abiding to International Organisations and African Human Rights instruments remains to be a challenge to the Members of the bloc. While conformity to the EAC law by Partner States at national level is still evolving, it remains a big challenge to the integration process. Numerous obstacles to the regional integration continue to slow down the pace of harmonisation of national social security laws of Member States.

The common market score cards for 2014 and 2016 both demonstrate that there are numerous barriers to free movement of workers, persons and services among other things. Among other things, there is a lack of uniform EAC model law on social security portability through coordination within the region for removing obstacles to

equality of treatment of nationals and foreign labour migrants moving within the EAC. This calls for a need to enact region-wide social security co-ordination rules. The next chapter examines the legal framework for equality of treatment in social security for migrant workers in Kenya.

CHAPTER FIVE

5.0 EQUALITY OF TREATMENT IN SOCIAL SECURITY FOR MIGRANT WORKERS IN KENYA

5.1 Introduction

This chapter examines the state of compliance to international treaties and regional instruments on equality of treatment in social security for migrant workers in Kenya. It commences with an introduction, followed by a brief Kenyan political history. A discussion on historical labour migration and social security policies in Kenya is then provided and shown how it impacts on international labour migration in the region regarding migrants' rights to equality of treatment in social security. A discussion of the legal framework for protection of migrant workers in Kenya is then provided. The chapter proceeds to examine the state of compliance to international law on equality of treatment in social security for Migrant workers. Finally, a conclusion is made on findings and some various ways in which Kenya can improve its compliance profile to applicable international law and relevant regional instruments.

5.2 Political History

The political history of Kenya can be divided into two phases, namely the first phase that describes the Colonial History of Kenya from 1884-1963 and the second phase that describes the Post-independence political history of Kenya between 1963 and 2017. In the first phase, the British government took over the Kenya territory from Imperial British East Africa Company (IBEAC) in 1895. Subsequently, the Kenya highlands were opened up to white settlers for farming and settlements. This was

followed by construction the Kenya-Uganda Railway line.[600] Kenya was declared a British colony on 23rd July 1920 under the *British Order in Council* of 11 June 1920.[601]

During the colonial period, Kenya passed through various constitutional processes. The three *Lancaster* House conferences held in 1960, *1962,* and 1963 led to creation of *Kenya*'s *constitutional* framework and negotiation for independence.[602] In 1963 Lancaster III was held which led to the independence of Kenya in December 1963 under the *Constitution* of Kenya, 1963.

The second phase of political history of Kenya describes the Post-independence political history between 1963 and 2010. This period is characterized by various features of constitutional changes and political consolidation of ruling elites. The first Constitution of Kenya of 1963 passed through a number of amendments[603] before the current Kenya Constitution of 2010. The first Constitution of Kenya, 1963 had no provisions to guarantee the right to social security. Human rights and equality of treatment were not national priority issues. After decades of class consolidation and social stratification that perpetuated the inequality in Kenya, the country was able to promulgate the new Constitution of Kenya of 2010 that came into force on 27 August 2010.

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[600]See Lousdale, J, and Berman, B., "Coping with the Contradictions: The Development of the Colonial State in Kenya, 1895-1914", Journal *of African History*, 1979, Vol. 20, pp.487-505.

[601]See Fisher Z., "Law and Political Change in Kenya: A study of the Legal Framework of Government from Colonial Times to the Present, 'in' Ghai Y. and Mc Auslan, J., *The International Journal of African Historical Studies*, 1972, Vol. 5, No.1.

[602] See Kariuki, G. G., Lancaster Constitutional Negotiation Process and Its Impact on Foreign Relations of Post-Colonial Kenya 1960-1970, A Thesis Submitted in Fulfilment of the Requirements of the Degree of Doctor of Philosophy in International Studies, Institute of Diplomacy and International Studies (IDIS), University of Nairobi, 2015, pp.93-275.

[603]See Constitution of Kenya (Amendment) Act No. 14 of 1965; the Constitution of Kenya (Amendment) Act No. 2 of 1974; the Constitution of Kenya (Amendment) Act, 2008 (Act No. 3 of 2008, and several other amendments.

5.3 Labour Migration

The state of cross-border or transnational labour migration in Kenya is as old as history dating pre-colonial period before formation of modern national boundaries. During colonial period there existed labour migration whereby migrants had virtually no social security due to the colonial policies of segregation and inequality of treatment based on racial lines.[604] The colonial policy of land alienation and forced labour left Kenya African native workers without formal social protection or security. A policy of unequal development and treatment of African natives showed clear class differentiation that was based on racial lines. Several social security legislations were enacted for protection of Asian and European communities based on race without regard to equality of treatment.[605]

Since independence in 1963 to 1980s emigration from Kenya to other countries was significantly low. During the period of 1980s through to 1990s there was an increase of emigration based on several factors for the increase[606]. Cross-border labour migration in Kenya has been caused by a number of diverse factors which are individual movers in migration. Ghai has contended that the rapid pace and intensity of globalization, and a growing gap in living standards between Kenya and the developed countries, and increase in personal insecurity have encouraged out-migration.[607] Kenya immigrants are mostly originating from Eastern Africa countries

[604]See Masta, J., and Omolo, J., "Social Protection in Kenya", in: Kalusopa, T., Dicks, R., and Osei-Boateng, C. (eds.), *Social Protection Schemes in Africa, Accra, Ghana,* 2012, pp.183-214.

[605] Such laws include, the *European Officers' Pensions Ordinance, 1927*; the *Non-European Officers' Pensions Ordinance, 1932*; the *Asian* Widows' and Orphans' Pension *Ordinance*, 1927, the *Asiatic Widows' and Orphans' Pension (Amendment) Ordinance 1949*, and the *State Railway Provident Fund Ordinance (Cap.35)* (for Kenya Uganda Railway workers),[605] among others.

[606]See *Migration Policy Institute (MPI),* 2003, retrieved at https://www.migrationpolicy.orf, accessed 18 June 2016.

[607] Ghai, D., Diaspora and development-the case of Kenya, Working Paper Series No 10, Global Migration Perspectives, 2004, p.2.

including Ethiopia, South Sudan, Tanzania, and Uganda and increasingly from Somalia.[608]

Existing data estimates show that between 1990 and 2013, the overall size of the international migrant population in Kenya increased but still it remained only at around 2 per cent of the entire Kenyan population.[609] As of 2013, the World Bank estimated that there were approximately 475,499 Kenyan emigrants which constitute 1% of the total Kenyan population[610]. Top destinations for Kenyan emigrants are the United Kingdom, United States of America, the Middle East and other African countries such as Uganda, Tanzania, Botswana, Democratic Republic of Congo (DRC), Lesotho and South Africa[611]. A recent study on the dynamics of international labour migration in Kenya has described the labour immigration in Kenya as follows:

> *"The overall majority of the migrants (or 79% of the total), come from sub-Saharan Africa countries, with the top twelve countries of origin being Nigeria (7.9%), the Republic of the Congo (7.61%),Eritrea(7.5%), Burundi (6.31%), the Democratic Republic of the Congo (DRC, 5.76%), Mozambique (4.25%), Somalia (4.3%), Chad (4.3%), Sudan (3.81%), Rwanda (3.59%), Senegal (2.78%) and Mali (1.72%); only two of these – Burundi and Rwanda – are EAC countries*[612].

The study report of 2015 on the *Dynamic Kenyan labour migration in the East African Community* shows that the neighbouring countries of Uganda and Tanzania do not form part of major source of Kenya's immigrants. Some other studies on

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[608] See *Kenya Draft National Migration Policy 2016,* Danish Refugee Council and Regional Mixed Migration Secretariat, Horn of Africa and Yemen, Nairobi.

[609] *Migration in Kenya: A Country Profile 2015,* Danish Refugee Council and Regional Mixed Migration Secretariat, Horn of African and Yemen, IOM, 2016, Nairobi, pp.15-16.

[610] Ibid, p.1

[611] Ibid, pp.46-51.

[612] Oucho, J. O., Oucho, L.A., and Ong'ayo, A. O., The Biggest Fish in the Sea? Dynamic Kenyan labour migration in the East African Community, ACP Observatory on Migration & International Organization for Migration (IOM), 2013, p.6.

emigration mobility trends and patterns in Kenya have suggested that within Africa, Uganda and Tanzania account for the bulk immigrants from of Kenyan as the sending country.[613] Tanzania has been cited as the most preferred destination by Kenyan migrants in the year 2007, followed by Uganda.[614]

The establishment of the EAC since 1999 and subsequent coming into force the East Africa Common Market Protocol in July 2010 accelerated the increase in the in-flow and out-flow of migrant labour, goods and services into Kenya. Like in many other countries of the world, the international labour migration in Kenya has some challenges. The challenges range from discrimination to xenophobia, restriction on certain legal rights, limitations on equal employment opportunities and social welfare, unfavourable legal treatment under the law, poor social justice, lack of human rights protections and apparent barriers based on nationality status in cases of labour migrants who seek jobs form one Partner State to another.[615]

5.4 Social Security Policies

Various policies have played an important role in characterizing Kenya's attitudes towards legal protection of migrant workers. Some of social security policies have been incorporated into the Kenya Constitution, 2010. Policy measures for protection of Kenyan people are categorized into three social protections systems which include: social security[616], health insurance[617], and social assistance as provided in

[613] Odipo, G., Olungah , C. O., and Ochien'g Omia, D., "Emigration Mobility Trends and Patterns in Kenya: A Shift From South-North to South-South Migration", *International Journal of Development and Economic Sustainability*, 2015, Vol.3, No.4, pp.29-48, at.p.30.
[614] Ibid, pp.25-33.
[615] Gagnon, J., and Khoudour-Castéras, D., *"South-South Migration in West Africa: Addressing the Challenge of Immigrant Integration*, Working Paper No. 312 (Perspectives on Global Development: Migration), OECD Development Centre, 2012, pp.1-53.
[616] *Kenyan Constitution, 2010,* Art. 43 (1) (e) and (3).

the *Kenya Social Assistance Act, 2013.*[618] Under this sub-part the some social security and other relevant national policies are briefly examined in order to establish their influence on equality of treatment in social security for migrant workers. These policies include*: The Kenya Social Protection Policy 2006*[619]; *The Kenya Social Protection Policy, 2011*[620]; *The Kenya National Policy on Ageing and Older Persons, 2009*[621]; *The Kenya's Vision 2030*[622]*;* and the *National Diaspora Policy, 2011*. These policies are briefly examined below in relation to the subject of this thesis.

To begin with, the *Kenya Diaspora Policy, 2011* is considered relevant for setting broad framework of protection of migrant workers. The policy was launched in January 2015 as a response by the government of Kenya to the dire need of addressing various problems of its citizens in Diaspora so that they may form part of national development processes. [623] The policy recognizes that Kenyans in the United States and in some European countries as well as in other African countries do not enjoy portability of benefits.[624] Therefore, the policy seeks to develop measures to enhance protection of Kenyans abroad, develop mechanisms for partnership with Kenyans abroad and establish necessary coordination mechanisms

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[617] Ibid, Art. 43(1) (a).
[618] Act No. 24 of 2013.
[619] Government of Kenya. *The Kenya Social Protection Policy 2006*. Ministry of Gender, Children and Social Development, 2006.
[620] Government of Kenya, *The Kenya Social Protection Policy, 2011*. Ministry of Gender, Children and Social Development, 2006.
[621] See Government of Kenya: *National Policy on Ageing and Older Persons, 2009(Revised 2014). Nairobi: Ministry of Labour, Social Security and Services, 2014, pp.1-36.*
[622] The Government of Kenya: *The Kenya's Vision 2030,* Government Printer, 2003.
[623] See African Union, *The Migration Policy Framework for Africa*, AU Executive Council, 9th Ordinary Session, 25-29 June, Banjul, The Gambia.
[624] Kenya Human Rights Commission (KHRC), *Towards Equality and Anti-Discrimination: An Overview of International and Domestic Law on Anti-Discrimination in Kenya*. Nairobi, KHRC, Nairobi, 2010.

for issues affecting Kenyans living and working overseas. This policy states that the subject of Social security benefits transferability and portability has been one of concerns among Kenyan emigrants overseas or even in neighbouring countries.[625]

Further, the Policy states that Kenyan emigrants working in the Diaspora contribute to the various social security services in their countries of destination. However, on termination of their employment contracts, there is lack of transferability and portability of benefits or their social security savings to Kenya which translates into lack of social security guarantee in foreign territories. This is largely contributed to by lack of enabling legal framework to afford them enjoy equality of treatment and be freed from discriminatory tendencies based on their nationality while working abroad. Absence of reciprocal bilateral social security agreements that would facilitate the portability of their hard earned social security benefits has been a challenging problem.[626] Existing information show that Kenya concluded a bilateral agreement with Namibia on health worker migration in June 2004 to provide workable guidelines whereby temporary labour mobility of Kenyan health workers can move to Namibia[627].

The *Kenya Diaspora Policy* is placed in context of the fact that, Africa's Migration Policy emphasizes the importance of establishing regular, transparent and comprehensive labour migration policies, legislation and structures at the national and regional levels. This policy can bring significant benefits for States of origin and

[625] Government of Kenya: *Diaspora Policy of Kenya*, 2011, Part 2.9 at p. 7.
[626] Ibid, See also International Organisation for Migration (IOM), *Analysis of the Legal and Policy Framework on Migration and Health in Kenya*, Nairobi: IOM, 2013, pp.1-32.
[627] See Interactive Map on Migration in Africa, the Middle-East and the Mediterranean Region (MTM i-Map) Migration and Development Layer- Country Profile Kenya. Updated August 2012, p.36.

destination. In addition to its Diaspora policy, Kenya has developed other policies and strategies for implementation of human rights of Kenyans, and has also attempted to address some problems related to labour migration and their protection. The second relevant policy for implementation of equality of treatment in social security for migrant workers in Kenya is referred to as the *Kenya National Social Protection Policy, 2011*[628] which aims at:

> *"…policies and actions, including legislative measures, that enhance the capacity of and opportunities for the poor and vulnerable to improve and sustain their lives, livelihoods, and welfare, that enable income-earners and their dependants to maintain a reasonable level of income through decent work, and that ensure access to affordable healthcare, social security, and social assistance."*[629]

The policy recognizes *social assistance*, *social security* and *health insurance* as forms of social protection.[630] Consequently, the Constitution of Kenya, 2010 has entrenched the right to social security, equality of treatment, equity and social justice. By 'social justice' it means Kenya has obligation to implement the fair and proper administration of laws conforming to the natural law that all people irrespective of ethnic origin, gender, possessions, race, religion, or ability should be treated equally and without prejudice. Under this policy, the Government of Kenya anticipates levels of coordination and integration between social assistance, social security, and health insurance.[631]

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[628] See Kenya Cabinet-approves-national-social-protection-policy, 17th May, 2012, available at http://africapsp.org/index.php/..., accessed 7 March, 2017.
[629] See State of Social Protection in Kenya 2014, p.7.
[630] Government of Kenya: *TheKenya National Social Protection Policy,2011,* pp.10-13.
[631] Ibid, p.22.

In its policy statement, the *Kenya National Social Protection Policy*[632]provides that, it is a national policy to align social security schemes, laws, arrangements, and interventions with the Bill of Rights in the Constitution and, in so doing, ensure that any discrimination or unequal treatment is eliminated[633].The policy envisages protection of maternity benefits, work injury and diseases benefits (workers' compensation), unemployment protection, sickness benefits, retirement benefits.[634] The *Kenya National Social Protection Policy* has foreseen the need of addressing discrimination against nationals and non-nationals within the context of international human rights standards and the EAC treaty and Protocols: The *Kenya National Social Protection Policy* states:

> *"Social security and health insurance schemes are also characterised by various forms of discrimination, such as direct and indirect forms of gender discrimination, insufficient provision for non-citizens in accordance with international and regional (EAC) standards, and disparities in the contribution framework of the NHIF among others"(emphasis added).*[635]

The Kenya National Social Protection Policy recognizes insufficient provision for non-citizens in that does not comply or implement the international and regional (EAC) standards. As a member State of the UN and State Party to ILO Kenya has an obligation towards complying with relevant international labour standard and international human rights treaties protecting social security for migrant workers. Also, the policy embraces the principle of equity and social justice in accordance with the Constitution and international agreements. For this reason, social protection

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[632] Ibid.
[633]Ibid, policy statement no.11, p.20.
[634] Ibid, pp.18-19.
[635]Ibid, p. 15.

in Kenya is intended to ensure the promotion, and protection of workers while conforming to international labour standards.[636]

In order to attain effective compliance to international standards, Kenya requires instituting an efficient strategy for implementation of international and regional treaties. This has to be in tandem with implementation of national Constitution of 2010 which embraces international law as part of the law of Kenya. Therefore, harmonising her social security laws so as to conform to EAC law is part of the policy of Kenya within the framework of the EAC.

The third policy that is relevant in implementation of equality of treatment in social security is the *National Policy on Ageing and Older Persons, 2009*[637]. In January 2014 the responsible Ministry reviewed and aligned this policy with the Kenya Constitution, 2010.[638] Although the policy states that it is guided by principles of human dignity, equity and social justice, inclusiveness, equality, human rights, social protection, public participation, it does not address the subject of ageing migrant workers at all.[639] Among other things, the policyon ageing and older persons states that it complies with all international treaties ratified by Kenya.[640] The policy states that the rights of older persons are anchored under Article 57 of the Constitution of Kenya. Although the *Policy on Ageing* does not address the concerns of migrant workers, it forms another basis for national legislative framework given that it

[636] Ibid, p.6.
[637] See Government of Kenya: *National Policy on Ageing and Older Persons, 2009(Revised 2014). Nairobi: Ministry of Labour, Social Security and Services, 2014.*
[638] Ibid, p.ix.
[639]Ibid, section 1.5 of the Policy at p.4.
[640] These include the UN Convention on the Rights of Persons with Disabilities of 2006; UN Plan of Action on Ageing of 1982; UN Principles for Older Persons of 1991; UN Proclamation on Ageing of 1992; UN Plan of Action on Ageing of 2002; AU Policy Framework on Ageing of 2002.

justifies the need to facilitate the enjoyment of basic human rights.

The *Kenya Vision 2030* is fourth policy in this study that contains broad national development agenda encompassing economic, political and social "pillars" to help transform Kenya into an industrializing, middle-income nation by 2030[641]. It plans to implement social strategy through the health sector[642] and creation of national health insurance scheme.[643] It has eight governance principles but also emphasize "equality of citizens",[644] among other things. However, the *Kenyan Vision 2030* makes no specific mention of the rights of non-citizens (non-nationals) in the context of creation of just and equal society. No any direct strategy that aims at addressing social security of migrants and their health vulnerability.

Also, the subject of equality of treatment in social security for migrant workers may be assessed through *Kenya Health Policy (2012–2030)* [645] which makes reference to the right to health by all Kenyans as part of national social protection system anchored on the Constitution of Kenya.[646] Protection of health of migrant workers in Kenya is considered as a protection of human rights as established under international legal framework. The policy addresses health aspects related to the increased cross-border movements of people, goods, and services as well as international regulations and institutions. These aspects have considerable influence

[641] Government of the Republic of Kenya: *The Kenya Vision 2030: The Popular Version*, Nairobi: 2007, p.22.
[642]Ibid, p.16.
[643] Ibid, p.17.
[644] Ibid, p.22.
[645] Government of Kenya: *Kenya Health Policy 2014-2030*, Ministry of Health, Government Printer, Nairobi, 87pp.
[646] Ibid, p.1; see *Kenya Constitution, 2010*, Arts. 20, 21, 43, 26, 32, 46, 53-57, 174-175, and 189-191.

on national health risks and priorities[647]. The policy responds to national, regional and global challenges by focusing on health in its wider context. The policy acknowledges the need for a health service network throughout the East Africa region to serve people at national and sub-national levels.

Therefore, the right to health as part of social protection in Kenya is guaranteed under the Constitution. Broadly interpreted, Article 2(6) of the Constitution of Kenya recognises all ratified international treaties as part of the laws of Kenya. Other relevant policies related to health include the updated *2001-2010 Kenya Malaria Strategy* that produced the *Kenya National Malaria Strategy of 2009 – 2017.* However, this strategy does not state the aspect of protection of health and related risks of diseases transmissions affecting international migrants in Kenya. The *second Kenya National Health Sector Strategic Plan (NHSSP 2005–2010)* explains about reaching out to all Kenyans through 'health sector strategic plan'. But ithas not mentioned any aspect of protection of non-nationals or migrant workers. Therefore, all the post independence Kenya social security do not consider non-citizens a priority area of focus such that the fully integrated labour migrants are the ones better paced to enjoy some guarantee of equal protection with nationals.[648]

5.5 Kenya Treaty Practice

In an attempt to explain the Kenya treaty practice, it is pertinent to define what a treaty is. In this sub-part, the author makes some points on ensuing implications following ratification, accession, succession, approval and consent to a treaty. In

[647] *Kenya Health Policy 2014-2030,* p.6.
[648] *See* Hailbronner, K., *Union Citizenship and Access to Social Benefits,* 42 *Common Market L. Rev*. 2005, pp.1245-1246.

international law, and in the context of relations between two contracting States the meaning of a treaty is contained in Article 2 of the *Vienna Convention on the Law of Treaties (VCLT)* 1969 which defines as "treaty" to mean:

> *"an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"*[649].

Before any international treaty becomes binding on any sovereign State, there must be evidence of acceptance to be bound by the provisions of the treaty, which acceptance may be through ratification or accession or acceptance, among others. Briefly, Article 2 (1) (b) of the *Vienna Convention on the Law of Treaties (VCLT) 1969* defines "ratification", "acceptance", "approval" and "accession" to mean in each case: "*the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty"*.[650]

There are two main theoretical and practical aspects regarding the mode of entering and implementing international, multilateral and bilateral treaties by sovereign nations, namely "dualism" and "monism".[651] As to Kenya's treaty practice, some scholars have argued that from the eve of its independence, Kenya adopted dualist system of treaty practice while others argue that Kenya adopted both doctrines of 'monism' and 'dualism' in implementation of international law in its domestic legal order. It has been argued that this two pronged policy approach to treaty practice has been followed by the Republic of Kenya since its independence in 1963. The post-

[649] See The *Vienna Convention on the Law of Treaties (VCLT)* 1969, Art. 2(1) (a).
[650] Ibid, Art. 2(1) (b).
[651] Mwagiru, M., 'From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice', *Journal of Language, Technology &Entrepreneurship in Africa*, Vol. 3 No. 1, 2011, pp.144-155.

independence Kenya treaty practice largely followed the dualist legal system.

Under the dualist theory, both international and municipal laws become two distinct systems of law that did not directly form a unity until the international law was first domesticated in order to acquire the status of being interpreted and applied in domestic jurisdiction. The Judicial attempts to interpret the Constitution of Kenya of 1963 in the perspective of dualist doctrine were put forward in the case of *Okunda v. Republic*[652] in 1970.

In Okunda' case, the Court was of the decided view that, international law did not form part of the law of Kenyan unless it was first domesticated. The decision was to the effect that international treaties had no place in Kenya's domestic legal order before it was domesticated. The Court considered that a parliamentary legislation was necessary to transform international law into municipal law. The Court went on to hold further that, even if the treaty was to be part of both national and international law, yet its provisions could not supersede those of the Constitution of Kenya in case of conflict. Any provision of the treaty that was made part of municipal law was to be rendered void if it contradicted the provisions of the Constitution of Kenya. This was the long standing principle of dualism that existed in Kenya since independence.

It should be stated, however, that there had been a gradual shift in Kenya Treaty practice from dualism to monism through interpretation of human rights treaties into domestic courts even without their incorporation into domestic courts. The latter is

[652] (1970) EA 453.

well explained in the cases of *Rono v Rono (2008)*[653] and the *Estate of Lerionka ole Ntutu Succession Cause 1263 of 2000*.[654]

In Rono's case there was remarkable shift in judicial orientation towards a more flexible interpretive approach to unincorporated human rights treaties. The Court of Appeal of Kenyan in Rono's case had an opportunity to state to the effect that for a long time, there has been raging debates in Kenyan jurisprudence about the application of international laws within domestic context regarding the dualist and monist theories on when international law should apply. The justices commented that Kenya subscribes to the common law view that, international law is only part of domestic law where it has been actually incorporated, while for civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it expressly or impliedly in contradiction with domestic law.

However, in Rono's case the Court added that the current thinking on the common law theory is that both international customary law and treaty law can be applied by State Courts where it is not in contradiction with existing State law. This is so even in the absence of implementing legislation. The Court's attempt to depart from strict dualism to monism serves to explain how international human rights treaties which provide for standards of treatment of human beings in various rights related issues including the right to social security for international migrants have to be interpreted in Kenya's domestic legal order. After the Rono's case of 2008, there was also

[653] (2008) 1 KLR (G&F) 803.
[654](2008) eKLR, High Court of Kenya at Nairobi, Family Division.

handed down another decision in 2011 whereby the High Court of Kenya in *Beatrice Wanjiku & Another v The Attorney-General & Another*,[655] held that:

> *"Before the promulgation of the 2010 Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular articles 2(5) and 2(6) gave new colour to the relationship between international law and international instruments and national law". (Emphasis added).*

In *Wanjiku's* case referred to above, the holding of the Court shows that prior to the Kenya Constitution, 2010 it was the Act of parliament which could approve implementation of international treaties on Kenya's sovereign territory. However, the promulgation of the Constitution of Kenya, 2010 has dramatically changed the position. Article 2 of the Constitution of Kenya provides for the supremacy of the Constitution but also Article 2(5) specifically provides that: "*The general rules of international law shall form part of the law of Kenya."*

The first implication of the latter provision is that as from 2010, Kenya will directly implement and apply customary international law within her domestic legal institutions that embodies principles that have crystallised over a period of time and which are considered to have a binding effect on States. The second implication of Article 2(5) is that Kenya has shifted from dualist system of treaty practice to monist system whereby the international legal rules now form a unity with municipal law of Kenya and hence are directly applicable in national courts.

The shift from dualism to monism is further reflected in Article 2 (6) of the Kenyan Constitution, 2010 which provides that: *"Any treaty or convention ratified by Kenya*

[655] High Court of Kenya at Nairobi, Petition No. 190 of 2011, at para 17.

shall form part of the law of Kenya under this Constitution." This shows that the monist structure of legal system is current treaty practice of adopted by the Government of Kenya since 2010.

5.6 Legal Framework for Protection of Migrant Workers

The legal framework for protection of migrant workers in Kenya is divided into two main parts. The first part discusses the Constitutional guarantee of equality of treatment in social security for migrant workers and the second part discusses the social security legislation and other laws providing for equality of treatment in social security for migrant workers.

Starting with the first part of legal framework on the Constitutional guarantee of equality, the Constitution of the Republic of Kenya 2010 has addressed the subject of social exclusion and discrimination by entrenching the principles and values of human rights and dignity of man in its provisions. The Constitution of Kenya has listed the concept of equality as one of the six key values upon which socio-political and economic governance as well as legal control should be based.

The ambit and effect of the application of the principle of equality of treatment and opportunity is given legal force in Article 10 (2) (b) of the Constitution of Kenya. The Article mentions national values and principles of governance which bind every person and has to be observed by all Kenyan State organs, State officers, public officers and all persons when interpreting or applying the Constitution. These principles and values of good governance are described as including '*human dignity', 'equity', 'social justice', 'inclusiveness', 'equality', 'human rights', 'non-*

discrimination' and 'protection of the marginalized.'[656]Therefore, the principle of equality of treatment is applicable in making or implementing national policy decisions.[657]

The Kenyan Constitution[658] in Article 20 entrenches equality and equity as key values that are protected and promoted in interpretation and application of the Bill of Rights. Also, Article 21 (1) imposes duty on the Government of Kenya to observe, respect, protect, promote and fulfil the fundamental human rights and freedoms of all people in Kenya, without discrimination.[659] Substantially, the Constitution shows positive steps taken by Kenya on theoretical part to ensure that every individual person in Kenya has the right to claim equal treatment and liberties with others subject to limitations imposed by the municipal law.

In Article 27(1) of the Constitution of Kenya it is further provided that: *"Every person is equal before the law and has the right to equal protection and equal benefit of the law".* The equality of treatment of 'every person' under the Constitution extends to include, among other things, the '*full and equal enjoyment of all rights*…'[660] It should be pointed out that there is no direct reference to migrants' rights or migrant workers' rights in the Constitution of Kenya. However, it may be argued that, the reference to Constitutional obligation to protect "minorities,"[661]"marginalized groups,"[662]"every person"[663] and "any persons"

[656] See *Constitution of Kenya, 2010*, Art. 10(1) and (2).
[657]Ibid, Art. 10 (2) (b)
[658]Ibid, Art. 20 (4) (a).
[659] Ibid, Art.21 (1).
[660] Ibid, Art. 27(1) and (2).
[661] Ibid, Arts. 21(3) and Art. 56.
[662] Ibid.

without discrimination impliedly includes migrant workers. The words-*'every person'* is broad enough to include coverage of migrant workers. Note also that sub-Article (4) of Article 27 of the Constitution provides:

> *"The State shall not discriminate directly or indirectly against any person on any ground, including, race, sex, pregnancy, marital status, health status, ethnic, or social origin, colour, age disability, religion, conscience, belief, culture, dress, language or birth".*[664]

The foregoing cited provision does not expressly prohibit discrimination based on nationality or national extraction or migration status generally. On the face of it, one may contend that the extent of protection of migrant workers in Kenya under this provision is unclear. But one may also view the same section from another angle. Since the phrase in sub-article (4) of Article 27 opens with the words: "*the State shall not discriminate directly or indirectly on any ground, including*…" one should think of other possible prohibited grounds of discrimination that may be contemplated of under clause (4) even if such grounds are not expressly stated. In the author's view, the list of prohibited grounds of discrimination contained in Article 27 is not exhaustive. The word *"including"* invites interpretation to the effect that there are other prohibited grounds of discrimination other than those expressly listed in the provision.

It means that, any migrant worker complaining of violations of human rights including unequal treatment based on nationality may be entitled to lodge a complaint to the Kenya Human Rights and Equality Commission or any judicial

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[663] Ibid, Arts. 20(1); 43(1); 47(1); 50(1) and (2);
[664] Ibid, Art.27 (4).

authority challenging discrimination based on nationality.[665] This interpretation approach is fortified by the provision on construing the Constitution of Kenya contained in Article 259(4) (b) which provides that …"*in this Constitution, unless the context otherwise requires... (b) the word "includes"* means *"includes, but is not limited to"*.[666]

Again, the Constitution of Kenya[667] in Article 39 provides that *every person* has the right to freedom of movement[668], and that *every person* has the right to leave Kenya[669] and that it is the right of every citizen to enter, remain in and reside anywhere in Kenya.[670] This Article provides for the 'right to freedom of movement' and the *'right to leave Kenya'* as the right of "every person" which is an expression that is so inclusive of migrant workers from other countries. No specific guarantee or protection of rights of immigrants from other countries is provided, other than the right of Kenyans to freedom of movement and residence. The right to enter, remain in and reside anywhere in Kenya is exclusively reserved for Kenyan citizens only as provided for in sub-article 3.

In terms of Article 43 (1) of the Constitution of Kenya, the right to social security for "every person" is a constitutional guarantee and is entrenched as a bill of rights, thus every person has the right to social security.[671] It is provided in sub-article (3) of same Article that: *"the State shall provide appropriate social security to persons*

[665] Ibid,Art. 59(2) (e).
[666] Ibid, Art.259 (4) (b).
[667] Ibid, Art. 39 (1), (2) and (3).
[668] Ibid, Art. 39(1).
[669] Ibid, Art. 39 (2).
[670] Ibid, Art. 39(3).
[671] Ibid, Art. 43(1) (e).

who are unable to support themselves and their dependants",[672] and this may take form of social assistance by the Government. Thus, the Constitution attempts to implement the international human rights instruments providing for social economic rights, particularly the ICESCR of 1966 which refers to the right to social security as a human right issue.

As aptly discussed in chapter 3 of this thesis, the human rights may take the form of economic, social, cultural or political rights. The Constitution of Kenya provides that *"Every person is equal before the law and has the right to equal protection and equal benefit of the law."*[673] The Constitution interprets the words 'equality of treatment' as including the full and equal enjoyment of all rights and fundamental freedoms.[674] Further, in Article 27 (6) of the Kenyan Constitution, 2010 it is provided thus:

> *27(6) "To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination."*

According to Article 59 of the Constitution of Kenya, it is established the Kenya National Human Rights and Equality Commission for purposes of promoting, investigating, encouraging and recommending on matters of equality of treatment and observance of human rights**.** Article 59(2) g) of the Constitution provides for duties and functions of the Kenya National Human Rights Commission. One of these includes acting as the principal organ of the State in ensuring compliance with

[672] Ibid, Art. 43 (3).
[673] Ibid, Chapter 4 Part 2 sub-articles 27(1).
[674] Ibid, 27(2).

obligations under treaties and conventions relating to human rights. As such, Kenya has the Constitution that tends to advocate for equality of treatment.

However, a grey area exists in the Constitution because there no clear and effective provisions on protection of migrant workers' rights. While the Constitution is a general law but fundamental law, its enforceability is to be found in specific national policies and legislation passed for enforceability of the Constitution. Apart from the constitution of Kenya entrenching human rights and establishing conditions for the enjoyment of social protection rights and social security, there are other social security laws that enforce the constitutional provisions in the area of social security and equal treatment. The next discussion addresses the social security legislative framework for equal protection of nationals and migrant workers in social security guarantee.

As already stated the second part of this discourse discusses the legal framework of equality of treatment in social security for migrant workers in Kenya. A number of social security laws govern the administration of social security benefits under the laws of Kenya. Some of these laws contain express legal provisions which directly refer to equal protection of migrant workers while some are either silent or unclear.

Some relevant provisions of the *Kenya National Social Security Fund Act,* 2013[675]are examined in order to establish the extent to which the Act takes on board principles of equality of treatment in social security for migrant workers. The Act repeals the consolidated version of the former *National Social Security Fund Act,*

[675]Act No. 45 of 2013, assented on 24/12/2013, commencement date 10/01/2014.

1965.[676] The Act in section 34 provides for pension benefits of the following class: (a) retirement pension; (b) invalidity pension; (c) survivors' benefit; (d) funeral grant; and (e) emigration benefit.[677] The relevant provision to migrant workers is section 64 which in sub-section (1) provides:

> *"To give effect to any agreement providing for reciprocal arrangements with the government of any country beyond the East African Community in which a fund scheme similar to the Fund has been established, the Cabinet Secretary may make Regulations to give effect in Kenya to any such arrangements and for modifying or adapting this Act in its application to cases affected by such arrangements".*[678]

The provision cited above shows that the possibility of reciprocal social security agreements with countries beyond the EAC for social security benefits of migrant workers is envisaged under the NSSF Act. The Act states some basic principles of social security portability or transferability of benefits for migrant workers. If the EAC countries will agree to ratify a mutual recognition agreement in matters of social security, then certain arrangements are essential to ensure equality of treatment. Such arrangements should include: portability or exportability of benefits, maintenance of acquired rights, aggregation of benefits, equality of treatment and transferability.

If harmonization is made possible as envisaged under the Kenya NSFF Act and the EAC Treaty, 1999[679], the question of determination of applicable legislation needs to be resolved. Therefore, concluding reciprocal social security agreements between

[676]Cap. 258 of the Revised Laws of Kenya, 2012.
[677] See Kenya NSSF Act, 2013, s. 34 (1).
[678] See *Kenya NSSF Act, 2013*, s. 64(2) (a).
[679] See detailed discussion on harmonisation of social security laws and systems under the framework of the EAC Treaty in chapter 4 of this thesis.

Kenya and other EAC Partner States is essential for enabling payment of benefits under applicable legislation. The *Kenya NSSF Act* in section 64(3) provides:

> *"Where the employee resides outside Kenya but is within the East African Community Member State, the Board shall coordinate with the social security scheme of the Member State, or a similar scheme by whatever name called, to ensure that:…there is actual physical transmission of contributions and benefits under paragraph (d) to the Fund in order to facilitate the totalisation of contributions and benefits under this section."*[680]

The above referred paragraph (d) provides that: "… *where an employee decides to return to Kenya, the exportability of the benefits of the member as at the date of that decision takes place."* Therefore, the Kenya NSSF Act has provided for the establishment of legal coordination framework among other EAC countries. The Act has created the Board that is given legal obligation to co-ordinate with the social security schemes of other EAC member States. The latter is done with a view to work out modalities of guaranteeing portability of social security benefits within the EAC.

The phrase used in section 64 (3) of the Kenya NSSF Act is: "*the Board shall coordinate with the social security scheme of the Member State"*. Social security benefits payment within national borders and beyond borders among EAC countries invites application of territorial law. The choice of law to apply requires some agreement between migrants sending and receiving countries. General principles of social security coordination law require that standards of treatment of migrant workers and nationals should be based on equality principles. Although the EAC CMP requires Partner States to observe this rule, there is lack of special rules of

[680] *Kenya NSSF Act*, s. 64(3) (e).

social security coordination among Partner States. Migrant sending and receiving countries still have different laws which are often in conflict. This difference in social security laws leads to difficulties in implementation of the principle of exportability of benefits. Therefore, Kenya NSSF Act alone, even it appears to have been improved to conform to EAC law, it cannot unilaterally facilitate portability of benefits within the EAC. Therefore, a coordination instrument for social security is imperative.

The Kenya NSSF Act, 2013 creates legal basis for concluding reciprocal agreements for benefits of Kenyan emigrants and immigrants from other countries beyond the EAC. It makes provision for some modifications of the Act to meet the said objective. The Act provides that, migrant workers and other entitled migrants can access social security benefits on equal principles with nationals if the Act is accordingly modified to make it suitable for conclusion of social security agreements in respect of specified agreed benefits.[681]

The said modifications may include provision for securing certain acts, omissions and events having any effect for the purposes of the law of the country in respect of which the reciprocal agreement is made so as to have corresponding effect for the purposes of this Act[682]. By the words "corresponding effect between countries" implies that acts or omissions or events occurring in Kenya regarding treatment of migrant workers in social security should be accordingly similar in foreign territories where Kenyan migrant workers reside and working for gain. Any portability of

[681] Ibid, s.64 (2) (1).
[682] Ibid, s.64 (2) (1).

social security benefits may be made subject to reciprocal agreements designed to take into account the avoidance of double benefits payment.[683]The enabling provision for reciprocal social security benefits enforcement for migrant workers is section 64 of the Kenya NSSF Act which partly provides:

> *"(1) To give effect to any agreement providing for reciprocal arrangements with the government of any country beyond the East African Community in which a fund scheme similar to the Fund has been established, the Cabinet Secretary may make Regulations to give effect in Regulations to give effect in Kenya to any such arrangements and for modifying or adapting this Act in its application to cases affected by such arrangements."*[684]

The pre-condition for practical enforceability of payment of benefits beyond the EAC is existence in place of social security fund in the foreign Contracting States that is similar to the Kenyan NSSF Fund as established under the NSSF Act. The NSSF Act does provide for maintenance of acquired rights to social security benefits because the Act allows determination of rights which have accrued both under the Act and under the law of that other country beyond the EAC. The determination is intended to make sure that applicable rights are made available to the insured migrant worker and they are appropriately and accordingly determined and administered.[685]

For efficient administration of social security benefits portability, the NSSF Act has provided for various principles setting procedures to be followed by beneficiaries. The first principle is *mandatory registration with social security schemes* of a host State. Registration is a requirement under the Kenya NSSF Act for a migrant worker to benefit from entitlement to benefits. Any Kenyan national who is an employee

[683] Ibid, s.64 (2) (1) (a).
[684] Ibid, s.64.
[685] Ibid, s. 64(2) (c).

and is residing outside Kenya within any EAC Member State has to register with the national social security scheme of the country he resides and work for gain. The condition is that the social security scheme in which the migrant worker has to registered should be similar to the scheme obtainable in Kenya.

Basically, the purpose of registration with social security schemes of a host State is to ensure that a migrant worker acquires membership in the national social security scheme of the EAC Partner State.[686] The EAC Partner State may have similar scheme like that of Kenya and in this case the exact name of the scheme may be irrelevant. Therefore, as long as the migrant resides and work for gain in a Member State there should be coordinated arrangements for registration of that migrant worker.[687]

The second principle for making it possible the administration of social security benefits under the Kenya NSSF Act is that of *Applicable law*. The Act provides that, where the employee is residing and working for gain outside Kenya but is within the EAC Member State, the Board of Trustees of the Kenya NSSF is mandated to coordinate with the social security scheme of the Member State, or a similar scheme by whatever name called. The purpose is to ensure that the member makes the required contributions in the said foreign scheme. A migrant worker from Kenya to the other EAC countries is by virtue of the law of Kenya, required to make social security contribution in accordance with the law of the Member State.[688] This partly

[686] Ibid, 2013, s. 64(3) (a).
[687] Ibid.
[688] Ibid, s. 64(3) (c).

complies with the provisions regarding the applicable legislation under the Maintenance of social security rights convention of 1982.

The third principle established under the NSSF Act 2013 is the principle of cross-border *portability (or exportability) of benefits*. Section 64(3) (c) of Kenya NSSF Act provides that, where the employee resides outside Kenya but is working and residing within any of the EAC Member State he may enjoy social security benefits exportability.[689] Portability occurs where a worker-member to social security schemes is enabled to preserve the actuarial value of accrued pension rights or other benefits when moving from one country or job to another.[690] In an event a migrant employee chooses to return to Kenya, the NSSF Act, under section 64(3) (d) allows *exportability* of benefits of the member in a foreign State as at the date of labour migrant's decision to exercise the right of return to his or her home country.[691]

The Kenya NSSF Act under section 64 (3) (e) imposes obligation on the Fund's Board to ensure that there is coordination with social security schemes of other Member States within the EAC for actual physical transmission of contributions and benefits due for exportability. Transfer of benefits is to be made back to the National Social Security Fund in Kenya in order to facilitate the totalisation of periods of contributions and benefits for purposes of crediting the benefits into the individual account of the Member or beneficiary. The benefits are supposed to be credited into

[689] Ibid, s. 64 (3) (c).
[690] Pasadilla, G. O., and Abella, M., "Social Protection for Cross-Border Workers in East Asia", In: Holzmann, R., and Werding, M., (organizers), *Portability of Social Benefits: The Economics of a Critical Topic in Globalisation*: Venice International University, Venice Summer Institute 2012, p.1.
[691] See the NSSF Act, 2013, s. 64(3) (d).

the appropriate account of the member as soon as it is practicable. Depending on the nature of individual membership and period of contributions, the employee's account may be either 'pension fund credit' or a 'provident fund credit' within the terms of section 24 of the Kenya NSSF Act.[692]

The fourth one is the principle of *payment of retirement benefits* o*f a Kenyan migrant worker within EAC Countries*. The Kenya NSSF through its Board is required to coordinate payment of retirement benefits to a Kenyan emigrant who resides and work for gain outside Kenya but remains within the EAC Member State[693]. Such coordination is made with the social security scheme of other EAC Member State where that emigrant is employed and has made contributions.[694] Upon retirement of a migrant in foreign territory within the EAC, that migrant who contributed in the foreign scheme is subjected to the Kenya NSSF Act in terms of member's retirement benefits. Therefore, social security benefits coordination for exportability or portability beyond Kenya national borders within the EAC is envisaged under the Act.

The legal framework for provision of death grants or survivors benefits to migrant workers in foreign country outside Kenya but within the EAC is also provided for under the Kenya NSSF Act. Where the employee was residing outside Kenya but within the EAC Member State, but dies while in that Member state, the Kenya NSSF

[692] Ibid, s. 24; s. 64(3) (e) and (f).
[693] Ibid, s. 64(3) (g).
[694] Ibid, s. 64(3) (g).

Board is charged with the duty to coordinate death grants and survivors' benefits.[695] The NSSF Fund has a duty to coordinate with the social security scheme of the Member State, or a similar scheme for that purpose.

The principle of *mutual administrative assistance in social security* is another essential rule for proper legal mechanism of management of social security for migrant workers under the Kenya NSSF Act. The Act in section 64 (2) (c) makes provisions for mutual administrative assistance between Contracting States particularly where reciprocal a social security agreements exist. Internal laws may be modified by making provisions as to administration and enforcement of migrants' social security rights at both ends of Contracting Parties.[696] This has the objective of ensuring that there is close collaboration between Kenya and other EAC Contracting Parties' administrations and institutions responsible for administering social Security.

Mutual administrative assistance in social security enables cooperation between social security authorities of Contracting States particularly regarding proper keeping of records of social security beneficiaries who engage in labour mobility from one country to another. The overall objective is to create efficient managements of social security rights of migrant workers and enable speedier determination, coordination and payment of benefits to the beneficiaries. Mutual administrative assistance in social security involves the application of social security laws of country of origin and country of destination which may be any EAC Member State. In recognition of the existing disparity among the EAC social security laws and schemes, the Kenya NSSF Act has provided in section 64 that:

[695] Ibid, s. 64(3) (h).
[696] Ibid, s.64 (2) (c).

> *"(3) Where the employee resides outside Kenya but is within the East African Community Member State, the Board shall coordinate with the social security scheme of the Member State, or a similar scheme by whatever name called, to ensure that:*
> ……
> *(i) the Board makes every endeavour to work with the foreign scheme of the Member state to ensure that the records pertaining to the member are preserved until all rights and entitlements of the member in the foreign scheme are fully exhausted in favour of the member and that there is no liability whatsoever in the foreign scheme with regard to the member."*[697]

Therefore, it is the right of a migrant worker in Kenya to freely access social security benefits while on mobility within the EAC depending on existence enabling coordination instruments. Internal harmonisation of social security laws in each EAC countries determines the extent to which enjoyment of cross-border social security benefits is realised by a migrant worker. The provisions of section 64 (3) of the Kenya NSFF Act contemplate of a legal mechanism in other EAC Partner States that facilitates social security coordination and which creates room for reciprocal social security Agreement between Contracting Parties.

Kenya has made positive legislative steps under the NSSF Act of 2013. However, she has not succeeded to convince her fellow sister Partner States to negotiate an EAC region-wide social security convention to govern exportability, totalisation, maintenance or preservation of acquired rights within the EAC intra-region labour migration. Effective implementation of social security benefits coordination as envisaged under the Kenya NSSF Act requires a general Agreement on social security coordination in the EAC. Such Agreement has to indicate the place and

[697] Ibid, s. 64(3) (i).

mode of payment of benefits. It should show methods of computation of periods of insurance in the framework of agreed principles of coordination. A typical EAC Agreement on social security would state the applicable legislation at the time of payment of benefits to a migrant worker. If there would be such multilateral legal arrangement, the nature of any reciprocal multilateral or bilateral Agreement for coordination would depend on the type or nature of clauses agreed by the Parties.

Kenya has several other legislations which directly or remotely play an important role in explaining the extent to which Kenya implements international instruments setting standards of equal treatment. The Kenya *Employment Act, 2007*[698] is another relevant Act that defines a "migrant worker "as "*a person who migrates to Kenya with a view to being employed by an employer and includes any person regularly admitted as a migrant worker*".[699] In order to prevent discrimination in employment the Act provides that the Minister responsible for labour matters and labour officers and the Industrial Court of Kenya have a duty to promote and guarantee equality of opportunity for a person who is a "migrant worker" or "a member of the family of the migrant worker" who is lawfully within Kenya.[700]

The Kenya Employment Act prohibits direct and indirect discrimination in employment based on nationality, among other things.[701] The right of every employee to join pension and pension schemes form part of terms and conditions of employment under which any person employed in Kenya whether a migrant worker

[698] Act No.11 of 2007 (Revised 2012), Cap. 226.
[699] Ibid, s.2.
[700] Ibid, s. 5(1) (b).
[701] Ibid, s. 5(3) (a).

or any other national should not be discriminated as provided in the Act[702]. Also, rule 4 of *Kenya Legal Notice No. 28* of March 2014 made under Kenya Employment Act provides:

> *"An employer shall put in place at every work place policies which-(a) promote equality of opportunity in employment in order to eliminate discrimination in employment; and (b) promote and guarantee equal opportunity in employment for all employees including migrant workers lawfully employed in Kenya."*[703]*(Emphasis added).*

The Kenya Employment Act read together with the Kenya NSSF Act of 2013 tend to implement the provisions of the *Migration for Employment Convention (Revised)*[704]which Kenya has ratified. The latter convention protects migrant workers in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities. These contingencies are also covered by the Kenya NSSF Act. However, the gap that is revealed in "Appendix 1, Table 5.2" is that Kenya has not ratified several instruments impacting on social security for migrant workers.[705]

The second legislation is the *Kenya Labour Relations Act, 2007*. This Act provides in section 5(1) as follows: *"No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act".* The Act is too general as it neither have any specific provision to exclude protection of a migrant worker nor does it specifically contain any specific legal provision that guarantees protection of a migrant worker.

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[702] Ibid, s.5 (2) (b) and s.10 (3) (iii).
[703] LN is made under s.91 (1) of Employment Act, 2007.
[704] ILO Convention 97of 1949.
[705] See "Appendix 1, Table 5.2" to this thesis.

The *Kenya Persons with Disabilities Act, 2003*[706]is one of the specific anti-discrimination laws in Kenya that applies to "persons with disabilities. The Act implements the provisions of the Kenya Constitution 2010, particularly Article 54 on the rights of persons with disability.[707] However, the Act lacks any direct reference to protection of migrant workers. Also, Kenya has not ratified the *Optional Protocol to the Convention on the Rights of Persons with Disabilities of 2006* despite being State Party to the *Convention on Persons with Disabilities, 2006*[708].

In international law, the referred optional Protocol binds parties that have accepted obligations to recognize the competence of the Committee on the Rights of Persons with Disabilities. The competence relates to receiving and considering communications from or on behalf of individuals or groups of individuals who claim to be victims of a violation by State Party to the Convention[709]. Kenya is not State Party to the Protocol; hence, it is difficult for a migrant worker or any victim of violations under the Convention to file communication by way of complaint to the Committee. The protocol prohibits communication to be received by the Committee if it concerns a State Party to the Convention that is not a party to the respective Protocol.[710]

[706]Act No.14 of 2003 (Revised 2010).
[707]See the *Constitution of Kenya, 2010,* Art. 54(1) (a).
[708] See Appendix I Table 5.2 to this thesis.
[709] See *OptionalProtocol to the Convention on the Rights of Persons with Disabilities, 2006,* Art.1 (1).
[710] Ibid, Art. 1(1) and (2).

In the EAC, three countries have ratified the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*. These include Uganda[711], Burundi[712] and Tanzania.[713] In 2008, Kenya produced the *National Survey for Persons with Disabilities of 2008* but there was not addressed any aspect of migrants' health or migrants' disabilities. The survey also omitted to report on the state of legal protection and coverage of migrant workers with disabilities in implementing the principles of equal treatment between nationals and migrants.[714]

The *Kenya Social Assistance Act, 2013*[715]is another law that implements the provisions of the Constitution of Kenya, 2010 in as far as equality of treatment and social security is concerned. The Act deals with 'social assistance' as part of social security and services to Kenyans who are in need. The legislation gives effect to Article 43(1) (e) of the Constitution which provides that *"every person" has a right to social security".* The Constitution provides for the right to social assistance (as a form of social security) to persons who are unable to support themselves.[716]

Social assistance benefits may be of the type of emergency, short term and long-term[717]financial assistance and social services such as income assistance or indigent relief, counselling services, rehabilitation services, day care services, community

[711] Ratified on 3 May, 2007.
[712] Signed the *Optional Protocol* on 26th April, 2007 and ratified it on 22 May 2014; see also United Nations, *Treaty Series,* Vol. 2518, p. 283.
[713]Signed the *Optional Protocol* on 29/09/2008 and ratified it on 10/11/2009, see United Nations, *Treaty Series,* vol. 2518, p. 283.
[714] IOM, 2011.
[715] Act No. 24 of 2013 Adopted 14 January, 2013.
[716]*Kenya Constitution,* Art. 43 (3).
[717]*Kenya Social Assistance Act,* s.18.

development services and adoption services[718]. However, the Act has no specific provision that mentions protection of non-nationals or migrant workers. Section 22 of the *Social Assistance Act* provides:

> *" (1) A person qualifies for social assistance as an unemployed person if—*
> *(a) the person is a youth;*
> *(b) there is proof that the person has no source of income; and*
> *(c) the failure to have a source of income is not due to negligence or lack of industry by the person."*[719]

Whether a migrant worker in Kenya is covered by the *Kenya Social Assistance Act* or not can be answered by looking into the interpretation of the text of the Act. Specifically section 19(1) provides that a person is entitled to social assistance if the person-

> *"(a) is a person in need as provided for under section 17 of this Act;*[720]
> *(b) is a Kenyan citizen, and complies with any requirement prescribed in Regulations by the Minister in consultation with the Authority."*[721]

Section 19 (1) shows that the condition for accessing social assistance benefits is set out in section 17(3) of the Act but it excludes non-citizens living in Kenya or elsewhere. To qualify for social assistance benefits under the legislation, one must fall under any of the categories listed in section 17. These eligible persons include:

> *" orphans and vulnerable children*[722]*; poor elderly persons;*[723] *unemployed persons;*[724] *persons disabled by acute chronic illnesses;*[725] *widows and widowers;*[726]*persons with disabilities;*[727] *and any other persons as may*

[718] Ibid, s. 2,
[719] Ibid, s. 22.
[720] See Kenya Social Assistance Act, s. 19(1) (a).
[721] Ibid, s. 19(b).
[722]Ibid, s. 17(3) Para (a).
[723] Ibid, Para (b).
[724] Ibid, Para (c).
[725] Ibid, Para (d).
[726] Ibid, Para (e).
[727] Ibid, Para (f).

from time to time be determined by the Minister, in consultation with the Board"[728].

Another condition for accessing social assistance benefit is contained in paragraph (b) of section 19(1) which imposes the Kenyan citizenship as a qualifying condition. This citizenship is in addition to other conditions contained in paragraph (a) referred to in section 19 of the Act. Thus, a migrant worker in Kenya is excluded from entitlement to social assistance benefits.

The *Kenya Work Injury Benefits Act of 2007*repeals the Kenya Workman's Compensation Act of 1949[729] and provides for general standards for Kenya social security. The Act extends social security benefits in form of insurance coverage to all categories of workers in Kenya. It aims at ensuring that there is adequate compensation for injury and work-related diseases. Immigrants employed in Kenya are covered as long as they reside and work for gain in Kenya and sustain accidents or occupational injury in Kenya. The law requires all injured persons to be compensated irrespective of the employer's solvency.[730] Under section 3 of the Act, the benefits entitlement applies to all employees under private employer and to all employees employed by the Government. However, the Act excludes employees of the armed forces from coverage.

The Act also excludes coverage of Kenyan emigrants employed outside Kenya on long term contracts or permanent terms[731]. However, if an employee is a Kenyan based employee who is employed outside Kenya on temporary basis, then such

[728] Ibid, Para (g).
[729]Cap. 236 [consolidated version].
[730] The *Kenya Work Injury Benefits Act, 2007 (Cap. 236)*, s.7 (3).
[731] Ibid, s.11 (3) and (4).

employee is entitled to work injury benefits as if the injury had occurred in Kenya, if the circumstances warranting entitlement to benefits occur. Section 11(1) of the Act provides:

> *"If an employer carries on business chiefly in Kenya and an employee ordinarily employed in Kenya is injured in an accident while temporarily deployed outside Kenya, the employee is, subject to subsection (3), entitled to compensation as if the accident had happened in Kenya"*[732].

Also it is provided in section 11 (4) the *Kenya Work Injury Benefits Act of 2007* as follows:

> *"If an employee ordinarily employed outside Kenya by an employer that carries on business chiefly outside Kenya, is injured in an accident while temporarily deployed in Kenya, the employee is not be (sic!) entitled to compensation under this Act."*[733]

For purposes of Work Injury Benefits Act, any person who is employed outside Kenya as a migrant worker is not regarded as insured against any risks of injuries. He is not protected employee under this Act save as provided for in section 11 of the Act unless such person remains within the territory of Kenya.[734] This provision is in tandem with Article 22 (1) of the *Employment Injury Benefits Convention, 1964* which provides that:

> *"A benefit to which a person protected would otherwise be entitled in compliance with this Convention may be suspended to such extent as may be prescribed- (a) as long as the person concerned is absent from the territory of the Member."*[735]

The referred ILO convention above did not intend to introduce portability or exportability of occupational injury benefits as part of social security benefits beyond national borders. Under the Kenya Work Injury Benefits Act, 2007 the

[732] Ibid, *s. 11(1).*
[733] Ibid, s.11 (4).
[734] Ibid, s. 5(3) (b).
[735] ILO Convention

benefits for work injuries are intended to be available to any employee who sustains accident while employed within Kenya irrespective of whether he is a national or non-national. In order to access the work injury benefits, a beneficiary employee should ordinarily be residing and working for gain in Kenya. Alternatively, an employee should have been employed in Kenya but was temporarily outside the country for short assignment when he sustained injury. The criteria is that while the employee is outside Kenya he must have permanent or long term base of employment in Kenya. Therefore under section 5(3) (b) of the Act, an employee who is employed outside Kenya is not covered, and for that matter even the work injury benefits are not exportable for such labour migrants.

The sixth piece of legislation is the *Kenya Occupational Safety and Health Act of 2007*[736] (hereinafter referred to as OSHA). This legislation does not directly address the subject of equal treatment in social security *per se.* However, the preamble to the Kenya OSHA broadly states the objective of the law as being to provide for the safety, health and welfare of workers and '*all persons lawfully present at workplaces'*. It calls for the establishment of the National Council for Occupational Safety and Health and for connected purposes. The Act in section 3(1) provides that: "*This Act shall apply to all workplaces where 'any person' is at work, whether temporarily or permanently".* By the use of the words '*all persons lawfully present at work places'* and '*any person at work'* implies that the protection of health and welfare of workers extends to include migrant worker employed in Kenya. However, the portability of occupational benefits is not provided under the Act.

[736] Act No. 15 of 2007.

Another legislation impacting on the equality of treatment and the right to social security for migrant workers in Kenya is the *National Hospital Insurance Fund Act, 1998*. This Act establishes a Fund to collect insurance contributions from self-employed, Government employees, and private sector employees actually residing in Kenya to pay for health care benefits that are provided by hospitals in Kenya.[737] Under section 18 of the Act, any Kenyan national residing outside the country can only contribute to the Kenya NHIF upon return. Although the NHIF Act does not contain any specific legal provision that provides for equality of treatment of migrant workers with nationals in health insurance, it is again the author's view that migrants' right, may be considered as impliedly guaranteed in Kenya given the provisions of the Constitution of Kenya, 2010 which embrace the core standards of protection of human rights including the right to health care.

The *Kenya National Cohesion and Integration Act, 2008*[738] is another Act that merits evaluation as regards to implementation of equality of treatment of nationals and migrant workers in Kenya. The Act promotes equality of treatment of all persons in Kenya whether they are migrant workers or nationals or any citizen. It can be discerned from the preamble in which it encapsulates that the aim of the Act is to encourage national cohesion and integration by outlawing discrimination on ethnic grounds[739]. The Act prohibits discrimination based on "ethnic" background. Essentially this includes prohibition of discrimination based on nationality among other grounds. Section 2 of the Act defines *"ethnic group"* to mean:

[737] See Act No.9 of 1998, s.15.
[738] Act No. 12 R.E 2012 [2008].
[739] Ibid, see Preamble.

> *"a group of person defined by reference to colour, race, religion, or ethnic or national origins, and references to a person's ethnic group refers to any ethnic group to which the person belongs".*[740]

The Act elaborates that the words discrimination based on "ethnic grounds" may mean including discrimination based on "nationality" or "national origins", among other things. This interpretation of the words *"ethnic origins"* to mean including *"nationality origin"* may be appropriately adopted and applied correctly in the interpretation of the Constitution of Kenya, 2010 whereby the omission to use the words *"nationality"* is seen in Article 27 (4). The omission to list down "nationality" as one of the prohibited grounds of discrimination may be cured by reading into the provision of the Kenyan Constitution the prohibited grounds of discrimination as including those based on nationality. This would be well in line with the meaning contained in the *Kenya National Cohesion and Integration Act, 2008*. The Act defines "ethnic grounds" to mean: "*any of the following grounds, namely colour, and race, religion, nationality or ethnic or national origins*"[741].

Therefore, under the *National Cohesion and Integration Act*, particularly in section 43(1) and (2) of the Act, any one or more persons may lodge a complaint to the 'National Cohesion and Integration Commission' if there is any alleged contravention of the Act. Such complaints may be brought against individuals and against corporate or unincorporated bodies of persons[742]. Under section 43(4), the Act allows a complaint to be lodged either individually or collectively or on behalf

[740] Ibid, s.2.
[741] Ibid.
[742] Ibid, s. 43(3).

of other affected persons[743]. If the Act is interpreted in a permissive approach, the import of the law itself seems broad enough to cover protection of non-nationals (migrant workers) as ethnic group.

However, the negative aspect of the Kenya *National Cohesion and Integration Act* is in sub-section 10 (2) paragraph (a) which permits discrimination where it is a necessary requirement in the nature of business transaction and there is no alternative way of realizing the intended goal.[744] The Act says that public authorities in Kenya may act in discriminatory manner in the exercise of immigration functions where necessary[745]. A non-Kenyan person may be qualifying for certain rights but a public licensing authority, planning authority, public authority, employment agency, educational establishment or body offering training, may discriminate against such person in the provision of certain services and this is permissible under the law.

The *Kenya Citizens and Foreign Nationals Management Service Act, 2011*[746] is another legislation that merits examination in the context of equality of treatment between nationals and immigrants in Kenya. This legislation caters for the establishment and maintenance of a national population register to record identification and registration information for all Kenyans and resident foreign nationals. Information on migrant workers, asylum seekers, and refugees are obtained and managed under this Act. Among other things, the Act governs the administration of laws relating to identity, travel documentation, immigration

[743] Ibid, s. 43(4).
[744] Ibid, s. 10(2) (a).
[745] Ibid, s.10 (2) (b) (iii).
[746] Act, No.31 of 2011, see Preamble and s.4.

matters and other related matters as provided in section 2 of the Kenya National Cohesion and Integration Act, 2008.[747]

The foregoing analysis of Kenya legal framework and its impact on compliance with equality of treatment principles in social security for migrant workers has demonstrated some positive and negative compliance features. Based on this analysis, any discrimination that goes outside the scope of permitted differentiation between citizens and non-citizens for just cause under the Constitution of Kenya stands as a violation of international law and the EAC regional law, particularly the CMP of 2009.

5.7 Compliance to International Law on Equality of Treatment in Social Security for Migrant Workers

5.7.1 Compliance to ILO Instruments Concerning Social Security

Kenya as Member State of the ILO is also a State Party to several international labour conventions that have a bearing on the fundamental principles and rights of man at work. Kenya has ratified a few of the conventions concerning the right to social security for migrant workers. The status of Kenya's ratification of the ILO social security conventions is presented in *Appendix 1, Table 5.2*[748] which indicates the extent to which Kenya complies with international minimum standards for social security and equal protection of migrant workers. However, as *Appendix 1, Table 5.2* shows, Kenya has not ratified several other ILO conventions that are relevant to equality of treatment in social security for migrant workers and the nationals in the

[747] See Act No. 12 of 2008, s.2.
[748] See details of Kenya's status of ratification in Appendix 1, Table 5.2 to this thesis.

world of work.

Kenya is State Party to the *Equality of Treatment (Social Security) Convention*, 1962 which sets international minimum standards of equality of treatment in social security and protection of both nationals and migrant workers. Thus, she is bound by international labour standards provided in this instrument in terms of Article 2(1) covering *'invalidity benefit, old-age benefit*, and *survivors' benefit*. However, the domestic legislation in Kenya remains unsatisfactory particularly because other EAC countries have not ratified this convention and other instruments on social security for migrant workers. The summary of ratification of ILO conventions by Tanzania is provided in *Appendix 1 Table 6.2* to this thesis. The latter shows that Tanzania has not ratified convention 118 and several other social security conventions impacting on the rights of migrant workers.

The 2001 ILO Report on Application of Conventions and Recommendations reflects that the instruments that were adopted at 81st to 87th Sessions of the ILC from 1994 to 1999 would be submitted before the Kenyan National Assembly but since then there had not been positive development.[749] In the year 2016, Kenya was applauded for taking some legislative steps towards human rights compliance measures in respect of ILO Convention No.138 which concerns minimum age for employment.[750] In 2017 nothing is on records of the ILO that demonstrates meaningful measures taken by Kenya towards ratification of social security conventions relating to migrant workers. According to *Appendix I, Table 5.2*, Kenya

[749]ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), Geneva, ILO, 2001, p.666.

[750]ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILO, Geneva, 2016(1), pp.37-48.

has poor record of ratification of international labour conventions concerning social security, particularly those concerning migrant workers.

Thus, Kenya remains earmarked as one of the countries that still need technical assistance towards compliance with international labour standards. An effective implementation of equality of treatment of migrant workers in social security within the EAC countries requires ratification of this convention, but also a harmonisation of social security laws. Unfortunately, With the exception of Kenya and Rwanda, the rest of the EAC countries have not ratified ILO Convention 118.

Kenya is State party to the *Discrimination (Employment and Occupation) Convention,* 1958[751].This convention provides that each Member for which this Convention is in force has to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation[752]. The Convention describes discriminations exclusionary practices in treatment based on whatever distinction or preference based on *national extraction or social origin*, *race, colour, sex, religion,* and *political opinion* which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.[753]The preamble to this convention states that *discrimination* constitutes a violation of rights enunciated by the UDHR.

Therefore, by ratification of Convention 111, Kenya has accepted obligation to eliminate any discriminatory treatment in respect of women and men, including obligation not to exclude women migrant workers. As a step towards complying with

[751] ILOConvention 111.
[752] Ibid, Art. 2.
[753] Ibid, Art.1 (1).

equality of treatment between women and men, Article 27 (3) of the *Constitution of Kenya, 2010* provides that: "*Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres"*.

In an attempt to comply with principles of equality of treatment between nationals and migrant workers, the Kenya *Employment Act, 2007*[754] in section 5 has prohibited discrimination in employment by providing that the Minister, labour officers and the Industrial Court under the Act have a mandatory duty to:

> (a) promote equality of opportunity in employment in order to eliminate discrimination in employment; and
> (b) to promote and *guarantee equality of opportunity* for a person who is a *migrant worker* or a member of the *family of the migrant worker*, lawfully within Kenya. [755] (Emphasis added).

The Kenya Employment Act prohibits any indirect or direct discrimination based on nationality as provided in section 5(3) (a). But also section 5(4) (c) provides that it is not discrimination to employ a citizen in accordance with the national employment policy. This is particularly permitted where the policy gives priority for Kenyans in employment. Since 09 February, 1971 when Kenya ratified convention 118, she accepted to be bound by branches (d) to (f) which cover *invalidity benefit*, *old-age benefit* and *survivors' benefit* respectively as provided in Article 2(1) of the convention[756].

[754] Act No.11 of 2007, Cap.226 [Rev. 2012].
[755]Ibid.
[756] See Appendix 1 Table 5.2 to this thesis.

However, this instrument is binding only upon those Members of the ILO whose ratifications have been registered with the Director-General within the terms of Article 15(1). Therefore, Kenya is legally bound to comply with equality of treatment of nationals and migrant workers pertaining to provisioning of invalidity benefit[757]; old-age benefit[758]; and survivors' benefit.[759] Thus, Kenyan Government has to enact a legislation that enables provisions of the referred benefits to her own nationals and to nationals of other Member states which have accepted the obligations of this Convention in respect of the accepted branches of social security.

Convention 118 in Article 11 requires corresponding State Parties to the Convention to afford each other administrative assistance free of charge in order to facilitate the implementation of the provisions of the Convention and of their respective national legislation. This has been partly complied with by Kenya particularly under section 64 (3) of the Kenya NSSF Act, 2013 which establishes the NSSF. The latter provision provides that where the employee resides outside Kenya as a migrant worker, but remains within the EAC Member State, the NSSF Board is legally mandated to coordinate with the social security scheme of the Member State in the EAC. The NSSF may also coordinate with a similar scheme by whatever name called to ensure that the exportability of social security benefits entitlement to a migrant worker is guaranteed.[760]

[757] Branch (d).
[758] Branch (e).
[759] Branch (f).
[760] NSSF Act, 2013, s. 64(3) (c).

The implication is that where an employee decides to return to Kenya from foreign employment outside Kenya but within the EAC, the law says that there is legal assurance of exportability of benefits of the member as at the date of that decision to return takes place.[761] The Kenya NSSF Act in section 64 (3) (a) provides that a migrant worker from Kenya working in other EAC countries is required to register for social security scheme in a host country as contributing employee in that Member State.

The guarantee of preservation and maintenance of social security benefits of a Kenyan migrant worker in any EAC countries is also provided under para (c) of the section 64 (3). Also, the Act gives mandate to the Fund to share all relevant information in its possession with regard to the social security concerning its member who has acquired migration status and is entitled to benefits under the foreign social security scheme of the Member country[762].

Therefore, the Kenyan law envisages the importance of reciprocal agreements between EAC members in implementing its legal obligations under the NSSF Act. Sub-section (5) of section 64 gives the Fund with freedom of right to secure required assistance of the Government, where necessary. This has the objective of ensuring effective application of this section. Furthermore, the Kenya NSSF Act, 2013 provides:

s.64(7) "*The provisions of subsection (3) may be applied, with the necessary modifications, to any reciprocal agreement involving employees working in*

[761]Ibid, s. 64 (3) (d).
[762] Ibid, 64 (4).

Kenya but belong to schemes of other countries in order to give rights and protection thereof under this section to such employees".

Section 64(7) of the Kenya NSFF Act is an attempt to comply with Article 7 of the *Equality of Treatment Social Security Convention* which directs Member States that have accepted obligations under this instrument to make agreements to implement schemes for maintenance of the acquired rights and rights in course of acquisition under their national legislation. Kenya ratified this convention by accepting only the obligations of social security branches under branches of medical care (branch 'a'), sickness benefit (branch 'b'), maternity benefit (branch 'c'), survivors' benefit (branch 'f'), and employment injury benefit (branch 'g').[763] However, this is possible if a country has a legislation for which this Convention in force. This means that, effective implementation of Convention 118 in Kenya and in the rest of EAC countries depends on ratification by all countries sending and receiving migrant workers.

The EAC countries of Tanzania, Uganda, Burundi, and South Sudan are sources of migrant workers to Kenya and to the rest of the EAC but have not ratified Convention 118[764]. These countries are not legally bound to comply with the provisions to which Kenya has accepted to be bound with. Consequently, the cost of administering the *invalidity*, *old-age* and *survivors'* benefits may not be easily shared among these countries because required ratification is still lacking. Such cost sharing

[763] See Convention 118, Art. 2(1).

[764]Rwanda ratified *the Equality of Treatment (Social Security) Convention, 1962* (No. 118) on 21 September 1989. Has accepted to be bound by braches (d) to (g) which relate to invalidity benefit; old-age benefit; survivors 'benefit; and employment injury benefit, available at <http://www.ilo.org/dyn/normlex/Ratifications>,accessed 05 March, 2017.

may be possible only if there is a network of bilateral or multilateral agreements for implementation of provisions on equality of treatment and maintenance of acquired social security rights and rights in the course of acquisition across the EAC.

In order to combat some of the discriminatory treatments against migrant workers worldwide, the UN passed the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 1990. The detailed functions of this instrument are already discussed in chapter 3 of this thesis. Even with this Convention, still most of the developed countries are not party to this instrument. Moreover, with the exception of Rwanda and Uganda, the rest of the EAC countries have not ratified this Convention. Rwanda acceded to this Convention on 15December, 2008 while Uganda acceded to it on 14 November 1995.

5.7.2 Compliance to Human Rights Treaties relevant to Social Security

a.) Kenya's Ratification Status

Under international law, Kenya is the successor state to the historical Kenya colony. Thus, unless denounced, a treaty ratified by Kenya by then as Colony under British Administration will remain in force for Kenya. Kenya has ratified several UN international human rights treaties that contain relevant provisions advancing the right to social security and equality of treatment of all human beings. Some instruments specifically mention the right to social security while others portray indirectly the implied protection of migrants. Essentially, equality of treatment and protection of migrant workers in social security is in many instances implied.

A summary of the status of Kenya's ratification of selected international human rights instruments is presented in *Table 5.3* in *Appendix I* to this thesis. The name, long title, date of coming into force and the status of ratification of these instruments are as shown in the referred Table 5.3. All these international human rights instruments either directly or indirectly have a bearing on the status of recognition of the right to social security for migrant workers. Therefore, Kenya's compliance profile to these instruments in terms of national policies, laws, and systems of controlling the rights of migrant workers in Kenya is a mixed one.

In an attempt to fulfil some of the international human rights standards, the Government of Kenya has adopted a variety of legislation that directly or indirectly tends towards addressing compliance with the human rights. Kenya has entrenched the right to social security in its Constitution of 2010 under Article 43. The bill of rights in chapter four of the Constitution of Kenya from Articles 19 to 58 presents a full extent of human rights and institutional mechanisms for enforcement of various categories of human rights.[765] This has created the framework for social, economic and cultural policies of the country and basis for legislative framework for implementation of international human rights treaties. Therefore, migrant workers can claim protection under ratified treaties subject to national laws governing labour migration.[766]

[765] The Kenya Constitution 2010 entrenches Bill of Rights as an integral part of Kenya's democratic state (see Article 19).
[766] See Constitution of Kenya, Art.19 (1).

b.) Compliance to economic, social and cultural rights

Kenya acceded to the ICESCR of 1966 in 1972[767]. After Kenya had passed through numerous constitutional amendments since 1963 to 2008, the new Constitution of Kenya resolved many issues that affected human rights in the country. For example, the new Constitution of Kenya in Article 43(1) (e) has provided for the right of every person to enjoy social security. Further, in an attempt to implement the social and economic rights, the *Kenya Constitution* also provides:

Article 20 (5);

> *"In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles;*
> *(a) it is the responsibility of the State to show that the resources are not available;*
> *(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and*
> *(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion".* [768]

Further, Kenya has enacted the *Kenya Social Assistance Act, 2013*; *the Persons with Disabilities Act, 2012;* the *Kenya NSSF Act, 2013*; and the *Kenya Health Act, 2012*. But all these listed Kenya laws do not provide specific guarantee to equal social protection of migrant workers with nationals.

The Kenya Constitution 2010 requires the Government to enact and implement legislation that fulfils its international obligations in respect of human rights and fundamental freedoms within the terms of Article 21.[769] In Article 21 (2) Kenya Government is required to operationalise a policy of compliance to international

[767] See Kenya ratification details in Appendix I, Table 5.3.
[768] Kenya Constitution, Art.20 (5).
[769] Ibid, Art.21 (4).

standards through legislative measures by creating institutions with mandates for ensuring the enjoyment of equal social protection for all. Sub-article 4 of Article 21 of the Constitution of Kenya emphasizes that the Government should develop a political will to enact and implement legislation to fulfil its international obligations in respect of human rights.

It should be put clear that, a right without a remedy raises questions of whether it is in fact a right at all or not. Therefore, justiciability of human rights in Kenya may be clearly viewed in Article 22 (1) of the *Kenya Constitution* on enforcement of bill of rights. The sub-article provides as follows:

> *"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."*[770]

In Article 22, the Constitution of Kenya puts in place some procedural mechanism for enforcement of the bill of rights. The Constitution in Article 23 provides for authority of courts to uphold and enforce the bill of rights. This includes regulation of both the rights to equality and non-discrimination as provided for in Article 27. Various specific rights granted to different groups are legally protected, and these rights are to be progressively realised within the meaning of Article 21(2) of the Constitution of Kenya which provides*:*

> *"The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43".*[771]

[770] Ibid, Art.21 (1).
[771] See Constitution of Kenya, Art. 21(2).

Ordinarily, the right to access judicial process must be accompanied by effective remedy otherwise litigation will be a futile process. The lack of effective realisation of rights in Kenya is in the limitation imposed on satisfaction of the orders against the Government. The *Kenya Government Proceedings Act* in section 21(4) provides as follow:

> *"(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs."*[772]

The cited provision of the Kenya Government Proceedings Act curtails the enforcement of individual rights. The concluding observation of the Committee on Economic, Social and Cultural Rights dated 6th April 2016 on effective compliance with ICESCR by Kenya states that:

> *"The Committee urges the State party to repeal section 21 (4) of the Government Proceedings Act since it places the State party above the law in that it does not oblige the State party to comply with court orders and it infringes the rights to equality and right of access to courts in that it denies the right of an effective remedy in case of a violation by the State Party of the economic, social and cultural rights of an aggrieved party".*

It is understandable that the judicial enforcement is not the only or rather the best way of protecting economic, social and cultural rights of every person, including rights of migrant workers. However, the judicial enforcement has a clear role in developing our understanding of foundation of these rights. Judicial process affords remedies in cases of clear violations and in providing decisions on test cases. In that

[772] Cap. 40 of the Laws of Kenya, R.E 2015 [2012].

process, judicial precedents can lead to systematic institutional change to prevent violations of rights in the future.

The enforcement of social security rights under ICESCR is through progressive realization of the stipulated rights which depend on levels of economic development of each country. Developing countries may determine to what extent they would guarantee the economic rights recognized in the ICESCR to non-nationals.[773] Today, Kenya is faced with the demand raised by the ICESCR to eliminate reservations it made in 1972 against the provision of Article 10 (2) of the Covenant. This sub-article requires states to make provision for paid maternity leave. This right could not be guaranteed to employees due to the fact that existing circumstances obtaining in Kenya by then could not render necessary or rather expedient to mandatorily impose such principles by legislation.[774] However, in 2008 the UN Committee on Social and Economic Rights recommended to Kenya as follows:

> *"The Committee recommends that the State party withdraw its reservation to article 10, paragraph 2 of the Covenant, and that it consider ratifying ILO Conventions No. 103 concerning Maternity Protection (Revised, 1952) and No. 183 concerning the Revision of the Maternity Protection Convention (Revised), 1952 (2000)."*[775]

Maternity protection is one of those rights that concern migrant workers and their families. Women migrant workers fall in the category of discriminated groups due to structurally discrimination. Women migrants face difficulties in defending themselves and in accessing social security benefits such as maternity benefits and

[773] See the ICESCR, 1966, Art. 2 (3).
[774] See UN: *Report of the Committee on Economic, Social and Cultural Rights of ICESCR on Kenya*: Consideration of reports submitted by States Parties under Art. 16 and Art.17 of the ICESCR, 41st Session, 3-21 November 2008, Geneva, 2008, Concluding Observation No.39.), p.11.
[775] Ibid, Concluding Observation No. 39.

related maternal care while in foreign countries of employment. Kenya is a signatory to the ICESCR, hence required to ensure certain degree of consideration to such minority and vulnerable groups of women migrant workers in times of maternal care and healthcare benefits even in circumstances of severe resource constraints.

Under the UN framework concerning non-discrimination, the principle of equality requires States Parties in appropriate cases and circumstances to take *affirmative action* to eliminate conditions which cause or help to perpetuate discrimination that is prohibited by the ICESCR.[776]The Constitution of Kenya in Article 260 has defined "affirmative action" to include: "…*any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom*".[777] This affirmative action in the provision of any benefits to any person in need in Kenya is meant to be governed by existence of evidence of genuine need.[778]

By using combined literal approach (or constructionist)[779] and purposive approach to statutory interpretation, a balance may be struck on the import of sub-Article (4) of Article 27 of the Constitution of Kenya. This provision does not mention nationality as one of prohibited grounds of discrimination. The provision has the effect of possible denial of immigrants' opportunity to challenge any violation of internationally recognized human rights. However, if the purposive approach to interpretation is applied in arriving at what was the intention of the Kenyan Parliament in Article 27(4), the list of prohibited grounds of discrimination

[776] See UN Human Rights Committee General Comment No. 18 of 1989, para 10.
[777] *Constitution of Kenya*, Art. 260.
[778] Ibid, Art. 27(7).
[779] See a treatise by Lonnquist, T., "The Trend towards Purposive Statutory Interpretation: Human Rights At Stake", *Revenue Law Journal,* Vol. 13 [2003], Iss. 1, Art. 3, pp.18-27, retrived at http://epublications.bond. edu.au/rlj/vol13/iss1/3.

contained in this sub-article may be widened. In *Magor and St Mellons v Newport Borough Council* the United Kingdom's House of Lords once stated:-

> "We do not sit here to pull the language of Parliament to pieces and make nonsense of it. We sit here to find out the intention of Parliament and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis".[780]

The legal position in the above English decision looks similar to another case in the United Kingdom's case of *Pepper (Inspector of Taxes) v Hart (1993)* in which Lord Griffiths stated thus:

> *"The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."*[781]

Applying to Kenya's situation, the two English principles of statutory interpretation in the two cases cited, it may be argued that the list of prohibited grounds of discrimination in Article 27(4) of the Constitution of Kenya is not exhaustive one. The omission to include nationality as one of the prohibited grounds of discrimination in Article 27(4) of the Constitution appears to have been inadvertently done. Where the Parliament did not foresee the circumstances (*acasus omissus*), the judicial role becomes that of legislators in interpreting statutes if the Court is to enforce the intent of Parliament.

Thus, the overall intention of the Constitution of Kenya in sub-article (4) of Article 27 is generally to address issues of inequality and discriminatory practices which

[780](1951) 2 All ER 839; [1952] AC 189).
[781](1993) 1 All ER 42; (1993) AC 593.

indeed have emerged as central challenges in the country. Kenya has realized the threat posed by the inequality of treatment and enacted the *Kenya National Cohesion and Integration Act, 2008*. This Act prohibits any public establishment from employing more than one third of its staff from the same ethnic community[782]. However, it remains unclear if Kenyan considers migrant workers as a vulnerable minority group deserving any special protection.

c.) Compliance to Conventions on international migrant workers' rights

The *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990* is one of such instruments deserving discussion. Although Kenya has a relatively good record of ratifying major international and regional human rights instruments if compared with other EAC countries,[783] it has not ratified the ICPRMW. For instance, the ICPRMW provides for 'emergency medical treatment to migrants in Article 28. The Article provides that:

> *"Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment".*

The obligations upon States arise upon ratifying this Convention in accordance to Article 88 which prohibits exclusion of any category of migrants. The Article states that:

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[782] See *Kenya National Cohesion and Integration Act*, s.7 (2).

[783] Kenya Human Rights Commission: *Towards Equality and Anti-Discrimination: An Overview of International and Domestic Law on Anti-Discrimination in Kenya, Nairobi, January, 2010, p.2;* Also see Appendix 1 Table 5.3 to this thesis on ratified Human Rights Treaties by Kenya.

> *"A State ratifying or acceding to the present Convention may not exclude the application of any Part of it, or, without prejudice to article 3, exclude any particular category of migrant workers from its application."*[784]

Once the convention is ratified, every ratifying State is prohibited to exercise any form of exclusion of any particular category of migrant workers. However, within clear bounds of international law, Kenya cannot be held legally accountable for not guaranteeing protection of rights of migrant workers or violations of the ICPRMW. This is because the Convention binds only the ratifying or acceding State Parties. Kenya is not a State Party to this Convention.

Other international human rights instruments that have effect on the rights of migrant workers include the ICERD, the CRC, the CEDAW, the ICCPR, and the CRPD. As shown in the summary of Kenya's status of ratification of international human rights treaties[785], Kenya acceded to the ICERD on 13.09.2001. Within the terms of Article 5 of the ICERD, it is provided that the non-discriminatory practice among ratifying States in health protection is clear part of guarantee of social protection to all.

Kenya is also State Party to the *International Convention on the Rights of the Child (*CRC) of 1989 since 1990. This instrument guarantees the right to health care as part of medical insurance scheme as provided for in Article 24 of the Convention. Kenya has obligations under this Convention to ensure that children of migrant workers are not discriminated based on their nationality status or based on the status of their parents.

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[784] See the ICPRMW, 1990, Art. 88.
[785] See Appendix 1, Table 5.3 to this thesis.

Kenya is also State Party to the *International Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) since 9 March 1984 by way of accession[786]. This convention is of general nature concerning all women found in different situations. It is of significant value in the protection of women migrant workers particularly in form of the right to 'medical care' for all without discrimination of any kind. This forms part of social security and equality of treatment in health insurance.[787]

The general import of Article 11 of CEDAW is to emphasize the importance of the right to work for women as an unalienable right of all human beings. The convention underlines the significance of equal pay for equal work between women and men but also puts clear position on the right to social security for all without exception based on nationality status of workers. The significance of paid leave and maternity leave with pay is provided as a requirement for international standards compliance by all ratifying States to this Convention. In this regard, CEDAW is so important in promoting equality of treatment of women migrant workers involved in cross-border mobility in many countries including Kenya and all EAC countries.

However, despite the Kenya's gender neutrality approach to international migration it has not ratified the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP*-CEDAW)of 1999. This protocol is a side-agreement to CEDAW which allows its parties to recognise the competence of

[786] See United Nations, Treaty *Series*, vol. 1249, p. 13.
[787] See the CEDAW, 1990, Art. 11(1) (e) and Art.12.

the *Committee on the Elimination of Discrimination against Women* to consider complaints from individuals in ratifying States.[788]

While the Constitution of Kenya 2010 provides for the right of complaint in cases of violations of human rights, its practical enforceability is weak particularly where violations of rights affect migrant workers. This is because even specific national laws of Kenya are either silent or vague with regard to protection of migrant workers. For instance, in the field of health care, it is clear that Article 12 of CEDAW creates the obligation of states parties to the Convention to take all appropriate measures to eliminate discrimination against women (including women migrant workers). This has the objective of ensuring that there is unfettered access to health care services and family planning services.

Another relevant Convention which is of recent development is the *Convention on the Rights of persons with Disabilities* (CRPD) of 2006.[789] This convention appears remotely relevant to equality of treatment of migrant workers in cross-border mobility conditions. It should be pointed out that, the community of migrant workers is not without persons with disabilities; hence, in international law such disabled migrants deserve similar equal protection under international legal norms as is done to women, children, refugees, and other categories of vulnerable groups. The EAC Treaty in Art.20(c) and Article 39 of the EAC CMP cover such groups of vulnerable people.

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[788] The Optional Protocol was adopted by the UN General Assembly on 6 October 1999 and entered into force on 22 December 2000.
[789] United Nations, *Treaty Series*, vol. 2518, p. 283.

Through Article 54 of the Constitution of Kenya 2010 the rights of persons with disabilities have been entrenched. But Kenya has not ratified the *Optional Protocol to the Convention on the Rights of Persons with Disabilities of 2006* which came into force on 3 May 2008.[790] Kenya is not a State Party to the protocol and does not recognize the competence of the *Committee on the Rights of Persons with Disabilities* to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction.[791] The complainant may be any migrant worker or other persons who claim to be victims of a violation by the State as to the provisions of the CRPD. Unlike other UN human rights instruments the Protocol to the CRPD is subject of ratification by regional integration organisations[792] such the EAC or the ECOWAS.

Kenya has not appropriately addressed the problem of hesitation to put her signature to other human rights instruments relevant to the protection of human rights of all human beings. Such optional protocols not ratified by Kenya are presented in "Appendix 1, Table 5.3" to this thesis some of which include the Optional Protocol to the ICCPR of 1966; the Optional Protocol to the ICESCR of 2008; the Optional Protocol to the CEDAW of 1999; and the Optional Protocol to the CRPD of 2006. These protocols contain legal mechanism of complaint procedure through mandated committees under each protocol. Amongst the duties of these mandated Committees include powers to receive individual communications on complaints after exhausting

[790] See Appendix 1, Table 5.3 to this thesis.
[791] See the Optional Protocol to the CRPD, Art. 1 to 7.
[792] See *Optional Protocol to the Convention on the Rights of Persons with Disabilities, Art.11 and Art.13.* Also see Article 120 (c) of the EAC Treaty, 199.

domestic remedies. Upon receiving complaints, these committees have to hear such individual complaints lodged against State Parties and make recommendations for possible redress.[793]

Taking an example of the ICERD, Kenya has not made a declaration under Article 14. This Article requires States Parties to declare that they recognise the competence of the Committee for Elimination of all forms of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming that they are victims of human rights violations by the State Party of any of the rights that are contained in the CERD. Thus, hearing of such complaints in respect of Kenya is not possible.[794] Also, Kenya has not made any declaration to recognize the competence of the Committee provided for in Article 6 and Article 7 of the CRPD which deal with receiving information on complaints, inquiry, examination, findings, observations, comments and recommendations or measures over the allegations. A declaration by each committing State is required to be done under Article 8 of the CRPD but Kenya is not a State Party to the international complaint procedures under all the instruments listed above. This is a common feature in many developing countries which often ratify treaties in big numbers but lack practical implementation in the domestic legal order.

However, the *Kenya National Human Rights and Equality Commission* (KHRC) established under Article 59 of the Constitution of Kenya is mandated to ensure compliance to international treaties and conventions relating to human

[793] See for example, the CRPD, 2006, Arts. 1-7.
[794] International Convention on the Elimination of All Forms of Racial Discrimination, 1965.

rights.[795]Among other things, the Commission receives and investigates complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated[796]. In sub-article (3) of Article 59 of the Constitution of Kenya it is provided as follows:

> *"Every person has the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."*[797]

In Article 59 (4) the Parliament is required to enact a law to give full effect to the duties and functions of the KHRC.[798] The KHRC is empowered to promote respect for human rights, promote protection, monitor, investigate, report, research, and make recommendations to improve the functioning of State organs. Also, it has a duty to provide remedial action to secure appropriate redress where human rights have been violated. However, it is not mandated to invoke judicial intervention as one of the remedies available within the context of Article 59 of the Constitution.

5.7.3 Compliance to Regional Instruments

The foregoing analysis has laid the basis for answering the second research question which had asked: *What are specific conditions in Kenya and Tanzania that affect the rights to equal treatment in social security for migrant workers?* Kenya is State Party to several regional treaties that have an impact on obligation to enforce equality of treatment of her nationals and other persons from different countries in various spheres of regional cooperation pursuant to ratified treaties. Some regional instruments to which Kenya is a State Party and have impact on equal treatment of

[795] See *Constitution of Kenya, 2010,* Art.59 (2) (g).
[796] Ibid, Art.59.
[797] Ibid, Art.59 (3).
[798] Ibid, Art.59 (4).

EAC nationals and those from the rest of Africa are shown in "Appendix I, Table 5.4" to this thesis. This includes protection of migrant workers under the framework of international labour standards, human rights instruments and regional treaties and protocols impacting on social security rights of migrant workers.

Some regional economic communities to which Kenya is a State Party include the *Common Market for Eastern and Southern Africa (COMESA)* established on 8 December, 1994, the *Intergovernmental Authority on Development (IGAD)* revitalised in 1996, and the *East African Community (EAC)* formed in 1999. Notably, the *COMESA Treaty* in terms of paragraph (b) of Article 4(6), the Republic of Kenya has obligation to harmonise or approximate her laws to the extent required for the proper functioning of COMESA common market. Such harmonisation envisages promotion of economic and social development of peoples in the region.

Also the *COMESA Treaty* requires Kenya and all other Member States to remove obstacles to the free movement of persons, labour and services, right of establishment for investors and right of residence within the Common Market.[799] Further, by ratifying the COMESA Treaty, Kenya has undertaken to recognise, promote, and protect human and peoples' rights in accordance with the provision of the African Charter on Human and Peoples' Rights as provided in Article 6 (e) of the COMESA Treaty.

The *COMESA Treaty* in Article 6 (e) emphasizes the recognition, promotion and observance of human rights values. The latter provision is similar to Article 6A (f) of the *Intergovernmental Authority on Development (IGAD)*.Therefore, by ratifying the

[799] See the *COMESA Treaty*, Art. 4(6) para (e).

two treaties (COMESA Treaty and IGAD Treaty), Kenya has undertaken to promote harmonisation of her policies, laws, and promote free movement of goods, services and people, right of establishment, and residence under Article 7(b) of the IGAD Agreement. Kenya has committed herself to implement the IGAD Agreement under Article 7 (e) which emphasises creation of enabling environment for foreign, cross-border and domestic investment and trade. However, poor compliance to IGAD Treaty by Kenya is caused by lack of trust among IGAD countries. This region is also vulnerable to conflicts particularly in States such as South Sudan. Other bottlenecks come from incompatible systems of governance among different IGAD countries and contested legitimacy of governments. Also the IGAD countries are characterised by a lack of democratic governance and unsatisfactory observance of human rights and rule of law.[800]

Regarding compliance with the *EAC Treaty, 1999* and the *EAC Common Market Protocol*, 2009, the East African Common Market Scorecard 2014 which tracks the EAC compliance in the movement of capital, services and goods has shown wide ranges of non-compliance by the EAC Partner States. The Common Market Scored Card of 2016 has also indicated in its report the prevalence of non-tariff barriers (NTBs) as being common practice found in EAC Partner States[801]. These NTBs have persisted since 2008 across all EAC Partner States. These countries also lack collective measures to eliminate these barriers.

[800] See Dersso, S., East Africa and the Intergovernmental Authority on Development (IGAD): Mapping Multilateralism in Transition No.4, International Peace Institute (IPI), October, 2014, pp.1-16, at p.16. IGAD countries include: Djibouti, Ethiopia, Eritrea, Kenya, South Sudan, the Sudan, Somalia & Uganda.

[801] See the EAC CMS 2014 & EAC CMS 2016, note 502 and note 509 respectively.

Despites the recommendations for reform made in the CMS 2014, Kenya has continued to impose restrictions on inward direct investments (discriminatory treatment for EAC domiciled investors and restriction of market access in selected sectors). Kenya restrictions are found in investment laws, insurance laws, and telecommunications laws. For example, there are restrictions on the acquisition of shares by non-residents in Kenyan companies in the insurance companies. The *Kenya Insurance Act,* Cap 487 in section 23 provides that, at least one-third of the controlling investment interest in an insurance company must be held by citizens of Kenya at all times. If not, then at least the investment must be controlled by a partnership whose partners are all citizens of Kenya.

Alternatively, the investment interest in an insurance company must be controlled by a body corporate whose shares are wholly owned by citizens of Kenya, or is wholly owned by the Government of Kenya. Also, there are several other laws that provide for preferential treatment of Kenyan nationals over foreigners.[802] Therefore, despite progressive constitutional developments in Kenya, the question of cross-border migrant workers and their equal rights continue to pose some challenges. Kenya still has common problems that often face cross-border labour migrants in many countries. Migrant workers are not comprehensively protected in the preservation, exportability, maintenance and totalization of their social security benefits as they migrate from other EAC countries to Kenya and from Kenya to other EAC countries.

[802] See for ample, the *Employment Act, 2007*, s. 5(1) (b), 5 (2) (a); 5 (c), 5(3), and s.10 (3) (iii); *Kenya Labour Institutions Act, 2007*, s. 3; Kenya Work Injury Benefits Act, 2007 ss. 3, 5, and 11; Kenya National Social Security Fund Act, 2013, s. 2 and s. 64; Kenya National Gender and Equality Commission Act, 2011, s. 7 (c), (d); s. 8(a), (c), (g), and (n); Kenya Citizens and Foreign Nationals Management Service Act, 2011, s. 4(1), (2), s. 6(2); the Kenya National Cohesion and Integration Act, 2008, s. 2, s. 3, s.10 and s.13.

One of the main causes of the lack of equal migrants' protection within Kenya and in the rest of the EAC countries is the lack or weak national policy on the people in Diaspora in the EAC countries.

Ineffective legal mechanism for reciprocal enforcement of social security rights between Kenya and other migrants' sending countries within the EAC and beyond the EAC makes it difficult to offer equal treatment and protection of labour migrants. Diversity of national social security legislations that create various social security schemes is another hurdle in the way of protection of migrant workers in Kenya and beyond national borders. Often times the rules of territoriality conditions of social security schemes exclude migrant workers from equal enjoyment of social security benefits with nationals.

Despite these challenges, Kenya has continued to push forward its policy towards favouring regional integrations with its neighbours in order to achieve its development goals. As such, Kenya is also State Party to several other regional integration organisations in Africa and it has ratified several other regional instruments as shown in "Appendix 1, Table 5.4" to this thesis.[803]

The status of ratification of regional instruments by Kenya depicted in "Appendix 1, Table 5.4" to this thesis has some implication in the context of the Kenya Treaty Practice. The Republic of Kenya has enacted the *Treaty Making and Ratification Act, 2012*[804] in order to give effect to the provisions of Article 2(6) of its Constitution of 2010. This makes international treaties ratified by Kenya part of

[803]See Appendix 1, Table 5.4 to this thesis.
[804]Act No 45 of 2012 (Rev. Edn 2014 .

Kenyan law. The Act puts elaborate procedure for the making and ratification of treaties. Also, Kenya has obligations under the ACHPR, 1981 since 23 January 1992 when Kenya acceded to this Charter. The African Charter guarantees the right to social protection to all people without exclusion or discrimination. Accordingly, this right has been accepted by Kenya by ratification of the Charter.

However, there is still a problem of lack of protection of labour migrants in the area of social security and protection of private individuals who are self-employed or employed in private formal and informal organizations in Kenya. Kenya is a State Party to the *Protocol to the Establishment of the African Court of Justice of 1998.* Despites Kenya's membership to this Court, her citizens and other category of migrant workers[805] may not be guaranteed of their entitlement to social security rights. This is because there is lack of a network of reciprocal agreements for enforcement of social security rights for migrant workers. Also, migrant workers may not directly institute cases in the African Court of Justice unless Kenya has made the declaration under Article 34 (6) of the Protocol to declare acceptance of individuals and NGOs to have direct access to the Court where domestic remedies have been exhausted without successful results. This declaration is lacking.

Complaints to the African Court may be in respect of State and non-state actors' responsibility for human rights violations. The case from the East African Court of Justice (EAC) explains the position of the law in African context. In *Democratic Party (DP) v. The Secretary General of the East African Community (EAC) and the Attorney General of the Republics of Uganda, Attorney General of the Republics of*

[805] Such as private individuals who are self-employed or employed in private formal and informal organizations and undocumented workers.

Kenya, Attorney General of the Republic of Rwanda, and Attorney General of the Republics Burundi,[806] in Appeal No.1 of 2014 the Appellate Division of the EACJ heard an appeal filed by the DP against the Respondents. The basis of the claim was that the referred countries had failed to accept the Competence of the African Court of Justice in line with Articles 5(3) and 34(6) of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights*, 1998.

Although the Appellate Court ruled that the Court had jurisdiction to hear complaints related to violations of the EAC Treaty, 1999 in matters of rule law including human rights, there is still a challenge as to whether social security rights may be enforceable in these regional Courts of Justice. In DP's Appeal case, among other things, the EACJ held that Articles 6 (d) and 7(2) of the Treaty for the establishment of the EAC empower the EACJ to apply the provisions of the African Charter on Human and Peoples' Rights, 1981. The referred articles also empower the EACJ to apply the *Vienna Convention on the Law of Treaties,* 1969 and other relevant international instruments to ensure observance by the Partner States, of the provisions of the EAC Treaty. The referred provisions also empower the EACJ to apply other international instruments to which the EAC Treaty makes reference, particularly the African Charter and other UN instruments.[807]

It may be contended that, within the context of Kenya legal framework and in the EAC in general, compliance with equal treatment of foreign labour migrants with

[806]Appeal from the Judgment of the First Instance Division at Arusha, Tanzania (Jean Bosco Butasi, PJ; Mary Stella Arach-Amoko, DPJ; John Mkwawa, J; Isaac Lenaola, J; and Faustin Ntezilyayo, J., dated 29th November 2013 in Reference No.2 of 2013).

[807] See Para. 69 of the Judgment in the Democratic Party's EACJ Appeal case No. 1 of 2014.

nationals in social security rights (in foreign territory but within the EAC region) requires supra-national judicial authority to adjudicate on matters that the EAC countries have failed to comply with. Such supra-national judicial authority can adjudicate upon violations of human rights where national courts have failed to provide effective remedies that are expected within the framework of EAC law.

The EAC Treaty establishes the EACJ under Article 9. Kenya is State Party to the EACJ but it is faced with some weakness regarding the impact of this Court on domestic jurisdiction. The EACJ interprets and enforces the EAC Treaty as its primary mandate but does not have competence to hear individual complaints of alleged violations of human rights law. Persons may not directly and individually allege violation of the enforceability of the right to social security or principle of equality of treatment under the EAC legal framework to which Kenya and other EAC Partner States have agreed to be bound with.

The community of foreign labour migrants within the EAC is subjected to domestic legal remedies even if domestic remedies may be unsatisfactory. Individual persons are barred from accessing the regional Court of Justice which makes the realization of the right to equality of treatment merely illusory in the context of the wider EAC law. However, in the case of *Katabazi and 21 Others v Secretary General of the East African Community and Another*,[808] a reference was made by individuals aggrieved by State actions of violations of rule of law. In this appeal, the EACJ was moved to determine whether the invasion of court premises by Uganda State security agents to

[808] Katabazi and 21 others v Secretary-General of the EAC and Attorney General of Uganda, Reference No 1 of 2007; [2007] AHRLR 119 (EAC 2007); IHRL 3112 (EAC 2007), [EACJ], 1 November 2007.

re-arrest persons granted bail by the court violated the principle of the rule of law. The Court was asked to determine if such State action amounted to a breach of the State's obligations under the EAC Treaty. Amongst several points of determination reached by the EACJ includes the finding that:

> *"The Court did not have jurisdiction to deal with human rights issues. Jurisdiction with respect to human rights required a determination of the Council and a conclusion of a Protocol to that effect. Neither of these steps was taken".* [809]

The EACJ was of the view that, its powers remained that of interpretation of the Treaty, thus, for this reason it also held that:

> *"While the Court did not assume jurisdiction to adjudicate on human rights disputes, it did not abdicate from exercising its jurisdiction of interpretation under Article 27(1) of the EAC Treaty merely because the Reference included allegation of human rights violation".*[810]

The Court held that the principle of the rule of law contained in Article 6(d) of the EAC Treaty summarizes the concept that 'the overriding consideration in the theory of the rule of law is the idea that both rulers and the governed are equally subject to the same law of the land'.[811]

The holding that the EACJ had no jurisdiction to hear complaints related to violation of human rights was overturned in *Appeal No. 1 of 2014 in Democratic Party's (DP's) Case against the Secretary General of the EAC and the Attorney Generals of Uganda, Kenya, Rwanda and Burundi*. In this case, the EACJ held that it had jurisdiction to hear violations of human rights because Article 6(d) and 7 (2) of the

[809] See paragraph 40 of the Judgment.
[810] See paragraph 47 of the Judgment.
[811] See paragraph 55.

EAC Treaty, 1999 empower the EACJ to apply the provisions of the African Charter, the Vienna Convention, as well as any other relevant international instruments to ensure the Partner States' observance of the provisions of the Treaty. The EACJ went further to state that it had jurisdiction and the duty to ensure Partner States' observance of even other international instruments to which the EAC Treaty makes reference.

In practical terms, the realization of migrants' rights to equal treatment in social security and rights of all EAC citizens in Kenya depends on justiciability of such rights. Under EAC law, the immediate jurisdiction of the EACJ in Article 27(1) of the EAC Treaty 1999 relates to the competence of the Court to interpret and apply the Treaty. The first instance Court of the EACJ had an opportunity to interpret Article 27(2) of the EAC Treaty that it provides for the envisaged jurisdiction of the Court which entails the competence to receive and determine human rights cases. However, in the view of the first instance Court, the envisaged jurisdiction of EACJ was recognized only if there was in the first place, a decision of the Council of Ministers of the EAC to allow it. Such a decision would pave the way for conclusion of a protocol to that effect. The first instance Court of the EACJ was of the view that, since there had not been concluded a protocol to recognize the competence of the EACJ to receive and determine human rights disputes, individuals and groups could not refer such cases to the Court. This position was overturned in an Appeal.

Concerning the implementation of the EAC Treaty and Protocols, Kenya has made significant strides in domestication of the common market protocol. There exist

many areas where Kenya is not compliant to the CMP especially in the areas of free movement of capital, goods and services[812]. The East African Common Market Scorecard (CMS) of 2016 indicates that there are some EAC laws and regulations that hinder the movement of capital in the region. Capital restrictions prevent EAC residents from benefiting from the advantages of increased investment opportunities in the region. Preferential treatment of residents and investors based on nationality exists in Kenya and in other EAC countries. Preferential treatment in services provisions and investment regulations violates the CMP because Article 16 requires application of similar conditions to nationals and non-nationals. Several investment and commercial laws in Kenya violate Article 17 which requires Partner States to accord similar treatment to nationals and non-nationals from Partner States. Article 18 of the CMP emphasizes equal treatment of all nationals in services provision within the Community.[813]

Prior to the commencement of the CMP in 2010, Kenya had a number of laws that governed free movement of foreign nationals including migrant workers. In order to pave the way for implementation of the EAC Treaty and the EAC CMP some restrictive laws were repealed and replaced. Such repealed laws include the *Kenya Citizenship Act* (Cap 170); the *Immigration Act* (Cap 172); and the *Alien Restriction Act* (Cap 173), among others. According to the EAC Common Market Scorecard 2014 and the EAC Common Market Scorecard 2016, social security Funds or Pension Funds within EAC countries are among EAC institutional investors. Both scorecard reports (2014 and 2016) indicate that Pension Funds and insurance funds

[812] See the EAC CMS 2016, pp. 1-232, note 509.
[813] Ibid, pp.30-37.

collectively possess asset base of around USD 22 billion for the East African region. However, analysis of operational challenges, legal settings and gaps or problems of social security schemes in the EAC countries were not made part of both the CMS 2014 and CMS 2016.

In Kenya, some new social protection policies, laws, and several amendments to old laws and regulations have been promulgated to address issues of equality of treatment and prohibition of discrimination of people in Kenyan[814]. However, various Kenya social security and employment laws analysed in *Appendix I Table 5.1* show clear lack of comprehensive legal protection of migrant workers. The subject of equal protection of migrant workers with nationals is either missing in these laws, or if it is provided, it is so unclearly stated.

A guarantee of equal protection of both nationals and international labour migrants in Kenya remains subject of reciprocal social security agreements as provided for in section 64 of the Kenya NSSF Act, 2013. In the absence of such agreements, equality of treatment of cross-border migrant workers remains difficult to achieve.[815]Admittedly, some significant steps have been made by Kenya to modernise its social security and employment legislation. But still the Kenya labour migration policies, social security laws, and labour laws are not sufficiently harmonised to fully comply with the EAC Treaty and EAC CMP as shown in Appendix 1, Table 5.1. There are some specific conditions in Kenya that affect the

[814] See Appendix I Table 5.1 to this thesis.
[815]See detailed discussion in sub-chapter 5.5 of this thesis; see also Appendix 1, Table 5.1 to this thesis.

rights to equal treatment in social security for migrant workers ranging from lack of compliance with the EAC law in terms of legislation and other factors discussed below.

Firstly, harmonisation is gradual and it involves a careful study of what is taking place in other EAC Partner States. Secondly, all EAC countries face various internal political struggles for power which consume much of the concentration of their Governments towards regional integration issues. Thirdly, there exist some economic wars based on nationalism. Practical steps towards deeper regional integration are less emphasized in the EAC Partner States. Fourthly, there is a persistent problem of divergent labour migration policies and laws in the EAC. This makes it difficult to comply with international and regional treaties impacting on equality of treatment of nationals and migrant workers. Fifthly, the slow pace of harmonisation of national laws among other EAC Partner States makes it difficult for Kenya and other EAC Member States to address issues of protection of migrant workers. This is seen in continued disparities legislative framework in Kenya that continues to hinder compliance with equality of treatment of cross-border migrant workers.

The Kenya NSSF Act of 2013 permits a worker to have more than one employment and to contribute to the Fund. This is possible upon agreement between employers with the Board of Trustees on modality of contributions by each employer towards the Fund.[816] In Tanzania this practice is difficult to enforce because the Tanzania law does not permit double formal employment. Only, a single employment is registrable

[816] See NSSF Act, 2013, s.32.

for social security contribution. A beneficiary would benefit from only one insurance source under one scheme. Hence, Kenya and Tanzania may not agree to implement equality of treatment of migrant workers involved in more than one employment. Generally, the operation of social security benefits administration in Kenya and within the EAC countries is still done amidst disparity of national legislations. Absence of comprehensive harmonisation of social security laws in Kenya is aggravated by similar situation in the rest of the EAC countries. This calls for a need to conclude reciprocal social security agreements between Kenya and other EAC countries for benefits of cross-border labour migrants.

5.8 Conclusion

Effective compliance to international standards on equality of treatment of migrant workers and nationals in social security requires steps to be taken. Firstly, Kenya has to ratify and fully domesticate all relevant international conventions on human rights of migrant workers including relevant ILO conventions concerning social security that impact on equal treatment of international labour migrants with nationals. Secondly, Kenya needs to speed up harmonisation of her laws concerning social security and labour matters in the direction of effective compliance with the EAC law even if the pace of other Partner States is slow. Currently legal provisions on harmonisation of social security under Kenya NSSF Act, 2013 envisage the need to coordinate social security schemes of EAC Partner States. In the next chapter, the author examines the subject of compliance to equality of treatment in social security for migrant workers in Tanzania.

CHAPTER SIX

6.0 EQUALITY OF TREATMENT IN SOCIAL SECURITY FOR MIGRANT WORKERS IN TANZANIA

6.1 Introduction

Chapter six examines the legal framework for equality of treatment in social security for migrant workers in Tanzania. The chapter starts with introduction followed by the Political History of Tanzania. A discussion on the empirical dimension of labour migration in Tanzania is provided followed by a discussion on the national social security policies. The chapter proceeds to explain the Tanzania Treaty Practice in an attempt to lay foundation for discussion of the legal framework for protection of transnational migrant workers. It examines the subject of compliance to international law on equality of treatment in social security for Migrant workers by examining selected ILO instruments concerning social security and international human rights treaties relevant to social security protection of international labour migrants.

In assessing the country compliance profile, the treaty ratification status for Tanzania is presented. In so doing, the chapter examines the country's compliance to economic, social and cultural rights for migrant workers given that the subject of social security belongs to economic and social rights. The chapter proceeds to present a discussion on the country compliance profile to relevant regional instruments and in the end, a conclusion is provided.

6.2 Political History

Historically, Tanzania is a Union of two Governments of Tanzania Mainland (formerly Tanganyika) which got her independence in 1961 and the Revolutionary

Government of Zanzibar. The Union was formed in 1964 after the successful Revolution of Zanzibar in 1964 which toppled the Zanzibar Sultanate. Both territories of Tanganyika and Zanzibar were demarcated after the Berlin Conference of 1884-1885 that partitioned the African continent.

Following the defeat of the Germans in the World War I[817], the mainland Tanzania (formerly Tanganyika) was surrendered by Germany to the victorious Allied nations under the *Versailles Treaty* (Treaty of Peace with Germany) and placed under British Mandate.[818] The United Kingdom governed the colony of Tanganyika under the *League of Nations Mandate System*[819] as an *international mandated territory* under the League of Nations[820]. After the establishment of the United Nations in 1945, the Tanganyika territory was turned into a Trust Territory under the *Trusteeship Agreement for the Territory of Tanganyika* in the framework of the United Nations under the Charter of the United Nations of 1945. The United Nations Trusteeship System became effective from 13th December, 1946.[821]

After some nationalistic struggles and campaign for independence, Tanganyika was granted internal self-rule on May 01, 1961 and on December 09, 1961 Tanganyika got her political independence.[822] Tanzania introduced the permanent constitution

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[817] See Townsend, M. E., *'The Rise and Fall of Germany's Colonial Empire, 1884-1918*, Macmillan, New York, 1930, pp.118-120.

[818] This was done on July 20, 1920 through the instrument issued by the League of Nations.

[819] See Seaton, E.E & Maliti, S.T., *Tanzania Treaty Practice*, Oxford University Press, Nairobi, Dar es Salaam, London, New York, 1973, p.12.

[820] See the *Versailles Treaty* (Treaty of Peace with Germany) of June 28, 1919 for the Covenant of the League of Nations, Part I.

[821] See The "Trusteeship Agreement for Tanganyika Territory", United Nations, Trusteeship 25 March 1947, Approved by the UN General Assembly on 13 December I946.

[822] See the Tanganyika Independence Bill, House of Commons Debate of 08 November 196, Vol 648. Order for Second Reading read, Hansard 08 November 1961 (Sitting of Commons).

called the *Constitution of the United Republic of Tanzania, 1977* which has undergone several amendments.[823]

6.3 Empirical Dimensions and Trends of Labour Mobility

Labour migration of peoples in Tanzania can be traced from the era of pre-colonial long distance trade[824] and subsequent eras of slave trade.[825] Also, the Germany colonial occupation of Tanganyika caused some displacement of African natives triggering internal migration. The development of migrant labour in Tanganyika can therefore be traced since 1902 which is the period under which Tanganyika was under the Germany colonial occupation.[826]

A history of cross-border labour migration existed in colonial Tanganyika and involved labour migrants from neighbouring territories of Malawi, Burundi, Rwanda and Mozambique.[827] Foreign labour migrants travelled on foot or in German colonial trucks or motor-lorries for a long distance to work in sisal plantations.[828] The nature of migrant workers in Tanganyika is historically divided into four categories. The "attested labour" is the category of migrant labour that was recruited during colonial rule from labour reservoir and repatriated to their places of recruitment after expiry

[823]The New Constitution Review Act of 2012 envisaged to establish the new Constitution but it has since stalled.

[824]See Sutton, J.E.G., The *East African Coast: an historical and archaeological review*, Nairobi, 1966.

[825] Alpers, E.A., *The East African Slave Trade,* Nairobi, 1967.

[826]Shivji, I.G., Development of Wage-Labour and Labour Laws in Tanzania Circa 1920-1964: A Study in Law, State and Society, A Dissertation Submitted at the University of Dar es Salaam in fulfilment of the requirements for the Degree of Doctor of Philosophy, 1982, p.76.

[827] Ibid, pp.75ff.

[828] See Shivji, I.G., Development of Wage-Labour and Labour Laws in Tanzania Circa 1920-1964: A Study in Law, State and Society, A Dissertation Submitted at the University of Dar es Salaam in fulfilment of the requirements for the Degree of Doctor of Philosophy, 1982, p.96; Cf. Graham, J. D, "A Case Study of Migrant Labour in Tanzania", *African Studies Review*, 1970, Vol. 13, No.1, pp.23-34.

of the contract of employment.[829] Repatriation was, however, done if a migrant worker wished to repatriate.

The *temporary alien labour* was another category that primarily involved internal migrant workers within the territory of Tanganyika who did not make any attestation upon entering oral contracts of service with employers.[830] The third category of migrant workers was the *resident alien labour* that in most cases came from various parts of Tanganyika but did not fit in the standard description of a migrant worker[831]. The owners of estates in colonial Tanganyika used to encourage *resident alien labour* migrants to settle on the estates and construct more permanent structures and create a reliable and sustainable nucleus of permanent labour for cash crop production.[832]

The fourth category of migrant workers in Tanganyika was *non-resident alien labour* that included migrant workers from distant far in neighbouring colonial territories such as Rwanda and Burundi (the former Belgian Mandated territories), Mozambique (Portuguese East Africa territory), Zambia (Northern Rhodesia), Kenya (British East Africa Protectorate) and Malawi (Nyasaland).[833]

According to the 2013 UNICEF *Migration Profiles Report* on the United Republic of Tanzania, the total international migrant stock for the year 1990 was 574, 025

[829] Shivji, pp.45-47.
[830] Ibid, p.47.
[831] Ibid.
[832] See Ezekiel, R.B., Compliance with ILO Conventions Concerning Social Security for Migrant Workers in Tanzania: A Critique with Emphasis on Equality of Treatment. A Dissertation Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Laws (LL.M) of the University of Dar es Salaam, June 2009, p.45.
[833] Wilson, D.B., "Report on a Medical Survey of Sisal Estates", Official EAF (nd).

migrants. The report also shows that in the year 2000, the total international migrant stock was 928,180 migrants. In 2013 the total international migrant stock was placed at 312,778 migrants[834]. In year 2000, Tanzania recorded 700 Asian immigrants employed without appropriate documentation (unlawful) immigrants.[835] In 2003-2005, the United States immigration authorities indicated that 28% of Tanzanians were granted residence status for employment based on preferences from 9% in 2003.

Also, in 2005 about 87% of the 1, 870 Tanzanians naturalised in the United States of America were of working age between 18-64 years.[836] In 2005/2006, it was revealed that 8, 870 Tanzanians were working in 27 foreign countries including professionals such as doctors, engineers, lecturers, nurses, economists, and lawyers.[837] Of these, about 342 Tanzanians were medical experts employed abroad.[838] In 2015, the outward migration from Tanzania was pegged at 294, 531 people which constitutes 0.55% of all citizens of Tanzania who lived outside their country of origin.[839]

Kweka, O., has argued that available literature on labour migration in Tanzania shows a lack of comprehensive and coordinated digital labour migration statistics. This means that, there is still manual processing of labour migration data,[840] and no

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[834] See UNICEF, United Republic of Tanzania: Migration Profiles, Unicef, 2013, p.2.
[835] Eyakuze, A., Foreign Employment in Tanzania: A Paper presented at the National Employment Forum Week, March, 2007, Dar es salaam, Tanzania, p.10ff.
[836] Ibid, Slide 13 of 24.
[837] Speech of the Deputy Minister for Labour, Employment and Youth Development in Parliamentary Session, 2005/2006.
[838] Eyakuze, Slide 3 of 24, note 835.
[839] See Kweka, O., *Mapping of migration data sources in Tanzania*, ACP Observatory on Migration (nd), IOM Publications, pp.1-37, retrieved from <http://www.publications.iom.int/Tanzania.pdf>, accessed 19 April, 2017.
[840] Ibid, pp.1-37, at pp.9-12.

coordinated central electronic database of labour migrants living and working in Diaspora.[841] According to the official document of the report of *Tanzania National Bureau of Statistics (*TNBS) issued in 2016, part of its summary states that:

> This booklet contains information from various statistical publications compiled by the National Bureau of Statistics (NBS), sector ministries, government departments and agencies. The booklet, therefore serves as a brief and comprehensive reference for such crucial statistical information.[842]

However, the report does not include statistical report on total numbers of lawfully engaged migrant workers in Tanzania despites being referred to as comprehensive report. It does not provide data on Tanzanians lawfully working in foreign countries (Diaspora population). It merely shows that in 2013 Tanzania recorded 871 illegal immigrants and in 2014 it had cracked down on 599 illegal immigrants. It also shows that a total of 928 were arrested as illegal immigrants.[843] This proves that labour migration statistics in Tanzania are not seriously documented.

Also, Kweka, O., has argued that Tanzanian national institutions continue to view data on labour migrants as confidential and there is clear lack of freedom in sharing such information.[844] Even in such situations, the available fragmented data estimates show that there is a rising trend in the inflow and outflow of labour migrants in Tanzania which started to increase since 1990s. A decision to migrate for employment within the EAC countries is associated with possession of higher or

[841]See Beegle, K., De Weerdt, J. and Dercon, S. "Migration and Economic Mobility in Tanzania: Evidence from a Tracking Survey", *Review of Economics and Statistics*, 2011, Vol. 93, No.3, pp. 1010-1033.
[842] Ibid, at p. (v) 'Preface'.
[843] Ibid, p.80.
[844]Kweka, p.7, note 839.

special skills in particular education. Thus, the higher (or the special) the skills or education, the higher is the probability of becoming an international migrant.[845] To some extent this serves to explain as to why the EAC CM (Free Movement of Workers) Regulations 2009 provides a table of prioritized educational skills that are specifically wanted or categorized as rare qualifications.

According to the study on *Labour Market Profile in Tanzania and Zanzibar of 2016,* instances of some discrimination against migrant workers are reported to have been occurring in some areas.[846] The labour market profile indicates some acts of unequal treatment between migrant workers and nationals. Some migrant workers employed in senior positions often discriminate against natives or in other incidences, migrant workers face difficulties in seeking legitimate employment in Tanzania.[847] Under the *Non-Citizens (Employment Regulations) Act*, 2015 there are some restrictions on foreign labour migrants in Tanzania. This legislation gives the labour commissioner powers to refuse work permits to foreign labour migrants if a Tanzanian worker with the same skills is readily available for the job sought by a foreigner.[848]

The foregoing brief empirical dimension and practices in international labour migration and protection of migrants' rights in Tanzania suggests that there is a need for comprehensive national and regional policies and laws in order to address challenges of protection of labour migrants' rights in international law.

[845] Ibid.
[846] Labour Market Profile in Tanzania and Zanzibar 2016, Danish Trade Union Council for International Development Cooperation, 2016, pp. 1-38, at p.15.
[847] Ibid.
[848] See Act No. 1 of 2015, s. 11(2).

6.4 Social Security Policy Framework in Tanzania Mainland

Literature shows that institutional provision for the needy poor in the early colonial period was carried out largely by Christian missionaries.[849] The human acts of providing help and care formed the basis of missionary ideals and work in many parts of East Africa.[850] Social protection' and 'social security' during colonial era were not a priority under German colonial policy, and even under British regime. However, the post-world war II socio-economic risks increased the desire of British commitment to the new initiatives for economic development of the African Empire.[851]

The British Empire had some legislation that governed some colonial welfare issues for whites during the British Mandate and trusteeship of Tanganyika.[852] Welfare benefits in form of pension were available only to foreign employees who had been transferred from overseas office of the British Government, and public officers in the service of the Colonial government in Tanganyika.

During the post-Independence period from 1961 to 2003, Tanzania had no clear national social security policy and some few institutions had for a long time enjoyed a monopoly of social security services provisioning in the country.[853] Up until 2003, Tanzania lacked an elaborate social security policy to guide effective functioning of

[849]Iliffe, J., *African Poor: A history*, Cambridge University Press, Cambridge and New York, 1987, p. 195.
[850]Ibid, pp. 195-112.
[851] Ibid, pp. 261-268.
[852]These include Master and Native Servant Ordinance, Cap.78(as amended by Cap 371 otherwise referred to as the Pension Ordinance; the Provident Fund (Government Employees) Ordinance (Cap.51); Provident Fund (Local Authorities) Ordinance, Cap.53; Workmen's Compensation Ordinance (Cap. 262).
[853]See Government of Tanzania: *National Social Security Police 2003*, Government Printer, Dar es Salaam, Ministry of Labour, Youth and Sports Development, 2003, Foreword at (v).

the social security industry. The sector was faced with many structural, operational and policy weaknesses that became inherent in the national social security system.[854]

In 2003 the National Social Security Policy 2003 was adopted thereby taking on board the provisions of the UDHR of 1948[855]. The policy states that social protection is a rights issue.[856] The policy links the concept of social protection with Article 11(1) of the Constitution of the United Republic of Tanzania, 1977. The latter Article provides for the duty of the State authority to make appropriate provisions for the realisation of the person's right to work and to make it possible for social protection of those in dire need (or who are in greater risks.)[857] The cited Article 11 (1) is reproduced in the policy thereby emphasizing, among other things, the person's right to social welfare particularly during old age, times of sickness, disability and other unforeseen contingencies such as incapacity.

The National Social Security Policy, 2003 admits existing gap in social security coverage of the majority of Tanzania because of inadequacy of existing schemes. One of the adopted statements in the policy reads: "*Efforts shall be made to enhance awareness and sensitisation of the society regarding the importance of provision of social security as a right."*[858]Although the policy attempts to underscore the need for portability of social security benefits, it does not specifically mention migrant workers but provides the meaning of *portability* of social security benefits as follows:

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[854] Ibid, Chapter 2.4 of the Policy.
[855] See UDHR, note 54.
[856] See Tanzania: *National Social Security Police 2003*, Chapter 3.3, note 1156, supra.
[857] Ibid, Chapter 3 of the Policy at para 3.
[858] Ibid, Chapter 3.3 of the Policy.

> *"This is a system which ensures that members' accrued benefits are not lost by a member changing employer, changing employment from one sector to another or by migrating from one country to another. The system ensures continuity of benefit rights accrued."*[859]

The policy addresses the need for portability of benefits among migrant workers so as to eliminate the loss of their earned contributions upon migration outside the country. The policy in chapter 2.4 addresses existing gap in a narrow policy statement on "*portability of benefits"* as follows:

> *"There is no established mechanism that can allow benefit rights of a member to be transferred from one scheme to another. This results in employees losing some of their benefit rights when they move from one sector to another."*[860]

The words 'from one scheme to another' should have been followed by the words: *"and from one country to another."* The latter words are missing in paragraph 2.4 (iv) of the policy. The subject of conclusion of reciprocal social security Agreements for transfer of benefits is also another aspect that is addressed under the *National Social Security Policy, 2003*. In sub-chapter 3.7 the Policy reads:

> *"Labour mobility across nations has become a common phenomenon due to globalisation and foreign investment there by requires people to work and live in different countries; and hence find themselves (sic) contributing to various social security institutions. Lack of a mechanism for transfer of benefit rights across nations may result into some members losing their rights or being unable to qualify for better benefits".*[861]

The policy statement from the above policy issue reads:

> *"Legal mechanisms shall be developed to provide for reciprocal agreements with other countries for transfer of social security benefits across nations."*[862]

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[859] Ibid, see Glossary to the National Social Security Policy, 2003; also Chapter 2.4 of the Policy.
[860] Ibid, Chapter 2.4 (iv) of the Policy.
[861] Ibid, Chapter 3.7 of the Policy.
[862] Ibid.

One may argue that the National Social Security Fund Act, 1997 already provides for a legal mechanism for possibility of conclusion of reciprocal social security agreements between Tanzania and other nations for benefits of migrant workers.[863] The National Social Security Policy 2003 does not point out any weaknesses in the existing legal mechanism provided for under section 92 of the NSSF Act, 1997.[864] It is not clear why the policy describes the need for legal mechanism to create reciprocal agreements while it already exists under the NSSF Act. Further, the National Social Security Policy in sub-part 6 of chapter 2.6 mentions one of the rationales for the social security policy as being to:

> *"Establish a social security structure that is consistent with the ILO standards but with due regard to the socio-economic situation in the country".*

However, while the social security structure in Tanzania tends to implement certain standards contained in the ILO social security conventions, some country practice seem to be inconsistent with the ILO standards. Lack of positive policy towards ratification of all ILO conventions concerning social security contradicts the national social security policy. Tanzania appears to follow unwritten policy of non-ratification of all social security conventions. This is because all policy statements contained in the National Social Security Policy of 2003 do not address the persistent problem of failure of ratification of social security conventions. It is this lack of ratification which denies migrant workers' the benefits of equal treatment in social security while employed in foreign country.

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[863] See the Tanzania *NSSF Act*, 1997, s. 92.
[864] Ibid, s.92 (1) and (2).

The Tanzania *National Social Security Policy of 2003* describes existing barriers that disqualify Tanzanian migrant workers abroad and foreigners in Tanzania from obtaining social security benefits on equal footing with nationals. These barriers are not yet solved even under the *National Social Security Fund Act, 1997* which provides for reciprocal social security agreements. Therefore, there is still a problem of loss of accrued social security rights among cross-border labour migrants because of lack of mechanism for transnational portability of benefits.

In many cases, foreign labour migrant spend periods between 6 months to one year or between 2-5 years in employment in foreign territories. As a result, earned contributions by such migrant workers in various countries of employment may be lost as a result of their constant cross-border labour mobility. This is because applicable national legislation that establishes statutory or mandatory contributory schemes in Tanzania put 15years statutory qualifying condition for obtaining pension benefits. The described condition stands as a barrier to obtaining pension benefits because different countries impose different qualifying conditions. However, this may be solved by conclusion of bilateral or multilateral treaties for coordination of social security. In this case, the law relating to international treaties may apply. The foregoing analysis leads us to a discussion of the Tanzania treaty practice and some applicable theories in international law.

6.5 Tanzania Treaty Practice

6.5.1 Concept of Treaties and Some Theories in International Law

In chapter 5 of this thesis, a discussion of the Kenya treaty practice was made. The term “treaty” was defined from the context of the *Vienna Convention on the Law of*

Treaties (VCLT), 1969[865] which came into force on 27th January, 1980. In principle, the province of the VCLT is that it is not a complete code of the law of treaties because other matters have been excluded from its jurisdiction. Such matters include some agreements between states that are regulated by national law of one of the parties or by some other national law system chosen by the parties.[866] This implies that, not all agreements concluded by Tanzania and other States are necessarily governed by international law.

From its provisions and limitations, one must realise that the VCLT declares existing law and also provides evidence of emerging norms of international law based on the fact that international law is not static but dynamic. The VCLT deals with conclusion of treaties, termination of treaty relationships, and effects of breach of treaty obligations.[867] Matters of State succession, treaties between States and non-State organisations, the effect of war on treaty obligations and relationships are outside the province of the VCLT.

The *Concise Oxford English Dictionary* defines a treaty as *a formally concluded and ratified agreement between states.*[868] A Web definition of treaty loosely defines it as an inclusive term to mean a *convention, accord, protocol and agreement.*[869] However, since the formation of the United Nations in 1945, the term treaty and

[865] See Sub-chapters 5.5 and 6.5 of this thesis on the meaning of a "treaty"; the VCLT, 1969, Art. 2(1) (a).
[866] Seaton & Maliti, p.19, note 819.
[867] Brownlie, I., *Principles of Public International Law*, 7th ed., Oxford University Press, Oxford, 2008, p.608.
[868] *Concise Oxford English Dictionary*, 11thedn, Oxford University Press, London, 2004.
[869] Glossary of Treaties, retrieved from < http://www.conventions.coe.int/Treaty/>, accessed 19 April, 2017.

related concepts or terms have carried slightly different conceptual meanings in international law.[870]

International law may be described as the universal system of rules and principles concerning the relations between sovereign States, and relations between States and international organisations such as the United Nations. Blay S., has argued that international law deals with international disputes, hence, like any other system of law the role of international law is to regulate relations between sovereign States and help to contain and avoid disputes in the first place.[871] This is why the substantial part of international law deals with dispute avoidance through the day-to-day regulation of international relations instead of placing major concern on dispute resolution.[872]

In order to fully comprehend international law it is vital also to define *municipal law*. Shwarzenberger, G., defines municipal law as 'the internal (domestic) law of States which regulates the conduct of individuals and other legal entities within their domestic jurisdiction'.[873] Between the two legal systems of *international law* and *municipal law*, there lie two theories of 'dualism' and 'monism' regarding treaty practice. The terms: 'monism' and 'dualism' describe two theories of the relationship between international law and national (municipal) law. The 'monist'

[870] See Borchard, E., "Treaties and Executive Agreements a Reply", *Yale Law Journal*, 1945, Vol. 54, pp.616-664.
[871] Blay, S., 'The Nature of International Law', In: Blay, S., Piotrowicz, R., and Tsamenyi, B.M., (eds), *Public International Law: An Australian Perspective*, Oxford University Press, Oxford, 2nd ed, 2005, p 3
[872] Ibid,
[873] Shwarzenberger, G., *A Manual of International Law*, (4th edn), Stevens and Sons Ltd, London, 1960.

theory states that the internal (domestic) and international legal systems form a unity.[874] Thus, both national legal rules and international rules that a sovereign State has accepted to be bound with, under any treaty, do determine as to whether actions are legal or illegal.

Under the *monist theory,* all law is part of a universal legal order and regulates the conduct of the individual State. Under the *monist theory,* international law does not need to be translated into national law such as by way of domestic legislation incorporating the provisions of the international treaty into the domestic legal order[875]. Monist theory permits national judges and citizens to directly invoke and apply international law as if it were national law because both international law and municipal law is part of the same legal order.

Under monism, a national judge has jurisdiction to declare a national rule or legal practice as invalid if it contradicts international rules, if in that jurisdiction the international rule takes precedence. Some monist theorists, though, consider that international law prevails over domestic law if they are in conflict with domestic law. Other scholarships contend that conflicting domestic law have some overriding operational effect within the domestic legal system well in exclusion of the international law.[876]For example, it was once decided in the Kenya Court of Appeal for East Africa in 1970 in the case of *Okunda v. Republic*[877] that:

> *"Even if the treaty was to be part of both national and international law, yet its provisions could not supersede those of the Constitution of Kenya in case*

[874] Stratton, J., *Hot Topics in International law*: *Legal Issues in Plain Language*, No. 69, Legal Information Access Centre (LIAC), New South Wales, 2009, p.3.
[875] Ibid.
[876] See the case of *Okunda v. Republic* (1970) EA 453 in which the Court of Appeal of Kenya in an attempt to interpret the first Constitution of Kenya (1963).
[877] (1970) EA 453.

> *of conflict. Any provision of the treaty that was made part of municipal law was to be rendered void if it contradicted the provisions of the Constitution of Kenya."*

The 'dualist theory', on the other hand holds that international law and domestic law are separate bodies of law which inherently operate independently of each other.[878] The dualists emphasise the difference between national and international law, and require the translation of the latter into the former. The international legal instruments such as *treaties, conventions, protocols or accords* do not have force of law without first being domesticated by internal or domestic legislations.

Dualist theory requires that before it can affect individual rights and obligations international law has to be national law as well, or else it is not law at all.[879] Without domestication, international law does not exist as law, and rules or principles of international law cannot operate directly in domestic legal order. The main differences between international and domestic law are considered to be the sources of law, its subjects, and subject matter[880].

The collective will of States is argued to be the source of mandate of international law and the subjects of international law are the States themselves while the relations between States is their subject matter. On the other hand, the will of the sovereign or the State is the source of domestic law and its subjects are the individuals within the sovereign State. Its subject matter is the relations of individuals with each other and with their sovereign government.

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[878] Stratton, note 874.
[879] Atkin, J., Atkin, B., "Monism and Dualism in International law", in Akehurst, M., *Modern Introduction to International law*, Harper Collins, London, 2015, p.45ff.
[880] Stratton, note 874.

Under dualist jurisdictions, if a state accepts a treaty but does not adapt is national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then, it violates international law. Therefore, without domestication of the international conventions or treaties one cannot claim that the treaties have become part of national law. In effect, the citizens cannot rely on such treaties and judges cannot apply them in resolution of domestic disputes even if national laws were in violation of such treaties. Such national laws which violate international treaties remain in force unabated.

Under the dualist theory, international law confers no right cognisable in the municipal courts and national judges may not automatically apply international law before it is first domesticated.[881] The legal theory of dualism is that it is only insofar as the rules of international law are recognized as included in the rules of municipal law that they are allowed in municipal courts to give rise to justiciable rights and obligations upon States.

It remains a general international legal rule that the supremacy of international law is a rule in dualist systems as it is in monist systems.[882] If international law is not directly applicable as is the case in dualist systems, then it must be "translated away".[883] By the phrase "translated away" essentially refers to elimination or modification of contradictory domestic legislation in order to conform to international law. Again, from a human rights point of view, to which the social security rights and equality of treatment for migrant workers is also part of, if a

[881]Atkin, J.R and Atkin, B., note 879.
[882]Ibid.
[883] Ibid.

human rights treaty is accepted for purely political reasons, and states do not intend to fully translate it into national law or to take a monist view on international law, then the implementation of the treaty is very uncertain.

Practices among states towards dualist jurisdictions have necessitated a continuous screening of all subsequent national laws for possible incompatibility with earlier international law and following States election to ratify international treaties.[884] The foregoing discussion leads us to examine the post-Independence Succession to Multilateral Treaties and current treaty practice in Tanzania.

6.5.2 Post-Independence Succession to Multilateral Treaties and Current Treaty Practice in Tanzania

Seaton and Maliti[885] have laid the foundation of Tanzania's treaty practice under international law since 1961. The authors have argued the *Nyerere Doctrine of Succession of Treaties* on pre-independence engagement of reviewing membership of international organisations, bilateral and multilateral treaties in order to align itself to international legal obligations in a manner that was fair, meaningful, and which served the interests of an independent Tanganyika and aspirations of its peoples. Under the doctrine, the Nyerere Declaration with regard to multilateral treaties states as follows:

> *As regards these, therefore, the Government of Tanganyika proposes to review each of them individually and to indicate to the depository in each case what steps it wishes to take in relation to each such instrument- whether by way of confirmation of termination, confirmation of Succession or accession. During such interim period of review any party to a multilateral treaty which has prior to independence been applied or extended*

[884] Stratton, note 874.
[885] Seaton and Maliti, 200p, note 819.

> *to Tanganyika may on the basis of reciprocity, rely as against Tanganyika on the terms of such treaty".*[886]

The most of the multilateral treaties fell within one or other of the two main categories. First category concerns treaties dealing with technical and non-political matters in which international co-operation was desirable to safeguard certain common standards or procedures which were made enforceable *inter parte.*[887] The second category concerns treaties constituting membership in an international organisation and binding the parties to its goals and principles.[888]

With regard to international treaties concerning international organisations, such as the ILO, Seaton and Maliti argue that, Tanganyika would not, it seemed, feel bound by the alleged succession or otherwise to continue membership of organisations conceived in terms of benefit not of the territory in respect of which they were concluded, or were applied.[889] Taking an example of the International Labour Organisation's Constitution, 1919 in Articles 1, 3, and 35 paragraphs 1 to 8 informs of non-automatic succession to the ILO conventions by its member States. The framework of the Organisation requires a declaration from the new State that international obligations relating to the ILO previously in force in the territory will continue to be respected or otherwise.[890] This informs that the *Nyerere Doctrine* of treaty succession was built around the exercise of dualist theory. This means that once an international treaty or convention is ratified, the same does not become

[886] Ibid, p.76ff, note 819.
[887] Ibid, p.78.
[888] Ibid.
[889] Ibid, p.79.
[890] Ibid, pp.79-82.

directly applicable or enforceable in the courts of Tanzania as if it were municipal law.

Domestication of an international treaty in Tanzania under the dualist system of treaty practice takes place through enactment of an implementing legislation pursuant to the Constitution. Article 63 (3) of the Constitution of the United Republic of Tanzania, 1977 (as amended)[891] gives the powers of ratification of international treaties to the National Assembly. When an international treaty is ratified by the National Assembly, an implementing legislation must be enacted in order to make the ratified treaty become part and parcel of the Act of Parliament. It is at this stage that municipal courts can apply the provisions of a treaty or convention to which Tanzania is a party.

Ratification and subsequent incorporation into domestic legislation confer rights to the citizens and the national judges to invoke the provisions of the ratified treaty. This means that domestic courts can then determine the rights of individuals based on the ratified treaties. The next sub-part below investigates the status of ratification of ILO conventions which in one way or another have an impact on provision of social security for migrant workers in Tanzania.

6.6 Legal Framework for Protection of Migrant Workers

6.6.1 Constitutional Guarantee to Equality of Treatment in Social Security

The Constitution of the United Republic of Tanzania, 1977[892] (as amended) presents a mixed state of protection of migrant workers. The Constitution of Tanzania in

[891] See *Constitution of the United Republic of Tanzania, 1977,* Art.63 (3).
[892] See Constitution of the United Republic of Tanzania, 1977.

Article 9(e) read together with Article 22 does entrench the fundamental rights of human beings including the rights in matters of labour relations and the right to work. Sub-article (1) of Article 22 provides: *"Every person has a right to work"*, but also, Article 23 (1) of the said Constitution provides:

> *"Every person, without discrimination of any kind, is entitled to remuneration commensurate with his work, and all persons working according to their ability shall be remunerated according to the measure and qualification for the work".*

It is the State policy directives and a national programme by all authorities towards, among others to ensure that human dignity and other human rights are respected.[893] The Constitution in Article 9(f) entrenches the upholding and respect for human dignity as one among the State policy directives in compliance with the United Nations Declaration on Human Rights, 1948. The Constitution in Article 9(h) discourages discrimination as a vice to be eradicated in society. The right to equality of all human beings is also entrenched in Article 12 and Article 13 of the Constitution.

The broad based basic rights of human beings are essentially, entrenched in Articles 12 to 24 of the Tanzanian Constitution. The provision of sub-article 5 of Article 13 of the Constitution specifically prohibits discrimination based on the person's *"nationality* as among the prohibited grounds of discrimination.[894]The right to social welfare aspect in which social security is one of the implied constitutive elements is also provided in Article 11(1) of the Constitution of Tanzania, 1977 (as amended) which provides thus:

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[893]Ibid, Art.9 (a).
[894] Ibid, Art. 13(5).

> *11(1)"The State authority shall make appropriate provisions for the realisation of a person's right to work…and social welfare at times of old age, sickness or disability and in other cases of incapacity. Without prejudice to those rights, the state authority shall make provisions to ensure that every person earns his livelihood".*[895]

From the above cited provision, the *Constitution of the United Republic of Tanzania*, 1977 does not specifically and directly provide for the right to social security as a category of fundamental human rights under the framework of Bill of Rights. Both the *Tanzania National Social Security Policy* of 2003 and the *Constitution of the United Republic of Tanzania* describes the right to social security as falling in the category of directive principles of State policy. The latter implies that social security is within the national aspirations for its citizens but not a category of rights falling under the Bill of Rights.[896]

In prohibiting discrimination and providing for inclusivity of protection of all persons under the constitution, the words used in the Constitution in Article 11, Article 12, Article 13, Article 14 and Article 15 are: "every person"[897], "any person" [898]or "all persons".[899] The meanings of these words may be elaborated in accordance with statutory rules of interpretation such as *textual literalism* which emphasizes taking the words by their literal meaning. This requires not straying too far from the text itself by unnecessarily importing extraneous considerations of text

[895]Ibid, Art.11 (1).
[896] Ibid, Art.9, see also *Tanzania National Social SecurityPolicy 2003*, at chapter 3.
[897] Ibid, Art.11(2); Art. 12(2); Art. 13 (3); Art.14; Art. 15(1) etc.
[898] Ibid, Art.13 (4).
[899]Ibid, Art.13 (1).

and policy unless compelling reasons exist and are clear.[900] For instance, whenever the words "every person"[901], "any person" or "all persons" are used, the first line of approach to reach at the meaning of these words is to look at their plain or literal meaning. In this case, the dictionary meaning of the words is adopted, unless the attached meaning within the context of the provisions renders the whole provision absurd or incomprehensible.[902]

Therefore, the above 'marked' words and as used in the interpretation of the Constitution clearly convey the meaning of inclusivity rather than exclusivity. It means a migrant worker, any foreign immigrant, a refugee; a stateless person or any national would be included in the protection guaranteed under the Constitution of Tanzania by the use of "every person", "any person" or "all persons" unless there is express exclusion of such persons based on their nationality from enjoyment of certain guaranteed rights.

All acts of discrimination of one person against another on grounds prohibited by the Constitution of Tanzania amount to violation of Article 13 (4) of the Constitution of Tanzania, 1977. The said Article provides: "*No person shall be discriminated against any person or any authority acting under any law or in discharge of the functions or business of any state office"*. This provision, and other constitutional provisions already discussed above promote the aspect of equal treatment of all human beings. Impliedly, all acts of discrimination of foreign

[900] See Kirby, Michael, "Statutory interpretation: The Meaning of Meaning", *Melbourne University Law Review,* 2011, Vol. 35, No.1, 113ff.
[901] See Art.9 (e).
[902] Kirby, pp.113ff, note 900. See also Jonstone, Q., "An Evaluation of the Rules of Statutory Interpretation", *Kansas Law Review, 1954-1955,* Vol 3, No. 1, pp. 171-197.

nationals including migrant workers within the ambit of basic constitutional principles are prohibited under the Constitution of Tanzania, 1977. The next discussion looks at some pieces of social security legislation and related laws in Tanzania as to their status in protection of migrant workers on equal footing with nationals in social security rights.

6.6.2 Legislation Impacting on Protection of Migrant Workers' Rights to Equal Treatment in Social Security

The current social security legislation in Tanzania is traceable from the period of the British Mandate (1920s-1946) and the Trusteeship period (1946 -1961) as well as from the period of the East Africa High Commission (1948-1961), the East African Common Services Organisation (1961-1967),[903] and the first EAC (1967-1977). After the independence of Tanganyika in 1961, some pieces of social security laws were inherited from the British colonial administration in Tanganyika, Kenya and Uganda.[904] Since her independence Tanzania enacted several pieces of social security legislation and has been amending and repealing these laws.

One of the post-independence social security legislation was the *Tanzania National Provident Fund (NPF) Act of 1964* which was amended in 1975[905] and continued to operate until the enactment *of National Social Security Fund (NSSF) Act in 1997*.[906]The NSSF Act, 1997 in section 92 contains a provision on possible

[903] Established by East African Common Services Organisation Ordinance, No. 26 of 1961.
[904] See for example *the Master and Native Servant Ordinance*, Cap 78 as amended by Cap 371; *the Provident Fund (Government Employees) Ordinance*, Cap 51 of the Laws of Tanzania (repealed); the *Provident Fund (Local Authorities) Ordinance*, Cap.53 of the Laws of Tanzania (repealed); the *Workmen's Compensation Ordinance*, Cap 262 of the Laws of Tanzania (repealed), and the *Severance Allowance Act*, 1962 (repealed)[904] to mention only some.
[905] Act No. 2 of 1975, Cap. 564 of the Laws of Tanzania.
[906] Act No. 28 of 1997(Cap 50 RE 2002) of the Laws of Tanzania.

conclusion of reciprocal social security agreements whereby migrant workers from Tanzania working abroad and those from abroad working in Tanzania may be protected through coordination arrangements.[907] The purpose of the NSSF Act is to reduce or totally eliminate barriers that disqualify a migrant worker from obtaining social security benefits upon migration from one country to another.

The NSSF Act, 1997 does not define the term "migrant worker", but the definition of an employee is contained in section 2 of Act. This section broadly interpreted may include, though remotely, protection of a migrant worker as one of the envisaged persons covered in the meaning of an employee under the Act. The section refers to an *employee* as including any person residing permanently in Tanzania but is employed outside Tanzania.[908] This is an expression which is intended to capture a a Tanzanian migrant worker (emigrant) employed outside the country although has permanent residence in Tanzania. While there is no any mention of the word "migrant worker" under the NSSF Act, section 92 of the said Act requires the Government to conclude reciprocal social security agreements for benefits of workers involved in cross-border labour mobility in different countries.[909] Section 92 of the NSSF Act, 1997 (as amended) provides:

> *(1) The Government of Tanzania may enter into a reciprocal agreement with the Government of any other territory in which a Scheme similar to the Scheme has been established and there may be included in the agreement the following provisions-*
> *(a) that any period of insurance of such scheme in the territory of that Government may be treated as a period of insurance on the Scheme and vice versa; and*

[907] Ibid, s. 92 (1) and (2),
[908] Ibid, s.2.
[909] Ibid, s.92 (1).

> *(b) that, subject to such conditions as may be agreed, any amount standing to the credit of an insured person under this Act who works for any employer in the territory of that Government may be transferred to his credit in such Scheme, and vice versa.*
> *(2.) Any reciprocal agreement made under this section may modify, adapt or amend the provisions of this law to give effect to the agreement."*

Thus, the NSSF Act permits entering into arrangements for transnational transferability of benefits in case of relocation of a migrant worker from one country to another. Broadly interpreted, section 92 of the NSSF Act permits any modification or adaptation or amendment to the provision of the Act so that in case there has been concluded any social security agreement which requires such adjustments of the law, then such adjustments should be made in order to implement the agreement without difficulties. Arguably, the NSSF Act of 1997 charges upon the Government to take steps to negotiate and conclude reciprocal agreements for enabling *equality of treatment* between nationals and migrant workers on reciprocating basis. Section 92 (1) (b) creates legal basis for making agreement for transferability or exportability of benefits to the migrant worker's country of origin beyond the Tanzania national borders or to a third country (where a regional community has established common citizenship).

However, the provisions of section 92 of the NSSF Act are sketchy in the sense that there is not detailed comprehensive mechanism for transferability or exportability of benefits in the EAC region for benefit of migrant workers, and beyond the EAC. Also, the NSSF Act lacks specific provision on regulation of tax liabilities or non-discrimination for exemption from taxes, stamp duty, registration costs of social security benefits claims or specific template or forms/documents applicable during

cross-border transferability of benefits to a migrant worker in another county. This could have been addressed under the NSSF Act or through separate regulations supposedly to be made under the Act.

Alternatively, such administrative arrangements may be placed in a negotiated EAC multilateral social security agreement between Tanzania and other EAC Partner States. Such arrangement would provide as to whether there should be any exemption from charges, taxes, or registration costs for processing benefits transfer beyond borders. All these aspects are not provided in the social security laws. The NSSF Act in section 47 imposes restriction against an insured person from receiving more than one benefit at any one time even if he qualifies for more benefits than one at the same time.

The law directs for payment of only one benefit out of the benefits which is the highest. As such, effective reciprocal social security agreements to provide for strong legal mechanism that enables payment of benefits beyond national borders is still required in Tanzania and in the EAC as a region. This would require social security coordination mechanism through mutual administrative assistance between migrants' sending and receiving countries for managing cross-border payment of benefits.

In 2008 Tanzania enacted the *Social Security Regulatory Authority Act, 2008* which has regulated and tried to harmonise domestic social security laws and operations. However, some specialised schemes such *Workman's compensation Act* which offer employment injury benefits has been under challenges because the same benefits have been offered under the NSSF Act, 1997 thereby creating a spirit of competition.

The SSRA seems to have recommended for merger of such social security schemes in order to do away with duplicity of benefits provisioning.

Such EAC Agreement on social security would stipulate rules applicable in maintenance of acquired social security rights and rights in the course acquisition as well as determining the applicable legislation in each respective benefit and for enabling coordination of different social security systems. However, the examination of Tanzania's social security legal framework under chapter 6 of this study has not found any enforceable multilateral social security agreement for cross-border exportability of benefits to which Tanzania is a Party with other EAC countries.

At the same time, the EAC CMP directs that all nationals of the Partner States choosing to migrate to other Partner State for employment as migrant workers are to be registered for social security contribution under respective national laws of host Partner States as provided for in Article 13 (3) (b) of the CMP. This is the rationale for the CMP directing all Partner States to review and harmonise their national social security policies and law and systems. The objective being to provide for free movement of labour within the Community as per Article 12(1) and to provide for social security for self-employed persons who are citizens of other Partner States as provided for in Article 12(2) of the EAC CMP.

The undertaking made by the EAC Partner States under the CMP to harmonise their national social security laws and policies resonates with the need for negotiating an EAC region-wide multilateral social security treaty that would allow migrant workers to meet prescribed social security benefits qualifying conditions such as

meeting minimum periods of contributions. The aspect of qualifying conditions originates from the fact that ordinarily under the EAC regional organisation's framework migrant workers have limited number of years of stay in one country of employment before migrating to another country or returning to their home countries.

Therefore, the foregoing discussion concerning equality of treatment of migrants with nationals in social security rights under the framework of the NSSF Act, 1997 (as amended) demonstrates existing country conditions that may render a migrant worker fail to meet qualifying contribution conditions for benefits entitlement. This creates likely situations for a migrant worker to lose advantage of enjoying equal treatment with nationals in benefits accessibility. Therefore, the foregoing analysis partly answers the second research question which had asked: *Which specific conditions in Kenya's and Tanzania's social security legal frameworks that affect the rights to equal treatment in social security for migrant workers?*

Another social security law that contains provisions on equality of treatment in social security is the Parastatal Organizations Pensions Scheme Act, 1978 (the PPF Pensions Fund Act, 1978[910]which since 2012 was amended to be named as PPF Pensions Fund Act *in lieu* of the former name of Parastatal Organisations Pensions Fund Act. Through the *Social Security Laws (Amendments) Act, No.5 of 2012* the PPF Pensions Fund Act, 1978 underwent several amendments in order to cater for

[910] See PPF Pensions Fund Act, Act No.14 of 1978 (Cap. 372 RE 2002) (as amended by the *Social Security Laws (Amendments) A*ct, No.5 of 2012of the Laws of Tanzania.

pension of employees in both Parastatal Organisations[911]and in private sector as opposed to its original confinement to Parastatals only. The PPF Pensions Fund Act, 1978 was amended in section 6 vide the provisions in section 123 (4) of the *Social Security Laws (Amendments) Act, No.5 of 2012* and the amendment provides that: "*an employer of a non-citizen shall remit contribution for that employee in accordance with the provision of the Act*.[912]

The foregoing implies that the PPF Pensions Fund Act permits registration of foreign immigrant workers to join the Fund as contributing employees. The word 'non-citizen' includes any category of migrant worker formerly employed in Tanzania. Hence under the PPF Pensions Fund Act (as amended), permits a migrant worker to join the Fund and enjoy benefits on equal basis with nationals.

As to reforms on social security perspectives regarding 'pension as a right', section 99 of the *Social Security Laws (Amendments) Act, No. 5 of 2012* repealed the previous section 25 of the PPF Pensions Fund Act and replaced it with the following provision:

> *25. Except for collateral, home mortgage or an order of any competent court for the periodical payment of sums of money towards the maintenance of dependants of the member to whom the periods or gratuity has been awarded, pension, gratuity, survivor's benefit or any other benefits conferred to a member or his dependants under this Act shall be payable as a matter of right and no person or authority may reduce, withhold or freeze such benefits."*[913]

[911] The phrase 'Parastal Organisations Pensions Fund' has since been repealed and replaced by the "PPF Pensions Fund".
[912]See PPF Pensions Fund Act, s.6 (as amended by the Social Security Laws (Amendments) Act, No.5 of 2012 in section 123 (4).
[913] See The *Social Security Laws (Amendments) Act*, No.5 of 2012, s. 99.

Save for the exceptions stated in sections 25 of the PPF pensions Fund Act, any benefits under the Act are conferred to a member or his dependants as of right. The Act provides for social security as of right and not as of a privilege, but it lacks legal mechanism for portability of benefits outside Tanzania neither within the EAC nor beyond the EAC. The Act does not provide as to whether exportability of benefits is guaranteed for foreign workers who terminate employment in Tanzania and emigrate to another country within the EAC or beyond without any prospects of return.

The Act does not provide for legal mechanism for transnational transferability of benefits, totalisation of periods of contributions in different countries and equality of treatment in the conditions of cross-border mobility of registered immigrants under the scheme. Even the international coordination of benefits payment is not provided. Similarly, the other social security legal framework that affects the right to equality of treatment between nationals and migrant workers in Tanzania may be examined under the *Public Service Retirement Benefits Fund (PSPF) Act*, 1999.[914]When the PSPF Act was enacted in 1999 it converted a section or part of employees of civil service under non-contributory into contributory in the Public service Pension Fund. Previously, this legislation excluded coverage of employees from private sector and therefore, a migrant worker never became a member in this scheme. Subsequently, social security reforms were made in the country from the year 2003 to 2015.

The referred reforms led to a plethora of amendments to all social security laws in Tanzania in a bid to implement the National Social Security Policy of 2003. Notable development was the enactment of the *Social Security Regulatory Authority (SSRA)*

[914] Act No.2 of 1999, Cap.371 RE 2002 of the Laws of Tanzania.

Act, No.8 of 2008 which established the social security sector regulator in Tanzania. The establishment of the social security sector regulator became the cradle for further major amendments that were made in 2012 to all major pieces of social security legislations including the present PSPF Act of 1999.

Following the establishment of the social security sector regulator in Tanzania it was harmonised that for a contributing member to qualify for pension in all schemes, such beneficiary must have contributed for a period of 15 years or more, but also this would be in addition to fulfilling statutory voluntary and compulsory retirement age among other conditions.[915] This condition is reinforced further under rule 5 of the *Social security schemes (Pension Benefits Harmonisation Rules),2014* made under sections 6, 25 and 36 of the SSRA Act, 2008 (as amended).[916] These harmonization rules, 2014 do not extend beyond Tanzania national borders nor do they facilitate cross-border payment of benefits.

The described harmonization rules provide for harmonized membership and contribution records and indexation systems between national local schemes. However, they do not address the subject of regional wide legal mechanisms for regulating social security provisioning in the context of intra-regional labour mobility within the EAC. There are also *Social Security Membership Registration Guidelines, 2013* and the *Social Security Schemes (Annual Reporting) Guidelines of 2014* passed by the SSRA. These r regulations require all social security schemes in Tanzania to report to SSRA on implementation progress of internal rules. These

[915] See the *Social security schemes (Pension Benefits Harmonisation Rules), 2014* made under sections 6, 25 and 36 of the SSRA Act, No. 8 of 2008 (as amended), Rule 5.
[916] Ibid, rule 5.

rules are territorial in application and they do not address the lack of region-wide social security coordination instruments for portability of benefits within the EAC.

The *Social Security Laws (Amendments) Act, No. 5 of 2012*[917] under section 122 it amended section 5 of the PSPF Act, Cap 371 by repealing it and it introduced the right to any employee who is in the formal and informal sector but who is yet to be registered as a member or insured person under any other scheme to choose to become a member of the Fund under the PSPF Act. By this expansion of eligible contributors, any self-employed national from other EAC Partner States as provided under Article 12 (2) and Article 13 (3) (b) of the EAC CMP and any other country lawfully working in Tanzania would be eligible to join the Fund.

These reforms were in response to identified gaps under the Tanzania *National Social Security Policy of 2003* regarding lack of coverage of the majority of the population but also addressing the regional integration issues such as the free movement of workers and the rights of self-establishment under EAC CMP.[918] However, still a migrant worker or a foreign worker is neither mentioned nor expressly guaranteed of his past earned contributions in different countries under the PSPF Act.

Arguably, though, by virtue of the referred *Social Security Laws (Amendments) Act*, 2012 which also amended the PSPF Act, a migrant worker who is self-employed or formally employed in Tanzania in private sector may not be excluded from becoming a contributor to the PSPF scheme. However, the gap that exists under is

[917] Act No.5 of 2012.
[918] See Government of Tanzania, *National Social Security Policy 2003.*

that the Act does not have legal provisions for cross-border exportability or transferability, totalisation of periods of insurance in different countries (adding up benefits earned from Tanzania and in other different EAC countries). Also, the PSPF Act does not have a provision for possible conclusion of bilateral social security agreements for benefits of international labour migrants in Tanzania and those working beyond Tanzania.

Such lack of provisions for mutual administrative cooperation between schemes of different countries and assistance in benefits administration for transnational labour migrants creates the state of uncertainty in the legal framework for protection of international labour immigrant under the Act. Therefore, a migrant worker who may prefer to join this scheme would also need to explore carefully the type of social security guarantee that is provided under this Act. This would involve looking at all risks taking into account the guaranteed benefits, conditions for accessibility of benefits, mechanism of facilitation of payment of benefits to beneficiaries residing beyond Tanzania to other countries of future employment.

Another social security law that is examined in order to establish existing conditions for implementation of the principle of equality of treatment and protection of international labour migrants in relation to national workers is the *National Health Insurance Fund (NHIF) Act*, 1999.[919] When the Act was first enacted, it was generally intended to create a scheme of contributory health insurance coverage to insure employees mainly employed in the public service of the Government of Tanzania. The original scheme did not envisage coverage of private sector

[919] Act No. 8 of 1999, Cap 395 of the Laws of Tanzania.

employees including migrant workers. However, following the reforms introduced in the social security sector since 2003 and the subsequent establishment of the SSRA under Act No. 8 of 2008, the Fund has since extended its coverage to include health insurance of employees in the formal private sector and informal sector (self-employed).

The extension of coverage has been introduced in an attempt to implement the Tanzania *National Social Security Policy of 2003* and to comply with social security sector reforms of 2003-2015. Today the NHIF coverage includes voluntary contributory scheme for self-employed, informally employed in the private sector in addition to coverage of public service employees. The amendments to the NHIF Act 1999 that were made in 2012 effected several amendments to the National Health Insurance Fund Act.[920] For instance, section 30 of the *Social Security Laws (Amendments) Act*, 2012 amended section 3 of the NHIF Act 1999 to introduce coverage of informal sector employees, self-employed and formal sector employees under private sector, and the supplementary health insurance benefits scheme was also established. This means that any self-employed national from any EAC Partner State as provided under Article 12 (2) and Article 13 (3) (b) of the EAC CMP and any other foreigner from any country lawfully working in Tanzania would be eligible to join the NHIF.

After the 2012 amendments to the NHIF Act, 1999 the definition of "formal sector" was expanded to include employers and employees who have entered into a contract of employment, apprenticeship or any other contract contemplated in the definition

[920] See The Social Security Laws (Amendments) Act, No. 5 of 2012.

of the term “employee” contained in the new section 3 of the Act. Also, the amendments expanded the definition of the insured “member” under the NHIF Act to mean including any person or any employee who might be employed in the formal sector or in the informal sector or in self-employment within Tanzania mainland. The described categories of persons were made eligible for registration with the NHIF for health insurance in Tanzania Mainland. The Act, however, does not extend to Zanzibar.

By the act of the NHIF Act expanding coverage of health insurance under the *Social Security Laws (Amendments) Act,* 2012 to include all categories of persons stated in the foregoing discussion, it also enabled coverage of ‘migrant workers’. Although the Act does not specifically state or mention ‘migrant workers’, the broad interpretation of the expanded coverage does not exclude or discriminate any labour migrant who may be willing to register for contribution into the Scheme. Given the expanded definition of a member for purposes of contribution under the Act, a migrant worker may contribute and join the NHIF supplementary health insurance scheme.

The NHIF Act permits any other “voluntary contribution" of any other form of contribution apart from statutory contributions of any person in case a member wishes to access supplementary health services or benefits. Therefore it may be argued that, even if the Act does not state specific rights of migrant workers still the Act is apparently not discriminatory of labour migrants in social security registration, contribution and benefits provisioning.

Another social security law under which the concept and practice of equality of treatment between nationals and migrant workers in social security provisioning is examined is the *Local Authorities Pensions Fund (LAPF) Act, 2006*[921]. In the year 2006, the LAPF Act was passed by the Tanzanian Parliament thereby converting the existing Local Authorities Provident Fund (LAPF) Act of 2000[922] into the 'Pension Fund' under the LAPF Act of 2006. The previous *Local Authorities Provident Fund (LAPF) Act*, 2000[923] created a Provident Fund that was intended to cover employees of the Local Government and Regional Administration. Under section 2 of the 2006 LAPF Pensions Fund Act it is provided that the Act is applicable in Mainland Tanzania, not Zanzibar.

The LAPF primarily covers employees of the formal sector namely the local government loans board, local government, and the Fund. This Fund also covers any private institution or self-employed persons wishing to join.[924] The 2012 *Social Security Laws (Amendments) Act, No.5 of 2012* that amended LAPF Act, 2006 among others repealed the previous section 3 which contained the definition of an "employee" and substituted it with the present definition of 'employee' which states that: "employee" means an individual who-

> *(a) has entered into a contract of employment; or*
> *(b) has entered into any other contract in which the individual undertakes to work personally for the other party to the contract the other party is not a client or customer of any profession, business, or undertaking carried on by the individual; or*
> *(c) is deemed to be an employee by the Minister under section 98(3) of the Employment*

[921] Act No.9 of 2006.
[922] LAPF Act No.6 of 2000.
[923] Ibid.
[924] See LAPF Pensions Fund Act, 2006, s. 2 (1) (e).

and Labour Relations Act; or
(d) is deemed to be an employee in accordance with section 61 of the Labour Institutions Act.".

Thus, the LAPF Pensions Fund Act is silent on whether the social security rights created under the legislation also cover foreign workers employed in Tanzania. The Act neither mentions the 'exclusion' or 'discrimination' nor inclusion of 'migrant workers' or foreign labour migrants from registering for contribution to the Fund.

The Act leaves room for its broader interpretation in the context of the objectives of the Tanzania social security reforms and the National social security policy of 2003 and the *Social Security Laws (Amendments) Act, No.5 of 2012* which permit expansion of extension of social security coverage to include the private sector. As such, one may argue that migrant workers may contribute and join the Fund for social security benefits under the scheme thereby compelling the Fund to treat migrant workers in similar way the nationals are treated under the Act. The Act does not have legal provisions on conclusion of reciprocal social security agreements for cross-border portability of benefits, maintenance of acquired social security rights and rights in the course of acquisition, totalisation of periods of insurance benefits earned in different countries during migration for employment, and mutual administrative assistance between the LAPF and similar schemes that may exist in migrants' sending countries.

The occupational (employment) injuries benefit is another form of international system of social protection in the world of work. The legal mechanism under which international or cross-border migrant workers in Tanzania are insured and treated as

a result of risks related to accidents (injuries) or diseases sustained in the course of employment may be examined under the *Workers Compensation Fund (WCF) Act, 2008*[925]. The preamble to the WCF Act, 2008 states the general objectives of the Act stating that the Act creates legal mechanism to offer social security benefits of the nature of compensation for employment injury and occupational diseases contracted in the course of employment. All employers in both public and private sectors are statutorily required to contribute on behalf of their employees pursuant to section 2 of the WCF Act[926].

The Act offers the '*dependants' grant'* under the provisions section 52 (1) if an employee dies. The provisions of section 53 of the Act provide for '*funeral grant'* as another benefit offered under the WCF. The *conveyance of the injured employee* is another benefit offered under sections 20 and 61(1) of the Fund. Qualifying employee may receive '*medical aid'* as provided under section 62 of the Act. For purposes of restoration of injured person's health and bringing back to societal participation the '*rehabilitation benefits'* are offered under section 69 of the WCF Act.

As to coverage, the WCF is a social security scheme that covers insurance of all employees employed in Tanzania, whether they are employed in public or private sectors. Contributing members to the Fund are the employers insuring occupational injuries and diseases covering both *migrant workers* and *nationals* without exception. This means that any self-employed national from any EAC Partner State as provided under Article 12 (2) and Article 13 (3) (b) of the EAC CMP and any

[925] The WCF Act, No. 20 of 2008.
[926] Ibid.

other foreigner from any country lawfully working in Tanzania would be required to be insured under the Employment injury benefits scheme (WCF).

However, benefits are payable only in Tanzania. Within the terms of section 2 read together with sections 24 and 25 of the WCF Act, the benefits are provided if the contingence occurred in Tanzania or the said contingence is considered as if it had occurred in Tanzania, even if it occurred outside the country.[927] The protection covers both the private sector and public service of the Government of Tanzania. Contributing employers must contribute for all employed nationals and immigrants working in Tanzania for more than 12 months continuously.

The Act provides that the legislation is meant to cater for social security and protection of employees of Mainland Tanzania which implies that it is not applicable in Zanzibar.[928] The WCF Act also prohibits double benefits compensation to an employee entitled to benefits under laws of two different countries, in an event the insured contingence occurs.[929] The law requires such employee to elect only one legislation and claim under it for compensation and not under both schemes.[930] Further, the Act extends social security in the form of protection of injured or disease stricken employees who primarily are employed in Tanzania but have suffered accident or disablement or death while temporarily employed outside Tanzania (including those working in continental shelves beyond Tanzania)[931].

[927] Ibid, s. 24 and s.25.
[928] Ibid, s.2 (1).
[929] Ibid, s. 25 (3).
[930] See WCF Act, 2008.
[931]Ibid, s. 2(2) (c).

The WCF Act prohibits payment of compensation benefits to employee working outside Tanzania (emigrant) whose employment outside the country is for the period of more than 12months in continuous employment[932]. The legislation puts restrictions on benefits payment to a migrant worker temporarily working in Tanzania who sustains injuries or diseases while temporarily working for the employer having business in the country while his permanent place of business as employer and the employee's ordinary place of employment are ordinarily outside Tanzania.[933] Alternatively, the employer must pay all assessments made by WCF specifically in respect of such incidence if such employee has to be entitled to compensation.

As regards to equality of treatment, it is the researcher's view that although the WCF Act does not mention a 'migrant worker', the constructive interpretation suggests that a foreign worker is impliedly not excluded from employment injury benefit coverage, provided that the employer is registered for contributions and the contingence that occurs in Tanzania. The Act however, like the rest of the Tanzania social security laws (save for the NSSF Act, 1997), does not have legal provisions on conclusion of reciprocal social security agreements for cross-border portability of benefits and other arrangements for payment of employment injury benefit abroad.

Another social security legislation that is examined regarding how efficient is the domestic implementation of the principle of equality of treatment in social security concerning both nationals and migrant workers in Tanzania is the *GEPF Retirement*

[932] Ibid, s.24 (3).
[933]Ibid, s. 2(2) (c); and s. 25 (1).

Benefits Fund Act, 2013[934]. In its preamble, the GEPF Act states that it covers both formal and informal sector employees,[935] including self-employed as well as government employees. This means that any self-employed national from any EAC Partner States as provided under Article 12 (2) and Article 13 (3) (b) of the EAC CMP is eligible to join the scheme.

However, the GEPF Act, as other social security laws operates just in Tanzania mainland only. [936] The Act was, however, primarily intended to cover government employees who retire and those getting re-employed after retirement. It excludes registered employees of other mandatory schemes established under existing written social security law.[937] It covers all employees within the meaning of section 98(3) of the *Employment and Labour Relations Act,* 2004[938] and section 61 of the *Labour Institutions Act*, 2004.[939] These two legislations describe broadly who is actually an employee. The Act neither does it mention migrant worker's social security guarantee and protection nor provide for exclusion or inclusion save that it says it covers informal sector employees including self-employed which are also recognized under Article 12 (1) and (2) as well as Article 13 (3) (b) of the EAC CMP.

In order to provide a positive and constructive interpretation of the intended meaning of an employee under the GEPF Act, one would forcefully argue that the definition of an employee envisaged under the Act is inclusive enough to imply social security coverage of a migrant worker. Notwithstanding the foregoing state of the Tanzanian

[934] The GEPF Retirements Benefits Fund Act, 2013, (Act No.7).
[935] Ibid, s. 2(a) i.
[936] Ibid, s.2
[937] Ibid, s. 2(b).
[938] Act No.6 f 2004.
[939] Act No. 7 of 2004.

law, though, elsewhere there exist various propositions that have often captured through the concept of methodological nationalism in social security and other immigration rights. The practice in many countries worldwide has been that of discrimination or exclusion of foreign labour migrants from equal access to employment. This has occurred mainly in the public service sector or in the civil service of the sovereign governments. Statutorily established Government agencies as a matter of public policy, national security and other undisclosed reasons have excluded to hire foreign labour migrants, save where they work as consultants in specific time-bound tasks.[940]

Moreover, the GEPF Act does not provide for any legal mechanism for transferability or exportability of benefits across national borders, or totalisation of periods of insurance earned by migrant workers across different countries of employment. Legally speaking, therefore, the GEPF does not specifically provide justiciable legal entitlement to foreign labour migrants to claim social security benefits or equality of treatment as of enforceable legal right. In actual legal practice, the Act has not provided any specific provision warranting conclusion of binding agreements to ensure that non-citizens have an enforceable right against the GEPF pension fund or any other institutions that provide social security benefits.

Tanzania has another insurance scheme referred to as the Community Health Fund established under the *Community Health Fund (CHF) Act of 2001*.[941] The CHF was

[940]See Millard, D., "Migration and the portability of social security benefits: The position of non-citizens in the Southern African Development Community", *African Human Rights Journal*, 2008, Vol.8, pp.37-59; Minderhoud, P., "The 'Other' EU Security: Social Protection", *European Journal of Social Security*, 2006, Vol.8, No. 4, pp.361-380, at p.366; White, R., "Residence, Benefit Entitlement and Community Law", *Journal of Social Security Law*, 2005, Vol.12, pp.10-25; Benhabib, S., *The Right of Others: Aliens, Residents and Citizens*, Cambridge University Press, Cambridge, 2004.

[941] Act No.1 of 2001.

essentially enacted to provide for legal mechanism of establishment of Community Health Fund in Tanzania in the local governments authorities with a view to providing health insurance to household communities[942].

While the legislation provides that contributing members are the Tanzanian households or families in villages and wards the Government may also contribute to the Fund through District Council[943]. Although the legislation does not have any specific provision on nationality criteria for joining the scheme, the CHF is a Health Insurance Fund only meant for Tanzania nationals organised in village communities and wards under participatory management supervised by local government authorities. The overall national supervision is done by the Ministry responsible for Health.[944] It is therefore argued that by virtue of the Government's right to contribute to this Fund under the *Community Health Fund (CHF) Act of* 2001 where necessary, a migrant worker may not be intended for coverage under the scheme owing to the fact that ordinarily local Tanzanian village communities are composed of nationals.

Finally, the foregoing legal framework of social security coverage and protection of migrant workers in Tanzania[945] that has been examined has presented a summary of social security laws which indicate, albeit, in a nutshell, on whether or not existing laws have provisions on equal protection and treatment of migrant workers in similar ways the nationals are treated. Among areas of assessments were, but not limited to the right to join social security schemes, nationality condition in benefits

[942] See CHF Act, 2001(Act No.1 of 2001), s. 4(1).
[943] Ibid, s.8 (1), (2) and (3).
[944] Ibid, s. 11(1) and (2).
[945] See Appendix I-Table 6.1 to this thesis.

accessibility, transferability or portability of benefits outside Tanzania, maintenance of acquired social security rights, and rights in the course of acquisition, totalisation of benefits earned in different countries of previous employment, present and future employment.

6.7 Compliance to International Law on Equality of Treatment in Social Security for Migrant Workers

6.7.1 Compliance to ILO Instruments Concerning Social Security

Compliance to international law concerning social security for labour migrants may be assessed by looking at the status of ratification of relevant ILO instruments which are discussed in chapter three of this thesis. The status of Tanzania in terms of ratification of relevant ILO conventions impacting on equality of treatment in social security is presented in *"Appendix 1, Table 6.2*" to this thesis in which it is shown that Tanzania has ratified only 4 conventions out of 20 listed instruments.[946] The status of ratification of the referred conventions has some implications on domestic legal regime of Tanzania in the context of implementation of principles of equality of treatment in the framework of international legal system as discussed below.

Firstly, in terms of the ILO Constitution[947] and as per the procedure for succession to multilateral treaties by former colonies known under international law, the newly independent State of Tanganyika in 1961 made clear her position regarding her obligations under the Membership to the ILO.[948] Tanganyika deposited to the Director-General of the international labour office a declaration on respecting her

[946] See Appendix 1, Table 6.2 to this thesis.
[947] See ILO Constitution, 1919, Art. 1 (3), (4); Art. 3 (a), (b); and Art.35 (1)-(8).
[948] Seaton and Maliti, pp. 79-82, note 819.

obligations with respect to ILO conventions that were concluded on Tanganyika's behalf by the United Kingdom during the periods of the Mandate and the trusteeship before the independence of the territory.[949] Her declaration was to either accepting to be bound or not to be bound by treaties concluded by the United Kingdom on her behalf during the period of the Mandate and under the Trusteeship period.

The declaration became part of Tanganyika's post-independence State policy on international treaty position with respect to ILO treaties. This was reflected in the note that was sent to the ILO by the new State of Tanganyika stating her qualified commitment to be bound by the international labour conventions that were applied by the United Kingdom to the territory of Tanganyika during the periods of the Mandate (1920s-1945) and the trusteeship (1946-1961). The Tanganyika's note stated as follows:

> *"The Government of Tanganyika recognizes that it continues to be bound by the obligations entered into on behalf of the territory of Tanganyika by the United Kingdom in respect of the following conventions (listed,…18 conventions). The Government of Tanganyika undertakes to continue to apply all the other conventions previously ratified by the United Kingdom and whose provisions are fully applied in Tanganyika and to consider the formal ratification of the said Conventions or of corresponding Conventions at the earliest opportunity"*[950]

It should be stated that, all treaties that were succeeded were of national interests and had a bearing on the fundamental principles and rights of man at work. No doubt that this includes promotion of the right to social security to all for all.[951]

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[949] Ibid.
[950] Ibid, p.82.
[951] Ibid, pp.45-46.

Secondly, another implication may be derived from the status of ratification of ILO conventions impacting on social Security for Migrant Workers as shown in *Appendix I, Table 6.2* regarding Tanzania. In all non-ratified conventions listed in the referred table, Tanzania has no binding or enforceable legal obligations under international law resulting from non-implementation of such instruments. Most ILO conventions that have impact on the social security rights of migrant workers have some legal provisions that require member states sending migrant workers and those hosting migrant workers to conclude reciprocal bilateral agreements for ensuring that migrant workers are not exploited or discriminated in employment policy and in social security.

All the ILO conventions that provide for conclusion of multilateral agreements with other countries for benefits of migrant workers are listed in "Appendix I, Table 6.2 in this thesis, but have not been ratified by Tanzania.[952] The implication of non-ratification is that migrant workers cannot enjoy their right to portability or transferability of benefits when they migrate for employment to other countries. This particularly, this affects portability of long-term social security benefits.

Thirdly, non-ratification of ILO conventions eliminates any guarantee of reciprocity of treatment of migrants with nationals on equal basis because the conclusion of such reciprocal social security agreements is made difficult because the basis upon which to build the foundation for agreement is relevant instrument being ratified and existence of political will. Lack of ratification creates suspicion or lack of trust

[952]For example see ILO Conventions 118, 143, 97, 102, 103, 157 and 155.

among countries given that a failure to ratify such treaties is likely to replicate in the failure to implement social security agreements, should the agreements be concluded without first accepting obligations of the conventions under the ILO constitutional framework. Thus, in an international society in which state sovereignty remains the paramount ordering principle the ratification and implementation of international treaties cannot be forced upon a sovereign State.

Fourthly, the consequence of non-ratification of ILO treaties by Tanzania is that the country cannot be held accountable for failure to implement the provisions of un-ratified treaties. Non- implementation of equality of treatment clauses as envisaged under the social security conventions for benefits of migrant workers cannot make Tanzania legally liable under the international legal system. Take an example of ILO Convention 118; it is a mandatory requirement within the terms of Article 15(1) of the Convention that the legal binding status of the convention comes only after ratification of a convention by a State.[953] Since Tanzania has not ratified this convention, there is any liability that may arise from this Convention. In effect, there is not legal measure that can be legally taken against Tanzania.

Fifthly, all selected international labour conventions listed in *Appendix I, Table 6*.2 contain a clause to the effect that any convention that is not ratified does not become a binding law on the non-ratifying State. Even the Courts of law in Tanzania, may not legally enforce a right of a migrant worker under non-ratified treaty. Tanzania has not accepted any obligations concerning protection of rights of international

[953]See ILO Convention No. 118, Art.15 (1); see also Appendix 1, Table 6.2 to this thesis.

labour migrants under non-ratified conventions. Moreover, Tanzanian is not a state party to the *Minimum Standards (Social security) Convention*[954] which establishes foundational principles and branches of social security under international system.

Migrant workers and other foreign nationals as well as Tanzanian nationals may not legally enforce the right to social security in courts of law based on the un-ratified conventions, or based on the Tanzanian Constitution, or current legislation. Constitutionally, the right to social security in Tanzania is merely a directive principle of state policy that is to be realized progressively as economic conditions improve.

International labour standards enshrined in the conventions fall within the category of soft law that is normally enforceable through political rather than legal. Soft law is thus, typical of all international labour conventions. In pure international law, the international legal rules have not established strict and legally enforceable sanctions against any nation that does not implement ILO conventions other than soft mechanism of reporting procedure and demonstrating some progress towards compliance with the standards set by the ILO.

Therefore, the ILO supervisory mechanism instituted under articles 19, 22 and 35 of the ILO Constitution is largely and plainly moral and political. Enforcement mechanism is executed administratively under the ILO reporting system on compliance with standards through the work of the Committee of Experts on Application of ILO conventions and recommendations.

[954] No.102 of 1952.

The moral and political enforcement mechanism under the ILO reporting system is helpful on willing parties. It therefore remains a weak international enforcement system because of its use of moral persuasion and economic means as well as technical assistance mechanism to induce complying and non-complying nations rather than legal sanctions.[955]The Mandate of the Committee on compliance or Application of ILO treaties in countries involves undertaking an impartial and technical analysis of how the Conventions are applied in law and practice by member States. The ILO is, however, is cognizant of different national realities and legal systems when determining the legal scope, content and meaning of the provisions of the Conventions.

The opinions and recommendations on Committee of Experts on Application of ILO conventions derive their persuasive value from the legitimacy and rationality of the Committee's work primarily due to its impartiality, experience and expertise. Nevertheless, its opinions are non-binding but merely guide the actions of national authorities. The impact of the work of ILO committee is widely reflected in the incorporation of its opinions and recommendations in national legislation, international instruments and court decisions.[956]

Therefore, the issue as to how the Conventions are applied in law and in practice by member States must be assessed in the context of different national realities and diversity of legal systems. Although Dicey, A.V. has argued that the breach of a

[955]ILO Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), *Application of International Labour Standards 2016 (I)*, I. L. C. 105th Session, Geneva: ILO, 2016, pp.6-9.
[956] Ibid, p.9.

Convention itself involves a violation of a rule of law, [957] Basu, D., has to the contrary argued that, ILO Conventions as a body of international law are a category of rules of morality or constitutional propriety which do not attract legal sanctions *per se*. [958] Not only that but also any un-ratified Convention is not enforceable by a court of law as it cannot attract legal sanctions as there is no binding obligation to complying with unless and until such convention is embodied in municipal law.[959]

Courts of law in Tanzania cannot give remedies for breach of any such un-ratified conventions as non-ratified instruments cannot be invoked to alter or control the meaning of the Tanzania municipal law or statute. In order to translate international treaties and conventions into municipal law Tanzania has to pass through treaty ratification process under Article 63(3) of the *Constitution of the United Republic of Tanzania, 1977*. The Article provides:

> *"For the purposes of performing its functions, the National Assembly may-*
> *(e) deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratification."*[960]

Sixthly, the status of Tanzania's non-ratification of international treaties does not necessarily mean that she does not have to take steps towards making unilateral measures to improve social security guarantee to citizens and labour migrants. The ILO has elaborate social security standards in accordance with the social security conventions.[961] However, the direct impact of these conventions on social security

[957] Dicey, A.V., *Introduction to the Study of the Law of the Constitution*, 10th ed. (R), Palgrave Macmillan, London, 1984, pp.446-50, cxci).
[958] See Basu, D. D., *Comparative Constitutional Law*, Prentice Hall, India, 1984, p.179.
[959] Ibid.
[960] See *Constitution of the United Republic of Tanzania*, Art. 63(3) (e).
[961] Specific provisions are contained in the listed instruments in *Appendix I-Table 6.2 and* as discussed in chapter 3 of this thesis.

developments in Tanzania can only be measured through the result of their implementation which is lacking.

In the absence of ratification and domestication of these conventions, Tanzania's compliance with these instruments cannot be meaningfully evaluated within the framework of ILO constitutional mechanism and reporting procedure. Evaluating the country's compliance profile with international standards can be effectively and efficiently done if treaties setting standards have been ratified and domesticated in order to give rise to international legal obligations.

In the absence of acceptance of obligations enshrined under ILO conventions impacting on social security rights of migrant workers, Tanzania continues to be assessed as a country that is still marginally concerned with implementation of the principles of equal treatment in social security and protection of international labour migrants. This is seen in the lack of effective legislative steps towards implementation of relevant international instruments setting standards of equality of treatment of nationals and foreign migrant workers.

Seventhly, the specific standards that are applicable in legal protection of migrant workers in the nine branches of social security have been underlined under chapter 3 of this research in which relevant conventions have been examined. For instance, *the Equality of Treatment (Social Security) Convention*[962] in Article 5(1) provides that:

> *"In addition to the provisions of article 4, each Member which has accepted the obligations of this Convention in respect of the branch or branches of social security concerned shall guarantee both to its own nationals and to*

[962]No. 118 of 1962.

> *the nationals of any other Member which has accepted the obligations of the Convention in respect of the branch or branches in question, when they are resident abroad, provision of invalidity benefits, old age benefits, survivors' benefits and death grants, and employment injury pensions, subject to measures for this purpose being taken, where necessary, in accordance with article 8".*[963]

Article 8 of Convention 118 referred to above concerns the obligations imposed on the ratifying States to the latter Convention to also ratify the *Maintenance of Migrants' Rights Convention, 1935*. The latter Convention requires the signing of mutual agreements which may be bilateral or multilateral agreements with a view to implement the provisions of Convention 118. Therefore, further legal implication of ratification of ILO treaties concerning social security for migrant workers include the ratification of social security conventions by both the countries sending migrant workers and receiving ones and a requirement to conclude the social security agreements.

Arguably, even if Tanzania alone or Kenya alone were to ratify all the ILO treaties without other EAC countries ratifying the listed ILO conventions, it would still not be sufficient to cater for protection of migrant workers' social security right to equal treatment within the EAC and beyond the EAC. It is argued so because, cross-border portability of social security benefits and implementation of equality of treatment between nationals and migrant workers require reciprocal fulfilment of international obligations by all countries that send migrant workers to Tanzania and those receiving labour migrants from Tanzania. Wider involvement of countries in ratification and domestication of international instruments is so important for

[963] Ibid, Art. 5(1).

benefits of both nationals and migrant workers within the EAC and other regional organisations such as the SADC region.

Consequently, the absence of satisfactory ratification of ILO treaties concerning social security creates justification for non-ratifying countries such as Tanzania to explore the possibility of conclusion of networks of social security agreements.[964] Such agreements can facilitate provision and maintenance of social security benefits for workers involved in cross-border labour mobility in the EAC and across the whole of the SADC region.

The conundrum though must arise as to what model legal framework that is internationally recognized as governing enforceability of bilateral social security agreements if the governing legal rules are structured from model multilateral agreements (Conventions) which require uniform or general standard social security code for the regional economic bloc such as the EAC. Certainly, it is not so intended that social security agreements must be applied strictly as per the provisions of the VCLT, 1969, rather they are bilateral arrangements between countries receiving and sending migrant workers which do not necessarily flow from international law. However, agreements must draw inspiration from international labour conventions which are a category of soft law.

[964]See also Ackson, T., Social Security Law and Policy Reform in Tanzania with Reflections on the South African Experience. Thesis submitted for the Degree of Doctor of Philosophy in the Department of Commercial Law, Faculty of Law, University of Cape Town, pp. 75-77, and pp.213-218.

Due to the unsatisfactory trend of ratification and implementation of international conventions concerning social security, the Tanzania's model of enforcement of social security rights has been that of unilateral implementation of some provisions of the ILO treaties without ratification. Tanzania lacks reciprocal social security agreements among the EAC countries and in effect all these challenges make it difficult to evaluate or assess the country's compliance to the framework of ILO on application of standards contained in the ratified conventions. Tanzania does not have specific legal guarantee of providing *invalidity benefits*, *old age benefits*, *survivors' benefits* and *death grants*, and *employment injury pensions* to cross-border migrant workers within the meaning envisaged in Article 5 (1) of Equality of Treatment (Social security) Convention 1962.

What is acknowledged is that, firstly, there is no any binding legal obligation on the United Republic of Tanzania arising under all the un-ratified ILO conventions concerning social security for migrant workers. Consequently, even the legal mechanism provided in section 92(1) and (2) of the NSSF Act,[965] which creates leeway for conclusion of reciprocal agreements with Government of any other country or territory that has a social security scheme similar to Tanzania Scheme is not subject of any legal liability under the ILO Standards' compliance framework. Thus, as already discussed in this chapter, section 92 of the NSSF Act tends to implement some provisions of various ILO conventions on equality of treatment between nationals and non-nationals including migrant workers. For instance, the *Social Security (Minimum Standards) Convention of 1952* in Article 68(1) provides:

[965] Act No. 28 of 1997 (as amended).

> 1. *Non-national residents shall have the same rights as national residents: Provided that special rules concerning non-nationals and nationals born outside the territory of the Member be prescribed in respect of the benefits or portions of benefits which are payable wholly or mainly out of public funds and in respect of transitional schemes".*[966]

The special rules envisaged under the above referred Article 68(1) do not exist in Tanzania because, as demonstrated in the status of ratification of ILO conventions in *Appendix I-Table 6.2,* Tanzania is not a State Party to Convention 118. As to international labour standards for protection of nationals of another ILO Member State, sub-article (2) of Article 68 of Convention 118 further provides:

> *"Under contributory social security schemes which protect employees, the persons protected who are nationals of another Member which has accepted the obligations of the relevant Part of the Convention shall have, under that Part, the same rights as nationals of the Member concerned: Provided that the application of this paragraph may be made subject to the exercise of a bilateral or multilateral agreement providing for reciprocity."*

As already indicated under the national legal framework for social security in Tanzania regarding protection of migrant workers, bilateral or multilateral agreements for reciprocal enforcement of social security rights play a pivotal role in the protection of migrant workers in social security. However, with the exception of the NSSF Act, 1997 (as amended) all other Tanzania social security laws do not provide for legal framework to manage cross-border transferability(portability) and totalisation of benefits for migrant workers.[967]

According to the *Social Security Laws (Amendments) Act, (No.5) of 2012* the social security laws in Tanzania were amended to open up and extend coverage of employees in private sector whether employed informally, formally or self-

[966]Convention No. 102.
[967] See Appendix I-Table 6.1 to this thesis.

employed. The broader coverage opened up room for migrant workers to join and register for contribution into any of these schemes and Tanzania has a sizeable population of migrant workers largely employed in the private sector. But as indicated in the analysis of Tanzania social security laws tabulated in *Appendix I-Table 6.1,* most social security legislations do not have specific legal provisions for possibility of conclusion of reciprocal agreements with other ILO Member States that have accepted obligations under social security conventions. Key conventions directly impacting on migrant workers include ILO conventions Nos.097, 102; 118; 143; 157; and several other instruments.[968]

Further, the Tanzania's underdevelopment nature of its economic conditions continues to limit the cost of national social welfare budget to the extent that migrant workers have not yet attracted the attention of policy makers and legislators. This is seen in the way national social security legislation and constitutional provisions avoid the use of explicit provisions regarding equal protection of migrant workers with nationals in the subject of social security guarantee. However, all countries of the world have primary political duty to provide priority to nationals first before devoting their national resources to cater for needy migrant workers in national welfare programmes intended for nationals.

Most national policies of many countries of the world, whether written or unwritten, do not encourage foreign nationals of any category to become a burden on country's social welfare budgets particularly when financial resources are scarce

[968] See Appendix I, Table 6.1 and Table 6.2 to this thesis.

or limited and while the majority of the nationals are still unprotected. Prioritization of nationals is internationally permissible as long as it is done within the boundaries set by the basic constitutional values and rights of human beings. National constitutions that are implied here are those that adhere to basic principles of human dignity as enshrined under the Universal Declaration of Human Rights (UDHR), 1948 and in several other international human rights instruments. The Tanzania National Social security Policy of 2003 mentions its commitment to the principles and values contained in the (UDHR).

As demonstrated in *Appendix I, Table 6.2*, which shows the status of ratification of ILO Conventions impacting equality of treatment and social security for migrant Workers in Tanzania, there is virtually no ratification of relevant conventions that guarantee equality of treatment of migrant workers in the country. The implication is that automatically migrant workers from all ratifying and non-ratifying countries who work in Tanzania cannot legally claim as of right, the equal treatment with nationals under the Tanzania social security legislation. Similarly, the Tanzanians employed abroad would face similar treatment.

Certainly this is due to the absence of reciprocal agreements. Article 2(1) of the ILO convention 118 sets the minimum of at least one or more branches out of the nine branches of social security to which every Member State of the ILO ratifying this convention should provide to migrant workers or foreign nationals. It is the ratification that has the effect upon States because it is upon acceptance of implementation of equality of treatment clauses that the obligations to accord migrant workers and nationals equal rights on the basis of reciprocity arises.

However, it is not until each country sending and receiving migrant workers has in effect the legislation that provides the prescribed nine branches of social security benefits to its nationals that it will be possible to afford the same rights to migrant workers.

Therefore, equality of treatment in terms of social security for migrant workers remains subject of conclusion of reciprocal social security agreements between the Governments of the United Republic of Tanzania and any other State which may be willing to conclude such agreements. As amply demonstrated in this chapter, such social security agreements are lacking in Tanzania. Since the adoption of the *Tanzania National Social Security Policy in 2003*, there have not been concluded reciprocal social security agreements for maintenance of acquired rights and the rights in the course of acquisition, transferability or portability of benefits, and totalisation/aggregation of benefits earned in different counties of foreign employment for benefits of migrant workers.

6.7.2 Compliance to Human Rights Treaties relevant to Social Security

a.) Tanzania's ratification status

Tanzania is a party to several core UN human rights treaties related to anti-discrimination. The country status of ratification of core UN human rights treaties which are most relevant to equality is provided in "Appendix 1 Table 6.3" to this thesis.[969] As shown in in "Appendix 1 Table 6.3" Tanzania has ratified several core UN human rights treaties,[970] but has not ratified the *International Convention on the*

[969]See Appendix I-Table 6.3 to this thesis.
[970]Ibid.

Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW) (1990).

The Convention has 93 articles providing a broad range of human rights of all migrant workers and procedural aspects of migrants' protection.[971] It also requires States' Parties to afford to documented labour migrants and undocumented workers a range of civil, social and labour rights such as equality with nationals before the courts. It covers emergency medical care to labour migrants and their rights to enforce employment contracts against employers. Migrant workers have rights to health at work place, among other rights.[972]

The implication of state of ratification of international treaties by Tanzania may be explained in the framework of *Nyerere Doctrine* of treaty succession as under stood in Tanzania Treaty practice.[973], immediately after independence some treaties that were concluded by the United Kingdom on behalf of Tanzania as successor state to the British Mandate and trusteeship, were declared as binding on Tanzania and therefore remained in force for Tanzania until they are terminated. Other treaties were considered non-binding due to either lack of national interests or consent of the people of Tanzania, or were in violation of international law.[974] It is argued that treaties which Tanzania did not accept to be bound with cannot be relied upon by any State to claim a right upon Tanzania.[975]

[971] See ICPRMW, Part III Arts. 8-35.
[972] Ibid, Arts. 8-35.
[973] See Seaton and Maliti, note 819.
[974] Ibid,
[975] Ibid.

Thus, in the framework of international human rights law, and as presented in the status of ratification of treaties by Tanzania as presented in *Appendix I-Table 6.3*, Tanzania has ratified some human rights treaties. The said treaties contain relevant provisions advancing the right to social security and equality of treatment of all human beings including migrant workers.[976] Some instruments specifically mention the right to social security while others do not. Reading through all human right treaties in broad context, they carry some implied protection of migrants within the larger picture of all human rights. However, it is obvious that, where a country has simply signed any treaty without ratification, it then follows that the State has not expressed its consent to be bound by that treaty.

By a signing on the treaty, a country simply authenticates and expresses willingness of the country to be willing to continue the treaty-making process. The action of Tanzania signing on the treaties listed in *Appendix I-Table 6.3* informs of the country's readiness to commence the process of ratification or acceptance or approval of a treaty whatever the case it might be, of which it did. By ratification, the country signifies to be bound by the treaty obligations subject to any reservations or exceptions that may be availed to any country under the treaty.

However, since its independence in 1961, Tanzania adopted a dualist legal system. Dualist approach for Tanzania means that international treaties and obligations once established they do not directly take immediate effect and required implementation in Tanzania unless they are first domesticated through tabling the same to National

[976] See Appendix I-Table 6.3 to this thesis.

Assembly for deliberation and approval of ratification and eventual enactment of legislation for implementing the same. Under the Constitution of Tanzania 1977 as amended, any treaty or convention which is duly ratified cannot form part of the law of Tanzania unless the same is first domesticated by way of implementing legislation.

As a result, the Government of Tanzania has adopted a variety of legislation that directly or indirectly tends towards addressing compliance with the human rights instruments. However, the Constitution of Tanzania does not entrench social economic rights as does the Constitution of Kenya of 2010 in Article 43. The Constitution of Tanzania of 1977 broadly provides for the Bill of Rights generally in Articles 12 to 22. However, the right to social security is far from being categorically entrenched into the Constitution of Tanzania as a human rights issue even if the Tanzania National Social Security Policy of 2003 states social security as a right.[977]

The violation of social security rights may not be subject of judicial enforcement in courts of law under Tanzania law. The unenforceability of the right to social security is due to the fact that the right has not been entrenched in the Constitution despite several treaties providing for human rights protections being ratified. The foundational framework for social, economic and cultural rights upon which other domestic legations may be based to implement the right to social security for migrant workers on equal footing with nationals under international human rights standards contained in the ICESCR for benefits of the rights holders is not constitutionally backed.

[977]See *TanzaniaNational Social Security Policy 2003*, Chapter 3.3 of the Policy.

b.) Compliance to economic, social and cultural rights

Taking the example of compliance to Economic, Social and Cultural Rights in Tanzania and as shown in the table of ratification under *Appendix I-Table 6.3*, Tanzania acceded to the ICESCR in June 1976. However, it is now over 40 years since Tanzania acceded to this treaty but to this date, it has not accepted the individual complaints and inquiry procedures as provided under the Optional Protocol to the ICESCR. Not only that but also Tanzania has not domesticated the provisions of the ICESCR. Although Tanzania has made steps towards ratification of key human rights instruments as indicated in its ratification status, its practical implementation is rather less appealing.

The Constitution of Tanzania 1977 does not specifically entrench the social economic rights which include the rights to social security. Measures to effect Constitutional changes are normally affected by the Government of the day. In this regard, the fulfilment of equal treatment of all working population in matters of social protection and social security benefits to nationals and migrant workers depends on the priority of the government of the day. It is incumbent upon the government of Tanzania to decide where on the priority list social security and protection of migrant workers should fall. For reasons given though, justiciability of social security rights in Tanzania under its Constitution is yet to develop in the legal theory and practice as a basic human right *per se*.

It would seem that in the absence of acceptance by Tanzania of the individual complaints and inquiry procedures under the Optional Protocols to the ICESCR, it is

doubtful if a migrant worker, or indeed any national, can institute court proceedings against denial of equal treatment regarding the right to social security under the Constitution. A firm grounding for justiciability of social security rights is therefore lacking in the country's legal framework. Even the right to social security is vaguely implied in an indirect way under Article 11(1) of the Constitution.

This right is excluded from the category of basic human rights within the meaning of the Bill of Rights as contained in Chapter three of the Constitution. The aspect of social protection has been implicated in the Constitution of Tanzania under the directive principles of state policy in Articles 6-11 in which, among other things, it provides for the State obligations in providing social welfare and right to care in times of old age, disability, incapacity, sickness, and other similar conditions.[978]

The directive principles of State policy provided in Article 9 of the Constitution of Tanzania call for implementation of the provisions of the ICESCR which Tanzania has acceded to since 11 June, 1976. If the Government chooses to facilitate constitutional amendments to incorporate social economic rights, then it is possible that this may pave the way for further practical enforcement of social security rights through enactment of clear and focused legislation to implement the provisions of the Convention. This is so pertinent because, a right which is not capable of being pursued in courts of law for remedy raises questions of whether it is in fact a right at all or it is merely illusory.

[978] See the Constitution of the United Republic of Tanzania, 1977, Art.11 (1).

c.) Compliance to ILO Conventions on international migrant workers' rights

The status of ratification of ILO Conventions by Tanzania as depicted in *Appendix 1, Table 6.2* shows a lack of ratification of several international conventions impacting on the rights to equal treatment in social security as between migrant workers and nationals. Tanzania has neither signed nor ratified the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990).* This Convention puts obligations upon all ratifying states to grant equal protection of migrant workers with nationals in terms of the right to social security (among others) as provided for under Article 33 of the Convention.

The ICPRMW in Article 25 binds ratifying states to take all appropriate measures to ensure that migrant workers are not deprived of their social security rights. The findings in this study show a selective ratification by both Tanzania and Kenya of international labour instruments and human rights treaties, and this point to a lack of ratification of several instruments that impact on the rights to equal treatment in social security for migrant workers[979].

Lack of effective ratification is due to priority to national interests placed on by Partner States and absence of political will which substantially limits the opportunity for full implementation of international law on protection of migrant workers in domestic jurisdictions.[980] Both Kenya and Tanzania admit lawful migrant workers in

[979] See Table 5.2, Table 5.3, Table 5.4, Table 6.2, Table 6.3 and Table 6.4 in Appendix I to this thesis.
[980] Falk, R., *Human Rights and State Sovereignty*, Holmes & Meier Publishers, Inc., New York, 1981, pp.43-47 and p.157; also Jackson, R. S., "Quasi-States, Dual Regimes, and Neo-Classical Theory:

social security schemes but not illegal or irregular labour immigrants. Even the nature of social security guarantee to formally employed foreign labour migrants depends on the terms of their contracts of employment particularly the duration of contract, scales of remuneration, nature of stay in the country and any other terms that may be deemed appropriate.

Migrant workers employed by multinational companies and foreign governments, UN agencies and other international organisations have opportunity to remain longer in the country, and have a greater degree of labour market mobility. They have advantage of enjoying the right to reliable social security guarantee under international legal framework protection.

In chapter 4 it was demonstrated as to how the various provisions of Article 6 and Article 7 of the EAC Treaty as well as the EAC CMP in Articles 3, 5, 10, 12, 13, 39, and 47 and the EAC Treaty in Articles 76 and 104 require Partner States to comprehensively harmonise their social security laws. Among the principles of the common market include the principle of non-discrimination of nationals of other Partner States on grounds of nationality. According similar treatment to nationals of other Partner States as it is accorded to third parties is another principle of the common market.[981] This study has, however, established that the Partner States still lack required compliance to the common market principles.

A list of Tanzania social security laws and labour legislation shown in "Appendix I-

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International Jurisprudence and the Third World", International *Organization*, 1987, vol.41, No.4, pp. 545-547.

[981] See EAC CMP, Art. 3 (a) and (b).

Table 6.1"[982] shows evidence of lack of express legal provisions on guarantee of equality of treatment of migrant workers with nationals, and absence of reference to a migrant worker. A lack of expected harmonisation of social security laws makes the laws of Tanzania fall short of conforming to the EAC Treaty and the CMP provisions on equality of treatment. Conclusion of reciprocal social security agreements envisaged under section 92 of the NSF Act, of 1997 (as amended in 2012) is lacking because national social security laws have not been comprehensively harmonised to comply with the national obligations under the EAC CMP.

Also, the provisions of section 123 (4) of the *Social Security Laws (Amendments) Act*, No.5 of 2012amended the PPF Pensions Fund Act, 1978 by providing as follows: "*an employer of a non-citizen shall remit contribution for that employee in accordance with the provision of the Act*. The latter implies that, deductions from a migrant worker's salary may be remitted to the PPF Pensions Fund Act through his employer. However, the aspect of equal treatment between nationals and migrant workers under this Act remains unclear.

The PPF Pensions Fund Act has not provided for possible conclusion of reciprocal social security agreements to afford cross-border portability (exportability) or transferability of benefits to a migrant worker. The PPF Act is silent on whether it permits maintenance of acquired social security rights from other EAC countries and rights in the course of acquisition. The principle of totalisation of periods of

[982] See details in Appendix 1, Table 6.1 to this thesis.

insurance earned by a migrant worker beyond Tanzania borders in different countries of employment is not provided in several Tanzania social security laws.

Equally the LAPF Pensions Fund Act, 2006 neither refers to a migrant worker nor addresses the concept of equality of treatment between nationals and foreign workers or nationals of other EAC Partner States. Nevertheless, a migrant is not prohibited from registering for contribution to the Fund.[983] The Act does not provide for mechanism of transferability, exportability of benefits and totalisation of periods of insurance contributions by a migrant worker done in different countries. The LAPF Act lacks provisions that would enable coordination of social security benefits payment beyond national borders, which implies that cross-border exportability of benefits to migrant workers outside Tanzania is not guaranteed.

Also, the national social security legislation in Tanzania apparently lacks effective legal provisions to enable payment of social security benefits and other benefits related to occupational health and safety beyond national borders across the EAC. The latter position still remains despite the fact that migrant workers under Tanzania social security laws have the right to contribute to social security schemes. While foreign workers and employed nationals have had a right withdraw from a social security scheme and claim withdrawal benefits upon deciding to return to their home countries, this right to withdraw has been restricted in Tanzania.

[983] See LAPF Pensions Fund Act, 2006 as amended by the *Social Security Laws (Amendments) Act, 2012* (Act No.5), s. 3.

Despite the foregoing gaps that exist in social security laws in Tanzania, the Government of Tanzania through the *Social Security Laws (Amendments) Act*, 2012[984] repealed section 44 of the PPF Pensions Fund Act, 1978 which permitted withdrawal benefits.[985] The suspension of payment of withdrawal benefits has affected all employees in all schemes including the NSSF, PSPF, LAPF, and GEPF. However, the referred 2012 amendments did not repealed sections 31 and 32 of the LAPF Act, 2006 which permit withdrawal benefits and emigration grants. Under the referred sections of the LAPF Act, it is permitted for women to claim for withdrawal benefits if they marry and upon giving birth they chose not to be employed again.[986]

Under the provisions of section 32 (1) of the LAPF Act, 2006, the withdrawal benefits would be paid to employees who permanently move (emigrate) outside the country without any prospects of return.[987] Withdrawal benefit as a risk has been debated upon as to whether the Government should enact a law that replaces it with the proposed introduction of *unemployment benefit* as contained in section 29 (1) (e) of the proposed draft Tanzania *Public Service Social Security Fund Act, 2017* that was published as *Special Bill Supplement No.8A* of 19th October, 2017.[988] The proposed draft law was tabled to the Parliament in 2016/2017. This draft Bill proposes repealing the PPF Act, 1978 (as amended); the PSPF Act, 1999 (as amended); the

[984] Act No. 5 of 2012
[985] Ibid, s. 107- "The principal Act is amended by repealing sections 37 and 44".
[986] The LAPF Pensions Fund Act, 2006, s. 31(a).
[987] Ibid, s. 32(1) (a).
[988] See Mwalimu, S., Pension Fund Withdrawals to be restricted in new plan, *The Citizen*, Saturday, June 4, 2016, retrieved at <http://www.thecitizens.co.tz>, accessed on 28 August, 2016; See also for example such as the NSSF Act of 1997 (as amended) and the PPF Act of 1978 (as amended), s. 44; the LAPF Act, 2006 (as amended), ss. 31 and 32.

LAPF Act, 2006 and the GEPF Act, 2013 in order to create one law dealing with social security rights for Government workers and its institutions.

Under the new bill, the pension funds should provide a certain percentage of payment to members who have lost employment while they seek for re-employment instead of providing withdraw benefits. The abolition of withdraw benefits is still widely criticized for its negative impact on contributing workers but also migrant workers upon termination or completion of their employment would wish to return to their home countries or move to other countries. The final terms of receiving withdrawal befits to migrant workers are yet to be clearly understood until the final version of the law is passed.

Tanzania has of recent worked on National Employment Policy of 2017 which among other things talks of need to strengthen the cross border placement services to facilitate employment of Tanzanians abroad. The policy also talks of need to enforce institutional and regulatory frameworks for managing employment of noncitizens. Tanzania has been part of the implementation of global and regional commitments, bilateral and multilateral agreements on labour migrations mainstreamed in national development frameworks.

The *Immigration Act*, 1995 (as amended) and the *Employment and Labour Relations* Act, 2004[989] both prohibit illegal immigrants to work in Tanzania. As such the rights of illegal immigrants that are stated under the ICPRMW, 1990 are not guaranteed in Tanzania. The latter Convention provides the right to "emergency medical treatment'

[989] Act No. 6 of 2004.

in Article 28 which provides that:

> *"Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment".*[990]

Tanzania is not State Party the ICPRMW which prohibits any ratifying state to make reservations on providing "emergency medical care" to a migrant worker whether such migrant worker is legally residing in the country or not.[991] Tanzania has neither signed nor ratified this Convention hence not accepted the individual complaint procedures as provided under Article 77 of the ICPRMW. Within clear bounds of international law, Tanzania cannot be referred as a non-compliant State to the provisions of the Convention given that this treaty binds only the ratifying or acceding State parties, of which Tanzania is not among them.

6.7.3 Compliance with Regional Instruments

a.) Status of ratification of African Union and other regional treaties

The list of ratified treaties contained in *Appendix I-Table 6.4* show that Tanzania has adopted various treaties, protocols and conventions established under the framework of the African Union and the EAC as well as SADC. Therefore, Tanzania is a State Party to several regional integration treaties and human rights instruments that have a bearing on equal protection of all human beings including legal protection of workers in international migration. Tanzania ratified the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 on 10th

[990] See the ICPRMW, 1990, Art. 28.
[991] Ibid, Art. 88.

January, 1975. The African Charter on Peoples and Human Rights (ACPHR) (The Banjul Charter), 1981 was signed by Tanzania on 31th May 1982 and ratified on 18th February, 1984.

The Protocol to the Statute of the African Court of Justice and Human Rights of 2008 was signed by Tanzania on 15 January, 2009 but since then, the same has never been ratified to date. The *Protocol to the African Charter on Peoples and Human Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court),* 1998 was signed by Tanzania on 9 June 1998 and ratified on 6 February 2006.Tanzania has ratified several other regional instruments as indicated in "Appendix I-Table 6.4" to this thesis. The latter shows selected regional treaties that have effect on legal protection of migrant workers in terms of social security and other general human rights issues.[992]

The African Charter does not specifically provide for equality of treatment of migrant workers with nationals. But Article 2 of the Charter discourages distinctions based on nationality, among others, in treatment of human beings. Every person has the right to enjoy fundamental rights and freedoms. The Charter in Article 3 provides for equality of all human beings before the law and the right of every person to enjoy equal protection under the law. The EAC Treaty, 1999 in Article 6d and Article 7(2) refer to compliance with the African Charter, and therefore, Tanzania has obligations to protect human rights in its domestic legal system within the framework of the African Charter.

[992] See Appendix I-Table 6.4 to this thesis.

The ACPHR in Article 16 of provides for the right to health to every person in all signatory member countries. Tanzania has a duty, as one of the ratifying States, to provide and guarantee the right to medical care as part of health insurance to all its population without discrimination of people based on their nationality, among other things.[993] However, the gap that exists under the ACPHR is that it does not specifically guarantee the right to social security.[994] If it does, it is so done in an implied way.[995] The Charter in Article 16 provides for every individual to have the right to enjoy the best attainable state of physical and mental health.

Accordingly, States Parties are obliged to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. The Charter places a duty on state parties to protect the family as the natural unit and basis of society and to protect the physical health and morals of the family[996]. The Charter in Article18 (4) recognises the right of the aged and disabled to special measures of protection in keeping with their physical and moral needs. It also provides that every individual has a right to work under equitable and satisfactory conditions.[997] Equality of every worker to receive equal pay for equal work is also provided in Article 15.

The Charter provides for several other rights realisation mechanisms such as the State reporting mechanism under Article 62. In this latter provision, the legal

[993] See also Lindholt, L., Questioning the universality of human rights-The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique, 1997, pp.3-10; van Rensburg, L.J., and Olivier, M.P., "International and supra-national law", in Olivier, M.P., et al,(ed.), *Social security: A legal analysis*, 2003, p. 632.
[994] Lindholt, L., p.217, note 993.
[995] See The African Charter on Human and Peoples' Rights (African Charter or Charter) as illustrated in articles 16, 18(1) and 18(4).
[996] See the ACHPR, 1982, Art.18 (1).
[997] Ibid, Art 15.

procedure for interstate complaints is provided. This is concerns complaints by one State Party to the Charter and another State that has violated the provisions of the Charter. [998] Also, all State Parties are required to submit bi-annual reports to the *African Commission on Human and Peoples' Rights* as among mechanisms used to monitor compliance with the Charter.

b.) Compliance to the Common Market Protocol

As regards compliance to the EAC Treaty and the CMP, the Republic of Tanzania is within the terms of Article 10(3) and (4) of the CMP[999] required to implement the CMP by observing the Council directives. Available evidence from EAC Common Market Score Card report of 2014 and the EAC Common Market Score Card report of 2016 both point to the lack of commitment on the part of Tanzania and other EAC Partner States in the removal of non-tariff barriers (NTBs) and non-conforming measures (NCMs) as well as phytosanitary standards (SPS) and technical barriers to trade (TBT).[1000] Notably, the CMS 2016 point out two aspects that demonstrate a less positive progress.

Firstly, it is the persistence of the number of unresolved NTBs since 2010 to 2016 CMS. All EAC countries have made commitment under the Customs Union Protocol, 2004 in Article 13 to immediately remove existing NTBs and stop introduction of any new NTBs[1001] but it has not materialised to this date. Secondly, from 2014 to 2016 period, the EAC CM Score Card report shows a big increase in

[998] See also van Rensburg and Olivier, pp. 217-227; 287-299 and 390-397, note 993.
[999] See The EAC CMP Art. 10 (3) and (4).
[1000] See the East African Common Market Score Card 2016, pp.190ff, note 509.
[1001] See the EAC Customs Union Protocol, 2004, Art.13.

new restrictive measures introduced by Tanzania. A total of 17 new restrictive measures have been recorded. Kenya introduced 13 new restrictive measures while Uganda imposed 10 new measures.[1002]The effect of restrictions to nationals of Partner States and their corresponding businesses and investments have contributed to retarding the speed of harmonisation of other laws.

Harmonisation of security laws for compliance to EAC law and enforcing equality of treatment of nationals of EAC Partner States has not been effective. In the schedule of commitments, Tanzania had 59 commitments to be implemented by 31 December, 2015 while Kenya had 63 commitments to be implemented during the period under reference.[1003]

Tanzania and Kenya are leading in imposing numerous restrictions on each other in the areas of free movement of capital, services, and goods.[1004] This constitutes a lack of legal compliance with the CMP by these Partner States. Both countries have circumvented efforts to adopt effective legal framework that is necessary to implement their commitments to eliminate tariffs on each other's products, investment and services. The CMS 2016 has shown that, there has been a repeated problem of Tanzania's refusal to recognize certificates of origin and that this has continued to stand as a significant non-tariff barrier (NTB)[1005].

While the EAC CM Scorecard 2016 shows that Kenya has scored 90 percent, the Tanzania's status of score in recognition of certificates of origin has been placed

[1002] The East African Common Market Score Card 2016, note 509, p.15.
[1003] Ibid, pp.10-13.
[1004] Ibid.
[1005] Ibid, p.14.

between 50 to 60 percent of compliance. By this data Tanzania is considered to have greater share of unsatisfactory performance in terms of recognizing certificates of origin of other EAC countries. [1006] Also, the scorecard shows that by December 2015 Tanzania and the rest of the EAC countries had improved their compliance score on applying tariff equivalent charges.

However, the foregoing explained compliance demonstrated by Kenya has been offset by imposition of other barriers to intra-EAC trade.[1007] Again, this is another bottleneck that points to the lack of sincere spirit of cooperation in promotion of freedom of investment, business, and trade among Partner States. This has been negatively affecting the free movement of workers, persons and the right of establishment for the growth of the EAC common market.

However, it is acknowledged that many reforms have been carried out among EAC countries since the Scorecard report of 2014. For instance, restrictions or non-conforming measures (NCMs) were brought down from a total of 63 in 2014 to 59 in 2016. Unfortunately, there has been frequent introduction of new non-conforming measures which continue to be a stumbling block in the way of the regional cooperation. Even the percentage reduction of restrictions from 63 to 59 is very small and it confirms that all EAC Partner States remain largely non-compliant in their services trade liberalization commitments[1008].

[1006] Ibid, p.14.
[1007] Ibid, pp.10-13.
[1008] The EAC CMS 2014, pp.190-192, note 502.

Non-compliance with the CMP by Tanzania as of 2015 is also evidenced by lack of harmonised customs border management institutions' working hours which has affected all the EAC countries and blamed on Tanzania during the period under reference.[1009]The study has also revealed that Tanzania has been failing to harmonise road user charges or road toll as part of compliance with the CMP.[1010] Also, lack of coordination among the numerous institutions involved in testing of goods has been reported as a problem arising from Tanzanian side and it continues to affect all EAC countries. These events have been among the causes for slow movement towards harmonisation of national social policies and social security laws in both Kenya and Tanzania.[1011]

The CM Scorecard 2016 has shown that Tanzania has continued with discrimination of East African Breweries (Kenya) products (Smirnoff Ice) and numerous monetary charges required by various agencies in the EAC Partner States for exports of milk to Tanzania which are unresolved.[1012] There have been delays in issuance of certificates by Tanzania's National Environment Management Authority (NEMA) which takes three months to get a new certificate and three months to renew the certificate, hence stands as an obstacle to growth of the common market in the EAC.[1013]

The unresolved problem of introduction of a railway development levy of 1.5 percent by Tanzania for imports from Kenya has been pointed out in the 2016

[1009] Ibid, pp.190-192
[1010] The EAC CMS 2016, pp.192-193, note 509.
[1011] Ibid, p.192-193
[1012] Ibid, p. 193
[1013] Ibid, p.195.

scorecard[1014]. The findings have pointed to the unresolved problem of plastic stripping products exported to Tanzania. These products are not accorded preferential treatment by Tanzania as per the EAC law, and it has become among non-conforming measures that continues to affect Kenya. This is described as a violation of the CMP and the EAC Customs Union Protocol.

There has been an on-going unresolved problem of requirement imposed by Tanzania Food and Drugs Authority for companies exporting to Tanzania to register, re-label, and retest the certified EAC Partner States' products. This has affected all EAC Partner States and it is regarded as a violation of the CMP and the CUP, 2004.[1015] Such non-tariff barriers and other restrictive measures have direct and implied negative impact on the development and attainment of CM objectives and comprehensive harmonisation of other laws. Essentially, all these problems point to a lack of equal treatment of nationals of EAC Partner States in a wide range of areas of the cooperation and enforcement of the EAC common market protocol.

The foregoing described barriers and similar other restrictions which are imposed by Tanzania on Kenya and on other EAC Partner States and reciprocated by Kenya and other EAC countries on Tanzania continue to delay the full regional integration and attainment of a robust common market.[1016] The EAC CMP in Article 5 calls upon Partner States to cooperate and remove all restrictions related to coordination and harmonisation of social security laws, systems, and practices. It also calls for elimination of all restrictions on the right of establishment and residence, goods,

[1014] Ibid, p. 195.
[1015] Ibid, p. 195
[1016] Ibid.

services, free movement of labour, capital, elimination of non-tariff barriers, and many others. However, this study has established that there is a general lack of compliance with the provisions of this Article.

The decentralised model of enforcement of the EAC Treaty is one of the challenges towards deeper integration. This model is by itself slowing down the compliance to international instruments and the EAC law. The approach and actions taken by national governments as provided for in Article 5 of the EAC CMP determine the nature of compliance with the EAC Treaty and CMP. The EAC Treaty in Article 8(5) requires that each Partner State should make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones. This includes the process of harmonisation of laws. The roadmap towards harmonisation requires identifying national laws that hinder enjoyment of fundamental market freedom by national governments. Where appropriate, the duty to amend national laws and draft new laws follows.

The EAC Treaty and CMP rest within individual Partner States. The latter scenario would imply that the speed, scope and extent of implementation of the EAC Treaty and the CMP are all determined by individual actions of Partner States. This process of common market implementation model delays the agenda of harmonisation of national laws, and in effect it delays the overall agenda of EAC integration process. In practical sense, the entire process of harmonisation seems costly and governments are hesitating to embark on robust harmonisation agenda because of huge financial implications and lack of transparency in the implementation of the signed

protocols.[1017]

In addition, the EAC Treaty in Article 8(2b) provides that Partner States have to enact law that confers upon the legislation, regulations and directives of the Community and its institutions as provided for in the Treaty, the force of law within its territory. This delegation to partner states denies the EAC the supranational status to enact laws that should cascade from the EAC law for direct application in national Courts and systems. As the EAC Partner States have chosen national legislation as a method of implementation of the EAC Treaty in the integration process, full compliance with the CMP has not been quickly to attain. The study has shown that there is lack of supranational laws that ought to cascade from the EAC regional body for direct application in the Partner States. The Treaty provisions that establish obligations to be fulfilled by the Partner States make compliance to the EAC law become conditional. In the overall, this makes the compliance process a difficult endeavour to achieve.

An attempt at coordination of social security laws in Tanzania is impliedly provided for under section 92 of the Tanzania NSSF Act, 1997.[1018] This provision provides for possibility of conclusion of reciprocal agreement for social security benefits provisioning to international migrant workers beyond national borders. However, this provision is so scanty and un-detailed.[1019] Section 64 of Kenya NSSF Act takes into account the principles of coordination of social security as contained in the

[1017]Ibid, pp.87-90.
[1018]Tanzania NSSF Act, 1997as amended by the Social Security Laws (Amendments) Act, No.5 of 2012.
[1019] See detailed discussion of section 64 of Kenya NSSF Act, 2013 in chapter 5 of this thesis.

CMP provisions as reflected in Articles 3(2) which lay down the principle of non-discrimination and equality of treatment of nationals of EAC Partner States as provided in Article 5 of the CMP on removal of all restrictions against free movement of workers.

Equal enjoyment of social security benefits as nationals of the EAC Partner States is also provided in Article 10 of the CMP. This is similarly intended to be implemented through section 64 of the Kenya NSSF Act and Section 92 of the Tanzania NSSF Act. Although section 92 of the Tanzania NSSF Act, 1997 and section 64 of the Kenya NSSF Act impliedly tend to comply with Article 12 of the CMP which provides for harmonisation of social security laws, policies and programmes as is the case with Article 39 and 47 of the CMP, there is still lack of comprehensive provisions under section 92 of Tanzania NSSF Act. The Kenya NSSF Act provides for possible exportability of benefits within the EAC and beyond the EAC and it anticipates similar reciprocal arrangements through coordination agreements. As such the Kenya NSSF Act provides for facilitation of mutual administrative cooperation between Kenya NSSF Fund and other schemes of EAC countries in social security benefits provisioning to migrant workers upon their migration back to Kenya.[1020]

The Tanzania NSSF Act, 1997 in section 92 lacks sufficient details of enabling legal mechanism for cross border benefits transferability, portability, totalization and aggregation. Even after the *Social Security Laws (Amendments) Act No. 5 of 2012* the gap still remains. The Tanzania NSSF Act does not have similar coverage

[1020] Ibid, s. 64 sub-sections (1)-(7).

as in section 64 of the Kenya NSSF Act. The Tanzania NSSF Act does not provide for detailed provisions on benefits exportability across national borders for migrant workers within the EAC and beyond the EAC. Also, all the examined pieces of social security laws in Tanzania lack comprehensive legal rules on intra-region coordination, maintenance of acquired rights, portability and totalization of benefits.

As regards the occupational injury and protection of social security rights of migrant workers under the *Tanzania Workers Compensation Fund (WCF) Act*, 2008 the law lacks specific legal provision on equality of treatment of nationals and non-nationals. The preamble to the WCF Act states that the Act protects all injured or disabled or disease stricken employees in the course of employment whether in the private sector or public service of the Government of Tanzania. The Act in section 2(1) shows that the law is meant for protection of all employees in formal employment both in public and private sector in Mainland Tanzania.

The WCF Act prohibits payment of employment injury benefits to employees working outside Tanzania (emigrants) whose employment outside the country exceeds 12months continuous employment.[1021] Also, the WCF Act in section 25 (1) prohibits payment of benefits to a migrant worker who was working temporarily in Tanzania and happen to sustain injuries or disease while temporarily working in Tanzania, while his major place of employment is outside Tanzania[1022]. However, the employer employing such a foreigner may be required to pay all assessments

[1021] Ibid, s. 24 (3).
[1022] Ibid, s.25 (1).

made by WCF specifically in respect of such incidence or contingence if such employee has to be entitled to compensation under the Act. The Act also prohibits double benefits of compensation to an employee entitled to benefits under laws of two different countries. The entitled employee must elect one law only and claim under that respective legislation for compensation.[1023]

However, after the researcher had completed this study, the Government of the United Republic of Tanzania produced for the first time the proposed draft Bill called *Public Service Social Security Fund Act, 2017* (Special Bill Supplement No 8A) published in the Special Gazette of the United Republic of Tanzania No. 8A Vol.98 dated 19th October, 2017. This Bill makes legislative proposals for the enactment of the Public Service Social Security Fund Act for purposes of providing social security benefits to employees in the public service, and to repeal the Public Service Retirement Benefits Act, Cap.371, the LAPF Pensions Fund Act, Cap.407, the PPF Pensions Fund Act, Cap.372 and the GEPF Retirement Benefits Fund Act, Cap.51.

However, this new Bill retains the NSSF Act, 1997; the WCF Act, 2013; the NHIF Act, 1999 and the CHIF, 1999. The draft Bill proposes amendments to the National Social Security Fund Act, Cap.50 with a view to providing provisions on social security benefits to employees in the private sector. This Bill also introduces the unemployment benefit and it is an attempt to make internal harmonisation of social security laws. It directs all employees in private sector and those informally employed or self-employed to contribute to NSSF. This special Bill supplement

[1023] Ibid, s. 25 (3).

when it is enacted into law, it will dramatically change the course of social security administration in Tanzania. The long title of the proposed *Public Service Social Security Fund Act, 2017* reads:

> *"An Act to provide for establishment of the Public Service Social Security Scheme; to provide for contributions to and payments of social security benefits in respect of the service of employees in the public service; to repeal the Public Service Retirement Benefit Act, the LAPF Pensions Fund Act, the GEPF Retirement Benefits Fund Act and the PPF Pensions Fund Act and to provide for other related matters."*

This proposed draft Bill defines "totalization of periods of contribution" as the process of adding up together the number of months which a member has fully contributed to a Fund for the purpose of getting similar social security benefits from different social security schemes due to change of employment for purpose of creating qualifying condition for pension benefits. Section 31 of the proposed draft Bill(Public Service Social Security Fund Act, 2017) provides that:

> *"A member who proves to the satisfaction of the Director General that- (a) he is emigrating from and has no present intention of returning to the United Republic; and (b) the country to which he migrates has no bilateral agreement with the United Republic of Tanzania that allows portability of benefits, may terminate his membership with the Scheme and upon such termination shall be entitled to a payment of special lump sum".*

The proposed draft *Public Service Social Security Fund Act, 2017* which is still a Bill also provides in section 26 (2) that: *"A member shall not be entitled to retirement benefit unless he has completed the minimum qualifying period of fifteen years of contribution".* The proposed draft Bill seems to have reinstated the rights to withdrawal but upon satisfying the qualifying conditions within the terms of section 24(1) of the draft Bill. Section 24 says that no sum of monies standing to the credit of a member may be withdrawn from the Fund except with the authority of the

Board. However, the proposed law says that such authority should not be given unless the Board has been satisfied that the member has met the qualifying conditions which are provided for under the draft Act.

The draft bill in section 24(2) provides that in an event a withdrawal under subsection (1) of section 24 has been made of any amount standing to the credit of the member, the member should not be treated as a member from the date of withdrawal. The proposed draft bill does not address the question of harmonisation of qualifying period in the EAC countries nor does it address the issues of contributions in the schemes of other countries because there are no yet produced social security coordination instruments in the EAC region. However, this thesis is not based on this draft bill and the final form of the law cannot be established as of now. Thus, this bill raises many pertinent issues that will hopefully form the basis of future research agenda.

6.8 Conclusion

Chapter six has examined the legal framework for implementation of equality of treatment in social security for migrant workers in Tanzania. Among other things, the chapter has established that Tanzania is falling short of compliance to the EAC CMP to the extent shown this chapter. Nationally, there is inefficient harmonisation of social security laws. Not only that but also social security coordination instruments or rules are not in place for managing intra-region benefits provisioning for migrant workers.[1024] The study has also found a significant lack of compliance

[1024] See Conference Report on The East African Community Common Market Protocol for Movement of Labour: Achievements and Challenges of Implementation of the Protocol presented at Merridian

with international human rights and labour standards instruments. Even the examined social security laws in Tanzania do not expressly or directly provide for effective equal protection as between nationals and foreign labour migrants in the subject of social security. Although the Government of Tanzania has argued that she was taking progressive steps towards compliance with her obligations under the ratified international treaties and the EAC regional instruments, she had obligations also to safeguard her national interests.[1025]

Court Hotel, Nairobi Organized and hosted by the Friedrich Ebert Foundation (Kenya) Nairobi, 1st -2nd November 2012, pp. 12-13.

[1025] See the "East Africa: EA Common Market Rules On Dar 'Radar", Tanzania Daily Newspaper, 6th March, 2014, The speech by Dr Abdullah Makame, an Assistant Director in the Ministry of East African Community addressing participants to the workshop at which findings on the study on the East African Common Market Scorecard, commissioned by the World Bank Group and the EAC Secretariat, were tabled in Dar es Salaam.

CHAPTER SEVEN

7.0 SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATION

7.1 Introduction

This study has investigated the state of compliance with international law and regional instruments on legal protection of cross-border labour migrants in the subject of equality of treatment in social security in the EAC with specific reference to the countries of Kenya and Tanzania. The pursuit of this study was through various legal research methodologies. These include: Doctrinal legal research, comparative legal analysis coupled with limited use of some empirical methods and the human rights research methodology. This concluding chapter is divided into five sections namely, introduction, summary of findings, conclusion, recommendation and lastly, it is future research agenda.

7.2 Summary of Findings

The findings below are presented in connection to the underlying research questions that guided the investigation in this thesis and the need to provide approximate answers. The first research question had asked: *"Does the legal framework in the EAC countries comply with and promote the principle of equality of treatment in social security for migrant workers under international labour, human rights and regional instruments*?" In response to this question of inquiry, it is argued that chapters 4, 5, and 6 have addressed this research question. Some of the findings in respective chapters responding to this question are summarised below.

It has been established in chapters 5 and 6 of this thesis that the two countries still run a multiplicity of social security legislation which points to a lack of

comprehensive internal harmonisation of social security laws and schemes. The social security legislation in both Kenya and Tanzania remain fragmented and create different qualifying condition for benefits accessibility. This challenge makes legal coordination of regional wide portability of benefits difficult to achieve.[1026] However, if the proposed draft *Public Service Social Security Fund Act, 2017* will be passed into law in Tanzania, it will address several of the local challenges raised in this thesis, but will be falling short of the solutions for the EAC regional body.

Also, the fact that there are still legal provisions in the EAC CMP, 2009 which recognize the rights of Partner States to implement 'permissible discrimination' of non-nationals of fellow EAC Partner States in employment, compliance with equality of treatment is far from being made a real benefit. The CMP in Article 10(10) permits Partner States to impose restriction on employment of foreign workers in cases of public service employment among Partner States.[1027]

The study has revealed a lack of multilateral region-wide agreement for benefits administration on equality principles from Tanzania to Kenya and versa. Absence of such instrument for region-wide social security coordination impedes the enforceability of equal treatment of EAC citizens. The administration of national social security schemes in both Kenya and Tanzania remains nationally focused and fragmented in nature without region-wide social security coordination instrument under the EAC legal framework. This gap hinders compliance to international

[1026] See Appendix I-Tables 5.1 and 6.1; also the Protocol to the EAC on Establishment of the EAC Common Market Protocol, 2009 Arts. 7, 10, 11, 13, and 15 as well as Annexes I, II, III, and IV to the EAC CMP of 2009.
[1027] See for example, the EAC CMP, Art.10 (10).

instruments that set standards for protection of international labour migrants as discussed in chapter 3 of this thesis.

It has been shown that, with the exception of NSSF Act, all social security laws in Tanzania do not have legal provision on mechanism for migrant workers to access benefits when they migrate to different countries within the EAC Partner States and join other different social security schemes. The study has shown that migrant workers under the EAC legal framework have been subjected to national laws of countries of employment. In the absence of regional wide social security coordination instrument and in the absence of comprehensive harmonisation of social security laws, migrant workers continue with the risk of losing their past contribution periods earned in different countries.

The study has found that several national social security laws of Kenya and Tanzania discussed in chapters 5 and 6 do not comprehensively comply with the EAC CMP and international instruments governing social security. National laws do not explicitly provide for specific guarantee of equal treatment in social security and cross-border accessibility of benefits within the intra-regional labour migration framework.

The *principle of variable geometry* that is entrenched in the EAC Treaty is likely to hinder collective implementation of harmonisation of social security laws. By this principle, no country is prevented to move fast in harmonisation of its own laws than the other. Equally, no country is forced to move fast as its fellow Partner State. Two or more countries may form a sub-group to move forward in implementation of the

CMP while leaving the rest moving at their own pace. This freedom appears positive but it has a disadvantage of condoning delays by other Partner States as no country is forced to move collectively with other Partner States.

Chapters 5 and 6 have revealed a lack of clear roadmap to harmonisation of social security laws at the EAC level towards full compliance to the Community law as part of observance of social justice and human rights. The approach towards harmonisation of social security laws relies heavily on actions of individual States.[1028] The decentralised approach to implementation of the EAC Treaty requires internal consultative procedures and legislative processes of Partner States. Sometimes there is lack of political will which leaves the EAC regional integration at the mercy of national governing elites who determine the course of events. All these factors delay the compliance with the EAC CMP and this explains as to why there is a lack of uniform legislation for protection of social security rights of migrant workers across the EAC.

Also, it is the finding of this study that the envisaged type of harmonisation desired by the EAC is not clear. Whether the EAC is pursuing a *'minimum harmonisation'* or *'standard harmonisation'* remains unclear.[1029] The harmonising instruments of the Community remain the EAC Treaty; the CMP; the Monetary Union Protocol; the CMP Regulations; the Council Directives and other legal instruments. These instruments have left each Partner State to determine how far harmonisation of

[1028] See obligations of Partner States under the CMP in Art. 3; Art. 5; Art.10; Art.12; Art.13; Art. 39 and Art. 47, among others.
[1029] See an elaborate discussion on 'minimum harmonisation' and "standard harmonisation" in chapter 2 of this thesis.

national laws and policies should be implemented towards compliance with EAC law.

Absence of clear type of harmonisation that is implemented by Partner States is reflected in the continued application of inconsistent multiple social security laws in Member States. All Partner States have different social security schemes operating simultaneously in each Partner State and this creates a major challenge with regard to harmonisation. For example, Burundi has a mandatory public pension scheme, civil service pension scheme, supplementary pension schemes and individual private pensions. Kenya has a mandatory public pension scheme, Local Authorities Provident Fund (LAPFUND) established under the *Local Authorities Provident Fund Act, Cap.272 (R.E 2012 (1984) of the Laws of Kenya*. The Act establishes a provident fund for certain employees of local authorities and provide for contributions to the fund by such employees and authorities.

The Kenya Local Authorities Provident Fund Act, Cap.272also provides for the administration of the fund by a Local Authorities Provident Fund Board. Kenya has in place the draft proposed *Kenya County Pension Scheme Bill of 2016* which is intended to establish the *County Pension Fund* in order to provide for the adoption of an existing umbrella pension scheme for all staff and officers of County Governments, County Agencies, County Corporations, Associated Organizations and other related entities. The County Pension Fund is the proposed scheme that is to replace the LAPTRUST for employees of county governments, Public Service Pension Scheme for the Civil Service, private pension schemes and individual

private pensions.[1030]

Therefore, in light of the above described multiplicity of social security schemes in the EAC Partner States, transferability (exportability) of social security benefits for a migrant worker from one country to another Partner State is not comprehensively regulated in the Community. In order to enable portability of benefits across national borders, Partner States are required to harmonise the social security (retirement benefits) sector. The latter is not yet harmonised and therefore still stands as one of the major impediments to the realisation of free movement of workers and equality of treatment of migrant workers.

The study has also demonstrated that, the EAC law permits migrant workers to register with national social security schemes for contributions in countries of employment while these national security laws are not harmonised. At the same time, the provisions of the CMP on Free Movement of Workers Regulations of 2009, particularly in regulation 13 contain a direction to all Partner States to put in place domestic legal mechanism that implement the principle of equal treatment of all citizens in employment. Hence harmonisation of social security systems of EAC countries becomes a mandatory requirement.[1031]

In the absence of comprehensive harmonisation, it is most relevant for EAC countries to develop a network of social security agreements. These agreements create an effective enforcement of international and regional human rights norms. The EAC regional instruments set general benchmarks of implementation of social

[1030] Ibid. Note also that LAPTRUST was established by the Kenya County Retirement Benefits Act,
[1031] See EAC CMP, Annex II Regulation 13 (1) particularly (c), (d), and (h).

security provisioning to migrant workers based on equality principles, rule of law, social justice, promotion and protection of human and people's rights in accordance with the provisions of Article 6d and Article 7(2) of the EAC Treaty which enforce the African Charter on Human and Peoples' Rights and other international and regional instruments which prohibit discrimination of peoples based on nationality.

It has been established in this study that the national social security laws of Kenya and Tanzania permit migrant workers to register for social security benefits contribution and these laws entitle their members to receive their benefits in host States. However, the EAC lacks a regional wide electronic social security benefits payment mechanism and no coordinated database of migrant workers linked to social security schemes in all EAC countries. Lack of such digitized administrative network of cross-border labour migrants for payment of their benefits through EAC regional wide electronic interconnection system poses difficulties in compliance with the EAC CMP. This affects the regional integration and implementation of equality of treatment of EAC citizens.

It has been argued that the EAC Treaty says that: "*Community organs, institutions and laws take precedence over similar national ones on matters pertaining to the implementation of the Treaty*" as provided under Article 8(4). However, the findings in the two case studies of Kenya and Tanzania have demonstrated that, the practical effect of the primacy of EAC law is hard to establish because the same EAC law recognises the disparity of national legislation among the EAC Partner States. If legal provisions in national laws remain contradictory to the EAC harmonising

instruments, the national law will remain operational until they are nationally amended in order to conform to the EAC law. The EAC has no control as to what time will a country take to comply with the Treaty.[1032]

The EAC Treaty in Article 16 provides that the Council is legally mandated to issue directives and regulations on several matters, including those related to enforcement of equality of treatment of EAC citizens.[1033] This study has not found any specific directive that set timeline to the Partner States to embark on regional social security convention for coordination of social security benefits. The EAC Treaty envisages observance of human rights, rule of law, and social justice in line with international law.[1034] However, the EAC Council has not firmly directed the incorporation into national laws specific legal provisions on mandatory domestication of international labour and human rights treaties as part of implementation the EAC Treaty and its protocols.

It is the finding of this study that Article 146 of the EAC Treaty provides for possible suspension or expulsion of a Member State that fails to observe and fulfil the fundamental principles and objectives of the Treaty. The study has established that from July 2001 when EAC was officially put into operation to this date (2017), the EAC Partner States have defaulted in many ways and failed to comply with the EAC Treaty and commitment to the CMP objectives.[1035] There have been delays in harmonisation of national laws by the Partner States and lack of clear social policies and clear legal regulatory frameworks towards implementation of equality of

[1032]See detailed discussion in chapter 4 particularly concerning the EAC treaty provisions on equality.
[1033] See the EAC Treaty, Art. 16.
[1034] Ibid, Art.130 (1), (3) and (4); see also Art. 6d and Art. 7(2).
[1035] See the EAC CMSC 2016, p.17, note 509.

treatment of nationals of the Partner States. The examined national social security laws of both Kenya and Tanzania and constitutional provisions do not show clear extent of guarantee of migrant workers' rights to equal treatment in social security.[1036]

This study has found that there is a problem of non-compliance with the EAC CMP by Partner States while no serious warnings or sanctions/penalties are issued against non-compliant States.[1037] The EAC Treaty provides for suspension and expulsion of non-compliant Partner States as provided in Article 147 (1).[1038] The suspension or expulsion of a member State must, however, be based on existence of evidence of gross and persistent violation of the principles and objectives of the Treaty. Incidentally, the Treaty does not define the types of actions that amount to gross and persistent violation of the Treaty. However, as it seems, the EAC does not prefer imposition of penalties or sanctions against non-compliant member States and consequently, the Member States do not feel compelled to comply with the timely implementation of their obligations under the Treaty and the ratified protocols.

Absence of penalties against violations of the provisions of the Treaty has the effect of prolonging the span of time taken by individual Partner States to comply with the CMP and to harmonise their domestic laws.[1039] Such delays have been revealed in the state of legal provisions under social security laws, citizenship laws and labour laws of both Kenya and Tanzania in the protection of migrant workers as shown in

[1036] Ibid, p. 87
[1037] Ibid, 232p, at p. 87ff.
[1038] See *EAC Treaty*, Art.147 (1): "The Summit may expel a Partner State from the Community for gross and persistent violation of the principles and objectives of this Treaty after giving such Partner State twelve months' written notice; See also the CMS 2016, pp.1-232, note 509.
[1039] See the *EAC Treaty*, Art. 131(1).

Appendix I, Table 5.1 and *Appendix I, Table 6.1*. Both countries under the study seem to be moving variably at slow pace in different areas of harmonisation of their domestic social security laws with Tanzania showing much slower pace than Kenya. This is due to the absence of specific clear roadmap that strictly puts clear timeline of accomplishing specific stages of harmonisation.

The study has also established a lack of supranational legislation that should have directly become applicable in domestic jurisdictions. This gap is one of the weaknesses of the EAC Treaty implementation model which follows the decentralisation approach. This decentralisation approach to implementation of the EAC Treaty has led to the EAC suffering from limited numbers of Community legislation that would have been adopted pursuant to the EAC Treaty and directly applicable in national jurisdictions in appropriate circumstances. The implementation model of the EAC CMP heavily relies on the concept of harmonisation of laws and the *principle of variable geometry*. The Partner States prefer to move ahead with compliance with the CMP at their own speed, and this means that some countries are left behind in certain aspects of the Community while other group of prepared Partner States are allowed by the Treaty to proceed ahead.[1040]

The findings in chapters 4, 5, and 6 of this thesis have also revealed that under the EAC CMP each country is required to harmonise its own national social security laws so as to conform to the EAC law. However, there is a challenge of lack of strong supranational structures at the EAC regional level that should operate in the

[1040]See the CMS 2016, pp.80-90ff, note 509.

Member countries to compel timely compliance with the EAC law. Moreover, the study has shown that, there is lack of a uniform EAC region-wide social wide security portability code or Agreement to govern transferability or exportability of social security benefits beyond national borders within the EAC. There is no common instrument to guide the intra-regional totalization of periods of social insurance earned in different EAC countries and maintenance of acquired social security rights. It is, therefore, difficult to monitor and enforce Partner States' obligations towards creating enabling legal environment for equal treatment of migrant workers. The EAC citizens who are employed in intra-region labour migratory conditions are subjected to national social security laws of respective member countries while these countries suffer from deficient harmonisation of their national social security laws.

This study has demonstrated that, the guarantee of equality of treatment between migrant workers and national workers in social security entitlements is only to the extent that migrant workers will be treated equally with nationals in accordance with the applicable legislation of a country of employment (host State). Upon migration to other countries, the earned benefits in the first country of employment may be transferred to the migrant worker's account in other countries subject to existence of reciprocal social security arrangement.

Impliedly, there is a need for effective conclusion of a network of reciprocal social security agreements of bilateral nature for purpose of creating the legal basis for preservation, exportability, maintenance and aggregation of social security benefits for migrant workers within the EAC and beyond the EAC. The thesis has established

such agreements are lacking among EAC Partner States. At the same time, harmonization of social security laws among the EAC countries remains impartial or incomplete and is selectively done in certain legal provisions. This makes the Partner States continue to fall short of fulfilling their commitments to implement the EAC CMP.[1041]

The foregoing summary of the findings has answered the first research question which had asked: *"Does the legal framework in the EAC countries comply with and promote the principle of equality of treatment in social security for migrant workers under international labour, human rights and regional instruments*?" The next discussion addresses the second research question.

As regards the second research question of this thesis, it had asked: "*Which specific conditions in Kenya and Tanzania affect the rights to equal treatment in social security for migrant workers?* In an attempt to answer this second research question, it is important to state that there exist various dimensions of legal effects of social security standards created by international labour conventions and human rights instruments in terms of interpretation, application, problems of supervision and implementation, and the role of these instruments in national jurisdictions. Therefore, several research findings anchored on the first research question are also relevant in answering this question.

It should be stated that chapter five has shown that the right to social security is entrenched in the Constitution of Kenya, 2010 as a human right under Article 43 (1)

[1041] Ibid, pp.1-232, note 509.

(e) of the Constitution. This implies that, social security as part of social economic right is justiciable and it has a judicial recognition in courts of law in Kenya. The justiciability of social security right in Kenya is well in line with the recommendations of Committee on Economic, Social and Cultural Rights (CESCR).This is a positive development on the part of Kenya. On the other hand, it has been established in chapter six of the thesis that the constitutional and social security legal framework in Tanzania places social security as a mere component of directive principles of State policy of the government's social welfare programmes.

The right to social security under the Constitution of the United Republic of Tanzania, 1977 (as amended) is not categorized as a basic or fundamental human right; hence it is not justiciable in courts of law. The policy of the government of Tanzanian on social welfare is stated in the Constitution as being to work towards ensuring social welfare during times of old age, disability, sickness and incapacity as part of directive principles of its state policy.[1042] The results of the investigation have shown that, the phrase 'social security' is not used at all in the Constitution of the United Republic of Tanzania. Surprisingly too, the study has also revealed that, even the final draft of the proposed new Constitution of Tanzania,2014 which entrenches the bill of rights in articles 32 to 59 neither mentions 'social security' nor social economic rights as part of bill of rights.

Also, the study has revealed that, despites accession to the ICESCR since 1976, Tanzania has not specifically domesticated the provisions of this treaty concerning

[1042] See Constitution of the United Republic of Tanzania, 1977, Art. 11.

social security as human right as interpreted by the Committee on Economic, Social and Cultural Rights in the UN General Comment No.19.[1043] The existing conditions in Tanzania are that the country has not ratified the *Optional Protocol (I) to the International Covenant on Economic, Social and Cultural Rights (ICESCR)* of 1966.[1044]

Tanzania has neither signed nor ratified the optional protocol to accept individual complaints mechanisms and inquiry procedures under the UN framework by recognizing the competence of the *Committee on Economic, Social and Cultural Rights*.[1045] Therefore, violations of social security rights of nationals and migrant workers cannot be brought before the Committee on Economic Social and Cultural Rights (CESCR) under the Covenant. Even violations of the right to adequate standards of health and emergency medical care[1046] and social security rights in Tanzania cannot be investigated under the ICESCR because they are not in the bill of rights. These rights are provided subject to available means and prevailing conditions and level of economic development.[1047] Therefore, Tanzania is still failing to comply with the ratified international human rights treaties such as the ICESCR, ICCPR, ICERD, CRC and various ILO social security conventions. The legal conditions obtaining in Tanzania do not promote the enjoyment of social economic rights.

[1043] See General Comment No. 19 on the right to social security- Comment adopted on 23 Nov. 2007 by *UN*Committee on Economic, Social and Cultural on the right to social security (art. 9 of ICESCR).
[1044] United Nations, *Treaty Series, vol.999* 3, p.171.
[1045] See ICESCR Article 9.
[1046] See ICESCR Article 12.
[1047] See Constitution of the United Republic of Tanzania, 1977 (Cap. 2, RE 2002), Arts. 9-11.

The study has revealed the existing conditions of multiplicity of social security laws that establish different social security schemes in both Kenya and Tanzania as shown in Appendix I, Table 6.1. The multiplicity of social security laws has created a weak national legal protection mechanism to migrant workers registered under different social security schemes of the two countries of Kenya and Tanzania, but also of the rest of the EAC Partner States. At national level, the social security laws are internally inconsistent and discriminatory in terms of treatment of contributing members while other laws are vague or unclear on protection of foreign labour migrants.[1048]

While the Tanzania's SSRA has introduced the *Social Security Harmonisation Guidelines of 2014*, the harmonisation deals with internal regulation of quantum of benefits and investment procedures. This instrument has got nothing relevant to the protection of the rights of intra-regional labour migrants working in different countries of the EAC.

The social security laws in Tanzania contain specific legal conditions that insist on territorial boundary of Tanzania mainland as a limit of operation of the law, and therefore restrictions on exportability of benefits beyond national borders[1049]. Some social security legislation such as the LAPF Pensions Fund Act of 2006, the GEPF Act of 2013, the PSPF Retirement Benefits Act of 1999, and the NHIF Act of 1999 are silent on cross-border or transnational exportability of social security benefits in case migrant workers migrate from one Partner State to another.

[1048] See Appendix I-Table 5.1 on selected Kenyan laws and Table 6.1 on Tanzanian laws.
[1049] Ibid.

Moreover, these laws do not contain any provisions on reciprocity agreements regarding international payment of social security benefits. For the case of Tanzania NSSF Act, 1997 (as amended), it has been established in chapter 6 that that section 92 of the Act for possibility of conclusion of reciprocal agreements for transferability of benefits where countries have legal conditions and similar social security schemes for permitting social security payment abroad on reciprocal basis.

However, equal treatment of migrant workers and nationals under this arrangement is subject to the terms of the agreement and undertaking made towards international conventions governing social security rights for migrant workers. In the latter case of NSSF, still there are no identifiable reciprocal social security agreements between Tanzania and other EAC Partner States. The comparative discussions in chapter 5 and 6 of this thesis show the legal frameworks of the two countries of Kenya and Tanzania and the ways in which they tend to implement the EAC Treaty and its protocols. It also shows the state of compliance with international labour and human rights instruments. In both cases, the problem of lack of comprehensive cross-border social security benefits provisioning mechanism through either harmonisation or coordination has been established.

Both the Kenya NSSF Act, 2013 in section 64 and the Tanzania NSSF Act, 1997 in section 92 provide for a requirement to conclude reciprocal social security agreements for provision of benefits to migrant workers. Similar provisions are missing in the rest of other social security legislations of these countries and such reciprocal social security agreements are not in place.

Moreover, the findings have shown that in order to be entitled to benefits[1050] national legislations of the two countries of Kenya and Tanzania contain a condition of strict location within national geographical boundaries where a migrant worker is employed. "Appendix I-Tables 5.1" and "Appendix I-Table 6.1 list down laws detailing the extent of legal provisions in national laws pertaining protection of migrant workers. The territoriality requirement excludes portability of benefits beyond national borders. Such restrictions are in employment injury benefits, maternity benefits, medical care benefits and similar others benefits.[1051] In effect, the territoriality condition conflicts with the spirit of the EAC Treaty of 1999 and the EAC CMP of 2009 which set principles of equality of treatment of all EAC citizens within the bloc without any discrimination based on nationality status.

Both Tanzania and Kenya still maintain their separate domestic social security legal rules; definitions; and practice of their social security systems thereby denying migrant workers wide enjoyment of internationally coded rights. For example, withdrawal benefits are still being provided in terms of section 45 of the Kenya NSF Act of 2013 while the same benefit has been suspended or removed by Tanzania through the draft Parliamentary social security Bill of 2016 which seeks to replace it with unemployment benefit.

The proposed draft Unemployment Bill of 2016 does not envisage guarantee unemployment benefits to non-nationals. Under current legal conditions, a Kenyan

[1050] See Chapters 5 and 6 in *Appendix I-Tables 5.1* and Table 6.1 and the corresponding discussion in sub-chapters 5.5 and 6.5 containing legal framework for protection of migrant workers between nationals and migrant workers in both Kenya and Tanzania.

[1051] See Appendix I, Tables 5.1 and 6.1 in Chapters 5 and 6 respectively on relevant laws of Tanzania and Kenya that excludes portability of benefits.

immigrant contributing in a scheme in Tanzania would find it discriminatory or unfair to deny him withdrawal benefits if a similar contributing member back in Kenya would be entitled to receive similar benefit.

Most social security laws examined in *Appendix I, Table 5.1* and Table 6.1 of this thesis on legal framework of both Kenya and Tanzania respectively contain restrictions based on territoriality, and also some are either completely silent or lack clarity (vague) on extent of legal protection of migrant workers. These laws have left the protection of migrant workers to the subjective legislation of individual EAC Partner States while all EAC countries are demonstrably still lacking comprehensive harmonisation of their social security laws.[1052]

The study has established that framework of enforcement of the EAC Treaty and CMP is through decentralised model but it lacks clear supranational legislation that directly applies in sovereign jurisdictions of EAC Partner States. This slows down the effective compliance with EAC law in the area of cross-border portability of social security benefits. The pace of implementation of the Treaty obligations is at the discretion of individual Partner States and at the will of political elites particularly the heads of States.

However, Kenya has made significant steps under its NSSF Act of 2013 to include detailed provisions under its section 64 on mechanism of social security benefits exportability across national borders. It has addressed the issue of maintenance of

[1052]See detailed discussion on social security legal framework of both Kenya and Tanzania in chapters 5 and 6 respectively.

acquired rights and aggregations of periods of insurance earned in different countries for benefit of migrant workers within the EAC and beyond. On the other hand, Tanzania has remained limited in its domestic oriented legislative scope regarding reciprocal agreements under section 92 of the NSSF Act, 1997 (as amended). The latter section is rather sketchy; less detailed, and does not address aspects of coordination of social security benefits within the EAC and beyond the EAC.

The modality of cooperation and operational rules as to social security benefits exportability across national borders, maintenance of acquired rights and aggregations of periods of insurance earned in different countries for benefit of migrant workers within the EAC and beyond are not provided in the law. Moreover, the EAC CMP whose implementation started in 2010 has demonstrably stalled in many respects such as failure to remove work permits among EAC nationals[1053]. This has the effect of negatively affecting the full enjoyment of equality of treatment in social security rights for migrant workers employed in Tanzania and who migrate for employment in other different countries within the Community and beyond.

The study has also shown that domestication and implementation of relevant international instruments that establish rules of coordination and harmonisation of social security is lacking in the EAC. Both Kenya and Tanzania demonstrably lack requisite ratification of relevant international labour conventions concerning social security as well as the international convention on migrant workers as demonstrated in *Appendix I, Table 5.2 and Appendix I, Table 6.2* to this thesis. Also, the lack of

[1053] Asiimwe, D., Future of EAC lies in presidents' hands, The East Africa, 18-24 November 2017, Issue No.1203, p.4.

ratification by Tanzania and Kenya has been found in the Optional protocols on recognition of individual complaint procedure under the UN human rights framework instruments as shown in *Appendix I, Table 5.3 and Appendix I, Table 6.3* to this thesis. Therefore, basic principles of social security benefits accessibility for labour migrants are difficult to enforce as they are not promoted by internal legal conditions.

The EAC countries tend to perceive social security for labour migrants as a source of unaffordable costs which should be avoided where possible particularly if there are no sufficiently compelling reasons to ratify. The fourth hurdle lays in the dilemma of political context of the EAC countries particularly the frequent turmoil in Burundi and South Sudan as well as the untamed strategic national Constitutional changes in some of the EAC countries which seem to create sort of unfavourable environment for implementation of international human rights treaties including social security guarantee.

In such circumstances, protection of migrant workers becomes a complex subject to absorb and address where most of the nationals in these countries remain without social security. Thus, lack of ratification stands as a setback to implementation of international labour standards and human rights instruments for protection of international labour migrants within domestic jurisdictions of these two countries.[1054]

The study has also established that, under the social security legal frameworks of both Kenya and Tanzania the varying legal provisions in the diverse national health

[1054] See Country status of ratification of international instruments in Appendix I-Table 5.2, Table 5.3, Table 5.4, Table 6.2, Table 6.3, and Table 6.4.

insurance legislations are silent on payment of benefits outside the host country of a migrant worker. National health insurance laws have not established any legal mechanisms or arrangements for reciprocal medical care benefits provisioning to migrant workers among the EAC countries.[1055] Lack of such reciprocity of reimbursements of costs or medical bills incurred by a migrant worker in neighbouring countries of both Kenya and Tanzania is a gap that needs to be addressed at the EAC regional and national level.[1056]

Therefore, in the final analysis, it can be stated that the specific conditions canvassed in this discussion on social security legal frameworks of both Kenya and Tanzania have demonstrated how they affect the rights to equal treatment in social security for migrant workers. Chapters five and six have substantially identified multiple features and conditions existing in both countries stemming from unsatisfactory compliance to international, regional and even national legal frameworks in social security impact on international protection of migrant workers.

7.3 Conclusion

The broad analyses outlaid in the previous chapters have demonstrated that the right to social security is a human rights issue as provided in various international and regional legal instruments discussed in this thesis. Through the rights based approach to social security, the study has shown that the EAC Treaty in Articles 6 (d) and 7 (2) provides for protection of human rights of all persons including migrant workers.

[1055] See the *Kenya National Hospital Insurance Fund Act, 1998 (Act* No.9), s. 15 and s.18.
[1056] Also see Holzmann, R., Koettl, J., and Chernetsky, T., *Portability Regimes of Pension and Health Care Benefits for International Migrants: An Analysis of Issues and Good Practices.* Social Protection Unit, Human Development Network, A paper prepared for The Global Commission on International Migration, The World Bank, Washington, DC, 2005, pp.6-30.

However, the EAC countries have not effectively given force of law to the international instruments on social security and the EAC legislation on Bill of Rights. Lack of common EAC instruments setting standard benchmarks of compliance to international standards and the Community instruments is a challenge to be addressed. This is one of the reasons as to why the international migrants in the EAC face obstacles in portability of benefits beyond national borders in the region.

The fragmented nature of national social security laws among the EAC countries of Kenya and Tanzania is one among causes of lack of strong protection of migrant workers in the area of social security benefits. Most insured persons who work for short periods in more than one country of the EAC do not qualify for long-term benefits such as pension benefits which require 15years of contribution in the case of Tanzania. A failure to qualify for long term benefits due to mobility status and lack of provisions for aggregation of insurance periods acquired by a migrant worker in different countries is a loss to such labour migrants.

A lack of region-wide harmonisation of social security laws makes it difficult to comply with the principles of equal treatment between cross-border labour migrants and national workers in the EAC.[1057]National constitutions of EAC countries are not harmonised on the entrenchment of the right to social security and its justiciability as a human rights issue. In Tanzania, this makes it impossible to claim any such rights through legal proceedings in courts of law by migrant workers. In Kenya, where the subject of justiciability of social security rights is entrenched in her Constitution of

[1057] See Appendix 1, Table 6.1 to this thesis.

2010, violations of migrants' rights to equal treatment in social security is yet to be tested in courts of law although it is permissible to bring an action on the subject.

A lack of multilateral social security coordination instrument in the EAC Partner States for enabling exportability, coordination, preservation of rights, and maintenance of acquired benefits is established in this thesis. Thus, fulfilment of the principle of equality of treatment between nationals and migrant workers remains less practical. The principle of aggregation of earned benefits from different countries is not complied with by the Partner States. As between Kenya and Tanzania, there are no clear social security coordination instruments that are envisaged under the EAC legal framework for protection of social security rights of privately employed workers within the region and under national social security laws. This is coupled with weak harmonisation of domestic social security laws among EAC countries as shown in the social security legal framework of both Kenya and Tanzania.

The EAC has not been able to enact strong supra-national legislation that should apply directly in national jurisdictions or courts to enforce the EAC law. The individual Partner States are at will to pass laws to enforce the EAC law as and when domestic conditions permit. This implies that, expecting national legal, political, social and economic conditions of each Member State to determine when and what type of law to enact leads to delays in enacting legislations to enforce the EAC law. Chances of enacting contradictory laws are also obvious. This is the problem of decentralised model of implementation of the EAC Treaty. In effect, it causes delays in fulfilment of obligations of Partner States under the EAC Treaty and the CMP.

7.4 Recommendations

In the context of the state of multiplicity of social security laws as established in the findings, some recommendations are proposed for adoption by the EAC countries. Firstly, the EAC Partner States should develop a common framework of commitments towards a common review of all national social security laws that establish various schemes. The EAC should put in place a binding timeline guided by rules to be complied by all Partner States so as to complete the process of harmonisation of their national social security laws.

Secondly, it is recommended that both the Treaty and Protocol for establishment of the EAC Common Market respectively, should be amended in order to provide powers to the apex judicial body of the EAC which is the EACJ to adjudicate upon cases of individual complaints against violations of social economic rights. This is possible because it has worked in other African countries such as South African. The Constitutional Court in South African in *Louis Khosa, Eliasse Mucambo Mulhovo & Sania Ndlovu v. The Minister of Social Development, The Director General of Social Development & The Member of the Executive Committee for Health & Welfare in the Northern Province,*[1058]in 2003 held that the right to social security is a human rights issue and therefore it is a justiciable right under her Constitution. The Court ruled further that the right to *social assistance* is meant to be for citizens whether permanent or temporary and that a person cannot be discriminated based on his nationality status. For South Africa, the critical question has not been if the social economic rights are justiciable but how these rights can be adjudicated.

[1058] Constitutional Case of South Africa, No. 12 of 2003; see also Olivier, M., & Van Rensburg, L.J., "Protection and enforcement of the right to social security, in *Law, Democracy & Development,* pp.87-97.

Thirdly, the existing legal conditions of lack of justifiability of social security rights in Tanzania should be improved by entrenching the right to social security in its Constitution in the category of Bill of Rights that is justiciable. This will enable migrant workers alleging violations of rights to social security to lodge complaints in the EACJ.[1059] Kenya has achieved this milestone under Article 43 of its 2010 Constitution and for this reason Tanzania has got no peculiar conditions prohibiting her from entrenching this right in its Constitution.

Fourthly, since Tanzania awaits the completion of new Constitution making process, it is recommended that there should be a review of the draft proposed new Constitution that was presented to the Constitutional Assembly in 2014/2015. Articles 32 to 59 which concern human rights should entrench the right to social security as a human rights issue capable of being justiciable. This is possible because Article 43 (1) (e) of the Constitution of Kenya 2010 has entrenched this right in the Bill of Rights. Both Kenya and Tanzania have obligations to observe the principles of human rights under the provisions of Article 6(d) and Article 7 (2) of the EAC Treaty.

Fifthly, the *Draft Bill of Human and Peoples' Rights for the EAC* that was initiated in 2009 and passed for possible adoption by the EAC Member States in 2012 has not yet been made part of EAC law. This law should be adopted by all EAC Partner States because they all politically and constitutionally aspire to observe human

[1059] Also see ILO: General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization, *Social security and the rule of law: Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution)*, Report III (Part 1B), International Labour Office, Geneva, 2011, pp.154-168.

rights. Failing to make the *Bill of Human and Peoples' Rights for the EAC* part of the EAC law is falling short of compliance with international human rights instruments. This instrument should establish the Supra-national EAC Human Rights Commission as additional principal organ of the Community. The Commission should have the function of promoting the regional wide observance and protection of human rights issues including rights of intra-regional labour migrants.

It is recommended that all national human rights Commissions of the current Partner States should report to this proposed EAC Human Rights Commission about all national legal conditions and actions impeding upon human rights of EAC citizens including social security rights of migrant workers. The *Commission* should be given mandate to develop principles and operating platform for receiving and processing human rights violations from any of the EAC Partner States. The proposed Commission may seek the intervention of the EACJ for interpretation and application of human rights instruments and determination of violations of the rights of the EAC citizens.

Sixthly, the EAC Partner States should negotiate and adopt an EAC region-wide social security benefits portability code or Convention to implement the fundamental principles of the EAC common market. Such convention will serve to coordinate schemes of different countries under agreed terms and conditions. Such model agreement similar to *the ECOWAS General Convention on Social security of 2013* will serve to create a mechanism of benefits administration, preservation, transferability and computation for exportability beyond national borders. Migrant workers will be able to preserve their earned benefits in different countries.

Also, for benefits of migrant workers and their equal treatment with nationals, the EAC countries should establish a network of reciprocal social security agreements for protection of such workers. This can be pursued while exploring for possible conclusion of regional wide social security convention. Such agreements are permissible under section 64 of the Kenya NSSF Act, 2013 and under section 92 of the Tanzania NSSF Act, 1997. However, such agreements would be effectively enforceable if all the EAC countries had to ratify relevant ILO conventions pointed out in "Appendix I, Table 5.2" and "Appendix I, Table 6.2" to this thesis.

Seventhly, the Government of Tanzania should amend all existing social security laws to include a legal provision that caters for modality of cross-border exportability of benefits. The law should provide for mechanism of coordination between schemes of different countries, preservation of acquired social security rights, totalization/aggregation of benefits, maintenance of acquired rights and the rights in the course of acquisition. The draft *Public Service Social Security Fund Act, 2017* that has been proposed by Tanzania as Gazetted on 10 October, 2017 does not seems to address such issues of portability of benefits in the EAC.

Eighthly, the Government of Tanzania should develop a national Diaspora Policy that creates uniform philosophy and common framework approach towards treatment of migrant workers living and working abroad.[1060] This policy will form the basis for establishing legal mechanism of bilateral and multilateral cooperation between migrants sending countries and migrants' receiving countries. In an event social

[1060] See Chapter 5 of this thesis on Kenya Diaspora Policy 2011.

security coordination instruments are developed in the EAC, the Tanzanian nationals living and working outside the country will benefit from this policy.

Ninthly, various national social security laws of both Kenya and Tanzania permit formally employed and self-employed migrant workers or non-nationals to register for social security contributions. These countries should devote some of their resources to establish a central electronic database for linking up and managing information of labour migrants who contribute to social security funds. The database will provide platform for social security coordination and control beyond national borders. For example, it will facilitate transfer of benefits to other funds within the EAC Partner States and assist in controlling, monitoring, and enabling efficient exportability of benefits.

Tenth, the EAC countries should examine into laws establishing *occupational diseases and injury* with a view to amending some restrictive provisions that prohibit exportability of benefits based on nationality status or territorial condition. The EAC Partner States have a duty to ensure there is non-discrimination of the nationals of Partner States based on their nationalities.[1061]

This thesis had the third research question which had asked: "*What is the appropriate model or framework of implementation of equality of treatment in social security for migrant workers that can be adopted by the EAC countries?"* In chapter 3 of this thesis, the author has explored several models of implementation of the

[1061] See the EAC CMP, Art.13 (2).

right to equal treatment as part of human right law impacting on rights of foreign labour migrants and national workers in the subject of social security.

Several EU social security instruments have become foundational instruments for various approaches to social security coordination across Europe for benefits of preservation of the social security rights of all EU citizens including migrant workers. However, European models may be complex systems. Therefore, other models have been developed in developing countries in Latin America, the Caribbean, and in Africa which are derived from European experience but with modifications to suit the context of developing nations.

In Africa, the question of cross-border portability of social security benefits for advantages of migrant workers has been governed by soft rules under some sub-regional frameworks. The first example is built under the framework of the *Charter of the Fundamental Rights in SADC* of 2003 contained in Articles 1 to 18 and the *Code on Social Security in the SADC of 2007* contained in Articles 1-21. The *Code on Social Security in SADC* was signed and adopted by the SADC Members on 1 January, 2008.

The SADC social security model Code would be perceived as a prototype that the EAC countries may consider examining for learning purposes, however, in the author's views, this model is not a complete model worth of emulation because it is still in its early stages of development. The SADC social security code requires Member States to enact laws to guarantee the rights to social security. It provides guidelines to Member States for development and improvement of their domestic

social security laws and schemes. Migrant workers are covered by Article 17 of the *Code on Social Security in the SADC*. The instrument simply provides guidelines for Member States to enact domestic legislation that facilitates the conclusion of bilateral agreements and multilateral social security agreements.

The *Code on Social Security in the SADC* permits introduction of principles that permit coordination of social security benefits between different countries and between different social security schemes with a view to facilitating exportability of benefits beyond national borders. As already pointed out, this *Code* may not be appropriate model to emulate for the time being because it is still under experiment, and it is without any legal binding character upon Member States. It lacks the tribunal to enforce it, and hence, it has not been implemented successfully due to its incomplete nature of ongoing evolution.[1062] Much can be learned only when the binding social security coordination instruments are ratified for implementation and actually put into use.

The second example of African social security model agreement is *ECOWAS General Convention on Social Security, 2012* that was adopted by authority of Heads of States of the ECOWAS in 2013 as a Supplementary Act to the Revised ECOWAS Treaty, 1993. By this action, the General Convention on Social Security has been made a binding instrument on member States without a requirement of ratification. In Article 44 of the General Convention, this Treaty requires that matters of administration of the Convention and its interpretation is done by experts in

[1062] See Regional Dialogue Report, Portability and Access of Social Security Benefits by Former Mine Workers, Southern Sun Hotel, Pretoria South Africa, 27-28 February, 2014.pp. 1-34.

fulfilling the aims of provisioning of social security to migrants and their families. The instrument guarantees cross-border portability of social security rights for lawful labour migrants in the formal and private employment sectors only within the Community.[1063]

Also it guarantees recognition and protection of human and people's rights as well as social economic rights. However, the report on the ECOWAS social security had reported of weak social security systems in benefits provisioning and some failure to provide certain benefits within the Community as one among the challenges. Other challenges include continued poor ratification of ILO Convention 97 of 1949 and ILO Convention 143 of 1982 as well as differences in social security systems among Member States. This adds to the problem of insufficient administrative capacities among Partner States to afford transferability of benefits beyond borders.[1064]

Three important developments under the *ECOWAS General Convention on Social Security* which may be relevant for the EAC countries may be put forward. Firstly, the ECOWAS have agreed to develop a uniform agreement or standard instrument that should be used by all Partner States. This instrument should be linked up together where all social security management organs will be connected. The objective of this is to facilitate the implementation of the Convention. Secondly, the ECOWAS has agreed to establish liaison Centre with a primary objective to manage the *ECOWAS General Convention on Social Security*.

[1063]See Dimeckie, K., *ECOWAS report on Labour Migration: Baseline Assessment on Free Movement of Persons and Migration in West Africa*, 2015, 35p, at p. 14, retrieved from <https://www.aau.org/2016>, accessed on 7 December 2017

[1064] Ibid, pp.15-21 and pp. 26-31.

The ECOWAS liaison Centre processes requests for benefits, manage the coordination of social security, administers validation of social security rights and emerging appeals. Other activities include management and updating the joint database of the ECOWAS Members which are currently 15 countries. Thirdly, the ECOWAS have decided to train staff of the social security schemes dealing with coordination of the ECOWAS Social Security systems. This training has the aim of ensuring that there is smooth and proper handling and control of the mechanism of administration and related arrangements of the social security benefits applications forms.

The third alternative model that the EAC countries may emulate is the *Caribbean Community* (CARICOM) *Agreement on Social security* of 1996 which is discussed in chapter 3 of this thesis. This model Agreement has almost 20 years of operation and therefore worth to learn from. This model Agreement is constituted into 65 Articles clustered into six parts whose characteristic features were discussed in chapter 3 of this study. The CARICOM social security Agreement model recognizes harmonisation of social security legislation of the Member States of the CARICOM as one of the ways to be utilized in order to promote functional cooperation and regional unity.

The CARICOM model Agreement on social security is recommended as a suitable model for the EAC to emulate because for over 20 years, the Agreement has successfully dealt with challenges of equality of treatment in social security for cross-border labour migrants. Also, the Agreement meets the third specific objective

of this thesis which is to explore for possible model of implementation of equality of treatment in social security for international migrant workers which the EAC countries and which the Partner States may emulate in addressing the challenges of benefits provisioning beyond national borders.

The CARICOM model Agreement is a workable model owing to existing similarities of conditions in terms of levels of economic development, related challenges, and legal features existing in both the CARICOM social security legal regime and those of the EAC social security legal regime. Existing literature show that there have been some difficulties in the interpretation of some provisions of the CARICOM Agreement, but still the instrument remains an important tool for the feasibility of multilateral agreements among non-industrialized countries such as the EAC Partner States.

7.5 Future Research Agenda

This study has been conducted in both Kenya and Tanzania as part of the EAC countries. A further research is required for the remaining countries in the EAC in order to establish how each individual country has harmonised her national social security laws in conformity to the EAC law and how they have complied with international standards for equal protection in social security for migrant workers.

Also, a further research is required in order to come up with a mechanism of setting up an EAC regional institution with legal and administrative tools for harmonisation of data collection on labour migrants, exchange of information between Member States in order to identify ways of implementation of a multilateral model of social

security instrument suitable for the EAC. Finally, the impact of consolidation of Tanzania social security laws through the *Public Service Social Security Fund Act, 2017* is also worth of further investigation as to its future implication. If it is passed into law, there is a need to investigate the extent to which the proposed new law complies with the EAC law and other applicable internationals standards revealed under this study.

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APPENDIX

Table 5.1: Selected legislation impacting on rights to equal treatment between nationals and migrant workers in Kenya since colonial era up until October, 2017

Act No/ Cap	Title of Legislation	Sections Applicable to equality of treatment of Migrant workers
No.45/2013	The Kenya National Social Security Fund Act, 2013	s.2-employee covered is any persons (including migrant worker) who is working in Kenya or outside Kenya but his employer ordinarily resides in Kenya or has place of business in Kenya; s.39-Emigration benefit; s.64-provides for protection of migrant workers in Kenya, in EAC and Beyond EAC; First Schedule Para 1 & 2 exempt migrant workers in Kenya who are covered under similar scheme in foreign country;
Cap.272 (R.E 2012 (1984) Laws of Kenya	Local Authorities Provident Fund Act, 2012	It establishes a Provident Fund (LAPFUND) for certain employees of local authorities and provide for contributions to the fund by such employees and authorities. It also provides for the administration of the fund by a *Local Authorities Provident Fund*. No legal provision on protection of migrant workers nor their equality of treatment as they are not envisaged under the Act.
No.24/2013	The Kenya Social Assistance Act, 2013	It implements Article 43 of the Constitution in which right to social security is entrenched. Principle of equality of treatment are restricted to nationals, under s.17 and S.19 (1) (b) migrant workers and any non-national are excluded from eligibility to social assistance benefits, hence, it is discriminatory.
No.8/2012(Cap.190A)	The Public Service Superannuation Scheme Act, 2012 (Rev. Edn. 2014 [2012)	S.5 Excludes all categories of employees except employees in public service. The Act is silent on Migrant workers employed in public service. Legislation does not cover equality of treatment nor social security benefits guarantee and provision for migrant workers. Note that employment in Public Service is reserved for Kenyan citizens only.
No.12/2011	The Kenya Citizenship and Immigration Act, 2011	S.15 and 19(4) recognizes the rights of stateless persons; S.16-provides for migrants rights. The Act does not address issues related to equality of treatment.
No.31/2011	The Kenya Citizens and Foreign Nationals Management Service Act, 2011	s.4 (1) implements, *inter alia*, policies, laws on immigration and foreign nationals' management; s.4 (2) (b)-provide for the general scope and direction of migration; S.6(2) provides for principles of affirmative action for gender equality, regional balance and inclusion of the marginalized populations at all levels of employment in accordance with Articles 27, 54, 55, 56, 232 and other relevant provisions of the Constitution of Kenya, 2010. The Act impliedly reflects equality of treatment of migrants as well.
No.15/2011 (Cap.5C)	The Kenya National Gender and Equality Commission Act, 2011	Promotes and protects values and principles set out in the Constitution and the laws of Kenya- s.7(c)-protects inclusiveness, non-discrimination and protection of the marginalized groups; s.7 (d)-observance of all *international treaties* and *conventions* ratified by Kenya, in particular *human rights*. Places equal importance for the dignity of all human beings, hence migrant workers are impliedly covered; s.8(a)-implements Article 27 of Constitution in promoting equality and fighting discrimination; s.8(c) Implements compliance with all *treaties* and *conventions* ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including *minorities* and *marginalised persons*, *women*, persons with *disabilities*, and *children*; s.8(n) Implements equality and freedom from discrimination for different affected interest group; Kenya to produce periodic reports for national, regional and international reporting on progress in the realization of equality and freedom from discrimination; s.8(g)-implements policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution and other written laws;

		s.8
No.20/2011	The Kenya Industrial Courts Act, 2011 Rev. Edn 2013 [2012]	s.28 of the Act requires compliance to Chapter Six of Kenya Constitution in which Article 78(1) excludes all non-citizens of Kenyan from holding State office, hence migrant workers as well.
No.12/2008	The Kenya National Cohesion and Integration Act, 2008	s.2 defines the Act to cover protection of ethnic groups including of other nationality; s. 3(1) (b) (ii) mentions discrimination based on nationality without justification as prohibited, hence migrants cannot be discriminated without justifiable grounds. s.3 (2) differential treatment based on nationality must be for achieving legitimate aim. s.4 protects persons who institute cases against acts of discrimination ; S.13 prohibits discrimination based on nationality (citizenship); Apparently, s.10(2)(a) and (b) (iii) permit discrimination of nationals.
No.11/2007 .(Cap.226	The Employment Act, 2007	s.5(1)(b) promotes and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya; s. 5(2) (a) prohibits discrimination in employment based on nationality. Thus migrant workers are impliedly covered; s. 5(c)-prohibits discriminatory terms and conditions of employment, hence social security and equality of treatment constitute terms and conditions of employment; s.5(3) prohibits direct and indirect discrimination in employment based on nationality; s.10(3)(iii)-Equality of treatment of migrant workers and right to join pension scheme; Rule 4 Kenya LN No,28/2014 implements equality of treatment of migrant workers lawfully employed in Kenya.
No.14/2007	The Kenya Labour Relations Act, 2007	The Act as a whole as reflected in the Preamble implements the Bill of Rights whereby Article 41(1) of Kenya Constitution entrenches fair labour practices and reasonable working conditions for every worker as human rights. The Act does not specifically mention a migrant worker, but impliedly such worker has rights to fair labour practices including equality of treatment in social security.
No.12/2007	The Kenya Labour Institutions Act, 2007 (Rev. Edn. 2012)	S.3 excludes legal protection of migrant workers sent by foreign State to work for that Foreign State in Kenya; Also excludes any Kenyan national employed in Foreign State as Migrant worker. Disputes by such persons related to violations of equality of treatment and rights to social security are not covered under the Act.
No.13/2007 (Cap.236 (Rev 2012).	The Kenya Work Injury Benefits Act, 2007	s.3-the Act protects all employees employed in Kenya; s.5(3)(b) benefits not exportable outside Kenya; s.11(3) and (4) excludes any person including Kenyan employed outside Kenya on long term basis and temporarily deployed in Kenya. Principles of equality of treatment inapplicable. The Act is line with Article 22 (1) of the *Employment Injury Benefits Convention, 1964.*
No.15/2007	The Kenya Occupational Safety and Health Act, 2007	s.3(1) does not exclude migrant workers. Benefits are equally available to any persons employed in Kenya. But benefits not exportable.
No.13/ 2006	The Kenya Refugees Act, 2006	s.16(1) (a) Refugees are entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party. s.16(4)-every refugee and member of his family in Kenya have a right to wage-earning employment, but subject to the same restrictions as are imposed on persons who are not citizens of Kenya.
No.14/2003	The Kenya Persons with Disabilities Act, 2003	It is silence on equal protection of migrants as it lacks any direct reference to the rights of migrants including migrant workers. It implements Article 54 of the Constitution of Kenya. Note that Kenya has not ratified the *Optional Protocol to the Convention on the Rights of Persons with Disabilities of 2006.*
No.9/1998	The Kenya National Hospital Insurance Fund Act, 1998	Social security benefits are payable only to any person who is employed or self-employed and resident in Kenya (S.15); A contributor to the Health Insurance Fund who is living outside Kenya can only contribute upon return in Kenya (s.18). The Act is silent on equal treatment of migrant workers or any person classified as immigrant in Kenya

No.3/1997(Cap. 197).	The Kenya Retirement Benefits Act, 1997 Rev.Edn. 2012)	As an Act establishing *Kenya Retirement Benefits Authority* to regulate retirement benefits (Old-age, invalidity and survivors benefit**)**, it does not mention equality of treatment as one of its principles.
(Cap. 258)	*The Kenya* National Social Security Fund Act, 1965 [consolidated version] Rev. Ed 2010 (1989) (Repealed)	s. 43 provides for reciprocal agreements for securing equality of treatment of nationals and non-nationals, subject to existence of similar schemes. No direct guarantee to equality of treatment.
No.28/1965	*The Kenya National* Social Security Fund Act, 1965 (Repealed).	S.2-Kenyan employed in foreign country recognized; s.24-emigration benefits; 43-reciprocal social security agreements
(Cap. 195)	The Kenya Widows' and Children's Pensions Act, 1965 (Rev. Edn. 2012 [1977] (Repealed)	S.1 (2)- the Act shall not apply to public officers who are not citizens of Kenya. It excludes migrant workers.
No.10/1942 (Cap. 194)	The Kenya Asian Officers' Family Pensions Act, 1942 Revised Edition 2012 (1972)	No legal provision to guarantee equality of treatment between nationals and migrant workers
No.31 of 1950 (Cap. 189)	The Kenya Pensions Act, 1950(as Amended Act No.9 of 2007)	s. 24 exclude a non-Kenyan citizen from entitlement to *Pension*. The Act does not guarantee equality of treatment between migrant workers and nationals and covers public service officers and those in Government employment only. Historically there existed inequality of treatment in Kenya in Pension laws. The European Officers' Pensions Act, 1927 and The Non-European Officers' Pensions Act, 1932 were anti equality of treatment.
(Cap.192)- Enacted in 1921	The Kenya Widows' and Orphans 'Pensions Act (Cap. 192)	It is silent on legal guarantee to equality of treatment between nationals and non-national workers
(Cap. 193) No 20/1927	The Kenya Asiatic Widows' and Orphans' Pensions Act	s.4 excluded the following persons from contribution: Asians with less than 3 years in employment; employees in Government of India or Kenya; unmarried persons and less than 21 years of age; s.40(3) allowed Asian officers employed in Amalgamated Posts and Telegraphs Department of Kenya, Uganda and Tanganyika since the 1st January, 1933 to contribute.
(Cap. 236)	The Workman's Compensation Act of 1949 [consolidated version] (Repealed)	No legal provision on equality of treatment of nationals and non-nationals

Source: Kenya Government Websites and Databases such as Kenya Law Reform Commission, Kenya Parliament, National Council for Law Reporting (Kenya Law), Judiciary of Kenya and other researcher's own compilation and analysis of collected information.

Table 5.2: Kenya's status of ratification of ILO conventions impacting on social security for Migrant workers up until October, 2017.

Conv. No.	Long Title of Convention	Date of Entry Into Force	Date of Accession/ Succession/ Ratification by Kenya
C019-Adopted 05.06.1925	Equality of Treatment (Accident Compensation) Convention, 1925	08.09. 1926	13.01.1964.
C097	Migration for Employment Convention (Revised), 1949	22.01.1952	30.11.1965
C100	Equal Remuneration Convention, 1951	23 .05. 1953	07.05 2001
C102	Social Security (Minimum Standards) Convention, 1952	27.04. 1955	Not ratified
C103	*Maternity Protection Convention (Revised), 1952*	07 .09. 1955	Not ratified
C111Adopted 25.06.1958	Discrimination (Employment and Occupation) Convention, 1958	15.06.1960	07.05. 2001
C118-Adopted28.08.1962	Equality of Treatment (Social Security) Convention, 1962	25.04. 1964	09.02.1971 (Accepted branches (d) -(f).
C121	Employment Injury Benefits Convention, 1964[Schedule I amended in 1980] (No. 121)	28.07. 1967	Not ratified
C.130-25.06.1969	Medical Care and Sickness Benefits Convention, 1969(No.130).	27.05.1972	Not ratified
C157 Adopted 21.06.1982	Maintenance of Social Security Rights Convention, 1982.	11 .09. 1986	Not ratified
1982	Maintenance of Social security Rights Recommendation, 1982 (No.167).	Non-binding	Non-binding
C143 Adopted 24.06.1975	Migrant Workers (Supplementary Provisions) Convention, 1975.	09.12. 1978	04.04.1979
MLC, 2006	Maritime Labour Convention, 2006 (MLC, 2006)	20 Aug 2013	31.07.2014
2006 03.07.2013	Amendments of 2014 to the MLC, 2006	Not in force (awaiting declaration of acceptance)	18.07. 2014
	Amendments of 2016 to the MLC, 2006		18.07. 2016
C183 Adopted 15.06.2000	Maternity Protection Convention (Revised), 2000	07.02. 2002	Not ratified
Adopted 21.06.1976	Tripartite Consultation (International Labour Standards) Convention, 1976	16.05.1978	06.06.1990
C 189 Adopted 2011	The Domestic Workers Convention, 2011	05 .09. 2013	Not ratified

Source: Websites of ILO repository; UN Repository and other sources as compiled and analysed by researcher

Table 5.3: Kenya's ratification of international human rights instruments which indirectly or directly impact on the right to social security for migrant workers up until October, 2017

UN Treaty No.& Year	Long Title of Convention	Date of Entry Into Force	Kenya's Date of Ratification/ Accession/succession
1948	Universal Declaration of Human Rights(UDHR), 1948	10.12. 1948	13.01.1964.
1951	Convention relating to the Status of Refugees, 1951	22.04. 1954	16.05.1966 (Accession)
1967	Protocol to the Convention relating to the Status of Refugees, 1967	04 .10.967	13.11.1981 (Accession)
1966	International Covenant on Civil and Political Rights (ICCPR), 1966	23.03.1976	23.03.1976 (Accession)
	Optional Protocol 1 to the International Covenant on Civil and Political Rights (CCPR OP1	23.03.1976	Not Accepted
1976- UNGA Res. No.	Convention on the Elimination of All Forms of Discrimination against Women(CEDAW), 1979	3 .09. 1981	09.03.1984 (Accession)
1999-	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999.	22 .12. 2000	Not Ratified
1966- UNGA Res. No. 2200A of 16.12 .1966	International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966	03.01. 1976	01.05.1972 (Accession)
1965- UNGA Res. No. 2106 (XX) of 21.12 1965.	International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	04.01.1969	13.09.2001 (Accession)
1990- UNGA Res. 45/158of 18.12.1990	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (ICRMW)	1 July 2003,	Not Ratified
Adopted by Social Council Resolution 526 A (XVII) of 26 April 1954	United Nations Convention on the Status of Stateless Persons, 1954	06.06. 1960	Not ratified
Adopted on 30.08.1961	Convention on the Reduction of Statelessness, 1961	13 12. 1975	Not ratified
Adopted 20.11.1989	The Convention on the Rights of the Child, (CRC)1989	02.09.1990	30th July, 1990
Adopted on 25.05. 2000	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000	18 .01. 2002	Not ratified. (Only Signed on 08.09. 2000
Adopted on 25.05. 2000	Optional Protocol II to the Convention on the Rights of the Child (2000)	12 .02. 2002	Ratification 28.01. 2002
Adopted on 13.12. 2006	Convention on the Rights of persons with Disabilities (2006)	03.05.2008	19.05.2008
13 December 2006	Optional Protocol to the Convention on the Rights of persons with Disabilities (2006)	3 May 2008	Not ratified

Source: Websites of UN repository and other sources as compiled and analysed by researcher.

Table 5.4: Kenya's Ratification of Regional Treaties impacting on the Equality of treatment and right to social security for migrant workers up until October 2017

Treaty Year	Long Title of Convention	Date of Entry Into Force	Kenya's Date of Ratification/ Accession
1969- 10 Sept. 1969	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.	20. 01. 1974	23.06.1992
1981	The African Charter on Peoples and Human Rights (ACPHR) (The Banjul Charter), 1981	21.10. 1986	Accession 23.01. 1992
1998	Protocol establishing the African Court on Human and Peoples' Rights (African Court)	January 2004	2004
2003	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of July 11, 2003.	25 .11. 2005.	12.12. 2003 (Signed)
Adopted on11 July 1990	African Charter on the Rights and Welfare of the Child,1990	29.11.1999	Ratified 25.07.2000
Adopted & Signed on 3.6.1991	Treaty Establishing the African Economic Community	12.05. 1994	June 18 1993
November 20, 2009	Protocol on the Establishment of the East African Community *(*EAC*)* Common Market, 1999.	01.07. 2010	Ratified
December 8, 1994	Treaty for establishment of Common Market for Eastern and Southern Africa (COMESA), 1994.	08.12.1994	05.11.1993 Signed/Ratified
21-03.1996	Agreement Establishing the Intergovernmental Authority on Development (IGAD), 1996	25.11.1996	21-03.1996

Table 6.1: Summary of status of current Tanzania's legislation on treatment between nationals and migrant workers

Act No/ Cap	Title of Legislation	Sections Applicable to equality of treatment of Migrant workers
Act No.28/1997	National Social Security Fund (NSSF) Act, 1997 (as amended).	S.2-definition of covered employees includes any person employed in Tanzania whether is a national or a migrant worker, thus a migrant worker employed in Tanzania is not excluded from the coverage. Also s.6(2) states that every person employed in private sector is eligible to join the scheme for social insurance, hence a migrant worker is covered; s.92 of the Act provides for legal mechanism for conclusion of reciprocal agreements with a view to providing mechanism of protection of migrant workers. This includes Tanzanian emigrants in Diaspora and immigrants working in Tanzania provided participating countries have similar social security scheme with that of Tanzania providing similar benefits. Transnational transferability/portability, totalisation of earned benefits across different schemes in different countries of employment, and equality of treatment through concluded reciprocal agreements is envisaged. Benefits upon which migrant workers may benefit through reciprocal agreements are: retirement pension-s.21(a); invalidity pension-s.21(b); survivors pension-s.21(c); funeral grants-s.21(d); maternity benefit-s.21(e); employment injury benefit-s.21(f); health insurance benefit-s.21(g). Enforceability of equality of treatment under the NSSF Act may only be legally effected as of right if conditions stated in s.92 (1) and (2) have been fulfilled by countries in a concluded reciprocal agreement. Absence of such social security agreement renders equality of treatment non-enforceable as of right.
Act No.14/1978	Parastatal Organisations Pensions Fund (PPF) Act, 1978 (PPF Pensions Fund Act)	As provided in section 123 (4) of the *Social Security Laws (Amendments) Act, No.5 of 2012* section 6 of PPF Pensions Fund Act was amended to provide that: "*an employer of a non-citizen shall remit contribution for that employee in accordance with the provision of the Act*. Thus, migrant workers may join the PPF Pensions Fund Act and enjoy benefits on equal basis with nationals. The gap, however is that the PPF Pensions Fund Act has no legal provision for conclusion of reciprocal agreements. No legal mechanism for cross-border transferability or exportability of benefits to migrant workers outside Tanzania; no provision for totalisation of periods of insurance for benefits earned in different countries. Equality of treatment is not legally enforceable as of right.
Act No.2/1999	Public Service Retirement Benefits (PSPF) Act, (Cap 371)	s.2 expands social security coverage to include employed persons in both formal and informal sector. Also, s. 122 of the *Social Security Laws (Amendments) Act, 2012* (Act No.5) amended section 5 of the PSPF Retirement Benefits Act 1999 (Cap 371) and introduced the right to any employee in the formal and informal sector to elect to become a member of the Fund under the Act. It excludes registration for insurance any member or insured person under any other mandatory scheme established by any written law. The Act has no legal provision mentioning a migrant worker. Again the Act does not have any legal provision putting barriers to a migrant worker who is self-employed or is formally or informally employed in private sector in Tanzania from becoming a contributor to the scheme. Impliedly, a migrant worker is not excluded. However, the Act lacks legal provisions for cross-border portability or transferability, totalisation of benefits, and enabling mechanism for conclusion of reciprocal social security agreements for benefits of cross-border labour migrants. Equality of treatment is not legally enforceable as of right.
Act No.8/1999	National Health Insurance Fund (NHIF) Act, 1999	S.3 of the NHIF Act defines broadly an employee to include those in private and public sectors, self-employed, formally and informally employed. Coverage was is enlarged 2012 amendments. Although the Act does not specifically state or mention the words 'migrant

		workers', in practice it does not exclude or discriminate any willing labour migrant to register for contribution into the Scheme given the expanded definition of a member under the Act through the *Social Security Laws (Amendments) Act, 2012* (Act No.5).The Act lacks legal provision for cross-border portability or transferability of health benefits. No enabling legal mechanism for conclusion of reciprocal social security agreements for health services abroad for cross-border labour migrants. Equality of treatment is not legally enforceable as of right.
Act No.1/2001	Community Health Funds (CHFs) Act, 2001	The Act covers only nationals of Tanzania organised in communities under local authorities creating social insurance fund for health services under supervision of local authorities. Members are the contributing households of Tanzanian families in villages, wards and districts. The Act does have any legal provision for social protection of Migrant workers, thus apparently they are not eligible under this scheme (See ss.2, 8, 11).
Act No.9/2006	Local Authorities Pensions Fund (LAPF) Act, 2006 (LAP	The LAPF Act 2006 (as amended) in 2012 applies in Mainland Tanzania only in relation to workers in the formal and informal sectors whether formally employed or self-employed (s.2). It neither mentions a migrant workers nor equality of treatment. Even if the LAPF Pensions Fund Act does not specifically mention the inclusion of migrant workers in the scheme, it does not discriminate migrant workers from registering for contribution to the Fund and enjoy social security benefits under the scheme. See section 3 of the Act as amended by the *Social Security Laws (Amendments) Act, 2012* (Act No.5). The gap, however is that the Act has no legal provision for conclusion of reciprocal agreements; No provision for cross-border transferability or exportability of benefits to migrant workers outside Tanzania; No provision for totalisation of periods of insurance for benefits earned in different countries; Equality of treatment is not legally enforceable as of right.
Act No.7/2013	GEPF Retirement Benefits Fund Act, 2013	Its Preamble states that it covers both formal and informal sector employees including se-employed as well as government employees. It operates in Tanzania mainland only (S.2). It excludes registered employees of other mandatory schemes established under written social security law. It covers all employees within the meaning of section 98(3) of the Employment and Labour Relations Act, 2004 (Act No.6) and section 61 of the Labour Institutions Act, No. 7 of 2004. No mention of migrant workers as to exclusion or inclusion, although the definition of covered employee is inclusive enough to imply coverage of migrant workers.
No.20/2008	Workers Compensation Fund(WCF) Act, 2008	Generally, the WCF Act lacks specific legal provision on equality of treatment of nationals and non-nationals. The Preamble states that the Act protects all injured, or disabled or disease stricken employees in the course of employment whether in the private sector or public service of the Government of Tanzania. S.2(1) states that the Act is meant for social security and protection of employees of Mainland Tanzania, hence not applicable in Zanzibar; S.2(2)(c) extends social security and protection of injured or disease stricken employees who primarily are employed in Tanzania but suffer accidents or disablement or death while temporarily employed outside Tanzania (including those working in workers in continental shelves beyond Tanzania). s.24 (3) prohibits payment of benefits to employee working outside Tanzania (emigrant) whose employment outside the country exceeds 12months continuous employment. s.25 (1) puts restrictions on benefits payment to a migrant worker from outside Tanzania working temporarily in Tanzania who sustain injuries or disease while temporarily working in Tanzania while his major place of employment is outside Tanzania. Alternatively, the employer must pay all assessments made by WCF specifically in

		respect of such incidence if such employee has to be entitled to compensation. S. 25 (3) prohibits double benefits of compensation to an employee entitled to benefits under laws of two different countries, hence employee must elect one only and claim under it for compensation.
No.5/2003	Occupational Safety and Health Act, 2003	s.3 which is an interpretation section defines an employee generally without mentioning a migrant worker. The Act does not say that it guarantees benefits to foreigners working in Tanzania and it does not say that they are excluded from entitlement of benefits resulting from employment injury. The Act is so general such that it neither excludes nor includes migrant workers' rights to safety, health and welfare who may sustain injury (accident) in the course of employment. The Act is silent on cross-border portability of benefits outside Tanzania.

Source: Tanzania Government Databases including Law Reform Commission, Parliament of Tanzania, and Researcher's own compilation and analysis of collected information.

Table 6.2: Status of Ratification of selected ILO Conventions impacting on Social Security for migrant workers in Tanzania up until 2017

Conv. No.	Long Title of Convention	Date of Entry Into Force	Date of Accession/ Succession/ Ratification by Tanzania
C019-Adopted 05.06.1925	Equality of Treatment (Accident Compensation) Convention, 1925	08.09. 1926	22.06.1964 (Zanzibar)
C048	Maintenance of Social Security Rights Convention, 1935		Shelved
C097	Migration for Employment Convention (Revised), 1949	22.01.1952	Not ratified
C100	Equal Remuneration Convention, 1951	23 .05. 1953	Ratified26.02. 2002
C102	Social Security (Minimum Standards) Convention, 1952	27.04. 1955	Not ratified
C103	*Maternity Protection Convention (Revised), 1952*	07.09. 1955	Not ratified
C111Adopted 25.06.1958	Discrimination (Employment and Occupation) Convention, 1958	15.06.1960	Ratified on 26.02. 2002
C118-Adopted28. 08.1962	Equality of Treatment (Social Security) Convention, 1962	25.04. 1964	Not ratified
C121	Employment Injury Benefits Convention, 1964[Schedule I amended in 1980] (No. 121)	28.07. 1967	Not ratified
C122 - Adopted: 09.07.1964	Employment Policy Convention, 1964 (No. 122)	15 .07.1966	Not ratified
C.130-25.06.1969	Medical Care and Sickness Benefits Convention, 1969(No.130).	27.05.1972	Not ratified
C157 Adopted 21.06.1982	Maintenance of Social Security Rights Convention, 1982.	11.09. 1986	Not ratified
1982	Maintenance of Social security Rights Recommendation, 1982 (No.167).	Non-binding	Non-binding-N/A
C143 Adopted 24.06.1975	Migrant Workers (Supplementary Provisions) Convention, 1975.	09.12. 1978	Not ratified by Tanzania
R151	Migrants Workers Recommendations, 1975.	Non-binding	Non-binding-N/A
MLC, 2006	Maritime Labour Convention, 2006 (MLC, 2006)	20Aug 2013	Not ratified
2006 03.07.2013	Amendments of 2014 to the MLC, 2006	18th January, 2017	Not signed/Not ratified
C183 Adopted 15.06.2000	Maternity Protection Convention (Revised), 2000	07.02. 2002	Not ratified
C144 Adopted 21.06.1976	Tripartite Consultation (International Labour Standards) Convention, 1976	16.05.1978	Ratified on 30.05.1983
C155 1981	Occupational Safety and Health Convention, 1981	11.08.1983	Not signed & Not ratified
C 189 Adopted 2011	Domestic Workers Convention, 2011	05 .09. 2013	Not ratified
P081	Protocol of 1995 to the Labour Inspection Convention, 1947	09.06.1998	Not ratified

Source: Websites of ILO repository; UN Repository and other sources as compiled and analysed by researcher.

Table 6.3: Tanzania's ratification of selected international human rights instruments impacting on equality of treatment in the right to social security for migrant workers up until 2017

UN Treaty No.& Year	Long Title of Convention	Date of Entry Into Force	Status of Tanzania's Date of Ratification/ Accession/succession
1948	Universal Declaration of Human Rights(UDHR), 1948	10.12. 1948	1983
1990-UNGA Res. 45/158of 18.12.1990	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (ICRMW)	1 July 2003,	Not Ratified
1966-UNGA Res.No. 2200A of 16.12 .1966	International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966	03.01. 1976	11.06.1976 (Accession)
1966-UNGARes.No. 2200A of 16.12 .1966	Optional Protocol (I) to the International Covenant on Economic, Social and Cultural Rights (ICESCR),1966	23.03. 1976	Not signed/Not ratified
1966	International Covenant on Civil and Political Rights (ICCPR), 1966	23.03.1976	11.06.1976 (Accession)
1966	Optional Protocol 1 to the International Covenant on Civil and Political Rights (ICCPR- OP1)	23.03.1976	Not Signed/Accepted
1965-UNGA Res. No. 2106 (XX) of 21.12 1965.	International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	04.01.1969	27.10.1972 (Accession)
1976-UNGA Res. No.	Convention on the Elimination of All Forms of Discrimination against Women(CEDAW), 1979	3 .09. 1981	Signed:17.07.1980 Ratified:20.08.1985
1999-	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP), 1999	22 .12. 2000	12.01.2006 (Accession)
1989	International Convention on the Rights of the Child (CRC), 1989.	02.09.1990	Signed:01.06.1990 Ratified:10.06.1991
1951	Convention relating to the Status of Refugees, 1951	22.04. 1954	12.05.1964(Accession)
1967	Protocol to the Convention relating to the Status of Refugees, 1967	04 .10.967	04.09.1968 (Accession)
1954-Social Council resolution 526 A (XVII) of 26 April 1954	United Nations Convention on the Status of Stateless Persons, 1954	06.06. 1960	Not signed/Not ratified
1961-30.08.1961	Convention on the Reduction of Statelessness, 1961	13 12. 1975	Not signed/Not ratified
2000- Adopted on 25.05. 2000	Optional Protocol II to the Convention on the Rights of the Child (2000)	12 .02. 2002	Accession: 24.04. 2003
2006-Adopted on 13.12. 2006	Convention on the Rights of persons with Disabilities (CRPD(2006)	03.05.2008	Signature: 30.03.2007 Ratification:10.11 2009
13 December *2006*	Optional Protocol to the Convention on the Rights of persons with Disabilities (2006)	03 May 2008	Signature: 29.09.2008 Ratification:10.11.2009

Source: Websites of UN repository and other sources as compiled and analysed by researcher.

Table 6.4: Tanzania's status of ratification of selected regional instruments impacting on equality of treatment and right to social security for migrant workers up until 2017

Treaty Year	Long Title of Convention	Date of Entry Into Force	Tanzania's Date of Ratification/ Accession
1969- 10 Sept. 1969	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969	20. 01. 1974	Signature:10.09.1969 Ratified 10.01.1975
1981	The African Charter on Peoples and Human Rights (ACPHR) (The Banjul Charter), 1981	21.10. 1986	Signed: 31.05.1982 Ratified: 18.02.1984
2008	Protocol to the Statute of the African Court of Justice and Human Rights 2008	After 15 countries have ratified	Signed: 15.01. 2009 Ratification: NIL
1998	Protocol to the African Charter on Peoples and Human Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court), 1998.	25.01.2004	Signed: 09 06.1998 Ratified: 06.02. 2006
2003	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of July 11, 2003.	25 .11. 2005.	Signed: 05.11. 2003 Ratified: 03.03.2007
Adopted on 11 July 1990	African Charter on the Rights and Welfare of the Child,1990	29.11.1999	Ratified 23.03.2003
Adopted & signed on 3.6.1991	Treaty Establishing the African Economic Community, 1991.	12.05. 1994	Signed: 03.06. 1991 Ratified:10.01.1992
1999	Treaty Establishing the East African Community, 1999.	07.07. 2000	30.11.1999
November 20, 2009	Protocol on the Establishment of the East African Community *(*EAC*)* Common Market, 2009	01.07. 2010	Ratified: Nov.2009

Source: Websites of UN repository; the African Commission of Human Rights; the EAC Secretariat; the AU Secretariat; and other sources as compiled and analysed by researcher.