Legality of External Military Interventions, Responsibility to Protect (R2P) and the Governing Theories: A Case Study of Afghanistan, Somalia and Libya

Kassian Clemence Mshomba[*] and Damas Daniel Ndumbaro[**]

kcmshomba@gmail.com[*] and damas.ndumbaro@gmail.com[**]

Abstract

It is a general principle of International law that no State should use military forces to intervene internal affairs of another State except under: self-determination and upon implementation of the principle of Responsibility to Protect (R2P) but without causing instability to other States. States are accorded right to external intervention under strict circumstances in safeguarding collective protection to basic human rights and human dignity. In implementing the exceptional circumstances, the International community has been urged to set norms and standards in avoiding tyranny from the super powers likely to cause anarchy to both directly and indirectly involved States in the process. Responsibility to protect aims at addressing anarchy as subsequently affirmed by a Commission of Rapporteurs to the Council of the League of Nations on the Aaland Islands. In expounding the above duties and responsibilities, this study discusses notable incidents of external military interventions from critical human rights and human dignity perspectives. Both doctrinal and comparative methods were employed in this study considering the study being legal research with comparison method employed in contrasting the involved interventions. It is recommended that the International community should refrain from invoking military interventions except under justifiable reasons within the framework of the UN Security Council.

1.0. Introduction

Responsibility to safeguard and protect her citizens from all forms of oppression and insecurity is primarily vested to States. The responsibility of International community to protect citizens shifts when a State fails to protect its nationals[1]. Among established concepts stands an exception under International protection including ‘‘self-determination’’ regarding right of a country to form its own statehood and

[*]LL.B (Hons) (UDSM), (LLM-Int’l Rel. (Makumira), (PhD Candidate at the Open University of Tanzania and Resident Magistrate and Advocate of the High Court of Tanzania.

[**]LL. B, LL.M, (University of Dar es Salam, Tanzania), PhD in Law (The Open University of Tanzania), Advocate of the High Court of Tanzania and Zanzibar and Member of Parliament and Minister of Natural Resources and Tourism of the United Republic of Tanzania.

[*]LL.B (Hons) (UDSM), (LLM-Int’l Rel. (Makumira), (PhD Candidate at the Open University of Tanzania and Resident Magistrate and Advocate of the High Court of Tanzania.

[**]LL. B, LL.M, (University of Dar es Salam, Tanzania), PhD in Law (The Open University of Tanzania), Advocate of the High Court of Tanzania and Zanzibar and Member of Parliament and Minister of Natural Resources and Tourism of the United Republic of Tanzania.

[1]Anne Oxford, (2011), *‘‘International Authority and the Responsibility to Protect’’*, p. 1.

Government. Such principle is an exception to the general rule that discourages State disintegration. Antonio Cassese[2] refers ''self-determination'' as a medieval phenomenon and well-established norm of International law traced back to the 18th Century vide the American Declaration of Independence of 1776 and the French Revolution of 1789. According to Lee C. Buchheit[3]; the concept of ''self-determination'' however has been discouraged by the International community with exceptions where there exists situations of deliberate suppression of fundamental Human Rights, mankind and dignity hampering stability though there are situations where self-determination have been encouraged or supported for protection, promotion and safeguarding human rights from a general outlook.

''Security'' is a broad phenomenon capturing state of peace and harmonization of all evolving incidents and dangers likely to injure all forms of freedoms, fears, threats and physical violence against mankind and humanity in ensuring States stability, prosperity and development from all spheres regardless of geographical boundaries. Security stands for moral, ideological and normative values shared in the global context. Security captures the notion of balance of power and its associated stemmed allies injurious to human dignity and modern civilization.

Kaplan[4] accords an account to balance of power between States to mean an involvement of all key players covering great powers in the civilized and democratic world. Notably, the author rather refrained from accounting as to what exactly amounts to state of balance of power and with regard to decision makers in the frontline with rational decisions. The author did not as well define what succinctly worth preference with justification regarding the best interests of the operating system warranting application of force upon failure to negotiate and or reaching an agreement with the confronting States towards supranational system captured through balancing of hostilities and differences. As such, this concept falls under realism principle in International Relations centred at the notion that States are always in a state of war and will

[2]Antonio Cassese, (1995), *"Self – Determination of Peoples: A legal Reappraisal",* pp. 350 - 351.
[3]Lee C. Buchheit, *"Secession: The Legitimacy of Self – Determination",* Note 48, p. 71 quoting *''The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs''* (1921), League of Nations Doc. B.7.21/68/106.
[4]Morton A. Kaplan, (1957), *''Balance of power, bipolarity and other model of international systems''*, American Political Science Review, vol. 51, issue 3, pp. 684-695.

always prefer war in advancing and maintaining their supremacy, autonomy and hegemony in the *realpolitik* world.

The concept of ‘‘collective security’’ has been controversial I settling its definition as they stand other controversial concepts including ‘‘democracy’’ and ‘‘human rights’’. According to Kupchan[5], the concept of ‘‘collective security’’ can be defined to mean a collective approach capturing joint merging individual efforts and powers into common defense security mechanisms in the fight against aggression and tyranny within and beyond a nation/State. On their part, A. Roberts and B. Kingsbury[6] define ‘‘collective security’’ as an arrangement where each State accepts that security or insecurity of one of them is a concern of all with an agreement to join collectively in response to aggression. The main overarching objective focuses at counterbalancing sovereignty of States and maintaining their respective independence which from a practical point of view, States have expressed their overzealous jealousness according to D. C. Hendrickson[7]. Moreover; “Collective Security” refers to collective mechanisms towards common understanding whereas ‘‘an attack against one is an attack against the community’’ in accordance with the conclusion arrived at by Glennon[8]. According to L. L. Martin[9], though there is no universal definition of the concept ‘‘collective security’’, it captures what in the resultant end, would lastly lead into peace. According to J. J. Mearscheimer[10], through realism principle of International relations; peace in the global is manageable through proper management of military power under aide of institutions as among predominant implementation cornerstone.

The concept of ‘‘collective security’’ operates through various assumptions. The first assumption under ‘‘collective security’’ is that wars are always likely to occur, hence in redress; it should be prevented.

[5]Charles A. Kupchan and Clifford A. Kupchan (1995), ‘*‘The Promise of Collective Security’’*, International Security 20 (Summer) pp. 52 - 53.
[6]A. Roberts and B. Kingsbury (1993), *“Introduction: The UN’s Role in International Society since 1945”,* in A. Roberts and B. Kinsgsbury (eds.), *‘‘United Nations, Divided World’’,* Oxford: Clarendon Press, p. 30.
[7]David C. Hendrickson, *‘‘The Ethics of Collective Security’’,* Ethics and International Affairs 7 (1993).
[8]Glennon, Michael J. (2006), *"Platonism, Adaptivism, and Illusion in UN Reform,"* Chicago Journal of International Law*:* Vol. 6: No. 2, Article 8, p. 622.
[9]L. L. Martin (1992), *“Institution and Cooperation: Sanctions during the Falkland Islands Conflict’’*, International Security, Vol. 14 No. 4, Spring, pp. 174-175.
[10]J. J. Mearscheimer, *“The Promise of International Institutions”,* International Security, Vol. 19, No. 3 (Winter 1994/1995), pp 26 -27.

Conflicts are referred to outcome of unexpected or rather unplanned passion or deliberate plan whereas the said resort into war normally focuses at acting as a mechanism of dispute resolution for the sake of avoiding impacts of indefinable situations of hostility. Under such circumstances, ‘‘collective security’’ acts as specialized instrument of International Policy aiming at preventing arbitrariness and aggressiveness manifested through use of determinable forces governed by International laws and established principles by the International community primarily restraining military resort with an option to resolve and abide into legal obligations.

Another assumption under ‘‘collective security’’ is that, there should be restraint to military action achievable through reformation mechanisms with regard to International Policies but without necessarily changing the structures of International systems. In other words, ‘‘collective security’’ materializes through encouragement to Governments regarding applicability of morals against misuse of force in a rationalistic approach towards common peace. This assumption aims at ensuring maintenance of International order without disrupting the world order. Such rational approach vide ‘‘collective security’’ covers potential belligerents through diplomatic, economic and military sanctions towards peaceful dispute resolutions thus avoiding anticipated damage with foremost interests to respective individual States and the global International community.

Another assumption is that, in regaining security, there will be likelihood of embarking into armed conflicts with the constituted States bearing room to sort out and identify the aggressor State and all member States bearing equal commitment against all forms of aggression regardless of their origin. Likewise, under ‘‘collective security’’, Member States have similar or rather identical freedoms in whatever action they prefer, also; with option to either join or refrain from joining preferred military action against identified forms of aggression. Another assumption include cumulative power of the involved Member States and players towards collective security through manageable mechanisms in overpowering the aggressive State powers against the posed aggression, also; a caution to all involved States and other stakeholders to be aware that in overpowering aggression, the aggressor States will

certainly retaliate or make some attempts in defence through policy modification, otherwise; they will be defeated, thus; to get prepared.

‘‘Collective security’’ vide collective security system covers, **one;** considerable diffusion of power with commendable equal resources whereas existent willing great power States have been beneficial without much disparity amongst where it has envisaged essential practical strength towards ‘‘collective security’’, **two;** ‘‘collective security’’ call for universal membership though it does not know the probable aggressor with an assumption that any State is likely to be a potential aggressor. In other words, ‘‘collective security’’ operates with focus to create and maintain world order in ensuring security to all States regardless of membership against any sorts of threat. Another operating assumption is that every State being a potential aggressor, needs to be member with crucial inclusion of all great powers towards a meaningful global security.

The last assumption is the best interest of the International community is to ensure global security against aggressors whereas collective security systems ensure security to all respective States against war and all forms of aggression from States both individually and collectively. In that perspective, States are obliged to note that all States are free and protected from all forms of aggression from other States. Collective security acts as Insurance Cover in favour of victims of aggression or war through neutralizing mechanisms. Contemporarily, ‘‘collective security’’ has been regarded as the reliable approach towards International Peace in consideration to the robust operationalization of realism theory. Collective Security is considered as deterrent against all forms of aggression vide its collective power. Collective security stands as the chief goal implicating all States, nations and organs. To all States, security runs foremost in the priorities of each State or nation up to sub regional, regional and the globe at large collectively.

The objective of collective security is to eradicate all forms of aggression and their associates, free the aggressed and prevent the aggressor from reaping out of such aggression. Another objective is restoration of health of the victim of aggression and restoration of International peace and security. Collective security differs from collective defence in International systems. Conditions have been set for successful operation of the notion of collective security. Collective defence refers to collective machineries or

mechanisms against aggression whereas collective defence caters for an arrangement by States with common objectives against a common enemy.

Collective defence refers to a specific group while collective security is global. Also; under collective defence, the threat to security is known while in collective security, the imposed threat is over sudden/immediate. According to the United Nations Charter[11], mandate is extended to the Security Council of the United Nations to take military action in securing International peace and security. Collective security is drawn from Charter of the United Nations[12] by requiring all members of the United Nations to contribute support and align efforts, resources and forces in collaboration with the Security Council of the United Nations towards collective security.

On the other hand, the United Nations Charter[13] contains some articles relating to peace keeping mechanisms towards collective security. Since establishment of the United Nations vide the United Nations Charter in 1945, various collective security measures have been taken covering though not limited to the invasion by North Korea to South Korea in the night of 24th – 25th June, 1950 whereas on 25th June, 1950 the Security Council in absence of the United Soviet States of Russia, resorted into action against the aggressor upon argument that the conduct of North Korea constituted breach of International peace necessitating call for immediate withdrawal.

Refusal by North Korea resulted into relation by the Security Council for military action in terms of part VII of the Charter of the United Nations with expression of willingness from 53 States. A unified command vide flag of the United Nations was set on 7th July, 1950 by the Security Council with a call for military assistance from member States. Involved States were the U.S.A, the U.K, Australia and New Zealand through what was referred to as "Peace Operation" in Korea. In 1951, sixteen more countries joined vide the UN unified command which was successful despite difficulties as China intervened in protecting the interests of North Korea.

[11]The United Nations Charter, article 42.
[12]The United Nations Charter, article 43.
[13]The United Nations Charter, articles 44, 45, 46 and 47.

Another collective approach was witnessed during the Suez crisis of 1956 with results impacted by the role played by the UN in hand with the Soviet threat to Britain, France and Israel. Also; reference is made in the DRC whereas the UN Peace Force played recommendable role in peace restoration in the country. Others include the Hungarian crisis of 1956 where the defunct USSR was compelled to act in response and in favour of the posed pressure from the United Nations, that is, to conduct itself in a manner that would not interfere with internal affairs of Hungary. Notably, from 1956-1990, Collective Security systems vide the United Nations did not succeed towards International peace and security among factors being persistence of the cold war between the Eastern and Western blocks as well as the bipolarity state of affairs existent in International relations and inability of the General Assembly to play its role under the Uniting for Peace Resolution. Another drawback was that there was change in nature of aggression and war whereas the combination acted to prevent operationalisation of Collective Security system.

The next concept down in sequential order regards ‘‘balance of power’’ which has to be checked in balancing the weigh bridge failure of which may sail the boat astray and result into war for the globe will be incapable of maintaining peace if at all the state of balance of power is left to be manifested through war. The philosophy of balance of power sometimes failed leading to war outbreak such as the first World War and ultimately the second World War. Balance of power requires military mighty to be equally distributed. Noticeably, the concept of balance of power does not necessarily mean rivalry between States. Balance of power operates to balance power and ensure collective security corresponds into an equilibrium system. Such state of affairs has practically proved to be a remedial mechanism with regard to the whole concept of power.

Another crucial term in this work is ‘‘intervention’’. This concept is associated and linked with another concept known as ‘‘interventionism’’. Interventionism has been categorized into aspects like political interventionism capturing manipulation of legal actions into Government with some examples drawn from the United States when she intervened in Japan in the end of the 2nd World War through military occupation where the United States facilitated Japan in re-writing its Constitution and in setting up its new Government into power regardless of the wishes of the people of Japan. Another category of

interventionism is military interventionism with an example again drawn from the incident when the United States engaged itself into various Middle Eastern nations against terrorism especially during war ‘‘against terror’’ during George W. Bush’s regime specifically in the Middle East following imposition of military dangers and threats. The latter sort of intervention, that is, military intervention forms centre of this study.

Also, exists ‘‘economic interventionism’’ capturing control of the economy of another State in all forms with regard to its prosperity and stability. An example is drawn from economic pressures and threats of invasion to interfere by the United States during the 19th and early 20th centuries over the known economic decisions met across Latin America. Notable examples were over Mexico during nationalization of oil production where the United States not only threatened to invade, but rather did invade Mexico once over that economic saga. The last category of interventionism is ‘‘cultural interventionism’’ where cultural influence is intervened through threat of use of force. The United States used threat of force where Native American nationals such as the Lakota Sioux were forced to adopt farming over semi-nomadic hunting that acted against their traditional means of living which was purely nomadic hunting.

The broad concept of ‘‘crisis management and power management’’ in securing International peace and security through collective mechanisms have faced a diverse of some criticism. Some critics have emerged underway the broad concept of collective security. These include the fact that the concept is more of idealistic nature with difficulties in its practical implementation. Some examples include uncertainties regarding what constitutes ‘‘an aggression’’, practicability in engagement of all Member States against the aggressor State and the ‘‘collectivist’’ concept bearing impracticability notions for no State will play such positive active role in such politics.

Furthermore; there have emerged critics regarding the concept as not all States agree with war as mechanism of redressing aggression by another foreign State. Other States find redress through other dispute resolution mechanisms not involving war. There are also challenges in maintaining neutrality during war and pooling up of resources against the spotted aggression. Another critic regards the involved limitations as it accepts right of a State to resort into war in self defence and the right to form regional

defence pacts and organizations for the sake of self-security and defence regarded as tension towards International peace and security. Notwithstanding the persistent critics and setbacks, collective security has been recognized and preferred through the embraced vision and possibility of collective mechanisms towards preservation of the world peace through crisis management especially during time of war. In a nutshell, Collective Security comprises of a modern mechanism in crisis management with task to all members of the International community to ensure and safeguard humankind and address all forms of war and aggression individually and through collective security mechanisms.

Renunciation of war as solution in solving International Crimes is traced back to the 1928 General Treaty for the Renunciation of War Kellogg Briand Pact[14] also known as "Pact of Paris" aiming at barring interventions considering impacts that States subject to their degree of involvement or association/affiliation with States engaging in wars have experienced. Non–adherence to the established instruments and treaties led into sequential external interventions for Collective Self Defence including the Hungary intervention by United Soviet States of Russia (USSR) in 1956; Lebanon intervention by the US and Jordan intervention by the United Kingdom in 1958; the Dominican Republic intervention by the Organization of American States and the US and the Vietnam intervention by the Unites States (US) in 1965; the Czechoslovakia intervention by the USSR in 1968; the intervention in Afghanistan by the USSR and the intervention in El Salvador, Honduras and Costa Rica by the United States in 1979; the intervention in Grenada by the US and the intervention in Chad by France 1983; the intervention in Kuwait by the US and her Western allies and others in 1991, again; the intervention in Somalia by the United States in 1992 and the intervention by the US in Afghanistan in 2001.

Historically, some external interventions had occurred under the umbrella of protection of human rights, mankind and humanity and under cover of Responsibility to Protect. Responsibility to Protect (R2P) has been embraced under the preamble to the United Nations Charter 1945 in which all people through the United Nations are required to reaffirm faith in fundamental human rights, dignity and worth of human

[14]Treaty between the United States and other Powers providing for the Renunciation of War as an instrument of national policy, Aug. 27, 1928, article 1.

person and equal rights of men and women and of nations. Right to Protect has emerged in the midst of serious debate between States with others arguing that such right to protect is associated with forceful intervention by powerful States thus creating fear that such right may unjustifiably be exercised by powerful States to the detriment of other States especially the less powerful ones in advancement of some interests in favour of the invading States for political, economic, military, social and diplomatic interests amongst.

R2P principle and canon of Responsibility to Protect were developed vide customary International Law in the aftermath and following failure of the International community to pay attention to the Rwandan genocide in the last quarter of the 20th Century. Invocation of Responsibility to Protect occurs when there is likelihood for anticipated atrocities resulting into negative impacts to mankind and humanity as they stood the incidents which occurred in both Bosnia and Rwanda whereas irresponsiveness of the International community resulted into brutal mass killings of innocent individuals which their sacred lives could have been protected or rather served. Despite the above been referred as the prerequisites for external intervention, from a practical point of view, studies have shown that; political, social or economic reasons have always been reasons in hidden justification for intervention and or non-intervention.

1.1. Disintegrations and wars outbreak in Libya and Tunisia

External intervention by the US in Libya traced its origin from the reigning of the "Arab Spring" that was unexpected movement in the Arab world. The move that ended up with intervention in Libya began with an incident when one Tarek al Tayeb Mohamed Bouazizi on 17th December, 2010 attempted a self-set into fire of in protest of the taking away of his merchandise, an infuriation and humiliation inflicted to him by some municipal officials. Bouazizi later died on 4th January, 2011 as a result of the unprecedented incident. Bouazizi was forced to work as a street vendor due to job opportunities scarcity manifested by amongst; inefficiency of the then Tunisia corrupt Government. The Bouazizi's self-assassination busted

anger of Tunisians to mark strong continuous moves amounting into Tunisian Revolution leading to the then President of Tunisia, Zine El Abidine Ben Ali to step down from power on 14th January, 2011.

The Tunisian Revolution resulted into protests in other Arab states hence, the "Arab Spring". Political protests spread from Tunisia to Egypt, Libya, Yemen, Bahrain, Syria, Algeria, Iraq, Jordan, Kuwait, Morocco, Sudan, Mauritania, Oman, Saudi Arabia, Djibouti, Western Sahara, Palestine and Mali. Unlike Tunisia; revolution in Libya was resisted by the Libyan Government during Muammar Gaddafi's regime. Expressing his bitterness to the Revolutionary movements, Gaddafi referred his opponents as drug addicts, stray dogs and he instigated an outburst against those he famously called 'rats' and 'cockroaches'. He declared publicly his disgrace and agony with declaration to confront the USA, the North Atlantic Treaty Organization (NATO) and other super powers and whoever happened to be against his regime. The Gaddafi regime was externally intervened by the International Community led by the US leading to the assassination of Muammar Gaddafi on 20th October, 2011 while hiding in a culvert in west Sirte.

Prior to the intervention in Libya, the International community witnessed interventions in Somalia, Afghanistan and Libya and refrained from intervening. Similar situations in Syria were reported and evidences of massacres in Syria were noticed in various news media. The regime by Bashar Al Assad in Syria faced some movements whereas unlike his counterpart in Libya, the Assad regime survived despite massive deaths of thousands of Syrians and massive fleeing from Syria as refugees. Likewise, thousands of Syrians and others found themselves internally displaced among other inhuman experiences. Despite mass killings in Syria, the International Community did not make any intervention in Syria as it did in Libya. Reluctance of members of international community from intervening in Syria forms key basis of investigation in this study.

1.2. Governing Theories for Intervention and Non-intervention

1.2.1 Realism Theory in Relation to Intervention in Libya

Realism in a theoretical perspective in International Relations focusing at safeguarding interests of State powers, national security and threats against use of force as utmost important elements in understanding

the world politics[15]. Under this theory, powerful States enter into regular wars to serve their interests, balance of power or sustenance of their dominance in power through suppression of other emerging powers. Balance of power against rising States is dictated by powerful States whereas weak States are obliged or forced to comply. According to Thucydides, "the strong do what they can and the weak suffer what they must". Interventions in Libya was manifested through "Realism Theory" whereas there were many interests which both the Western and US tried to reach in Africa but blocked by Libya during the Gaddafi regime.

Essentially; Gaddafi intended control over oil production and marketing, establishment of strong Central Africa Banks full-fledged owned, controlled and managed by Africans thus a threat to the Western world and the US. That necessitated intervention in Libya by the US and her allies through what is argued by Jeremy Salt[16] as furthering the US foreign policies in the world. Jorien van de Mortel[17] argues intervention in Libya to have been boosted by interests of the US in Libya in the *realpolitik*. Besides; Kelly L. Gosa[18] adds, the US invading Libya during the Arab Spring was to maintain US hegemony in world politics under umbrella of avoiding blames for inaction as happened in the former Yugoslavia, Somalia, Rwanda and Burundi in 20th century.

Manifestation of the argument that the Western Europe and the US have capitalized economic interests during Libyan invasion is through massive flow of multinational corporations in Libya soon after decline of the Gaddafi regime for search of business opportunities and in building infrastructures. This rather has been argued as a reparation mechanism after war which is rather untrue for even States even not directly involved in the intervention, sought to be parties in the reparation. The need to drain oil from Libya and destruction of Gaddafi's mastermind engineered the Western and United States invasion in Libya during

[15]Fiona B. A & Chandra L. S (2010), *"Perspectives on International law in International Relations"* in Basak Cali (ed.), (2010), "*International Law for International Relations",* Oxford University Press, p. 27.
[16]Jeremy Salt (2012), *"Containing the 'Arab Spring'*", a Journal for and about Social Movements Volume 4 (1), pp. 54 – 66, 56.
[17]Jorien van de Mortel (2014), *"Framing U.S. Policy on Libya and Syria a Comparative Analysis on the Frames of Two Similar Conflicts",* Utrecht University, p. 20.
[18]Kelly L. Gosa (2013), *"From Normalization of Relations to War: United States-Libya Relations 2001-2011",* International Studies Department College of Liberal Arts and Social Sciences DePaul University Chicago, IL), (Thesis), p. 46.

the Arab Spring in the 2010s. None is taking care of what was argued to be Humanitarian Intervention if at all that had ever been an intended concern. This is clear because massacres happened in Libya as days passed but none raised meaningful redress against the involved troops in the civil conflicts in Libya with regard to violations to Human Rights and cease of fire. Thus; no intervention was ever made to address Human Rights breaches in Libya by the West and United States as they initially put forth.

Another reason for intervention in Libya is that Libya had no specific affiliation to Western powers unlike Syria which was not intervened despite existence of similar violations against human rights and wars against humanity. Intervention did not occur in Syria because Syria has had close ties with Russia thus creating tensions against other great powers despite end of the Cold War in the late 1980's. There were allegations that Syria possesses chemical weapons used in the Syrian war against opponents to Bashar Al–Assad's regime amounting to crimes against humanity and war crimes. All these were manifested to conquer power and due to security reasons through realism theory. President Assad's mission succeeded through ties with Russia and Iran. In suppression thus; the Western led by US initiated measures to silence Syria for their security. This is because Syria was reputedly growing great in the East in collaboration with Iran ahead of plans to implicate their support to Hezbollah troops in manifestation of Israel destruction. The involved strategies included passing of the Syria Accountability and Lebanese Sovereignty Act (SALSA) aiming at weakening Syria to strike balance of power in the region.

In that regard; by the time of intervention in Libya, there were already measures taken against Syria for checks and balances in reducing the encountered threats. Another reason for non-intervention in Syria was the affiliations Russia had with Syria where Russia is reported to have massively invested in Syria thus creating fears that intervention by the United States and her allies would cause tensions against Russia in protection of her investments in Syria. Besides; Russia is so affiliated with Iran, another State in the Middle East possessing nuclear weapons.

It thus follows; any intervention in Syria would find Iran joining Russia, hence, an International conflict leading to undetermined effects. Russia threatened to use both her VETO vote in the United Nations and military mighty on the field to protect Syria in all folds in case of intervention by the US and her Western

allies. In a nutshell; the above form bases for the intervention and non-intervention in Libya and Syria respectively under the Realist Theory of International Relation. Syria was avoided so as to avoid war eruption between the great powers due to great involvement of Russian in Syria in protection of Russia's economic interests. To the contrary; Libya could not have avoided the articulated and external fueled intervention in the name of democracy under the Realist Theory basing on the above discussion and state of affairs. The principle of Right to Protect favoured by external military intervention remains a rude horse as no one knows where to head to for lack of clear governing mechanism.

1.2.2. Liberalism Theory and its applicability in relation to the interventions in Libya, Afghanistan and Somalia

Liberalism Theory focuses at liberal institutionalism. Fiona & Chandra[19] are of the view that; there are disagreements regarding structure of the International system basing on existent International anarchy of world and power imbalance. Under liberalism, focus is on domestic set ups operating under formed Institutions and rules with ultimate structures as crucial features of democracy. Henceforth, a democratic society adheres to International Obligations. According to liberalism theory, fair International World Order features through conflict reduction and fostering greater level of cooperation among states. Liberals believe that, the World Peace Order will be attained when the world become democratic because liberals believe that democratic States do not fight. Notwithstanding; liberals are categorized in two limbs, that is; classical (valuing at individual liberty) and neo liberalism (widened to capture also free movements of both individuals and commodities i.e. free economies in the globe, hence; the evolution of free market global concepts). The two limbs have resulted into debates creating warring blocks which are so serious than the competition between states Georg Sorensen[20] comments.

[19]Fiona B. A & Chandra L. S (2010), *"Perspectives on International law in International Relations"* in Basak Cali (ed.), (2010) *"International Law for International Relations",* Oxford University Press, p. 30.
[20]Georg Sorensen, "*Tensions in Liberalism: The Troubled Path to Liberal World Order",* (SP IV 2007 – 308 WZB), Discussion Paper: Social Science Research Center Berlin, 2.

Under Liberalism perspective; it is evident in the Western World and United States that, the intervention in Libya joined hands and support from the Libyan people towards true Democracy and the long time amounting to over 42 years detained freedom as well as Human Rights in Libya during the Gaddafi regime. Jason William Boose[21] argues that; the brutal dictatorship of Gaddafi featured by frivolous spending of the Libyan oil capital while leaving most of the Libyan population to remain malnourished, hence resulting into people's struggles to earn their survival being among the reasons for the International Community not intervening the movements by the communities in Libya, instead, opting to support liberation movements.

To the contrary; liberals on the other hand are not at consensus as to the reasons and justification to the intervention in Libya by United States and her ally Western powers because though they all accept that there were necessities in making Libya a democratic state, yet; they differ as to the approach and methodologies employed in attaining democracy in Libya. In that regard; the intervention in Libya was molded to have based on International Humanitarian reasons though debatable whereas non-intervention in Syria was also based on Humanitarian reasons though the Bashar Al–Assad's regime was for long time accused to have used chemical weapons during the war necessitating intervention which was not the case in Syria as it happened in Libya. This principle under International relations sounds unlikely to what happened in Libya but propagated by the United States which is among the leading champions in propagation of this theory.

1.2.3. Constructivism Theory and its applicability in relation to the interventions in Libya, Afghanistan and Somalia

Fiona & Chandra[22] define Constructivism Theory of International Relations to encompass broad focus on approach to International Relations basing on the role norms, ideas, history, Institutional traditions and

[21]Jason William Boose (2012), *"Democratization and Civil Society: Libya, Tunisia and the Arab Spring",* International Journal of Social Science and Humanity, Vol. 2, No. 4, 314.

[22]Fiona & Chandra, *"Perspectives on International law in International Relations"* in Basak Cali (ed.), (2010) *"International Law for International Relations",* Oxford University Press, p. 37.

culture play in the world politics. Libyan intervention was featured by reasons for want to make reforms in the country through Constructivism school of thought in justification of the intervention. There are other none or less material aspects which are collectively crucial in understanding the world politics and their operationalization. Supporters of the Constructivism Theory argue that; Libya was not intervened for the purposes of securing Human Rights for the people of Libya, rather; the intervention was effected basing on the long-standing grievances on the part of Western Governments against Libyan Government under Muammar Gaddafi[23]. This proposition is shared by Kelly[24] adding that; the intervention in Libya was from the relation Gaddafi had in murdering the by then Crown Prince Abdullah bin Abdulaziz al Saud and the embarrassment that Gaddafi leveled against Saudi King Abdullah and Qatari Emir Hamad al Thani through several incidents. Gaddafi even named King Abdullah as a "British product and American ally" hence declared as an enemy to the West and Arab States.

The Western World and the United States branded Muammar Gaddafi as an enemy of the Western World. Incidents like the Lockerbie bombing in Scotland in respect of Pan Am Flight 103 on 21st December, 1988 which killed 243 passengers and 16 crew on board whereas the Gaddafi regime sluggishly accepted liability is among reasons for his bad pictured. Therefore; commutative of various causes altogether led the Western World and the US to fight against Muammar Gaddafi as also found by James D. Sidaway[25]. As to non-intervention in Syria; it has been argued that the negative impacts of the War experienced in Libya led to instability of Libya resulting to a failed State of Libya hence turning the same States which were in the forefront not to do the same in Syria despite of the Responsibility to Protect in the auspices of the UN arguing that invocation of the Responsibility to Protect should be considered in bringing justice and stability to the community instead of resulting into more atrocities and instabilities. Such principles in International relations contributed to the military intervention and nonintervention.

[23]Jeremy Salt, (2012) *"Containing the 'Arab Spring'"*, a journal for and about social movements Volume 4 (1), (May 2012), pp. 54 – 66, p. 56.

[24]Kelly L. Gosa (2013), *"From Normalization of Relations to War: United States-Libya Relations 2001-2011",* International Studies Department College of Liberal Arts and Social Sciences De Paul University Chicago, IL), p. 44.

[25]James D. Sidaway, (2012) *"Subaltern geopolitics: Libya in the mirror of Europe",* The Geographical Journal, Vol. 178, No. 4, December 2012, p. 300.

1.3. The intervention in Libya

Unlike in Tunisia where the uprising was composed and handled internally, the situation in Libya was rather handled and controlled externally by some foreign military powers including the US and her other alien powers. The uprising movements were supported by the International community vide a resolution of the UN Security Council against the referred "illegal regime" of the then President of Libya Muamar Gaddafi for protection of Libyan civilians. The intervention in Libya was construed under Humanitarian reasons though unclear whether the same also fell into R2P though essentially, the doctrine of R2P operates under humanitarian reasons.

Knowingly; Gaddafi was among leaders in the Arab world who vigorously resisted Revolutionary movements against their regimes and he seemed to overpower his potential opponents. Gaddafi's resistance is argued to have prompted the International Community led by the US in the auspices of the North Atlantic Treaty Organization (NATO) to intervene though the same was not the case in Syria. Many reasons have been given as to why Assad's regime in Syria was not intervened by the International Community, unlike Gaddafi's regime in Libya that led to downfall of Gaddafi. The Realism Theory justifies the intervention Libya for all that was done by the US and her allies in the auspices of NATO in Libya were purely for economic reasons camouflaged through Humanitarian intervention in justification for the intervention.

Economic aspects were evidenced by massive flow of Western Companies in Libya searching for business, markets and exploration of Natural Resources such as oil leaving no answer than Western manifestation of individual interests under the Realist Theory. If it was not the Russian resistance in the other limb of the Cold War which still practically subsists, definitely; Syria could not have avoided intervention by United States and other States. Formidably, even the States in the likes of Germany which earlier argued NATO and the United States not to intervene against Libya, have been in the forefront chasing for economic interests in Libya through their oil companies and rehabilitation or rather construction of infrastructures which were greatly destructed by the wars in in the "Arab Spring". During the intervention in Libya on humanitarian reasons, the same was not as demanding as it stood in Syria

where over 100,000 Syrians were killed with thousands fled as refugees or rather; internally displaced. Thus; the situation as happened in the State of Syria could have attracted intervention than in Libya if at all intervention was meant to be on Humanitarian reasons and in broadening democracy. It is from the above that one may conclude that the referred intervention and or nonintervention is more else than the propagated Humanitarian, Human Rights and or democratic reasons.

1.4. The Intervention in Somalia

Somalia is located in the Horn of Africa. Currently; Somalia is a failed State without an effective Government due to ethnic group wars persisted mainly from the early 1990s resulting from sporadic attacks sponsored by Somali warlords. Every ethnic group focused on sporadic attacks unlike interest of forming a stable Government wherever they conquer power. Regular causes of conflicts in Somalia are due to resource scarcity; domestic politics; geopolitical competitions; cultural and ethnic differences existing in the region for decades. Another affiliated cause is the geographical location of Somalia in the Horn of Africa which facilitates flow of arms from the Arab world to the detriment of Peace stability in Somalia. Commendably; the Somalia intervention by United States in the auspices of the UN has been attributed to many factors.

In January, 1991; the US Embassy in Mogadishu was caught by armed troops of President Siad Barre whereas after few days, the U.S Marines and SEALS relinquished the Embassy Staff and other foreigners. The invasion to the US Embassy in Mogadishu necessitated the US to accord more security strategies in defence of her interests in Somalia and to secure global Peace and Security. Mikael Eriksson[26] promulgates that external intervention in Somalia aimed at solving security dilemma in Somalia and the Horn of Africa in general. Unlike other successful interventions, that has not been the case in Somalia. Massive flow of arms and competition for resources in Somalia especially during Cold War rendered the intervention immeasurable.

[26]Mikael Ericksson (Ed.), (2013), *"External Intervention in Somalia's Civil War – Security Promotion and National Interests?",* Swedish Defence Research Agency (FOI), p. 33.

Another cause for intervention in Somalia was humanitarian reasons against famine outbreak in Southern Somalia. In the summer of 1992, famine outbreak was reported in Somalia whereas in August, 1992; the US responded through "Operation to Restore Hope" in securing easier food movement from ships to the Somali people countryside. Difficulties emerged where the US used airlift military to provide food and medicines to Somalis. Most food aid was captured by warlords. In 1993; more than 30,000 troops were sent to Somalia for Peace Operations for national reconciliations, transforming the Somalia Central Government and enlivening economy.

In March, 1993; the major 15 Somali groups agreed in Addis Ababa to form transitional Government through Addis Ababa Peace Accord. Due to the interests the warlords in Somalia had to real estate, they viewed UN Operations in Somalia (UNOSOM) plans as mission to reclaim their possession. That amounted into another war outbreak in June, 1993 between the UN and the militiamen of General Aideed where the militia of General Aideed killed 24 Peacekeepers followed by a battle which lasted for four months. The increasing instability in Somalia necessitated the United Nations Security Council (UNSC) in 1992 to deploy Peacekeeping mission; that is, the UNOSOM I which was superseded in December, 1992 by Unified Task Force (UNITAF). The UNITAF handed duties to UNOSOM II with additional mandate to operational bodies in supporting national reconciliation and reconstruction.

In March, 1994; the United States withdrew her troops from the UNOSOM II followed by the European nations. The remainder troops left Somalia in March, 1995. The 1993 Addis Ababa Peace Accord was followed by the 2000 Arta, Djibouti Agreement which established Transitional National Government (TNG) of which managed to survive for two years. Further conflicts were followed by Peace Talks in Kenya resulting into Transitional Federal Government (TFG) and other institutions (TFIs) in 2004. The TFG experienced difficulty in establishing control and legitimacy. By late 2006, TFG formed a coalition with the Islamic Courts Union (ICU) with its own frightening militias but in December, 2006, Ethiopian forces under invitation of the TFG entered Somalia to support the under pressure TFG which was supported by the US Administration for they were worried by information from the ICU that the ICU was

linked to Al Qaeda. Thereafter; the African Union Mission in Somalia (AMISOM) was authorized in early 2007 to substitute the Ethiopian troops in Somalia with its completion in January, 2009.

1.5. The Intervention in Afghanistan

Amongst debated external interventions was the external intervention in Afghanistan by the US and her allies. Before the said external intervention, the United States had no rivalry relations with Afghanistan especially with regard to the United States Policy against Afghanistan. The situation turned sour following the 1998 attacks in the US Embassies in Dar es Salaam and Nairobi where Osama bin Laden who was hosted by the Taliban in Kandahar Afghanistan was indicted of his involvement. Those incidents prompted the United States and the United Nations to pass sanctions against Taliban vide the United Nations Security Council Resolution No. 1267 of 1999 demanding the Taliban to surrender Osama bin Laden for trial in the United States and to ensure all terrorists' bases in Afghanistan face extinction. The unrest situation in Afghanistan kept on whereas maturity for intervention by the United States in Afghanistan was under inherent right of self-defense in terms of International Customary Law in purview of Article 51 of the United Nations Charter sourced from the aircraft attacks in the United States on September 11th 2001 where 2,996 people including the 19 hijackers were killed in the attacks.

As a result, the then President of the Unites States Mr. George Walker Bush and the then Prime Minister for the United Kingdom Mr. Tony Blaire initiated war against Al Qaeda in Afghanistan on 7th October, 2001, through "Operation Enduring Freedoms". The United States was supported by her allies through the North Atlantic Treaty Organization (NATO), who joined the war in Afghanistan in August, 2003. Apart from US self-defense, justification for the intervention was also backed on 20th December, 2001 when the UN authorized the International Security Assistance Force (ISAF) to help the Afghans to maintain security in Kabul and the surroundings.

The United States intervention in Afghanistan also aimed to effect change of regime to renounce the Taliban from power which had close ties with Al Qaeda. The invasion in Afghanistan by the US, UK and their allies were backed by United Nations Security Council Resolutions No. 1368 and 1373 all of 2001 which disparaged the terrorist attacks. The said Resolutions irretrievably acknowledged the inherent right

of States to self-defense as well as Collective Defense with demand to States to refrain from siding and or assisting terrorists. The United Nations Security Council acknowledged its duty against terrorism and its readiness to order measures in equal response to the threats by terrorism against Global Peace and Security.

1.6. Critical assessment of interventions in Afghanistan, Somalia and Libya

It should be noted that, in the first place; in authorizing intervention in Afghanistan, the UNSC was alerted to consider, **one;** that the UNSC is the only organ authorized to make decisions in maintaining Peace and Security and **two;** whether the war by the USA against Afghanistan fall clearly under self-defense upon proof of immediate and clear threats to declare a war under International Law. **Three;** whether the attacks in the US comprised a war justifying declaration of defensive war against any Government considering the general perception that the September 11th amounted to criminal acts where individual members of the Al Qaeda could be held responsible and **four;** the invasion should hold both moral and humanitarian justification by securing freedom from fear of further attacks and improving the value of life in Afghanistan.

Generally; intervention to any other foreign State sovereignty is strictly prohibited in terms of article 2(4) of the United Nations Charter. The Charter is clear that; all member States shall abstain from threatening or using force against other territorial jurisdictions or political independence of any State or in any manner inconsistent with the United Nations, that is; to prevent and remove threats to the Peace and for the suppression of acts of aggression or other breaches of Peace and to bring it about by peaceful means and in conformity with the Principles of Justice and International Law, adjustment or settlement of International disputes or situations which might lead to a breach of the Peace in terms of article 1(1) of the UN Charter.

Likewise; article 42 of the United Nations Charter provides that the United Nations Security Council may invoke military measures **but** in conformity with Chapter VII of the United Nations Charter. In terms of

the United Nations Charter[27], the only inherent powers to use force either individually or collectively is with regard to self-defense vide the prescribed procedure or when it has been authorized by the United Nations Security Council which is among key organs of the United Nations for the purposes of maintaining International Peace and global Security. In other words; any external intervention has to be justified and should occurs in exceptional circumstances only from the general principle that restricts external interventions.

Notably; generally, legitimate interventions by the International Community should abide the procedural requirements, that is, **one;** prior notification to the United Nations Security Council, **two;** offering public assessments of the factual and legal assessments that support an assertion of collective self-defense and **three;** developing objective criteria to guide future applications of Article 51 collective self-defense provisions. But lack of the above *per se* cannot render the interventions a nullity in justification and in securing the teleological purposes of the UN Charter; that is, securing Collective International Peace and Security. The International Community through the United Nations and its organs are worth the blame in according double standards to its members in favour of powerful States and to the detriment of weak States.

Besides; external interventions should focus attainment of Collective International Peace and Security or for humanitarian reasons and or in obliging to the Responsibility to Protect. This brings into play the interventions in Somalia and Afghanistan amongst. The issue is whether the said interventions had any justifications under the UN Charter and International Customary Law. Starting with the intervention in Somalia, the persisted situation in Somalia where the US Embassy war invaded also featured by the deaths of 18 Army Rangers in Mogadishu and the famine in Somalia necessitated invasion by the International Community for Self Defense and Humanitarian reasons respectively. Under the situation where the warlords fueled the sufferings to the Somali people through their sponsorship, rendered International intervention intolerable.

[27]The United Nations Charter, article 51.

The fact that the intervention in Somalia did not absolutely attain the intended purposes should not discredit the intervention because the efforts to restore Peace in Somalia were frustrated by the country disunity necessitating the United Nations to leave Somalia in March, 1995. So many dialogues and Conferences have been held in the region and in Europe to restore Peace in Somalia but in futile. The teleological intervention in Somalia is featured by John G. Fox[28] who portrays; the decision to intervene was purely for humanitarian reasons arguing the failure to have resulted from failure to focus and account for the Somali internal political aspects.

Regarding intervention in Afghanistan, apart from the September, 11th even; it has been controversially argued whether the US had that right of defense in favour of its nationals and the State against a planned armed attack. The intervention in Afghanistan was for self defence in reference to the September 11th eve and in future. Justification towards anticipatory intervention was stated by Antonio Cassese[29] arguing that; strict interpretation of the right to anticipatory action is indispensable considering the consequences if States were to abuse such right. Another support is gained by Richard J. Ericson[30] who accounts for anticipatory self-defense, that is; if States have to keep waiting until armed attacks are inflicted unto them for them to react, obviously; maintenance of International Peace and security cannot be said to materialize.

By so doing, that cannot be said to defeat the teleological enactment of article 51 of the UN Charter which was made in contemplation of maintenance of International Peace and Security by also covering anticipatory self-defense. Addressing the right self defence by a victim State, the International Court of Justice in the case of Nicaragua[31] held that, individual self-defense should be exercised as of such right if

[28]John G. Fox (2000), *"Approaching Humanitarian Intervention Strategy: The case of Somalia",* National Defence University, National War College Washington, DC, pp. 3-6.
[29]Antonio Cassese (Ed.), (1986), *"Return to Westphalia? Considerations on the Gradual Erosion of the Charter System"*; in *"The Current Legal Regulations of the Use of Force",* pp. 509 & 516.
[30]Richard J. Ericson, (1989), *"Legitimate Use of Military Force against State Sponsored International Terrorism"*, Note 33, p. 139.
[31]*Nicaragua vs. United States of America*, [1986] I.C.J. 14.

the State has been a victim of an armed attack. On his part, Hans Kelsen[32] argues that, Collective Security should be limited to protection of men against use of force by other men only as featured in the 1996 Advisory Opinion[33] where the International Court of Justice took the option not to decline likelihood of alternative to nuclear weapons in extreme situations of self-defense in circumstances of the endurance of a State.

No matter legality of the interventions in Somalia and Afghanistan, the remaining challenge is that, after the said interventions; the intervening States have not played their role in rebuilding the said States which is among the newly emerging values of International Peace and Security. In other words; the intervening States in Somalia and Afghanistan in whichever auspices it been under the United Nations or individually did not accomplish their duty to rebuild as the situations in Somalia and Afghanistan cannot be said to have been better after intervention comparing to the status before the said interventions. Thus; it is crucial for the intervening States to undertake their rebuilding duty to render the interventions meaningful. In expression of interest for intervention for instance, the then US President during Libyan invasion Barack Obama[34] had the following when addressing his nation regarding United States invasion:

> *..... We cannot use our military wherever repression occurs. And given the costs and risks of intervention, we must always measure our interests against the need for action ... In this particular country-Libya- at this particular moment, we were faced with the prospects of violence on a horrific scale. We had a unique ability to stop that violence: an international mandate for action, a broad coalition prepared to join us, the support of Arab countries, and a plea for help from the Libyan people themselves....*

This came amid another non-attention or ineffective focus to the Somalia wars between Somalia War Lords in the same last quarter of the 20th Century with a notable bang in 1990 onwards following marking end of the Cold War in 1989. The emerged effects due to none attention or ineffective address to the atrocities led to a new phenomenon and principle of International Law that envisaged the concept of Responsibility to Protect (R2P) which as such stands as "duty" and has received blessings of the United Nations Security Council in purview of Chapter VII of the United Nations Charter. Such concept emerged as solution initiated by the International community as a whole or some individual States through

[32]Hans Kelsen, (1957), *"Collective Security under International Law",* Washington DC: United States Government Printing Office, 1957, p. 1.
[33]Legality of the Threat or Use of Nuclear Weapons (United Nations), 1996 I.C.J. 244 paragraph 105(2) E.
[34]Barack Obama, *"Remarks by the President in Address to the Nation on Libya"*, National Defense University, Washington, D.C., 28th March, 2011.

permission of the United Nations. The captioned justification is centred on protection of humanity and all associated freedoms for mankind as an underlining valued worth protection by the International community.

Intervention by the International community emerges when the responsibility to protect their own citizens by the respective States is evidently ineffective, hence, transferring such responsibility to the International community according to Aidan Hehir[35]. This emerges when internal mechanisms appeared to have failed with danger to an outburst of infringement of human rights but through applicability of proper International Humanitarian Laws. In undertaking or rather exercising the R2P, States are allowed to intervene though illegally, hence, "legitimate though illegal intervention" as primarily, all interventions are illegal though can be justified upon establishment of legitimate cause of intervention. Remarkable legitimate but illegal intervention refers to that in Kosovo by NATO in the last quarter of the 20th Century.

According to Alex Bellamy[36], R2P is traced in the times of St. Ambrose (337-397) who argued that people and States are obliged to help others from oppression as a divine duty "he who does not keep harm off a friend if he can, is as much in fault as he who causes it". Under paragraph 139 of the World Summit Outcome Document[37], cognizance was extended to cover external interventions regarding Responsibility to Protect (R2P) to the effect that:

> *[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity*.

Underpinning the principle of R2P in March 2011, the United Nations Security Council passed Security Council Resolution No. 1973 of 2011 with a consequent statement issued by the Arab League dated 12th March, 2011 with a mission to instigate military interventions against Gaddafi's regime in Libya. The referred Security Council Resolution No. 1973 of 2011 comprises of flimsy evidence in justification for engagement of the R2P. The statement by the Arab League fuelled the United States to initiate strategies in facilitation of the move though it was resisted by other global powers i.e. Russia and China which opted to stay away from the resolution. Unlike during other invasions in Afghanistan and Iraq, the invasion in Libya specifically on the way was manifested, caused a series of discussions among scholars, Human Rights activities and the global public at large. For instance, the director of the Global Centre for

[35]Aidan Hehir (2012), *"The Responsibility to Protect: Rhetoric, reality and the Future of Humanitarian Intervention",* p. 75.
[36]Alex Bellamy (2006), *"Just Wars: From Cicero to Iraq",* p. 24.
[37]2005 World Summit Outcome Document, Note 28 paragraph 139.

the Responsibility to Protect, Dr. Adams, described Libya as a "key turning point in the history of R2P, where the debates shifted from battle around ideas to a battle around implementation"[38].

The debated means under which the invasion was executed led into difficulties in re-finding State stability in the North Western African country. In resultant, it has been debated as to whether truly the manifested invasion had bases on securing respect and individual rights to Libyan citizens in purview of the R2P principle. As such, in the aftermath of the invasion, there was no State-rebuilding strategy for the betterment of the Libyan people through guardianship, guidance and under representation of the UN. Such strategy would have definitely played role in rebuilding Libyan economy and social status unlike leaving the continuing state of unrest.

The Libyan experiment not only was wounded by Responsibility to Protect (R2P) but also limited willingness in the global South particularly among the BRICS countries in supporting propositions that effectively recognized legitimacy of humanity and protection of human dignity in the globe. According to Bolopion, Philippe[39], such mounting apprehensions were bluntly expressed by India's ambassador to the United Nations–Hardeep Singh Puri, who stated, "Libya gave R2P a bad name." Accounting for Libyan invasion, the former United Nations Secretary-General Kofi Annan[40], acknowledged that, "the way R2P was used in Libya caused problems". It is from the appraisal findings that applicability of the principle needs clear definition, focus with steady implementation guided by the whole community unlike individual State moves.

1.7. Concluding Remarks

Considering the reason for intervention in Libya one may be persuaded for existence of a pluralistic view that various factors have contributed as causes for the intervention in Libya, Afghanistan and Somalia by the United States and her allies with the elements proving existence of Realist Theory superseding the other categories of Theories. All the other reasons for foreign intervention are argued to have facilitated as tools towards attainment of the core objective in aiding the Powerful States for national security and threat or use of force as the major components surfacing under Realism Theory of International Relations perspective.

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[38]Interview with Harvard Carr Center for Human Rights Policy, New York, November 2014 in Sarah Brockmeier, Oliver Stuenkel and Marcos Tourinho, *"The Impact of the Libya Intervention Debates on Norms of Protection"*, Global Society 30, No. 1 (2015), p. 113.

[39]Bolopion, Philippe, *"After Libya, the question: To protect or depose?"*, August 25, 2011. Accessed on 25th August, 2017. http://articles.latimes.com/2011/aug/25/opinion/la-oe-bolopion-libya-responsibility-t20110825, in John W. Dietrich, *"R2P and Intervention after Libya"*, Journal of Alternative Perspectives in the Social Sciences 5, No. 2 (2013), p. 346).

[40]Natalie Nougayrcde, 'Kofi Annan: *"Sur la Syrie, a L 'evidence, Nous N' avons Pas R6ussi"*, [Interview with Kofi Annan: 'on Syria, It's Obvious, We Haven't Succeeded'], in Andrew Garwood-Gowers, *"The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?"*, (2013), UNSW Law Journal 36, No. 2 p. 610.

Though external interventions are generally prohibited by the International Community and Instruments; self-defense and humanitarian reasons including the Responsibility to Protect can justify External Intervention though there has to be obtained prior authorization from the United Nations Security Council. If at all checks and balances are properly observed within the teleological purpose of the United Nations Charter, attaining and maintaining collective international peace and security will be fairly manifested. Decentralization of the responsibility for International Peace and Security is crucially important to all States regardless of their respective status for the world Peace and Security but should continue to be restricted except under exceptional circumstances in justification after obtaining Special Resolution issued by the UN Security Council.

One would rather expect the reasons which applied in Libya, Afghanistan and Somalia to have been applied in Syria, otherwise; non-intervention in Syria with the same Humanitarian reasons in existence manifests manipulation of some other hidden agenda which should not be safeguarded under the umbrella of the United Nations and its respective organs or the associates towards common peace and Human Rights. Unless a serious note is taken by the International community, it is obvious that the superpowers are placed and will continue to ruin the existing lack of clear mechanisms in advancing their individual interests, unlike ensuring true protection and safeguard to Human Rights, mankind and dignity manifested in a democratic society.

Protection of succession rights of the unborn child under customary law in Tanzania

***Paul Robert Sayi**

Paul.sayi@out.ac.tz

ABSTRACT

Succession rights of the foetus in the mother's womb conceived before the death of his father and born after the death of his father is a contentious matter in the contemporary law of succession and property law. Often individuals tend to ensure that their children are protected and catered for in their Last Will and Testaments. But what is the position when it comes to unborn children? Are they qualified to inherit? What is the position when there is no Last Will and Testament? In Tanzania, the position is not clearly and expressly provided in the customary law of succession. This study is centred on examining the customary law and succession rights accorded to unborn child in Tanzania. In this regard, the author finds that customary succession law applicable in Tanzania Mainland does not expressly recognize and or guarantee succession right of the foetus in the mother's womb until is completely proceeded in a living state. The study recommends that if a person dies while his wife is pregnant, the distribution of estate should be postponed, if possible, till childbirth; otherwise, a share will be withheld for the child under the nominated guardian

Key words: *Succession rights; customary law; Unborn Child; Nasciturus.*

1.0 Introduction

The term unborn child literary means a foetus in the mother's womb. It is therefore referring to the child who is not in existence as of now but expected to come into existence in near future. From the perspective of biologists, the foetus is an independent creature and is considered a human being, but legally, until he is born alive would not be considered as an independent human and, therefore cannot have any right or duty. In some exceptional cases, foetus can possess rights even prior to his birth, provided that he is born alive.[41]However, in some countries like Kenya,[42] Norway and Canada, existence of human being is recognized from the moment of conception.

Historically, the property law of the Roman Empire granted foetus inheritance rights. As long as the foetus was conceived before the testator's death (usually, the father) and then born alive, his or her

*Assistant Lecturer, Faculty of Law, The Open University of Tanzania.

[41] Mohammad Reza Mohammadzadeh Rahni, Peyman Kavousi, Reza Emami Rad (2014). "Investigating the Inheritance of Fetus in the Civil Law of Iran and France" (PDF). *Journal of Applied Environmental and Biological Sciences*, retrieved 17 October 2019

[42]Section 26(2) of the Kenyan Constitution, 2010 provides that the life of a person begins at conception.

inheritance rights were equal to those born before the testator's death.[43]Even though under the Roman law the foetus was not a legal subject, it was a potential person whose property rights were protected after birth.[44]

Roman jurist Ulpian noted, that "in the Law of the Twelve Tables he who was in the womb is admitted to the legitimate succession, if he has been born".[45] Another jurist *Julius Paulus Prudentissimus* similarly noted, that "the ancients provided for the free unborn child in such a way that they preserved for it all legal rights intact until the time of birth".[46] The inheritance rights of the foetus were means of fulfilling the testator's will.[47] The interests of the foetus could be protected by a custodian, usually a male relative, but in some cases a woman herself could be appointed the custodian.[48]

In Tanzania, the position is not well clear as the customary succession law does not express provide for succession right of unborn child. It is not clear whether unborn child who is conceived before the death of father can inherit estate of his deceased father. If yes, the question that subsequent arise is whether the existing property related law allows the transfer of property to unborn child and to what extent. Therefore, this paper analyses the protection of succession rights of an unborn child under customary law in Tanzania. The study is limited to unborn child who are conceived before and born after the death of the father. Unborn child who scientifically conceived after the death of the parent are not subject of this study. Customary law of succession was a focal point of analysis.

The Concept of Succession rights and Unborn Child

The concept of succession right of unborn child is based on the Latin Maxim that state "*Nasciturus pro iam nato habetur, quotiens de commodis eius agitur."*This legal maxim means that a law that grants or protects the right of a foetus to inherit property. In principle, unborn child is deemed to have been born to the extent that his own benefits are concerned. "*Nasciturus"* literally translates to "one who is to be born" and refers to a conceived foetus that is to mean a living child who has not yet been born.[49] Pursuant to this legal principle, the foetus is presumed to have been born for the purposes of inheritance. The principle

[43] Jean Reith Schroedel (2000). *Is the Fetus a Person? A Comparison of Policies Across the Fifty States*. Cornell University Press, p. 31, ISBN 0801437075
[44]*Ibid.*
[45] Judith Evans Grubbs (2002). *Women and the Law in the Roman Empire: A Sourcebook on Marriage, Divorce and Widowhood*, Psychology Press, p. 264.
[46]*Ibid.*
[47]Jean Reith S, above at note 4, p. 31
[48] Judith Evans Grubbs, above at note 6, p. 264.
[49]Paisley R. M, (2006), Succession right of the Unborn Child; *Edinburgh Law Review, Vol. 10*, p. 50

was initially developed in Roman law and continues to be implemented today in most European nations, in the Americas (where the foetus is sometimes legally considered to be a person) and in South Africa.[50]

Nevertheless, In Tanzania the position is not clear regarding legal recognition and protection of succession rights of the foetus in the mother's womb who was conceived prior to the death of his father. It is not easy to point out the legal position on this concern in Tanzania probably due to existence of four different regimes governing succession issues namely customary law, statutory law, Islamic law and Hindu law. However this study is focusing on analysis customary law in regard to protection of succession rights of the so called unborn child.

Legal Personality of the Unborn Child in Tanzania

The legal understanding of the concept of 'person' or 'personality' revolves around possession of rights and capacity to discharge legal duties.[51] Hence, natural persons, that is, human beings are the prime claimants of legal personality.[52] The general rule is that, legal personality of natural persons begins at birth and extinguishes at death with the result that pre-birth, post death stages are devoid of any legal person.[53] Understanding absence of personality in the pre-birth stage (foetal stage) poses problems as the unborn being understood as incapable of exercising any legal rights and not being duty bound towards anybody, gets a raw deal when it comes to succession rights.[54]

However, it may be possible that an unborn (nasciturus) may, as an exception to the general rule that legal personality begins at birth, in some instances, be recognised before its birth as a legal subject with human rights.[55]This is the position under common law that was developed to protect the interest of unborn child so that his rights should not be deliberately disregarded in the will or intestate rule. Thus, the child in the womb is held as already born in any question which arise concerning its rights or interest.[56]The 'rule' essentially deems the law to recognise an unborn as a legal subject with legal personality from the date of its conception, and not only from birth, as an exception in some instances, when this may be to its benefit.[57]

[50]*Ibid.*
[51]Jelana J, Protection of Nasciturus within the Civil Law, Pravin Zapisi, Godina IX(2) 255-270, p. 255
[52]Jelana, *Ibid.*
[53]Paisley R. M, above at note 9 p. 50
[54]*Ibid*, at p. 30
[55] Moosa, N (2016), An argument for foetal Protection within a Framework of Legal Abortion, *South Africa. Medicine and Law*, 35:605-624, p. 5
[56]Paisley R.M,above at note 9, p. 30
[57] Moosa, N, above at note 15

In Tanzania, legal personality of a child can be derived from the Penal Code[58] where it provides that a child becomes a person capable of being killed, when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not.[59]In this regards, a child is considered as a person or human being when it has *completely proceeded in a living state from the body of its mother*(emphasis added).This legal personality of unborn child is defined in the context of penal law and for the purpose of murder. The child is the mother's womb can be capable of being beneficiary of succession right but not of being killed as provided. This provision was purely drafted for the purpose of criminal law specifically the act of killing.

The Law of the Child Act (LCA)[60] defines a child as any person being below the age of eighteen (18) years.[61] For the purposes of this Act, childhood ends at the age of 18 years but its wording leaves the starting point of childhood open. What is the starting point of childhood? Is it birth, conception, or somewhere in between? When does the foetus or unborn child start to enjoy the child's right and protection as accorded by national and international instruments?

Therefore, civil rights of the unborn child (foetus) is not statutory guaranteed in Tanzania due to the fact that, the capacity to possess rights begins with the birth of a child as defined under Penal Code[62] and ends with his death. It is therefore questionable as to whether a foetus in the mother's womb can inherit the father's estate under customary law as there is no express provision stipulate for this concern.

Succession Rights of Unborn Child in Tanzania

Succession or inheritance is the practice of passing on property, titles, debts, rights and obligations upon the death of an individual.[63] Succession to property upon death is concerned with the transmission of property as well as rights and obligations associated with that property from the deceased to the living and depends upon death.[64]Succession is classified into two types based on how the person dies in relation to will. These types are testate and intestate succession. These types are well discussed herein later in the next parts. Under common law, any child who is in mother's womb at the time of the death of the property owner is considered to come into existence in the eyes of law. Hence, unborn child under common law inherits in the same manner as if he were born before the death of the property owner if it was conceived

[58]Cap 16 [R.E 2002]
[59]Section 204 of the Penal Code, Cap 16 [R.E 2002]
[60]Act No. 21 of the 2009
[61]Section 4 of the Law of the Child Act, No. 21 of 2009
[62]Section 204 of the Penal Code, Cap 16 [R.E 2002]
[63]TAWIA, Report by Tawia on Widows Right of Inheritance to a Platform organised by CEDAW-Geneva, 20 September 2015, p. 1
[64]Kafumbe, p. 52

before the death of the property owner, and was born alive.[65]A foetus that was in existence at the time of a testator's death and that was subsequently born alive was entitled to inherit property equally with its living siblings. If the child is born alive but die subsequently, then shares are distributed amongst his/her heirs. The purpose of recognizing a fetal interest in property law is to ensure that children are not inadvertently omitted from their parent's will.[66]

Unborn Child under Customary Testate Succession in Tanzania

Testate succession is defined as the devolution of estate of person upon the death according to the will or testament.[67]Testate succession occurs where a person desirous of retaining absolute or limited control over his property after death, arranges to ensure that upon his death then property passes to a person or persons of his choice. These arrangements are made through a valid and enforceable will.[68] Under customary law, a 'will' is defined as a statement, which is voluntarily made by a person during his lifetime to show his intention and how he decided his property to be distributed upon his death.[69]The testator under customary law is mandated to change the rule of intestate. In this regard, testator is not barred from bequeathing his or her property to unborn child in Tanzania since there is no express provision of the law providing for or prohibiting such bequeath. Nonetheless, under common law unborn child can therefore inherit by Testate Succession in the case where the deceased has left behind a last Will provided that he or she is born alive. This was so restated by Judge De Villiersin the English case of *Ex Parte Boedel Steenkamp*[70], where the fact of the case was as following:

> *"In Ex Parte Boedel Steenkamp, the testator left the residue of his estate to his daughter and to the first generation. The testator's daughter was pregnant at the time of his (the testator's) death and subsequently gave birth to Paul Johannes. The executor to the estate sought a declaratory order on the issue of whether only the children born at the time of the testator's death would inherit or if Paul Johannes, born after the death of the testator, would also be able to inherit."*[71]

Judge De Villiers R held that the *nasciturus* should be able to inherit by means of the *nasciturus* fiction subject to being born alive and it being to the advantage of the *nasciturus*. He further held that Paul

[65]Marc S, (2014), The Nasciturus Non-Fiction; the Libby Gonen Story Contemporary Reflections on the Status of Nascitural Personhood in South African Law, LLM Dissertation, The University of the Witwatersrand, p. 40
[66]*Ibid.*
[67]Kitime e, (2017), *Law of Succession and Trusts: Student's Companion,* LAP LAMBERT Academic Publishing, Germany, p.3
[68]Musyoka, W, (2010),*Law of Succession*, Law Publishing (T) Ltd, Dar es Salaam-Tanzania, p. 31
[69]Local Customary Law (Declaration) (No. 4) Order, GN 436/1963, Schedule 1, Laws of Wills, Rule 1.
[70]*Ex Parte Boedel Steenkamp 1962 (3) SA 954 (O)*
[71]Shannon V, Circumstances in which an unborn child can inherit from a Deceased Estate, accessed from https://www.schoemanlaw.co.za/circumstances-in-which-an-unborn-child-can-inherit-from-a-deceased-estate

Johannes is entitled to share in the estate of the testator in equal amounts to his mother, brother and sister.[72]

The same position had been emphasised in the case of *Sopher v. Administrator-Eeneral of Bengal*[73] a grandfather made the bequest to his grandson who was yet to be born, by creating a prior interest in his son and daughter in law. The Court upheld the transfer to an unborn child since the vested interest was transferred when grandsons were born and only enjoyment of possession was postponed till they achieved the age of majority was held to be valid.[74]

Despite the fact that foreign decisions are mere persuasive in Tanzania as local courts are not bound to follow the decision of the foreign court, they are very useful and therefore can be adopted to fill the lacuna under the proviso of section 2 of the Judicature and Application of Law Act,[75]that provides for the application of the common law in Tanzania. It provides: "the common law shall be in force in Tanzania only so far as the circumstances of Tanzania and its inhabitants permit and subject to such qualifications as local circumstances may render necessary."Interestingly, there is nothing in the Customary Law Declaration Order that prohibits a testator to include a foetus in will, provided that the foetus was conceived before the death of the testator and the child born alive. In fact, a testator is free to dispose his estate by will regardless of intestate rules as provided in the Local Customary Law Declaration Order.[76]

Succession Rights of Unborn Child under Customary rules of intestacy

The term intestate succession refers the devolution of estate upon death of a person, which occurs when a person dies without leaving a will or dying with a will, which is invalid in the eyes of the law.[77]A man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect. This happens where a person dies without leaving a will. It is regarded as intestate. If one left a will which for some reasons it cannot take effect it will still be intestate.[78]

Rules of intestacy refer to rules which concerns the grounds under which an individual maybe entitled in the estate of the deceased. The rules which regulate the distribution of estates depends on whether the deceased died without a will(Intestate) or otherwise.[79]This study is premised on that assumption that there is inadequate legal protection of succession right of unborn child under customary law in Tanzania.

[72]*Ibid.*
[73]AIR 1944 PC 67
[74]*Ibid.*
[75] Cap 358 [R.E 2002]
[76]No 4 of 1963
[77]Kitime E, above at note 27, p. 4
[78]Kitime, E, above at note 27, p. 92
[79]Kitime E, above note 27, p. 92

Therefore, analysis is placed on this assumption to establish whether customary rules of intestacy provide recognize and provide protection to succession rights of the unborn child in Tanzania. In fact, there is no express provision under the Local Customary Declaration Order that either permits or bars unborn child from intestate succession. Thus, unborn child can be entitled to succession right under customary rules of intestacy though practically can be very difficult to implement such rights. This is due to the fact that customary rules of intestacy are primarily based on gender and age.[80]The rules provide the main heir has a bigger share than any of the others. Heirs in the 2nd degree get a bigger share than those in the 3rd degree. The sons get more than daughters. As per rule 30, within the 2nd and 3rd degrees, individual heirs will get more in accordance with age. It is very difficult to identify the sex of the unborn child without undue delay and costs. Consequently, the administrator is likely to face challenges on distributing the estate to the so called unborn child without known the sex of the child.

Nonetheless, the administrator is not be bound by these discriminatory rules based on age and gender as it has been persistently declared to be unconstitutional. As it was stated in the case of *Bernado Ephraim v Holaria Pastory*[81] that:

> "R*ule20 of the Rules of Inheritance of the Declaration of Customary Law, 1963, is discriminatory of females in that, unlike their male counterparts, they are barred from selling clan land. That is inconsistent with article 13 (4) of the Bill of Rights of our Constitution which bars discrimination on account of sex. Therefore under section 5(1) of Act 16 of 1984 I take section 20 of the Rules of Inheritance to be now modified and qualified such that males and females now have equal rights to inherit and sell clan land*."[82]

It was further stated that from now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritances of clan land and self-acquired land of their fathers is concerned. He further emphasized that Females just like males can now and onwards inherit clan land or self-acquired land of their fathers and dispose of the same when and as they like.[83]The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour.[84]

Despite the fact that customary law of this country have been declared to have the same status in our courts as any other law, subject only to the Constitution and any statutory law that may provide to the contrary and it should not be repugnant to natural justice or morality.[85] Since rule 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963, is discriminatory of females in that, and has been

[80] Rule 25 and 30 of the Local Customary Law Declaration Order, No 4 of 1963
[81](2001) AHRLR 236 (TzHC 1990),
[82]Ephraim v Pastory (2001) AHRLR 236 (TzHC 1990), para 42
[83]*Ibid*, para 44
[84]*Ibid*, para 43
[85]*Maagwi Kimito V Gibeno Werema* [1985] TZCA 1, [1985] TLR 132 (TZCA)

declared to be unconstitutional for being inconsistent with article 13 (4) of the Bill of Rights of our Constitution which bars discrimination on account of sex;[86]the administrator is thus not bound by these rules. The administrator can distribute the estate of the deceased father to the unborn child regardless to the rule of customary rules of succession as articulated under rule 20. This is justified by the statement of the court in the case of *Ephraim v. Holaria Pastory* that emphasized that section 20 of the Rules of Inheritance to be now modified and qualified such that males and females now have equal rights to inherit and sell clan land.

Therefore, unborn child can be entitled to succession under the customary rules of intestate in the case where there is no last Will, provided that he or she is born alive and would have come into consideration by the testator as an heir or even to suspend the distribution of estate pending glance period where the person dies while his wife is pregnant. In this effect, the distribution of may be postponed upon application by either interested party or administrator till childbirth. Alternative, a process of withholding a share of unborn child would be applied where distribution of estate is done before a child birth.

Succession Right of Unborn Child under Common Law

There is a well-established exception to the common law rule that the unborn has no legal personality and no legal rights. It is referred to as the *nasciturus* exception. This is a Latin version of the rule refer to "a child about to be born".[87]This exception exists as part of the law of succession, a branch of Property Law. The *nasciturus* exception accepts that a gift to a class of children living at a particular date is held to benefit a child *en ventre sa mere* which literally means a fetous in utero and the unborn child may even be a party to an action.[88] Thus, it would seem an unborn child shall be deemed to be born whenever its inheritance rights or interests as a financial dependant require it. This legal exception is a legal fiction. Lord Justice Fletcher Moulton in *Schofield v Orrell Colliery Co Ltd*[89] identified the approach as a peculiar fiction of law by which a non-existing person is taken to be existing person.[90]Therefore, a foetus in the mother's womb is entitled to inherit his father's estate provided was conceived before the death of his father and was subsequently born alive. Realistically, and for all intents and purposes, whether or not the *nasciturus* enjoys legal subjectivity prior to its birth is irrelevant because until the nasciturus is in fact born alive, it is not physically or legally capable of enjoying any benefits, rights, entitlements or interests

[86]*Ibid.*
[87]Whitfield A, (1993), Common Law Duties to Unborn Children, *Med Law Review*. p. 28
[88]Alison Burton, Women, the Unborn, the Common Law and the *State Southern Cross University Law Review, Volume 5 – October 2001, p. 173*
[89][1909] 1 KB 178
[90]Alison Burton, above at note 44

in a corporeal sense.[91]Although the *nasciturus* is theoretically capable of enjoying incorporeal benefits in a non-legal sense while *in utero*, the operation of the *nasciturus* doctrine remains subject to live birth.[92] The *nasciturus* doctrine in whatever form one chooses to interpret it, serves as a practical legal mechanism to protect potential *nascitural* benefits before birth by securing them for the *nasciturus* until such time as it is born alive and acquires bona fide legal subjectivity which enables it to take legal ownership in a sense of such benefits.[93]

Interim Protection under Procedural Laws

This section analyses the procedural law relating to probate and administration of estate in Tanzania. The issues is aimed at analyzing whether the procedural law accord some legal protection of the succession right of unborn child by setting a specific glance period before distribution of estate particularly where the deceased has left a widow. The issue of entitlement may come into sharp focus if there is litigation about the inheritance whilst the child is in the womb of the mother or if another party proposes to act to the child's prejudice. In either case the legal system is supposed to provide an interim protection to the interest of the child, possibly including the appointment of appropriate representative or postponement of the distribution of estate or otherwise withholding the share of the unborn child.[94]If a person dies while his wife is pregnant, the distribution is supposed to be postponed, if possible, till childbirth; otherwise, a share will be withheld for the child.

Unfortunately, the existing procedural law regulating probate and administration of estate in Tanzania which is the Probate and Administration of Estate Act[95] does not provide for an option to postpone the distribution of estate pending a glance period for a pregnancy mother to deliver her baby child or to withhold the share of unborn child. The rules should clear stipulate the minimum period of time of which an administrator or executor is allowed to distribute estate to the heirs. In consideration to succession rights of the unborn child, the rule ought to stipulate the glance period after which administrator or executor is allowed to proceed with distribution of estate. Essentially this would be after expiration of nine months from the death date of testator or the person whose properties are subject to succession. In absence to clear rule defining a glance period, there is a possibility of distributing estate in less than nine months in detrimental to succession rights of foetus in the mother's womb. Even if it can be distributed before the stated period, an exception should be provided where the deceased left a widow.

[91]Marc S, (2014), The Nasciturus Non-Fiction; the Libby Gonen Story Contemporary Reflections on the Status of Nascitural Personhood in South African Law, LLM Dissertation, The University of the Witwatersrand, p. 40
[92]*Ibid.*
[93]Marc S, above at note 51, p. 41
[94]Paisley R. M, (2006), Succession Right of the Unborn Child; *Edinburgh Law Review, Vol. 10*, p. 50
[95]Cap 352 [R.E 2002]

Conclusion

Therefore, the existing succession regime in Tanzania offers a little protection of the succession rights of unborn child who is conceived before the death of the father but born after the death of the said father. In absence of clear and express provision providing for that effect would prejudice unborn child from their succession rights. To deny the foetus, which the law presumes the man (deceased) would include as one of his children, the right to inherit simply because of the fact that it was not born at the time of death is seen to be unfair. Therefore, a common law exception to the general rule of legal personality should be adopted and applied to a child conceived before and born after the testator's death with the aim of protecting their succession rights. In particular, all of the revealed legal gaps seem to speak forcibly enough for the need to introduce a general provision in Tanzanian law providing protection of *nasciturus'*s rights and interests. The issue of the legal status of a conceived child carries several legal problems apart from succession that are difficult to resolve without clear provision of the law.

Harmonisation of social security laws in the East African Community: a myth or reality?

Rindstone Bilabamu Ezekiel*

Rindstone.ezekiel@out.ac.tz

Abstract:

The treaty for the establishment of East African Community (EAC), 1999 (as amended) and the Protocol for Establishment of the East African Common Market (EAC CMP) 2009 provide for harmonisation of national social security laws of Partner States for benefits of EAC citizens. A self-employed person who is in the territory of one Partner State has a right to join a social security scheme of another Partner State in accordance with national laws of Partner States. However, existence of uniform application of EAC law on social security benefits provisioning and the type of harmonisation that is desired by Partner States in addressing conformity to the community law for benefits of labour mobility raises questions.EAC citizens cross national borders for employment under the EAC citizenship right sand expect equal social security benefits under harmonised laws. It remains unclear as to what type of harmonisation of social security laws operates under the EAC law. This study uses doctrinal legal scholarship and comparative study methodology to examine tools and type of social security harmonisation that is applied within Partner States under the community law. An overview of national constitutional set-up of EAC Member States regarding treatment of EAC citizens and entrenchment of the right to social security in national constitutions is presented. Some pitfalls in the application of the principle of harmonisation are analysed and finally the author recommends, among other things, for(i) working-out a regional wide model law for social security portability that is likely to govern exportability of benefits across national borders for uniform implementation of social security laws within the EAC and (ii) enactment of similar national laws on social security by all EAC partner states, hinged on the provisions of the Treaty and implementing protocols.

Key words*: social security, harmonisation, approximation of laws, EAC law, convergence, standard harmonisation, minimum harmonisation.*

I. Introduction

The East African Community (EAC) is one such regional intergovernmental organisation in Eastern Africa which comprises six countries of Kenya, Tanzania, Rwanda, Burundi, Rwanda and South Sudan which are all equal sovereign Member States under the Treaty establishing the East African Community of 1999. The Community was officially re-established in 2001 running under the slogan of 'one people, one destiny'.[96] Each of the six Member States has a social security system established under different national social security legislations. All EAC countries have variably entrenched the right to social

*Lecturer in law, Department of Economic Law, Faculty of Law, Open University of Tanzania, P. O. Box 23409, Dar es Salaam, Advocate of High Court of Tanzania, Notary Public & Commissioner for Oaths. E-mail: rindstone.ezekiel@gmail.com.

[96]EAC: Development Strategy (4th) (2011/12 – 2015/16)- *Deepening and Accelerating Integration*, 'One People, One Destiny', EAC Secretariat, Arusha-Tanzania, 2011; Also see Stefan and Boltz, Moritz. *The East African Community regional integration: between aspiration and reality.* KAS International Reports, October 9, 2011, p.1.

protection under their national laws. These variations in national constitutions and national legislations range from non-inclusion of social security as a basic human right issue to inclusion of the same social security as a human right issue. Notably, the Republic of Kenya has expressly entrenched the right to social security in her national constitution[97], while the rest of partner states have either impliedly referred to the right to social security or not entrenched this right at all[98].

It is internationally agreed that the right to social security constitutes a human right issue governed by principles that set standards of human social protection[99].The right to social security entails accessing social security benefit regarded as natural human entitlement which should be justified by clear legal recognition. Many decades ago, members of the international community under the Charter of Universal Declaration of Human Rights (UDHR) agreed to include articles on the right to access to social security as a basic right[100]. Under the United Nations framework through the International Labour Organization (ILO), members of the international community agreed to pass the Social Security (Minimum Standards) Convention, 1952 for provision of benefits in the important areas of social security.[101]The EAC Partner States are members of ILO. With the exception of the Republic of South Sudan, the rest five EAC partner states have for decades implemented varied legislation on social security. In principle, social security is recognized as legally financed by national resources even in circumstances where countries have insufficient economic and fiscal capacities. What matters most is social security guarantee at a basic level of social security for all[102].

Since the right to social security is a human right issue, and since the EAC citizens cross national borders for employment and for establishment of business or trade outside their countries but within the

[97] See *Constitution of Kenya, 2010*, Art.43.
[98] This is with the cases of 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).
[99] Universality of protection; Dignity and autonomy; Inclusion of vulnerable groups; Equality and non-discrimination; Gender perspective; Transparency and access to information; Meaningful and effective participation; Access to accountability mechanisms and effective remedies; Respect of privacy; Comprehensive, coherent and coordinated policies; Adequate legal and institutional framework and adopt long-term social protection strategies; Standards of accessibility, adaptability and acceptability; Adequacy of benefits. [*https://socialprotection-humanrights.org/framework/principles/, accessed 8 September 2020].*
[100] UDHR 1948, Articles 22 and 25.
[101] See The 'Social Security (Minimum Standards) Convention, 1952 (No.102).
[102]Nancy J. Altmanand Eric Kingson, Social Security Works for Everyone! Protecting and Expanding America'sMost Popular Social Program, Paperback July 28, 2021.
The Truth About Social Security: The Founders' Words Refute Revisionist History, Zombie Lies, and Common Misunderstandings Paperback – August 14, 2018

Community,it is contendedfrom a human rights-based approach that, their social security rights should be strongly grounded in a strong legal and institutional framework within the Community. It should be noted that harmonising social security laws of partner statesforms part of processes of strengtheninglegal tools for realization of social security benefits by the EAC citizens based on the principles enshrined in the EAC treaty. Consequently, social security laws in the EAC are at different processes and levels of working towards harmonisation[103]. The EAC countries are likely to face challenges related to discrepancies in terms of national legislation on social security laws. The inclusion of the "*principle of variable geometry"* that permits flexibility allowing for progression in co-operation among a sub-group of members in a larger integration scheme in a variety of areas and at different speeds, has been another area that has posed some challenges[104]. Each country has different social security legislation with varied provisions in relation to alignment of national social security laws with EAC law.

Harmonisation of social security laws constitutes one of the powerful tools to enable functionality of social security systems. The EAC Member States share a common commitment to ensuring the well-being of their citizens through effective social security systems. However, social security legal frameworks of each country in the Community on who and how one is entitled to social security benefits tend to vary significantly depending on national laws. Therefore, harmonisation of social security laws is intended to bring concord or conformity of social security laws with Community law. The background information that follows highlight interplay of factors towards harmonisation of social security laws within the EAC.

II. Background information to social security law harmonisation in the EAC

The legal framework for social security laws formed by the EAC *(hereinafter referred to as "the EAC law")* requires Member states to harmonise, among other things, their national social security policies and laws so as to conform to those of the Community law.[105]In order for harmonisation of laws to take place, there should be effective harmonisation instruments. These instruments may be described as a mixture of Treaty, Protocols, Acts, Directives, Regulations and Rules passed by the mandated EAC institutions.[106] Harmonisation is expected to go through a number of stages.

[103] Kituo Cha Katiba 2010: Towards a Common Formal Social Security and Pension Scheme for the East African Community: an examination of the Legislative Framework, a Report of the Regional Workshop held on 10th December 2010 at Grand Imperial Hotel, Kituo Cha Katiba, Kampala

[104] See *EAC Treaty, 1999,* Art. 7 (1) (e).

[105]Articles104 (3((e), 126(2)(b), 131(1) of the EAC Treaty 1999; Article 10(3) of the EAC CMP.

[106]Johanes Joveling, Hamud I. Majamba, Richard Frimpog Oppong, Ulrike Wanitzek (eds), Harmonisation of laws in the East African Community: The State of Affiairs with Comperative Insights from the European Union and other Regional Economic Communities, Nairobi: Law Africa, 2018, p.2.

The first stage involves putting in place necessary institutions for the harmonisation process. While this is provided in the EAC Treaty and the EAC Common Market Protocol, there is no any institution in the EAC that is specifically set for harmonisation of social security laws in the Community member states. It is expected that at this preparatory stage**,** a series of technical activities including distribution and presentation of the East African legislation or instruments on specific areas of harmonisation of social security laws by following cardinal principles of harmonisation.

The second stage which is missing among East African Partner States is evidence of functioning analytical stage that should have been translating all necessary Community legal acts in in each of the six EAC partner states trying to incorporate the spirit of the EAC law in their national strategic plans for the Adoption of the Acts of the Community in line with the EAC priorities. There is great discrepancy among the partner states.

The third stage involves operational elaboration of the new legislation in each of the EAC partner states that is in line with the already set action plan towards harmonisation of social security laws. This stage may be described as transposition stage where actual approximation of the national legislations of six EAC partner states with the EAC acts is expected to be attained to a certain degree. It is expected that at the transposition stage the national and EAC social security law experts do prepare new draft national laws or propose amendments to the existing national laws and by-laws, but come up with the regional wide model law for harmonisation of social security legislation of national social security laws of partner states. National social security laws have to be harmonised in order to attain compatibility between the legal order in the national jurisdictions and the EAC accumulated legislation, legal acts, and court decisions which constitute the body of EAC *acquis.*

The fourth stage in the EAC legal harmonisation of laws requires adoption of the new laws, amendments of the existing incompatible social security laws through the legislative assembly and working on implementation these harmonised laws in an adequate fashion. This has to do with the pragmatics or functionality of the harmonised laws and their practical effects and effective management of their effect over the existing institutional set-ups. While it is known that the process of harmonisation of laws is gradual, the foregoing stages of harmonisation of laws should be used to assess the state of harmonisation of national social security laws among the EAC partner states and establish if they are fully harmonised in line with the EAC *acquis.*

The extent to which harmonisation or approximation of social security laws of EAC countries has been achieved and archived remains undetermined. The EAC is still faced with many regional integration challenges including those of asserting difficult issues at national level of the Member States including ethnic conflicts, political opposition being at loggerheads with incumbent Governments of the day, and civil wars in some Member States[107], among others. General mistrust of national leaders of EAC Member States at times becomes another challenge. In 2012 the mistrust occurred in Rwanda and Uganda over clashes in Ituri, DRC[108]. Not only that but also, between 2013 to 2015 Rwanda and Tanzania were engulfed in political mistrusts over the trade wars involving embargo on transit cargo trucks from Tanzania imposed by Rwanda, mostly as a result of military incursion in the DRC under the military assistance of Tanzania to DR Congo. Of recent, Tanzania has been accused of meddling in Kenya's domestic affairs.[109] As a result, one would wonder as to whether the EAC has not put national interests ahead and those of the EAC full integration agenda behind. Among these countries, there are no any signs that exist regarding ceding of their national sovereignty.

Some studies show that all six Member States of the EAC are responsible for the slow progress towards reaching the dream of full integration under the popular slogan one "people, one destiny".[110]Since 2001 when the EAC was effectively put into operation, the Community has had particular problems of implementing agreed decisions particularly within national structural set-ups. Internal political dynamics of these Partner States determine the pace of harmonization. Existence of political will and peaceful environment within Partner states are essential for creating space for working on harmonisation of policies and laws to conform with the laws of the Community. In some EAC countries, the said prerequisites have been lacking. The Republic of South Sudan has been under frequent challenges of civil wars while Burundi has been under constant civil conflicts and engulfed in Constitutional disputes. In these countries, the space and desire to deal with harmonisation of social security laws have been slow.

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[107] See *Khadiagala, G. "Regionalism and Conflict Resolution: Lessons from Kenyan Crisis." Journal of Contemporary African Studies, 2009, vol.27, No.3, pp.431-444; Also see* Kipkemboi, Chemelil, P. "Tanzania's Dilemmas and Prospects in East African Community: A Case of Trepidation and Suspicion", *Developing Country Studies*, Vol.6, No.1, 2016, pp.27-35.

[108]Lansford,Tom. *Political Handbook of the World 2012*, London: SAGE Publications Ltd, 2012, p. 1483ff.

[109]See Government is not meddling in Kenya affairs: Mahiga, available from:*http://www.thecitizen.co.tz/News/Govt-isn-t- meddling-in-Kenya-affairs--Mahiga/...index.html (*accessed18 August, 2017); also "Tanzania denies meddling in Kenya affairs-Kenyan News", retrieved from: *https://kenyannews.co.ke › Daily Nation (accessed 18 August, 2017); Also see "*Tanzanian govt rubbishes misleading Kenyan media report - Azaniapost, available from : *www.azaniapost.com/.../tanzanian-govt-rubbishes-misleading-kenyan-media-report-2((accessed 18 August, 2017).*

[110] Ibid, p. 29;Also see EAC Secretariat: Report of the Committee on Fast Tracking East African Federation, East African Legislative Assembly (EALA). Report of Select Committee on East Africa Federation (Munaka Report), Arusha: East African Community, 2004; *EAC: Report of the Committee on Fast Tracking East African Federation, EAC Secretariat, Arusha Tanzania, 2004.*

The dilemma on the much talked possible constitutional changes among EAC countries to allow extensions of possible presidential terms for presidents create state of mistrust among partner states.[111] Some internal political challenges related to the re-institution and recognition of Kingship, particularly of the Buganda Kingdom[112], among others, have occasioned unpredictable future for Uganda. The Republic of Rwanda successfully changed her national Constitution to suit the incumbent president for another re-run and the vote gave a landslide approval to the incumbent president.[113] Deep in every day ordinary life, underground ethnic divisions remain a sensitive issue that have impacted on current state of internal domestic politics in Rwanda and Burundi due to the past history of genocide in the former and civil wars in the latter . On the other hand, Tanzania has been under long term period of peace and harmony but it has of recent stumbled in the constitutional making dilemma since 2014/2015. The future of the new Constitution in Tanzania appears to have been shuttered. On another front, the internal political landscape in Kenya has been under the grim of ethnic divisions fuelled by political parties.

It may be inferred from few incidences above that internal dynamics add to other challenges on the inadequacy of harmonisation of national laws and speed of implementation of the EAC development strategy due to domestic problems.[114] Even Trade disputes between Member States such as between Tanzania and Kenya[115]; Rwanda and Tanzania[116], Kenya and Uganda[117] have been reflected in imposition of various *non-tariff barriers*[118] on goods and services at different times suggesting that Member states are still engaged in nationalistic inclinations and egoistic centred economic wars.[119] Reith and Moritz

[111]See "Uganda seeks constitutional change that would let Museveni extend rule…" available at: *https://www.businessinsider.com/r-uganda/(accessed 19 August, 2017);Alsosee* "AmendingUganda'sConstitution-Again?Human Rights Watch**" …**retrieved from: *https://www.hrw.org/news/2016/09/13/.accessed 19 August, 2017.*

[112] See "The clash of institutions: traditional authority, conflict and the failure... Museveni's government and the *restored Buganda Kingdom* deteriorate…" retrieved from: *https://www.tandfonline.com/eprint/9DtD.../full. (Accessed 19 August, 2017).*

[113]See "Rwanda votes to give President Paul Kagame right to rule until 2034"...available at: *https://www. The guardian...com / World › Rwanda. Accessed 17 August, 2017*.

[114] Cf. WTO, *Trade Policy Review: East African Community (EAC),* 2012. Available at: Retrieved, 18.08.2017

[115] See*The Citizen Tanzania News Paper*, Wednesday, July 26, 2017, "Tanzania, Kenya move to avert trade disputes", retrieved fromhttp://www.thecitizen.co.tz/News/Tanzania--Kenya-move-to-avert-trade-disputes/ (accessed 19 August, 2017).

[116]See "Relations between Rwanda and Tanzania are strained-Rwanda increasing tradebarriers against Tanzania", available from*:country.eiu.com/article.aspx?articleid=/...country=Rwanda&topic (accessed 18 September, 2017).*

[117]*The East Africa*,Sep 6, 2015, "EAC now backs Uganda on trade disputes with Kenya", available from: *www.heeastafrican.co.ke › News (accessed 17 August, 2017).*

[118] The EAC Treaty, 1999 defines "non-tariff barriers" to mean administrative and technical requirements imposed by a Partner State in the movement of goods.

[119] In 2014 it was reported that a recent survey conducted by Northern Corridor Transit and Transport Coordination Authority gave mixed results, giving positive signals for Rwanda and Burundi but worrying results for Uganda and Kenya. Kenya recorded the highest truck-stops at 1264 stops while Uganda had 362. In Rwanda, drivers were stopped six times, while Burundi and DRC recorded four stops and South Sudan only two, the survey which revealed this trend was released mid-year of 2014. Obtained from See *Daily Nation*, "Business lobby urges removal

have tended to suggest that Kenya's economic superiority threatens the perceived economically weak Tanzania and other EAC member States.[120] The authors argue that Kenya is a classic case of a dominant EAC regional economy that has progressively reformed her economic policies, labour migration policies and legislations on diaspora, dual citizenship and bit of social security laws that are likely to affect both emigrant and immigrant labour.[121]

In terms of legal enforcement of the EAC law, the most domestic governmental structures of Member States still hinder the primacy of the Community law and institutions. All the foregoing challenges have contributed to the slow pace of implementation of the EAC common market protocol and harmonisation of laws and policies in the region. There has been a frequent complainant over the poor or slow pace in the harmonisation of laws and policies which calls for more effort from governments, private sector, civil society and interested stake holders of regional integration process.[122] As a result, even the harmonisation of social security laws for benefits of EAC citizens has not been seriously addressed by the Partner States.

III. Methodology

The study employed empirical legal research, doctrinal legal approach and comparative study to investigate the roles of EAC law and national legislation in the Community. A systematic investigative approach was used to revise the current state of the literature, knowledge on the subject matter in order to discover new facts through inquiry into methods and processes of harmonisation of social security laws. The approaches were combined to bring insights for evaluation of data using the normative character of law. The description of legal issues and causal character was arrived at through combined legal research methods. The author collected a range of international, regional and national legal instruments, rules, regulations and constitutions focusing on EAC Partner States. These instruments were systematically analysed in order to establish any progress made in respect to domestication and implementation of the East African Community law in the area of harmonisation of social security laws. The author interrogated some experts on Community law and political decision-makers. The information obtained was used to analyze the extent to which the various provisions of EAC Treaty, the EAC CMP and its accompanying regulations touching on harmonisation of social security laws have been translated into national legislation by the member states. The author was able to analyse collected data on the nature and status of

of barriers to EAC trade", 24 Sept, 2014.Available at *http://www.theeastafrican.co.ke/business/Business-lobby-urges-removal-of-barriers-to-EAC-trade/2560-2465030-view (Accessed 18 September, 2017).*

[120] Cf. Reith, Stefan and Boltz, Moritz. *Op.cit,* pp.100-102.

[121]*See Research Report.* "*The Biggest Fish in the Sea? Dynamic Kenyan Labour Migration in the East African Community"*.ACP Observatory on Migration & IOM, 2013, pp.45.46.

[122] See *EAC Treaty,* op.cit, Art. 7 (1) (d) on principle of subsidiarity with emphasis on multi-level participation and the involvement of a wide range of stake- holders in the process of integration.

implementation of the EAC harmonisation instruments and identify potential and actual impediments for effective harmonisation of social security laws. The countries represented were Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan.

IV. State of literature

Several authors have written on harmonization of laws in Africa, however, less is written on the state of harmonization of social security laws in Africa and beyond. Alexander Aleinikoff has written on "International Legal Norms and Migration where he says that areas where the international consensus is less developed include, among other things, the extent and nature of harmonization of laws for benefits of labour migration for economic purposes. Existence and observance of international legal norms on application of uniform laws among partner's states ina regional organization play a key role in the harmonization of laws. Also, such as primacy of application of regional and international law over national laws in the subjects of equal employment treatment and legal frameworks to govern the harmonization of social security laws for benefit of immigrants[123]

D.C Moore has argued that international transactions beyond national borders call for harmonsation of laws of cooperating partner states for the benefits of citizens.[124]In the modern world, global trends go beyond national borders. This has direct impact on peoples' transboundary migration for employment and human development. Olusoji, Elias O., has argued that, crossing national borders is part and parcel of globalisation which operates within certain national, regional and international laws and policies.[125]Simo R.Y contends that harmonisation of laws becomes essential element in any regional organization due to the fact that there are always risks that accompany migration from one country to another or from one regional bloc to another.[126]To ensure social security beyond national borders in any regional organization demands strong legal framework that is harmonized or well-coordinated. Similarly, nearly two decades ago, Lee, Margaret wrote on wrote on "Regionalism in Africa: A Part of the Problem or a Part of the

[123] T. Alexander Aleinikoff, T. Alexander Aleinikoff, "International Legal Norms and Migration: A Report," in T. A. Aleinikoff and V. Chetail, Eds., Migration and International Legal Norms, The Hague, The Netherlands: Asser Press, 2003, p.2ff.

[124] Dickerson, Claire Moore (2005). "Harmonizing Business Laws in Africa: OHADA Calls the Tune", *Columbia Journal of Transnational Law*, Vol. 44, No. 1, pp. 17–73; Elias, Olusoji O. (2000). "Globalization, 'Law and Development', and Contemporary Africa", *European Journal of Law Reform*, Vol. 2, No. 2, pp. 259–275

[125]Olusoji O. Elias, Globalisation, 'Laws and Development', and Contemporary Africa, 2 European Journal of Law Reform, Vol 2 No.2, Kluwer Law international, 2000, p. 259.

[126] Simo R.Y. (2015) Regional Integration in Africa through the Harmonization of Laws. In: Elhiraika A.B., Mukungu A.C.K., Nyoike W. (eds) Regional Integration and Policy Challenges in Africa. Palgrave Macmillan, London. https://doi.org/10.1057/9781137462084_6

Solution[127]and commented on the aims regionalism that social interaction is one among many aims of the integration. However, Lee does not address the state of harmonsation of social security laws in the East African Community.

Boodman, in his 'myth of harmonisation of laws' argues that most often, many regional integration treaties and other related instruments governing the Community of member States do provide for possible avenues towards harmonisation laws.[128] Such possible avenues would include existence of agreement on exact application of uniform legislation to achieve the common goals within specified time limits under the framework of implementation. Ross Ashcroft[129]contends that the legal harmonisation refers to the principles and practice of adopting harmonised and uniform international laws in the subject matter be it legal, financial, commercial and administration across different regional integrations.[130] Kaufman argues that harmonisation creates a state of consonance or accord by adaptation of certain parts, elements or combination of several things that seem to be related although they are different so as to come up with a consistent, harmonious and stable subject matter that is in an orderly manner and which fulfils the status of removing inequalities,[131] and thereby guiding members relying on it.

In East Africa, Jean Barya[132] has written on social Security and social protection in the East African Community and recommends fora legal mechanism to enable portability of benefits from one scheme to another and from one EAC country to another. However, since 2011 when the study was conducted, there is neither any clear implementation of social security benefits portability scheme in the EAC nor any meaningful harmonisation of social security laws among the six EAC partner states. A recent study was conducted by several researchers in the year 2018 in the book titled *Harmonisation of laws in the East African Community*: *The State of Affairs with Comparative Insights from the European Union and other*

[127] Lee, Margaret (2002). "Regionalism in Africa: A Part of the Problem or a Part of the Solution", *Polis/R.C.S.P./C.P.S.R.*, Vol. 9. Available at: www.polis.scienc-espobordeaux.fr/vol10ns/lee.pdf.
[128] Boodman, "The myth of harmonization of laws", *The American Journal of Comparative Law*, 1991, pp.699 700-701.
[129] Ashcroft, Ross. "Harmonization of substantive legal principles and structures: lessons from environmental laws in a federal system (Australia)," In: Mads Andenas & Camilla Baasch Andersen (eds.), *Theory and Practice of Harmonisation.* Cheltenham, Northampton, Massachusetts: Edward Elgar Publishing Limited, 2011, pp.65-94.
[130] Ashcroft, Ross. "Harmonization of substantive legal principles and structures: lessons from environmental laws in a federal system (Australia)," In: Mads Andenas & Camilla Baasch Andersen (eds.), *Theory and Practice of Harmonisation.* Cheltenham, Northampton, Massachusetts: Edward Elgar Publishing Limited, 2011, pp.65-94.
[131] Cf. Kaufmann, "Social security in the context of French-African and intra-African labour migration", In: Benda-Beckmann et al (eds) *Between Kinship and the State(1988)*, pp.399-400.
[132] Kituo Cha Katiba 2011, Social security and social protection in the East African Community, Kampala, Fountain Publishers.

Regional Economic Communities.[133]Despites its detailed content on harmonisation of laws in the EAC, this edited volume does not address the state of harmonisation of social security laws within the East African Community. The process by which member states of the EU change their national laws to enable the free market to function properly. It is required by the Treaty of Rome. Compare harmonization of laws.

V. Nature of harmonisation (approximation) under the EAC Treaty

In order to understand the legal environment of harmonisation (or approximation) of laws in the EAC Treaty, one has to first make a recap of what really harmonisation. Generally, this is a term that is used as having similar sense with approximation. Approximation exists where there are differences which disturb the function of a given system. Behind any demand for harmonisation there are impeding differences which are regarded as source or cause of some problems towards reaching set objectives regarding conformity or common framework of practice. Essentially, harmonisation is geared at solving all or some of real and perceived problems of conflicting systems by removing such impeding differences. While existence of differences between legal systems of different States is not in itself a problem, the real problem arises only when application of certain policies, laws, regulations, or procedures creates unwanted frictions and prevents progress towards particular intended destination of equal treatment or similar equities agreed by the parties concerned. In such a situation, harmonisation comes in to remove such undesired impediments. This takes us to a discussion on degrees of harmonisation relevant to EAC and their foundations.

a.) Degrees of harmonisation relevant to EAC

Two approaches of harmonisation relevant for the EAC partner states are described. The first one is *standard harmonisation*.[134] Standard harmonisation requires that all national social security systems should adopt the same standards. This type of harmonisation does not allow Member States to deviate from the regionally set standards.[135] Thus, standard harmonisation of social security laws approximates to unification of social security laws of Partner States. The result of interpretation of harmonised laws must be the same to ensure that harmonising instruments work in practice and provide a foundation for

[133] Johanes Joveling, Hamud I. Majamba, Richard Frimpog Oppong, Ulrike Wanitzek (eds), Harmonisation of laws in the East African Community: The State of Affiairs with Comperative Insights from the European Union and other Regional Economic Communities, Nairobi: Law Africa, 2018.
[134] Pennings, Frans. *Introduction to European Social Security Law*, (3rd edn.), Cambridge: Intersentia Limited, 2003, p. 289.
[135] Ibid, pp.88-89.

developing harmonising legislation in member countries of a regional integration. This would also involve co-ordinating methods of application and adopting concordant policies to arrive at the effective internationalisation of social security.[136] The second type of harmonisation that is relevant under the EAC Treaty is *minimum harmonisation*. This refers to the degree of harmonisation envisaged by a regional integration body or Community whereby it 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.[137] Under this model, member states are at liberty to exceed the prescribed social security minimum standards of harmonisation as set in their social security provisioning mechanisms.

Harmonisation of social security laws in EAC largely relies on the EAC Treaty, 1999, the provisions the EAC CMP read together with Regulations and Council directives. The secondary instruments have provisions that require legal approximation activities that should be done by partner states to ensure there is a state of conformity or accord with standards fixed by international law through treaties or agreements or conventions or regional instruments. Thus, harmonisation of social security laws must operate where there are harmonisation instruments of the Community. Minimum harmonisation would require enforcement of agreed protocol together with governing rules for implementing the basis of minimum harmonisation. It is imperative that there is always a need to have governing legal instruments that clearly direct the extent to which harmonisation should be done as agreed upon in such instruments. Existence in place of principle instruments containing specific articles, guiding rules and regulations which provide minimum standards has been said to be key criterion for minimum harmonisation[138].

Although harmonisation steps are normally developed gradually spreading over a considerable period of time, there might still be many challenges in economic integrations which get involved in this endeavour. Notably, under the minimum harmonisation, harmonising instruments provide minimum standards and allow and at times encourage member states to exceed these standards. Member States are at liberty to exceed the minimum standards that are agreed and set in their social security provisioning arrangements. The latter implies that in the EAC it would appear that the harmonisation instruments of the Community which are treaties, protocols, regulations, directives, and another instruments operate on the basis of minimum harmonisation.

[136] Moles, Ricardo R., (note 32), p.167.
[137]See Mpedi , L.G., "Harmonising social security systems within the Southern African Development Community", 2009 *Journal of Southern Africa Law*, (697 -708), p.699
[138] See Pennings, F., (note 39).

b.) Foundations of harmonisation (approximation) of laws

Article 6 (d) of the EAC Treaty shows that the Partner States have agreed to undertake the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights, 1981 (The Banjul Charter). The African Charter, however, in its principal text, there is no express provision recognizing the right of migrant workers to social security. Due to lack of specific provisions for coverage of migrant rights to social security, the African Commission within its powers conferred to it to interpret the Charter as a qusi-judicial body under Articles 35 and 45 produced the first guidelines through Commission's working group that was established by the African Commission to draft these guidelines and principles regarding the implementation of socio-economic rights.[139] The African Commission also produced the second guidelines on socio-economic rights. In the first guidelines, 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.[140] Therefore, the right to social security is an internationally accepted human right which African countries have to implement. Thus social security has joined a plethora of international instruments such as the Universal Declaration of Human Rights, 1948(Article 25(2); the International Covenant on Economic, Social and Cultural Rights,1966 (Articles 9, 10, 11 and 12) and several other instruments which recognise the right to social security as a fundamental right which should be enjoyed by everyone.

VI. National constitutional foundation for harmonisation of social security laws

The national constitutions of EAC Partner-States have varied provisions on social protection, and social security. With the exception of South Sudan, national constitutions of the rest five member states existed even before the re-establishment of the EAC. The legal position under the Community law, the EAC Treaty does not override national constitutions of Partner States. The next discussion presents some findings on the foundation of harmonisation of social security laws and the state of national constitutions and legal position within the EAC Partner States.

a.) Constitutional and legislative status in Rwanda

The Rwanda Constitution of 2003 as Revised in 2015[141] has no any specific provision providing direct mention of the right to social security. However, Article 51 of the constitution of the Republic of Rwanda of 2003 as revised in 2015 provides for the State's duty within the limits of its means to undertake special

[139]Kabange Nkongolo, Christian-Jr. "The Justiciability 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 Law*, October, 2014, Vol. 22, Issue 3, pp.499-501

[140]. Ibid, pp. 499-501. These guidelines were termed as the first guidelines.

[141] Rwanda Official Gazette N° Special of 24/12/2015.

actions aimed at the welfare of the needy, elderly and other vulnerable groups. This may be inferred as an indirect or implied legal provision that recognize the duty of the republic of Rwanda in working towards supporting the indigent. It is does not create social security as a constitutional right. Rwanda has other additional policies, legislations, and programmes catering for elderly, vulnerable groups, and other needy people.[142] In actual sense, all existing legislations do not have provisions that harmonise national social security laws so as to align them with the EAC harmonising instruments.

Article 15 of the Constitution of Rwanda provides for equality before the law to all persons. The protection from discrimination is provided under Article 16. The latter, however, specifically refers to prohibition of discrimination of Rwandans and there is no mention of any other person who is a non-Rwandan national.

b.) Constitutional foundation in Uganda

The *Constitution of Uganda 1995*[143] as amended up to 2005 provides in Article VII that the State shall make reasonable provision for the welfare and maintenance of the aged. The constitution does not use of the word the right to *social security* for all. Further, Article 21 of the Constitution 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.[144]However, prohibition of discrimination based on nationality is not specifically provided for under the Constitution of Uganda.[145] Although the Constitution does not mention the right to social security, it provides that the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in the constitution are not meant to be regarded as excluding others not specifically mentioned.[146]

[142]See Law n°05/2015 of 30/03/2015 governing the organization of pension's schemes and Decree law of 22/08/1974 modified and complemented by the Law no 6/2003 of 22/03/2013 governing Occupational Hazards scheme, Law n°29/2017 of 29/06/2017 governing a Long Term Saving Scheme (LTSS) for salaried and non-salaried people, poor and rich people, in formal and informal sector; Law n°003/2016 of 30/03/2016 to compensate all female employees absent from employment because of pregnancy, giving birth and subsequently caring for the new-born child; Law n°24/2001 of 27/04/2001 on the establishment, organization and functioning of health insurance scheme for government employees (OG n°13 of 01/07/2001; modified and completed by law n°29/2002 of 19/09/2002),Law n°03/2015 of 02/03/2015 governing the organization of the Community Based Health Insurance Scheme (CBHI), Law n°08/2012 of 29/02/2012 establishing Military Medical Insurance (MMI) and determining its mission, organization and functioning; National Social protection Policy (2005) and its strategy (2013) as all revised in 2018; Draft policy "National policy on elderly persons" which is under process of approval

[143]Constitution of Uganda1995 with Amendments, retrieved from: *https://www.constituteproject.org/ constitution/ Uganda2005.pdf?lang=en (accessed on 16 August, 2017).*

[144] Ibid, Art. 21 (1).

[145] Article 21 (2) 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.

[146] See *Constitution of Uganda1995* (as amended), Art.45.

c.) Constitutional foundation in Burundi

The *Constitution of Burundi, 2005*[147] in Article 22 provides that all citizens are equal before the law, and this equality assures them an equal protection. The Constitution of Burundi provides in Article 59that 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. Therefore, 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. It is the author's view that the* latter would *imply that welfare provisioning takes into account the conditions of economic development and availability of resources of the country.*

d.) Constitutional foundation in Tanzania

For the case of Tanzania, Article 12 of the Constitution of the United Republic of Tanzania, 1977 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.*[148]*The Constitution is also meant to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord, where all forms of injustice, intimidation, discrimination, or favouritism among others, are eradicated.*[149]*The Tanzania Constitution defines the word "discriminate" to mean satisfying the needs, rights or other requirements of different persons on the basis of their nationality, tribe, and place of origin, political opinion, colour, religion, sex or station in life. To discriminate would suggest that certain categories of people are regarded as weak or 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*[150].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*

[147]*Constitution of Burundi, 2005*, English Translation by William S. Hein & Co., Inc., 2012, retrieved from *www.parliament.am/library/sahmanadrutyunner/burundi.pdf (accessed on 17 August, 2017.)*
[148]*Constitution of the United Republic of Tanzania, 1977, Art.12 (1), (2).*
[149]Ibid, Art. 9(h).
[150] Ibid.

in other cases of incapacity. Without prejudice to those rights, the state authority shall make provisions to ensure that every person earns his livelihood".[151]

e.) The Constitutional foundation in the Republic of Sudan

The *Constitution of South Sudan, 2011*[152] 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. The wording of Article 14 does not use the word 'including', which means that the list of prohibited grounds of discrimination is closed. As to the right to freedom of movement and residence, Article 27 (2) of the Constitution of South Sudan provides that every citizen of South Sudan shall have the right to leave and or return to South Sudan. The latter conforms to the right to freedom of movement established under the EAC law. In South Sudan, citizenship is the basis of equal rights and duties for all South Sudanese.[153] South Sudan is therefore founded on justice, equality, respect for human dignity and advancement of human rights and fundamental freedom.[154]

f.) Constitutional foundation in Kenya

The *Kenyan Constitution 2010*[155]under article 43(1)provides that:

1. Every person has the right--
(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
(b) to accessible and adequate housing, and to reasonable standards of sanitation;
(c) to be free from hunger, and to have adequate food of acceptable quality;
(d) to clean and safe water in adequate quantities;
(e) ***to social security;*** *and*
(f) to education.
(2) A person shall not be denied emergency medical treatment.
(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

Article 20 entrenches the aspect of equality and equity as key values protected and promoted in the interpretation and application of the Bill of Rights. Notably, article 27(1) further provides 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 of Kenya extends to include, among other

[151] Ibid, Art.11(1).
[152] See the *Transitional Constitution of the Republic of South Sudan*, 2011, Art.14.
[153] Ibid, Art.45 (2).
[154]*Ibid*, Art. 1(5).
[155]*Constitution of Kenya, 2010* (Revised 2012), Art. 20 (4)(a).

things, the '*full and equal enjoyment of all rights*…'[156] Note also that 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".*[157]

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) by the use of the word 'including', even if such grounds are not expressly stated.

The portability of social security benefits under the recently passed National Social Security Fund Act, 2013 is seen by many as a precursor to the regional cross-border portability of retirement benefits, and its implementation is keenly anticipated. The other EAC member states have not yet passed laws with similar provisions on portability of social security benefits. So far, there is a proposed Retirement Benefits Sector Liberalisation Bill, 2011 in Uganda which provides, among other things, that an employee may transfer his retirement benefits from one benefits scheme to any other licensed scheme in Uganda or the EAC. The new NSSF Act will come into force on 31st May 2014. However, any progress in achieving social security benefits portability will require the other EAC member states to pass similar national laws on social security or the enactment of a common EAC law to be adopted by all member states, to ensure unified implementation of pension laws within the EAC. Therefore, in each Partner States their national constitutions or legislations use equality and non-discrimination concepts with qualifications as regards to the extent citizens enjoy this right. Thus, harmonisation of social security laws in EAC member States aims at re-enforcing uniformity in the treatment f EAC citizens in order to arrive at equality of treatment of EAC citizens, particularly migrants' population involved in cross-border movements. Although equality of treatment is already entrenched in these national constitutions, the same is not fully implemented in line with EAC laws regarding social security harmonisation.

Also article 12 (2) of the of the EAC CMP 2009 provides that: "*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."* Furthermore, the Protocol imposes an obligation on all member states to maintain their social security systems at a satisfactory level by making sure that they remove the administrative procedures and practices, resulting from national laws or from

[156] Ibid, Art. 27(1) and (2).
[157] See *Constitution of Kenya*, *2010*, Art.27 (4).

agreements previously concluded between the Partner States, particularly those that from an obstacle to the right of establishment[158].

It should be made clear that the national social security legislations across the Member States are generally at variance on levels of harmonisation and on specific legal provisions on equality of treatment of the EAC citizens. However, various provisions in national constitutions of Member States provide for certain degree of guarantee of equality and non-discrimination of citizens. Below, it is presented a brief constitutional set-up of the six EAC Partner States regarding the concepts of equality of treatment and entrenchment of right to social security.

VII Harmonisation and equality of treatment as general principles of EAC Law

The EAC Treaty neither directly defines the word 'equality' nor 'equality of treatment' in its interpretation section, and it also does not define 'harmonisation'. Nevertheless, the EAC harmonisation instruments use the words "equitable distribution of benefits"[159], 'harmonise', and 'harmonisation'. Impliedly, "equitable distribution of benefits" refers to fair and proportionate distribution of benefits.[160]It should also be made clear that 'equality' and 'non-discrimination' are complex concepts with considerable debate on their meanings and justification. The EAC CMP also uses the words 'discrimination' and 'non-discrimination,'[161]and direct discrimination'.'Equality 'of treatment between nationals and foreign workers or immigrants is implied in Article 3(2) (b) of the Protocol. Other words used are 'indirect discrimination 'and 'equal opportunities. The discussion of equality and discrimination is, therefore, characterised by considerable conceptual and methodological confusion. 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.[162] Not only that but also Watson has 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 as far as interpretation and application of the principle of equality is concerned.[163] Therefore, there is still deep-seated conceptual confusion and a lack of consistency in interpretation and application of the concept of equality.

[158] See EAC CMP, op.cit., Art.13 (11) (a).
[159]See EAC Treaty, op.cit, Art.1.
[160]Ibid.
[161]EAC CMP, op. cit, Arts. 3 (2) (a); 10(2).
[162] See Hepple, B.& Barnard, C. Substantive Equality, *Cambridge Law Journal*, 2000, p. 583.
[163] See Watson, Philippa. "Equality of Treatment: A Variable Concept?" *Industrial Law Journal.* March 1995, Vol. 24, No.1 (33-48), at 33f.

Existing scholarship insists that the principle of equality generally demands that identical or comparable situations must be treated alike. Equally different situations must accordingly be treated differently.[164]The same fate befalls a debate on equality and discrimination in the East African Community legal context, particularly under the EAC law that is sought to be addressed through harmonisation. A fair chance exists that the concept of equality is understood and applied differently; hence confusion is also bound to exist. Equality and non-discrimination as contained in EAC Treaty[165] and the EAC CMP[166]is generally supported by the various national legal systems of Member States. The CM Protocol provides in Article 3(2) that: "*Partner States shall observe the principle of non-discrimination of nationals of other Partner States on ground of nationality".* The EAC law uses the words 'non-discrimination', direct discrimination', 'indirect discrimination', 'equality', 'equal treatment', 'equal opportunities,'[167]equitable distribution of benefits,[168]as the key terms indifferent circumstances. These concepts are either directly applied or are impliedly used. At EAC level, the EAC Protocol of 2009 prohibits discrimination of East African nationals on grounds of their nationality in matters within the scope of the EAC Treaty. This is one of the foundational principles of the Community. The prohibition of discrimination has continued to become more attached to citizenship of the EAC and it resembles that of constitutional guarantees contained in national constitutions of Community member states.[169]The EAC Partner States have obligation 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.[170] Article 10(11) of the CMP states that the free movement of workers in the EAC is permissible subject to certain limitations that may be imposed by the host partner state on grounds of public policy, public security or public health. The Partner States have agreed to such restrictions or limitations to the right of establishment imposed by the host Partner States.[171]The treaty establishing the East African Community does not bestow on citizens of the EAC with a right to move and reside freely within the territory of the Member States without conditions. The equality of treatment of any EAC citizen exists subject to conditions depending on the nature of movement, relocation, residence, and purpose of migration to another State. Therefore, the EAC citizenship under the treaty does not replace national citizenship, rather, it is simply additional, and the basic criterion is to possess national citizenship first.

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[164] Ibid.
[165] For example, Article 75 (6) of the EAC Treaty provides): "The Partner States shall refrain from enacting legislation or applying administrative measures which directly or indirectly *discriminate* against the same or like products of other Partner States."
[166] See EAC CMP, op.cit, Art. 3 (2) (b).
[167]EAC Treaty, op.cit. Art. 6(d).
[168]Ibid, Arts. 6 (e) and 7(1) (f).
[169] See Annex II, Regulation 13 (1) (d).
[170] See *EAC CMP, op.cit*, Art.13 (11).
[171]*Ibid*, Art.13 (8).

VIII. The foundation for harmonisation of social security laws

The fundamental and operational principles of the EAC are enshrined in Articles 6 and 7 of the EAC Treaty, 1999 (as amended). The harmonisation instruments for social security laws are the *EAC Treaty, 1999;* the *EAC CMP of 2009*,[172] the annexes to the EAC CMP and any other instruments that may be issued by the Council of Ministers for approximation or harmonisation as provided for under Article 131 (1) of the Treaty.[173] The treaty in its various provisions has provided broadly the basis of harmonisation in a range of areas of cooperation. However, there are specific provisions that have expressly used the word "harmonise" or "harmonisation" with respect to Member States policies, laws, regulations, frameworks, programmes, certification, practices, etc. These Articles include Articles: harmonisation of investment and taxation (80(1) (f); harmonisation of macro-economic policies and convergence framework of the Community (Art.82(1); harmonisation of tax policies (Art.83(2) (e); harmonisation of banking and capital markets development (Art.85); harmonisation of common transport and communication policies, regulatory laws and frameworks (Art.89); harmonisation of rules, regulations, traffic laws, licensing markings, documents and procedures of road transport (Art.90); harmonisation of railways and rail transport regulations, laws, loading and related matters (Art.91); civil aviation and civil air transport (Art.92); maritime transport and ports (Art.93); inland water ways transport policies, rules, regulations and procedures (Art. 94); multi-modal transport regulations (Art.95); freight forwarders, customs and clearing agents and shipping agents Art.97); harmonisation of postal policies and services (Art.98); harmonisation of telecommunications tariffs (Art. 99); meteorological services (Art.100); 102; 103; and free movement of persons, labour, services, rights of establishment, and residence (Art.104).

Harmonisation instruments are the main sources of authority for the harmonisation of the social security systems of member states in the EAC. The first source for authority for harmonisation is the treaty establishing the East African Community, 1999. It is provided in Article 76 of the treaty that there shall be established the EAC Common Market among the Partner States. It is within this treaty provision that the protocol building foundation for Common Market is established. This framework gives rise to cross-border migration for employment and hence workers crossing border for employment in member States have the right to social security. Article 76 read together with Article 104 of the treaty form the basis for establishment of the harmonisation process due to the consequences of creation of common market. Also,

[172] Ibid, Arts. 10(3) (f), (4); & 12 (1),(2) and (3).
[173] See EAC Treaty, op.cit, Art.131 (1)-the treaty grants the EAC Council the powers to explore and declare other areas requiring harmonisation.

Article 131(1) of the Treaty forms the basis for the Partner States to explore other avenues for harmonisation.[174]

For purposes of harmonisation of social security laws, the frame establishment is Article 104 of the EAC Treaty which provides for conclusion of protocol for free movement of persons, labour, services, rights of establishment, and residence. Within the Treaty, under article 104 (3) (e) the partner states are required to harmonise their labour policies, programmes, and legislation including legislation on occupational health and safety. Also as regards legal and judicial matters partner states are required to harmonise all their national laws appertaining to the Community.[175] Treaty provides for enhancement of approximation and harmonisation of legal learning and standardisation of judgment within the Community[176].

The fundamental principles of the Community[177] are enshrined in Article 6 of the Treaty and the operational principles[178]of the Community are contained in Article7 of the Treaty. While implementing these principles the Partner States undertake to (i) observe the principle of non-discrimination of nationals of other Partner States on grounds of nationality; (ii) accord treatment to nationals of other Partner States, not less favourable than the treatment accorded to third parties; (iii) ensure transparency in matters concerning the other Partner States and (iv) share information for the implementation of the EAC CMP[179].

The second source or foundation of authority for harmonisation is the EAC Common Market Protocol, 2009. The protocol puts in place the Community legal framework guiding national legal frameworks of member states. It puts a mechanism that should regulate free movement of labour, goods, services, capital, and the right of establishment. The provisions of Article 3 of the CMP establish the principles of the Common Market. The CM Protocol has a framework law that guides Partner States in harmonisation of their domestic policies and laws for implementation of the protocol.[180] The Protocol provides for the scope of co-operation in the common market and provide for harmonisation of social security benefits provisioning mechanism.[181] In Article 10(3) (f), the protocol provides for the rights of EAC citizens

[174]These articles are already explained in the foregoing parts. See sub-part 4.1 of this paper.
[175] See EAC Treaty, op.cit, Art.126 (2) (b).
[176] Ibid, Art.126 (2) (e).
[177]These principles include: mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; peaceful settlement of disputes; good governance, adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities; gender equality; recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; equitable distribution of benefits and co-operation for mutual benefit.[177]
[178] EAC CMP, op.cit, art.3 (1).
[179] Ibid, Art.3(2).
[180]See EAC CMP, op. cit, Art.4 (3).
[181] Ibid, Art.5 (2) (c).

migrating from one country to another to enjoy social security benefits as accorded to workers of the host State. It also provides that for the purposes of implementation of the enjoyment of the rights and benefits of social security to the workers of the host Partner State. Moreover, the Protocol mentions the Council as a body that has powers to issue directives and make regulations on social security benefits.[182]

The third source of authority that provides the basis for harmonisation are Community regulations issued by the Council and contained in annexes to the CMP that provide for the free movement of persons[183], free movement of workers[184], free movement of goods, services and capital[185], rights of establishment[186], rights of residence[187]. The Council directives, regulations, guidelines and decisions may also provide guidance by setting standards for harmonisation. 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, on all organs and institutions of the Community other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may under the Treaty be addressed.[188] In short, all the discussed sources or foundation for harmonisation provide guidance for facilitation of the accomplishment of harmonisation of legal rules or regulations relating to social security, harmonisation of social security schemes; health and safety standards at workplaces across the EAC region.[189] The CMP is mainly meant to provide the Community and member states with an effective instrument for *convergence*[190] and *harmonisation* of social security systems in the region and the co-ordination, where applicable.

Other EAC Treaty provisions containing harmonisation of laws, regulations, procedures, standards, practices etc include Articles:105; 106; 107; 108; 110; 112; 114; 116; 118; 119; 126; and 131. However, for the purposes of this paper, the provisions of Articles 104 and 131 (1) are taken as closely related to the harmonisation of social security laws. Further the EAC CMP has more specific provisions on harmonisation of social security policies and laws. The treaty in Article 104 provides for free movement of persons, labour, services, rights of establishment, and residence[191]. Sub-article 3 (e) of Article 104 provides that Partner States are required to harmonise their labour policies, programmes, and legislation

[182]See EAC CMP, op. cit, Art. 10(3) (4).
[183]Annex I to the CMP, 2009.
[184]Annex II to the CMP, 2009
[185] Annex VI to the CMP (Schedule for removal of restrictions on free movement of capital), 2009.
[186]Annex III to the CMP, 2009.
[187] Annex IV to the CMP, 2009.
[188] See EAC Treaty, op.cit, Art. 16.
[189]Ibid, Art. 104 (3) (e).
[190] See definition of convergence (note 103) (infra).
[191]See EAC Treaty, op.cit. Art. 104.

including those on occupational health and safety. The EAC CMP has more specific provisions that are directly of relevance to the right to social security[192]. Ancillary provisions include Article 126 which concerns harmonisation of legal and judicial affairs in which partner States are required to harmonise all their national laws appertaining to the Community[193]. Not only that but also Partner States are required to enhance the approximation and harmonisation of standardization of judgments of the Courts within the Community.[194]

The treaty provides that the fields of harmonisation are not closed. This is so because, Article 131 (1) of the treaty provides that the fields of harmonisation may be expanded as partner States may consider necessary from time to time for efficient implementation of the provisions of the treaty. Therefore, from the foregoing highlight, it is clear that harmonisation of EAC social security systems in this case, can be viewed as one of the modes of reducing the inequalities. The purpose of harmonisation of social security systems has already been explained, and one of the purposes is to ensure 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 may be described as minimum harmonisation. This type of 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.

IX. Challenges of harmonisation in the EAC

Firstly, the process of harmonisation of social security schemes has its own hurdles, pitfalls and challenges, as it is the case with harmonisation of all broad range of other sectors listed under the EAC treaty[195]. Harmonisation demands going step by step, and in a gradual process over a considerable period of years taking into account each national specific conditions and circumstances. Harmonisation of social security systems deals with the social realities of the region such as poverty, high levels of unemployment, under-employment, and social insecurity of the majority of the EAC citizens. This implies that, harmonisation should be geared at development of and the widening of the scope of coverage of social security schemes in the region. This is important, particularly when one considers the undeveloped and underdeveloped state of social security systems in each of the EAC member States.

[192] See EAC CMP, op.cit, arts. 10 (2),
[193]See EAC Treaty, op.cit. Art. 126 (2) (b).
[194]Ibid, Art. 126(2) (e).
[195]See sub-part 4.1 of this paper on EAC Treaty provisions mentioning areas of harmonization.

Secondly, the EAC countries have different levels of economic development and they all face different social, economic and political problems including governance issues. As such even if they are involved in the regional economic integration they are likely to continue facing difficulties of implementation of various agreements, directives, and provisions of the EAC treaty and EAC CMP that drain significant resources form national budgets. The EAC countries are economically different and the extent to which these States can harmonise their systems depends largely on their economic strengths altogether, among other things. Socio-economic and political climate of each regional integration is a sensitive issue, and therefore, as previously described on what is going on in each State of the Community in terms of civil wars, ethnic conflicts, economic development and trade issues affect the harmonisation. This hinders the speed of social security harmonisation and therefore care is needed to move forward. This is one of the reasons as to why harmonisation has been delaying considerably to the extent of creating accusation against each other as hindering the speedier implementation of the EAC integration process. In this regard, countries need to be keen by resisting the temptation of getting entangled in speed-tracking the process of harmonisation of their social security systems in a hurried manner without careful consideration of all aspects involved.

Thirdly, harmonisation of social security has to respect avenues available for each Member State to develop their home-grown national social security systems under the normal course of evolving social society systems. If this is the case, harmonisation does not get the status of playing down the role of Member States to develop comprehensive social security systems in their respective domestic jurisdictions.[196] This translates into the fact that Member states should not dwindle or dwarf their individual efforts to develop their own social security systems for benefits of wider groups including migrant workers. This ought to be done as envisaged under the international treaties or conventions and any regional economic integration protocols or treaties. Fourthly, although the EAC regional integration treaties and other related instruments provide for possible avenues to be followed in order to move towards harmonisation, there are still lots of discrepancies and unequal national legislation in each Member States. National social security laws of member States continue to exist and remain un-harmonised. This is because, the old patterns of nationalistic tendencies in legal regimes are yet to be totally dismantled and Member States remain deeply entangled or embedded in egoistic or self-centeredness spirit of nationalism[197].

[196] Cf. Kikuchi, Yoshimi. "Structural Reform and Social Security Law", *Review of Population and Social Policy,* 1999, No. 8 (1–9), at pp.4-7.
[197] Cf. Reith, Stefan and Boltz, Moritz. *The East African Community regional integration: between aspiration and reality.* KAS International Reports (pp-91-107), October 9, 2011 at p.100.

Fifthly, the collapse the former EAC in 1977 has had significant aftershocks which negatively affected the old EAC Partner States. Some of these countries such as Tanzania have been acting with extreme keenness resulting from past memories of deeply entrenched inequality and negative consequences of the demised Community. While some progress has been made in some member States such as Kenya towards harmonisation of their National Social Security Fund Act, 2013 under section 64, most of the social security laws of Member States such as those of Tanzania, Burundi, Rwanda, Uganda and some laws in Kenya remain less harmonised. A specific examination of EAC national social security laws will be a subject of another paper, as the space for this paper is not there and the focus is on EAC law.

Sixthly, both the EAC treaty and EAC CMP do not to define the concept of *"harmonisation* anywhere at all. Even the term coordination that is also used extensively is not defined either in these instruments. However, the term harmonisation has been extensively used throughout the treaty and the EAC CMP as demonstrated in previous discussion.[198] The two regional instruments do not expressly indicate the degree of harmonisation that is envisaged or desired in the EAC. Even the annexes to the CMP do not clarify the steps to be followed in harmonisation. Whether the EAC follows *standard harmonisation* or *minimum harmonisation* is not clear yet, as no where it is stated or elaborated.Even an outline that would adequately or at least sufficiently indicate the process or mechanisms by which this harmonisation is to take place does not exist at all. What exists is the matrix of implementation of the EAC CMP that indicates timeline and matters to be dealt with but lacking specific guiding criteria for harmonising social security systems and laws, among other, things. Essentially, there is clear gap of specific guidance from the EAC law contained in ratified regional instruments. Therefore, each one of the Member State pursues the quest for harmonisation of their social security systems and laws as deemed compliant with EAC harmonising instruments, which instruments merely state the need for harmonisation by Member states. The implementation of the EAC CMP protocol does not state the level of harmonisation desired and one would guess that probably, by implication, the Community pursues *minimum harmonisation* or gradual harmonisation. This pitfall underscores the point that harmonisation of social security systems must be founded on an informed understanding of how the harmonisation of social security systems is supposed to work, and this is another area where EAC faces the problem as it implements harmonisation process.

Seventhly, the EAC treaty (as amended) came into effect in 2001 and several documents explaining the implementation of EAC make reference to macro-economic convergence framework of the Community.[199] Arguably, all the EAC countries may be described as social states because they have

[198] See sub-part 4.1 of this paper.
[199]See EAC Treaty, op.cit, Art.82 (1).

elements of social welfare goals and social security is one of their paramount issues towards implementation of the EAC CMP and achieving integration objectives. The Community has described the need for working towards macro-economic convergences of its regional framework for facilitation of the integration process.[200] Thus, convergence of social welfares systems of the EAC countries is apparently the result of an international phenomenon of integration such as is the case with the European Union, ECOWAS, Caribbean Community (CARICOM), and the Southern African Development Community (SADC), among others. As a result, the East African Community political discourses, directives, regulations and recommendations given by the EAC points to some aspects of convergences in many areas including social security aspect from perspective of a welfare state model. However, both the EAC treaty and EAC CMP do not mention "*convergence of social security systems"* and this is another pitfall. They have used the term without precise scope of its application in law. Convergence of social security systems or social welfare policies has been described in terms of economic and institutional meanings. The definition given below is simply emanating from social welfares systems similar to the ones in the EAC, thus, convergence simply means:

> *"…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."*[201]

Eighthly, the EAC law has no clear guiding rules as to whether aggregation of insurance periods and the maintenance of acquired rights and benefits between similar schemes in different Member States are regulated by what instrument. There is no specific EAC regional wide social security convention or Code that should guide Member States to ensure there is facilitation of exportability of benefits across national borders beyond the host State of a labour migrant, including the payment of benefits in the host country.

Ninthly, there is a fact that operates towards hindering speedier harmonisation, and this is that in all regional economic communities, their Member countries have had discrimination in their social protection systems and this has been in existence for many years. As such, a failure to achieve full harmonisation is not a reason for despair or resentments, as that is part of historical evolution and development of human beings and State. Countries should strive to eliminate discrimination in everyday

[200] For example, see the EAC Treaty, op.cit. Art. 82.

[201] See O'Connor, J., "Convergence in European Welfare Analysis: Convergence of What?", in Classen J., Siegel N.A., *Investigating Welfare Change, 'The Dependent Variable Problem', in Comparative Analysis,* Cheltenham, UK, Edward Elgar, 2007, pp. 112-243; Vas Os, Guido; Homburg, Vincent; and Bekkers, Victor, *Contingencies and Convergence in European Social Security: ICT Coordination in the Back Office of the Welfare State*, IGI Global , 2013, pp. 269-270; Bouget, Dennis, Trends of Social Welfare Systems: From Convergence to Attractiveness. An Exploratory Approach. *Working Paper Series No. 9, Reconciling Work and Welfare in Europe*, 2009, pp.6-9.

life. In addition, a stable political climate across the region is lacking in some Member States even if it is not a prerequisite for the harmonisation of social security systems. But social security harmonisation efforts work better if there is peace and harmony both politically and economically in the region. Political stability is still lacking in Burundi and South Sudan.

X. Conclusion

This paper has critically explored the idea, mechanisms and challenges of harmonising social security systems in the East African Community regional bloc under its framework instruments. It has assessed the foundation or sources for harmonisation of social security systems in the Community. The paper has demonstrated that harmonisation of social security laws and systems aims at removing obstacles to achieving equality of treatment of citizens who take part in labour migration in the partner states. It has also shown that national constitutions of the EAC Member State invariably provide for right to equal treatment under the law, and the majority lack uniform provisions on the right to social security. Therefore, the paper has underscored, albeit briefly, the aims, pitfalls and challenges of harmonising social security schemes in the East African Community. Finally, it is recommended that the EAC partner states should come up clearly on the type of harmonisation that is being pursued. Secondly, harmonisation should not be speed-tracked because each country has its own domestic social, political and economic problems hence there is a need to undertake a thorough study and involve various stakeholders, civil society, private sector, and sectoral institutions so as to understand the long term and short-term impacts of chosen type of harmonisation. Thirdly, the harmonisation should be a gradual process and requires slow but sure learning process in each stage of harmonisation. Finally, the EAC countries should work on model regional wide social security portability bill that is likely to govern exportability of benefits across national borders. This will also help in maintenance of migrant workers' acquired social security rights in different countries of employment in the region and aggregation of benefits by counting periods of contributions in different partner States of employment of labour migrants.