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## Advancing Regional Integration through the Free Movement of Persons in the Southern African Development Community (SADC)

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### Abstract

The level at which the Southern African Development Community (SADC) region has managed to regulate the free movement of persons, so as to reduce or completely eliminate, rigorous administrative requirements poses a challenge in so far as the ease of services supply is concerned. The Draft Protocol on the Facilitation on the Movement of Persons of 2005, remains inoperative, leaving national immigration laws to regulate the movement of people in the region. This lack of progress may indicate a lack of political will towards creating an effective large-scale integrated community. Intra-regional trade in aspects relating to services in the SADC is at a low as will be seen in the background and introductory section of this paper. This paper seeks to argue for the adoption of a less restrictive approach towards movement of people as a strategy to further boost regional trade in the SADC. The underlying logic and hypothesis of this paper is that in a way similar to the free trade in goods, the movement of persons can stimulate economic development by furthering economic activities like services supply and can therefore encourage deeper integration in the SADC. Consequently,

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*facilitating the movement of people becomes a crucial and central point of discussion in this paper and is integral to the regional integration process and discourse to further trade and integration in the SADC.*

**Keywords:** Regional Integration, Intra-Regional Trade, Trade in Services, Movement of People, Economic Development, SADC.

## 1 INTRODUCTION AND FACTUAL BACKGROUND

On a global scale, trade in goods has been the major driver of economic growth over the years. More recently, trade in services is gradually becoming a dominant driver of economic growth in both developed and developing countries.<sup>1</sup> However, to better reap the benefits of this globalised trend, it can be argued that gaining access to domestic markets of trading countries is key.<sup>2</sup> That notwithstanding, gaining access to domestic markets is always challenging to either importing or exporting countries and this is an issue which is pertinent within Africa as a continent and its sub-regional blocs. In the African continent, to enhance development and economic growth, international as well as regional trade is of utmost importance and for decades has been part of Africa's overarching strategy towards economic transformation.<sup>3</sup> On a regional basis, in Southern Africa, the SADC<sup>4</sup> has pushed for macroeconomic convergence through the Regional Indicative Strategic Development Plan (RISDP)<sup>5</sup> aiming for a common market by 2015, a monetary union by 2016, and a single currency by 2018.<sup>6</sup>

Despite this agenda, realisation of this goal of deeper integration and economic transformation has been elusive. The SADC is yet to become a common market with harmonised regulation and policies on the free movement of factors of production<sup>7</sup> such as goods, capital, people and services.<sup>8</sup> In a 2019 research paper by the United Nations University World Institute for Development Economics (UNU-WIDER), it is highlighted that the SADC has experienced growth in regional trade in goods due to reduced tariff barriers.<sup>9</sup> Nevertheless, there is the perception of limited growth in service trade in the SADC.<sup>10</sup> The access of goods and services can be stifled by non-tariff barriers.<sup>11</sup> Non-tariff barriers include policies and measures other than tariffs that can impact on trade flows and can come in the form of behind the border measures.<sup>12</sup> This paper argues for fostering intra-regional trade by curtailing non-tariff barriers that hamper the movement of people and consequently those that supply services. One major barrier towards the liberal movement of people in general and economically active persons like service providers is a host of official and regulatory migration restrictions embodied in visa policies and requirements of host States,<sup>13</sup> and this issue is no different with the SADC.<sup>14</sup>

1 WTO "Trade in Services" [www.intracen.org/itc/sectors/services/](http://www.intracen.org/itc/sectors/services/) (accessed 08-05-2020).

2 Van Den Bossche *The Law and Policy of the World Trade Organisation* 2 ed (2008) 401.

3 Barka "Border Posts, Checkpoints and Intra-African Trade: Challenges and Solutions" [www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/) (accessed 08-05-2020).

4 SADC Member States are Angola, Botswana, the Comoros, the Democratic Republic of Congo (D.R. Congo), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, eSwatini, Tanzania, Zambia and Zimbabwe.

5 The RISDP is a development and implementation framework detailing the regional integration strategy of SADC for the period 2005 to 2018 and sets out convergence criteria for the region.

6 [https://www.uneca.org/sites/default/files/PublicationFiles/aria9\\_en\\_fin\\_web.pdf](https://www.uneca.org/sites/default/files/PublicationFiles/aria9_en_fin_web.pdf) (accessed 08-05-2020).

7 Saurombe "Regional Integration Agenda for SADC 'Caught in the Winds of Change' Problems and Prospect" 2009 *Journal of International Commercial Law and Technology* 4 103.

8 Nshimbi and Fioramonti "The Will to Integrate: South Africa's Response to Regional Migration from the SADC Region" 2014 26 *African Development Bank Review* 54.

9 Black, Edwards, Ismail, Makundi and Morris "Spreading the Gains? Prospects and Policies for the Development of Regional Value Chains in Southern Africa" *WIDER Working Paper 2019/48* 3. See also UNECA, AU and UNCTAD "Assessing Regional Integration in Africa: Next Step for the AfCFTA" 8-9.

10 Visagie and Turok "The Contribution of Services to Trade and Development in Southern Africa" *WIDER Working Paper 2019/37* 2.

11 Van Den Bossche *Law and Policy* 402. See also Alam and Islam, "Barriers to Trade in Goods and Services", in Carr, Alam and Bhuiyan (eds) *International Trade Law and the WTO* (2013) 147-165 147.

12 Staiger "Non-tariff Measures and the WTO" [http://www.wto.org/english/res\\_e/reser\\_e/ersd201201\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201201_e.pdf) (accessed 21-03-2016). See also Alam and Islam, "Barriers to Trade" 147-165 155.

13 Winters "The Temporary Movement of Workers to Provide Services (GATS Mode 4)" in Mattoo, Stern and Zanini *A Handbook on International Trade in Services* (2008) 480-591 489.

14 See Visagie and Turok *WIDER Working Paper* 3, which points out that modern services depend upon the availability of specialized skills and an enabling regulatory regime, which are lacking in many countries in Southern Africa.

Pertinent within the SADC is a lack of enthusiasm on the part of members to comprehensively regulate and ratify laws on the subject matter.<sup>15</sup> First, there was a Draft Protocol relating to the free movement of people in 1995.<sup>16</sup> The Protocol would offer more towards complete movement of people, conferring on SADC citizens the right to free entry, residence and establishment of oneself in the territory of another Member State.<sup>17</sup> However, the prospect of complete abolition of border controls on people's movements within SADC did not sit well with South Africa, Botswana and Namibia in particular who declined to support this Protocol, which consequently failed.<sup>18</sup> A redrafted version in the form of the Protocol on the Facilitation of Movement of People (Facilitation Protocol) was then agreed on in 2005.

The SADC Facilitation Protocol is a key document regulating the movement of persons in SADC. The Protocol is not comprehensive and tends to halt the process of free movement across regional borders by avoiding any further commitment particularly regarding the stages of residence and establishment.<sup>19</sup> Looking at the Protocol, it is implicit in the phrasing of provisions relating to Residence under Articles 16<sup>20</sup> as well as Establishment under Articles 18<sup>21</sup> and 19<sup>22</sup> that these provisions are subject to the domestic legislation of State Parties. In consequence, what this Protocol entrenches is the fact that respective national laws of host States which can be restrictive determines whether a citizen of a SADC Member State can reside and establish themselves in another Member State. So, in facilitating residence, what exists is unexceptional stipulation that permission to reside in another State must be by application for a permit based on the laws of the host State. Regarding the third phase of implementation, the right to establishment is only open to non-citizens already resident in another state and is not applicable to all. The Protocol, in essence, offers no substantive proposal towards residence and establishment which are key phases at which services can be traded and delivered by persons.<sup>23</sup> With persisting visa restrictions in Africa,<sup>24</sup> it is crucial that citizens should be able to easily access points of entry into where they intend to trade and to that effect SADC has to do more towards regulating the movement of people.

The article has five main sections. Section one gives an introduction and background to the paper. Section two discusses the normative complementarity in regulating the movement of persons internationally and in Africa. Section three briefly outlines the relevance of movement of persons. Section four highlights a different approach that SADC can adopt to further its efforts on migration governance. The last section offers a conclusion and further recommendations.

## 2 NORMATIVE FRAMEWORK REGULATING THE MOVEMENT OF PERSONS

At an international level, the laws for managing the accelerating, globalising and diversifying movement of people are few and remain highly fragmented, despite calls for more coherence.<sup>25</sup> Therefore, what is sought to be achieved in this section is a discourse on the different rules and principles that influence the movement of persons between states, gathering relevant norms that apply to individuals leaving their own country and entering another one and/or staying therein.

15 Nita "Free Movement of People within Regional Integration Processes: A Comparative View" in Nita, Pecound, Lombaerd, Neyts and Gartland (eds) *Migration, Free Movement and Regional Integration* (2017) 3–44 35.

16 SADC Draft Protocol on the Free Movement of Persons 1995.

17 Solomon "Towards the Free Movement of People in Southern Africa" 1997 *Institute of Security Studies Occasional Paper* 18 1.

18 Nshimbi and Fioramonti 2014 *African Development Bank Review* 56.

19 Williams and Carr "The Draft Protocol on the Facilitation of Movement of Persons in SADC: Implications for State Parties" 2006 Migration Policy Brief No. 18 9 <http://samponline.org/wp-content/uploads/2016/10/brief18.pdf> (accessed 08-05-2020). See also Segatti in Nita et al *Migration* 47–70 63. See also UNECA "Assessing Regional Integration" 17.

20 Residence in terms of this Protocol shall mean "permission or authority to live in the territory of a State Party in accordance with the legislative and administrative provisions of that State Party."

21 Establishment based on the Protocol shall mean "permission or authority granted by a State Party in terms of its national laws, to a citizen of another State Party, for; exercise of economic activity and profession either as an employee or a self-employed person; establishing and managing a profession, trade, business or calling."

22 Each State Party shall, in terms of its national laws grant permission for establishment to citizens of other State Parties.

23 Williams and Carr 2006 Migration Policy Brief 9.

24 Africans need visas to travel to 49% of other African States <https://www.afdb.org/en/documents/2019-visa-openness-index-report> (accessed 08-05-2020).

25 Betts *Global Migration Governance* 1 ed (2011) 2.

The international norms that guide this movement of natural persons will be discussed.

## 2.1 International Human Rights Law on Movement of People

Several international instruments touch upon international movement of people first from a human rights perspective. They provide for movements within States,<sup>26</sup> as well as cross-border movement (emigration and immigration). Looking at the United Nations, from a human rights perspective, the Universal Declaration of Human Rights (UDHR) 1948 is a declaration of viable principles on human rights with no binding effect.<sup>27</sup> Article 13 of the UDHR,<sup>28</sup> formed the legislative basis towards regulating the free movement of persons. In essence, based on that provision, people are afforded the right to emigrate and return without any inhibition. However, this is not complemented by an internationally recognised right to immigrate or enter another country.<sup>29</sup> In effect, the decision of whether a person is allowed to enter another country is in the discretion of sovereign nation States. This right to emigrate is reserved for nationals of the country of origin.

Flowing from the UDHR, is the 1966 International Covenant on Civil and Political Rights (ICCPR) which unlike the UDHR has a binding effect upon signing and ratifying the covenant.<sup>30</sup> The ICCPR has been ratified by 168 countries worldwide.<sup>31</sup> Citing Article 12 of the ICCPR, it provides that:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence and shall also be free to leave any country, including their own.<sup>32</sup>

Having this provision in place, constituted an important human right and one which was an essential part of the right to personal liberty.<sup>33</sup> However, like most human rights, the right to leave is not absolute and is restricted under Article 12(3).<sup>34</sup> Just like the UDHR, the ICCPR does not have any bearing on the right to enter another State. That right is exclusively reserved under national laws.

These aforementioned provisions in Articles 13 and 12 of the UDHR and ICCPR respectively are more constrained in regulating the movement of state nationals across their own borders as they do not allow for movement across states. They expressly specify that nationals have the right to leave and re-enter their countries of origin and not the right to enter into another country.<sup>35</sup> In essence, these provisions allow for state-bound movement, further entrenching the supremacy of countries in regulating the inflow of migrants into their countries. Whilst sovereignty is justified, some States become too restrictive with regard to the internal laws they propose.

26 Beyani *Human Rights Standards and the Movement of People within States* 1 ed (2000) 7.

27 Glendon "The Rule of Law in the Universal Declaration of Human Rights" 2004 *Northwestern Journal of International Human Rights* 5.

28 Article 13 of the UDHR which stipulates that 'Everyone has the right to freedom of movement and residence within the borders of each State and the freedom to leave any country, including their own, and to return to their country.'

29 Cornelisse *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* ed (2010) 175.

30 De Baets "The Impact of the Universal Declaration on Human Rights on the Study of History" 2009 *History and Theory* 20.

31 "Status of Ratification Interactive Dashboard" <http://indicators.ohchr.org/> (accessed 08-05-2020).

32 Article 12.1 and Article 12.2 of the International Covenant on Civil and Political Rights of 1966.

33 Beyani *Human Rights Standards* 2.

34 The right to leave is limited if the restriction is (i) provided by law, (ii) necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and (iii) consistent with other rights recognized in the Covenant.

35 Cornelisse *Immigration Detention* 175.

Notwithstanding these generalised provisions on movement of people from a human rights angle, there is no major development and consensus on laws that govern the movement of people from a trade or an economic perspective.<sup>36</sup> Only a handful of international law instruments regulate the movement of people from an economic perspective. Panizzon highlights this fact when he mentions that movement for the sake of labour or services is the focus of only two multilateral laws: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW) of 18 December 1990, which caters for a specific class of people (migrant workers) and so far has not been ratified by a single industrialised country, in his view;<sup>37</sup> and the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS)<sup>38</sup> which regulates trade in services, and the presence of natural persons (one of four modes of service supply). This will be of particular focus in this paper.

## 2.2 International Trade Law on Movement of Persons

Along with the above developments on human rights law towards movement of people is a strain of international trade law that has the potential to impact on international migration. International trade law seeks to promote development through greater economic integration.<sup>39</sup> Promoting the free movement of people and services across international borders is one means of facilitating economic integration and delivering greater economic prosperity to both sending and receiving States. Key to influencing movement of persons within the trade discourse is the GATS.

### 2.2.1 General Agreement on Trade in Services (GATS)

Within the GATS framework, the presence of natural people is commonly known as Mode IV and is often conceptualised as the temporary movement of natural persons despite GATS not setting any temporary limits.<sup>40</sup> This is the mechanism through which GATS demonstrates its concern towards the movement of people across international borders to provide services that are traded in a receiving State. Based on Article 1.2(d) this mode of service supply consists of nationals of one Member State entering the territory of another Member State to supply a service.<sup>41</sup>

Looking at Article XXVIII, the definition section in the GATS, defines a "service supplier" as "any person that supplies a service."<sup>42</sup> A person is defined as a natural person or a juridical person.<sup>43</sup> A natural person of another Member State is understood to mean:

a natural person who resides in the territory of another Member State or any other Member and who under the law of that other Member State is a national of that other Member State or has the right of permanent residence in that other Member State.<sup>44</sup>

A natural person can be classified as a service provider who presents him or herself in the territory of another WTO Member to supply a service such as a self-employed individual or independent contractor.<sup>45</sup> A natural person can also be classified as someone who is a national of a WTO Member State and is employed as a service supplier in another WTO Member State.<sup>46</sup> This definition by interpretation focuses on the ability of a foreign national to cross the

36 Panizzon "Trade and Labor Migration GATS Mode 4 and Migration Agreements" 5 <https://library.fes.de/pdf-files/iez/global/06955.pdf> (accessed 08-05-2020).

37 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families of 18 December 1990 UN Doc. A/RES/45/158 (1990), ratified so far by Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Cape Verde, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Mali, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Uganda and Uruguay.

38 Panizzon "Trade and Labor" 5.

39 Garcia "The Global Market and Human Rights: Trading Away the Human Rights Principle" 1999 *Brooklyn Journal of International Law* 64.

40 Jacobson "Liberalisation of Service Mobility in the EU'S international Trade Agreements: As External as it Gets" 2013 *European Journal of Migration and Law* 247.

41 Article 1.2 (d) of the GATS 1995.

42 Article XXVIII(g) of the GATS 1995.

43 Article XXVIII(k) of the GATS 1995.

44 Article XXVIII(j) of the GATS 1995.

45 Kategekwa *Opening Markets for Foreign Skills: How can the WTO Help? Lessons from the EU and Uganda's Regional Service Deals* 1 ed (2014) 41.

46 *Ibid.*

border into the territory of another Member country in order to provide a service rather than elaborating the conditions under which such movement takes place.

The Annex on the Movement of Natural People Supplying Services under the GATS Agreement defines the scope of this Article 1.2(d) of GATS. In terms of this Annex, it states in paragraph 1 that:

This Annex applies to measures affecting natural people who are service suppliers of a Member, and a natural people of a Member who are employed by the service supplier of a Member in respect of the supply of a service.<sup>47</sup>

From the aforementioned two distinct categories of natural persons are covered by GATS. First will be self-employed individuals<sup>48</sup> and second, employees.<sup>49</sup> Paragraph 2 offers further clarification of the scope of the GATS provision in that people seeking employment and labour are excluded. Neither the text of GATS nor its Annex on the Temporary Movement of Natural People defines the duration of stay or stipulate how long is temporary, leaving the provision open to interpretation by respective Member States.<sup>50</sup> Furthermore, the provision allows all measures of domestic regulation that prevent foreign natural persons from seeking job opportunities or accessing the employment market within the Member State.<sup>51</sup> In analysing the provision contained in paragraph 2, Kategekwa points out that “the exclusion of people seeking access to the employment market of a Member from the scope of the Agreement is a contradiction in terms.”<sup>52</sup> From her perspective, there is a thin line between the employment market in which the GATS service supplier would work, which is covered by the Agreement and that in which other people would work.<sup>53</sup>

Paragraph 2 equally excludes important parts of immigration policies relating to the regulation of residency and citizenship from the scope of application of the GATS.<sup>54</sup> This caveat has regulatory implications that technically differentiates GATS commitments from immigration laws, as GATS only deals with trading in services and has no impact on migration policies. Mode 4 does facilitate the movement of persons but ensures that natural persons enter a foreign country as service suppliers for the purpose of supplying a service in a specific sector temporarily. Consequently, Members of the WTO reserve their right to decide who is granted permission to enter their markets, reside in and/or to become a citizen of their country.<sup>55</sup> This provision indicates an unwillingness on the part of Members to tackle sensitive areas like ceding part of their sovereignty regarding immigration policy formulation which is central to achieving Mode IV.<sup>56</sup> However, the GATS Annex on movement of people seems to require States to allow services suppliers and employees of services suppliers to enter temporarily, provided they are covered by a commitment.

## 2 3 Continental and Regional Frameworks on the Movement of People

Having considered some international frameworks that entrenches the movement of people, a more narrowed perspective on the regulation of movement of people needs to be assessed. Hence, this subsection gives a brief outlook on the continental or regional approach towards the movement of people with reference to and focus on the African Union (AU).

### 2 3 1 The African Union

The AU through the Abuja Treaty of 1991<sup>57</sup> is vehemently pursuing this goal of movement of persons. Chapter IV of the Abuja Treaty based on Article 43, forms the foundational basis for

47 Paragraph 1 of the Annex on the Movement of Natural Persons Supplying Services under the GATS 1995.

48 Individual Foreign Service suppliers who move to the territory of a consumer for the supply of their service.

49 Individuals who are employed by a service supplier.

50 Stephenson and Hufbauer “Increasing Labour Mobility: Options for Developing Countries” in Cattaneo et al *International Trade in Services, New Trends and opportunities for Developing Countries* (2010) 29–66 31.

51 Kategekwa *Opening Markets* 45.

52 *Ibid.*

53 *Ibid.*

54 Paragraph 11 of the Annex on the Movement of Natural Persons Supplying Services under the GATS 1995.

55 Dawson “Labour Mobility and the WTO: The Limits of GATS Mode 4” 2013 *International Migration* 10.

56 Kategekwa *Opening Markets* 44.

57 Treaty Establishing the African Economic Community Organisation of African Unity, Abuja, Nigeria 1991 (hereafter, Abuja Treaty of 1991).

institutionalising free movement of people in Africa. This Article specifically provides that:

The Member States agree to adopt, individually, at bilateral or regional levels, the necessary measures, in order to achieve progressively the free movement of people, and to ensure the enjoyment of the right of residence and the right of establishment by their nationals within the Community. For this purpose, Member States agree to conclude a Protocol on the Free Movement of People, Right of Residence and Right of Establishment.<sup>58</sup>

Based on Article 43, it proposes a wider scope towards movement of persons compared to the international laws referred to above, ensuring at the basic level, entry, and at deeper level, establishment. This further ensures the facilitation of employment, and available skilled human resources of one Member State to easily move, enter and establish themselves in other Member States where there are shortages as an essential component for promoting regional cooperation and integration. To better achieve this, the AU has two primary frameworks, specifically on migration. They are the African Common Position on Migration and Development (ACPMD), and the Migration Policy Framework for Africa (MPFA) (both adopted in 2006). Both frameworks are not binding on AU Member States but adopt guidelines that can be utilised for better migration management.

The ACPMD is a recommendatory policy document with no binding effect that emphasises the strong nexus between migration and development.<sup>59</sup> It stipulates eleven policy measures directed towards enabling a comprehensive approach towards movement of persons, which is a key aim to better the migration strategy in Africa. Policies with influence towards the movement of persons, and of particular importance to this paper, will be those relating to:

- Migration and development (migration as an effective tool of development, enhancement of income distribution, enhancement of women empowerment and gender equality)
- Regional initiatives (the need to develop common regional policies for the management of migration within the Regional Economic Communities (RECs)).<sup>60</sup>

The MPFA came about due to discussions between the AU Member States at a regional and national level with a view to explore innovative ways to effectively address migration issues and harness the benefits of migration and development.<sup>61</sup> As an objective, the MPFA framework aims to contribute by addressing the challenges posed by migration and ensure the integration of migration and related issues into national and regional agendas for security, stability, development and cooperation. Furthermore, the MPFA aims to work towards the free movement of people and to strengthen intra-regional cooperation in matters concerning migration.<sup>62</sup>

The MPFA emphasises the critical role migration plays in development and encourages members to formulate policies to manage and harness migration for development.<sup>63</sup> Considering the dynamics of migration and the constant changes in trends and patterns, the AU Commission decided to update the MPFA and formulate a plan of action for its implementation in the form of the Migration Policy Framework for Africa and Plan of Action (2018–2030).<sup>64</sup> This revised document builds on the achievements and challenges of the previous MPFA to guide Member States and RECs in the management of migration.<sup>65</sup>

Considering the importance of the relationship between economic development, trade and migration, the revised MPFA amongst other strategies, recommends measures towards recognising the growing relevance of short-term migration and the movement of persons in the context of trade of services in regional or bilateral agreements.<sup>66</sup> Furthermore, it recommends

<sup>58</sup> Article 43 of the Abuja Treaty of 1991.

<sup>59</sup> Fagbayibo "Policy Discourse on the Possibility of a Pan-African Framework on the Free Movement of Persons" 2015 *Politeia* 9.

<sup>60</sup> African Union "African Common Position on Migration and Development" [http://www.un.org/en/africa/osaa/pdf/au/cap\\_migrationanddev\\_2006.pdf](http://www.un.org/en/africa/osaa/pdf/au/cap_migrationanddev_2006.pdf) (accessed 08-05-2020).

<sup>61</sup> African Union "Evaluation of the African Union Migration Policy Framework for Africa" [https://au.int/sites/default/files/newsevents/workingdocuments/32718-wd-english\\_report\\_evaluation\\_of\\_the\\_migration\\_policy\\_framework\\_for\\_africa.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/32718-wd-english_report_evaluation_of_the_migration_policy_framework_for_africa.pdf) (accessed 08-05-2020).

<sup>62</sup> Migration Policy Framework for Africa 2006 EX.CL/279(IX).

<sup>63</sup> Nshimbi and Fioramonti 2014 *African Development Review* 55.

<sup>64</sup> Migration Policy Framework for Africa and Plan of Action (2018–2030) [https://au.int/sites/default/files/documents/35956-doc-au-mpfa\\_2018-eng.pdf](https://au.int/sites/default/files/documents/35956-doc-au-mpfa_2018-eng.pdf) (accessed 08-05-2020).

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

strengthened co-operation in the area of migration and trade amongst RECs, on bilateral and multilateral bases between African states, and beyond.<sup>67</sup> These are key strategies that could be utilised in bolstering the SADC goal to achieving the movement of persons. Both frameworks are progressive and forward-looking setting the tone for a unified Africa in which migration and integration are linked positively to further development.

Going forward, the AU Members in 2015, adopted a Declaration on Migration, which reaffirms commitment at accelerating mobility and integration on the continent, as well as migration in development. The heads of state and government commit to undertake, among others, the following actions: speed up the implementation of continent-wide visa-free regimes; expedite the operationalisation of the African Passport that would initially facilitate free movement of people; and the development of a Protocol on Free Movement of People.<sup>68</sup> Building on this, Agenda 2063 was promulgated highlighting the importance of free movement of Africans in Africa for meaningful integration, and increased trade. Aspiration 2 specifically illustrates that viewpoint, providing for an integrated continent, politically united, based on the ideals of Pan-Africanism and the vision of Africa's Renaissance.<sup>69</sup>

Flowing from this broad aspiration, is the vision that Africa will be a continent where the free movement of people, capital, goods and services will result in significant increases in trade amongst African countries.<sup>70</sup> The free movement of persons in Africa will help to bolster a pan-African identity and deepen social integration, enabling for a collective and joint approach to address shared challenges, like optimising surplus labour migration and harmonising laws relating to the movement of people. Going forward, and implementing this agenda, the AU has undertaken some flagship priority programmes. This involves reaching legally binding agreements on a continental free-trade area and a protocol on free movement of people, rights of residence and rights of establishment as provided for under Article 43 of the Abuja Treaty.<sup>71</sup> Both will be discussed subsequently.

### 2.3.2 African Union Continental Free Trade Area (AfCFTA)

As an objective, the AfCFTA aims to create a single continental market for goods and services, with free movement of business people and investments, and thus paves the way for accelerating the establishment of a continental Customs Union.<sup>72</sup> The AfCFTA offers a wide-scope covering phased negotiations involving trade in goods, trade in services, investment, intellectual property rights and competition policy.<sup>73</sup> This broad scope has the potential to facilitate a strategic transformation of African economies, and from Nshimbi's perspective, with the AfCFTA, "Africa may have a more solid basis for a renaissance."<sup>74</sup>

In the context of movement of people, the Agreement does not in itself regulate the movement of people but offers in the first phase of negotiation, a Protocol on Trade in Services which, based on Article 1, allows for different modes of service supply especially on the temporary movement of natural persons.<sup>75</sup> Regarding the scope of the Agreement, just like the GATS, it regulates trading in services with no key focus on the movement of people.<sup>76</sup> The Protocol allows for the supply of service through the presence of natural persons of a State Party in the territory of another State Party.<sup>77</sup> Movement of persons is an essential component of a free-trade area, so one can argue that this aspect should be expansively regulated under

<sup>67</sup> *Ibid.*

<sup>68</sup> African Union "Declaration on Migration" <http://cap.africa-platform.org/news/au-summit-declaration-migration> (accessed 08-05-2020).

<sup>69</sup> "Aspiration 2 AU Agenda 2063: The Africa we Want" [https://au.int/sites/default/files/pages/3657-file-agenda2063\\_popular\\_version\\_en.pdf](https://au.int/sites/default/files/pages/3657-file-agenda2063_popular_version_en.pdf) (accessed 14-05-2020).

<sup>70</sup> "Paragraph 24 AU Agenda 2063: The Africa we Want" [https://au.int/sites/default/files/pages/3657-file-agenda2063\\_popular\\_version\\_en.pdf](https://au.int/sites/default/files/pages/3657-file-agenda2063_popular_version_en.pdf) (accessed 14-05-2020).

<sup>71</sup> Article 43 of the Abuja Treaty of 1991.

<sup>72</sup> Article 3(d) of the Agreement Establishing the African Continental Free Trade Area <https://www.tralac.org/documents/resources/african-union/1964-agreement-establishing-the-afcfta-consolidated-text-signed-21-march-2018-1/file.html> (accessed 14-05-2020).

<sup>73</sup> *Ibid* Art 8.

<sup>74</sup> Nshimbi "Pan-African Aspirations Drive a New Free Trade Area Pact" 2019 *Current History* 191.

<sup>75</sup> Article 1(p) of the Protocol on Trade in Services in the Agreement Establishing the African Continental Free Trade Area.

<sup>76</sup> Article 2 of the Protocol on Trade in Services in the Agreement Establishing the African Continental Free Trade Area.

<sup>77</sup> *Ibid.*



the Protocol considering the fact that export of certain services like financial services requires people to move freely, but that is not the case. Key to unlocking the developmental potential of the AfCFTA is to progressively liberalise<sup>78</sup> service sectors in various Member States and to afford market access across the continent to natural persons as service suppliers. To that effect, a Protocol to the Treaty establishing the African Economic Community relating to Free Movement of Persons, Right of Residence and Right of Establishment was negotiated separately to expansively regulate the movement of persons, and the rights of residence and establishment. Further to the aforementioned, there are challenges that need to be addressed in order to facilitate movement of people, goods and services within the continent. The most important is the low level of interconnectivity within the continent and the fact that physical infrastructure in large parts of Africa needs to be improved to enhance intra-regional trade and migration.

On 29 April 2019, 22 countries<sup>79</sup> had placed their instruments of AfCFTA ratification with the AU Commission, paving way for the AfCFTA's entry into force on 30 May 2019. According to Article 23 of the Agreement, entry into force occurs 30 days after the 22-country threshold is reached.<sup>80</sup> Ongoing progress on ratification has seen Zimbabwe, Burkina Faso, São Tomé and Príncipe, Gabon, and Equatorial Guinea deposit their instruments during the 12th Extraordinary Session of the Assembly of the African Union on the AfCFTA in Niger.<sup>81</sup> To date, the total number of approved ratifications placed with the AU sits at 30 with Mauritius,<sup>82</sup> Cameroon and Angola having gained approval on 30 September 2019, 31 October 2019 and 28 April 2020, respectively.<sup>83</sup>

### 2.3.3 African Union Protocol Relating to Free Movement of People, Right of Residence and Right of Establishment

With potential improvement in Africa's trading position and developmental outcomes coming with the implementation of the AfCFTA, one challenge that needs to be addressed is the ability of Africans to freely move within the continent.<sup>84</sup> With the AfCFTA not regulating the movement of people, the AU Protocol on Free Movement was adopted to fully regulate the movement of people in Africa. The AU Protocol stems from the vision of the Abuja Treaty and part of an implementation strategy in the Agenda 2063 referred to above, which affords African citizens the right to free movement residence and establishment. Free movement based on this Protocol means:

the right of nationals of a Member State to enter and move freely in another Member State in accordance with the laws of the host Member State and to exit the host Member State in accordance with the laws and procedures for exiting that Member State.<sup>85</sup>

The continental Protocol comes in tandem with a draft implementation roadmap. The Protocol will work in a gradual manner starting from the least common phase which will be, no visa required,<sup>86</sup> to the highest phase as mentioned above in Article 43 of the Abuja Treaty, which is the right of establishment.<sup>87</sup> The Protocol therefore works towards a united Africa in which, post-abolishing visa requirements, African citizens will enjoy the right to reside and establish

78 Article 18 of the Protocol on Trade in Services in the Agreement Establishing the African Continental Free Trade Area.

79 Ghana, Kenya, Rwanda, Niger, Chad, Guinea, Swaziland (eSwatini), Uganda, Ivory Coast, DRC, Djibouti, Mali, Mauritania, Namibia, South Africa, Senegal, Togo, Egypt, the Gambia, Sierra Leone, Ethiopia, Rwanda and Saharawi Republic, see <https://www.tralac.org/resources/by-region/cfta.html> (accessed 14-05-2020).

80 Article 23 of the Protocol on Trade in Services in the Agreement establishing the African Continental Free Trade Area 2018.

81 Status of AfCFTA Ratification <https://www.tralac.org/resources/infographics/13795-status-of-afcfta-ratification.html> (accessed 14-05-2020).

82 Instrument of ratification was submitted to the African Union Commission on 8 October 2019.

83 Status of AfCFTA Ratification <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (accessed 14-05-2020).

84 Adeyemi "Free Movement of African Citizens: An Imperative for Continental Free Trade in Africa" 2019 1 <https://www.afronomicslaw.org/2019/02/08/free-movement-of-african-citizens-an-imperative-for-continental-free-trade-in-africa/> (accessed 14-05-2020).

85 Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment 2018 [https://au.int/sites/default/files/newsevents/workingdocuments/33023-wd-pa20330\\_e\\_original\\_free\\_movement\\_protocol.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/33023-wd-pa20330_e_original_free_movement_protocol.pdf) (accessed 14-05-2020).

86 Article 6 read with Article 7 of the AU Protocol on the Free Movement of Persons 2018.

87 Article 17 of the AU Protocol on the Free Movement of Persons 2018.

themselves in another Member State. Based on this Protocol, nationals of a Member State shall have the right to enter, stay, move freely and exit the territory of another Member State in accordance with the laws of the host State.<sup>88</sup> Members shall implement this right by permitting nationals of other Member States to enter their territory without the requirement of a visa for a 90-day period.<sup>89</sup> The right of establishment based on the laws of the host State grants a national the right to establish themselves in another Member State. This right includes the right of any African citizen to set up a business, trade or be self-employed.<sup>90</sup> The right of residence includes the right to become a resident in any African country. This right shall be in accordance with the laws of the host Member State which also includes the right to be accompanied by a spouse and dependants,<sup>91</sup> allowing for family unification. Having these express provisions on entry, residence, and establishment, ensures that the movement of persons within the region is protected by law and Member States cannot derogate if the Protocol is enforced. Article 15 further requires the host State Party in terms of their immigration procedure to issue residence permits, work permits or other appropriate permits or passes to nationals of other Member States seeking to take up residence or work in the host State.<sup>92</sup> Interestingly, the procedures adopted in issuing residence permits by host states are put in check in that citizens have the right to appeal against a decision denying them a permit or a pass.<sup>93</sup> Consequently, services and labour can freely move because African citizens who wish to transfer their services will have the right to do so without any cumbersome process of paperwork as it exists now.

The draft Protocol is more progressive and forward-looking compared to the SADC Facilitation Protocol based on its content. It is not only bound to ensure entry, residence, and establishment of all nationals of AU Member States as a right. It also governs many other key issues, including the need to coordinate and harmonise laws relating to the movement of people;<sup>94</sup> the proposal of a universal travel documentation in the form of an African passport;<sup>95</sup> ensures the mutual recognition of academic and professional qualifications;<sup>96</sup> the protection of property rights and the portability of social security benefits.<sup>97</sup> The implementation of the Free Movement of People Protocol can unlock the continent's economic potential and stimulate an African integration agenda. It is believed that facilitating the movement of people in tandem with the liberalisation of trade in goods and services will enhance intra-African connectivity and development. It is therefore important to ensure a synergy within the RECs, and in the context of this paper, SADC, and with this Protocol in play, there will be a need to review, coordinate and harmonise regional texts and national policies giving effect to the objectives in the Constitutive Act of the AU.<sup>98</sup>

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88 Article 6(2) of the AU Protocol on the Free Movement of Persons 2018.

89 Article 6(2) and (4) of the AU Protocol on the Free Movement of Persons 2018.

90 Article 17(2) of the AU Protocol on the Free Movement of Persons 2018.

91 Article 16(2) of the AU Protocol on the Free Movement of Persons 2018.

92 Article 15 of the AU Protocol on the Free Movement of Persons 2018.

93 Article 15(3) of the AU Protocol on the Free Movement of Persons 2018.

94 Article 26 of the AU Protocol on the Free Movement of Persons 2018.

95 Article 10 of the AU Protocol on the Free Movement of Persons 2018.

96 Article 18 of the AU Protocol on the Free Movement of Persons 2018.

97 Article 19 of the AU Protocol on the Free Movement of Persons 2018.

98 Article 3(l) of the Constitutive Act of the African Union which provides as an objective, to coordinate and harmonise the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union.

In March 2018, at an Extraordinary Summit on the AfCFTA in Kigali, Rwanda, this Protocol on Free Movement of People, Right to Residence and Right to Establishment was presented for signature by Member States with 30 signatories at the Summit.<sup>99</sup> As it stands, a total of 32 out of 55 countries have signed the Protocol with four<sup>100</sup> ratifications<sup>101</sup> indicating a common trend in the lack of political commitment, an issue that has hindered economic integration in Africa.<sup>102</sup> The Protocol requires a minimum number of 15 ratifications for it to come into force.<sup>103</sup> That notwithstanding, this Protocol is a recent development and it will be worthwhile keeping track of how its implementation progresses.

The subsequent heading addresses the relevance of movement of persons towards regional trade.

### 3 ASSESSING THE RELEVANCE OF MOVEMENT OF PEOPLE TO REGIONAL TRADE

#### 3.1 Migration and Development Nexus

The basic economic perspective of migration is rather straightforward. Migration comes as a survival strategy, enabling humans to locate where they are most productive.<sup>104</sup> However, migration has always been viewed as a double-edged sword, with both positive and negative effects. This comes from a perspective of migration and development as inter-related concepts. Ammassari and Black highlight this inter-relationship line of thought by alluding to the fact that migration may relieve labour-market pressure and generate remittances, which constitute an important source of foreign exchange and income for migrants' families.<sup>105</sup> The ACPMD, also stresses this synergy that can exist between both concepts. It highlights the fact that:

migration can be an effective tool for development by enhancing income distribution, promoting productive work for growth in Africa, enhancing women empowerment and gender equality, combating HIV/AIDS, Malaria and Tuberculosis amongst the migrant population and improving partnership amongst the developed and African countries and other stakeholders.<sup>106</sup>

From a practical standpoint, the free movement of people can bring about development to trade, particularly through services supply. Both are interlinked or complementary concepts, with the former enhancing the latter if open borders and markets exist and are managed effectively. Poot and Strutt allude to this point by stating that "migration and other globalisation forces such as trade are increasingly interdependent, but the relevance of these interdependencies for trade negotiations has so far been given remarkably little attention in the literature."<sup>107</sup>

Positively, migration can serve as a catalyst to entrepreneurial growth, filling labour gaps with both skilled and unskilled people as well as enhancing cultural diversity in destination countries. Segatti is suggestive of this point of view in saying that: "migration plays a role in mitigating some of the shortcomings of regional labour markets with regard to the gap between the number of new labour market participants and the number of new jobs created, cyclical financial shocks, and the poor performance of some education and training systems."<sup>108</sup> To origin countries, free movement can also spur economic development through remittance

99 African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> (accessed 14-05-2020).

100 Mali, Rwanda, São Tomé and Príncipe and Niger.

101 Status List <https://au.int/sites/default/files/treaties/36403-sl-PROTOCOL%20TO%20THE%20TREATY%20ESTABLISHING%20THE%20AFRICAN%20ECONOMIC%20COMMUNITY%20RELAT...pdf> (accessed 14-05-2020).

102 Geda and Kebret "Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA" 2008 *Journal of African Economies* 358. See also Maru "Barriers to Free Movement in Africa: How to Remove Them?" <https://blogs.eui.eu/migrationpolicycentre/barriers-free-movement-africa-remove/> (accessed 14-05-2020).

103 Article 33 of the AU Draft Protocol on the Free Movement of Persons.

104 UNECA "Assessing Regional Integration" 16.

105 Ammassari and Black "Harnessing the Potential of Migration and the Return to Promote Development: Applying Concepts to West Africa" 2001 4 [https://www.iom.int/sites/default/files/our\\_work/ICP/IDM/mrs\\_5\\_2001.pdf](https://www.iom.int/sites/default/files/our_work/ICP/IDM/mrs_5_2001.pdf) (accessed 30-03-2018).

106 Africa Union "African Common position on Migration and Development" 2006 6 [http://www.un.org/en/africa/osaa/pdf/au/cap\\_migrationanddev\\_2006.pdf](http://www.un.org/en/africa/osaa/pdf/au/cap_migrationanddev_2006.pdf) (accessed 30-03-2018).

107 Poot and Strutt "International Trade Agreements and International Migration" 2010 *The World Economy* 1924.

108 Segatti "Migration to South Africa: Regional Challenges versus National Instruments and Interest" in Segatti and Landau (ed) *Contemporary Migration to Southern Africa: A Regional Development Issue* (2011) 9–27 25.

and can be a key livelihood strategy for people in hardship, and an employment strategy encouraging skills transfer. Based on a recent study by the United Nations Conference on Trade and Development (UNCTAD), cash remittances are greater than official development assistance and also more stable than foreign direct investment and are thus a critical and stable source of external finance for Africa. In that study, remittance flows are seen to have grown strongly, accounting for 51 per cent of private capital flows to Africa in 2016.<sup>109</sup> Looking at the aforementioned by UNCTAD and the view of the ACPMD of creating developing opportunities, it highlights the fact that remittances can have far-reaching benefits for individuals and the potential for families to reduce the depth and severity of poverty and promote human capital development.

Conversely, just as the movement of people can spur economic development and create a link to improve international trade, for origin countries, this movement can bring about the issue of brain drain.<sup>110</sup> Nevertheless, it is expected that if people move freely, it should be viewed as a developmental strategy which can lead to increased economic prosperity and poverty reduction<sup>111</sup> to both sending and receiving countries. Improved welfare schemes can aid retention but if people are to move, regional policies should not allow that they reside solely in the receiving country. This creates a system of circular movement and the possibility of citizens migrating back to their country of origin. Haas argues that migration should be viewed as “a process which is an integral part of broader transformation processes embodied in the term development.”<sup>112</sup>

The central argument of this paper is to foster or enhance regional ties in SADC taking cognisance of the vision of a pan-African identity and rejuvenating Africa as embodied in Aspiration 2 of the AU Agenda 2063<sup>113</sup> referred to earlier<sup>114</sup> by allowing less restrictive mobility of people. Allowing the free movement of people will subsequently encourage cross-border investment which can result in services and skills transfer. This can consequently contribute to economic development notably through employment, enhancing production as well as reinforcing and diversifying the labour force of a particular host country. In a classic article, Hamilton and Whalley showed that the liberalisation of the world’s labour market would double the world gross domestic product (GDP).<sup>115</sup> In effect, movement of persons can facilitate the supply of qualified and skilled workforce while strengthening the economic ties among neighbouring countries. Qureshi and Ziegler highlight that from a purely economic perspective, labour including both unskilled and skilled workers is an important input into the economic production process of both goods and services.<sup>116</sup> From Segatti’s perspective, adding to mitigating labour gaps as mentioned above, migration can also play a developmental role in times of crises as a survival strategy in a region that has very limited disaster management and also represents a link between dying rural economies and ever expanding urban areas through monetary, informational and in-kind transfers.<sup>117</sup>

109 UNCTAD “Economic Development in Africa Report 2018: Migration for Structural Transformation” 2018 135 [https://unctad.org/en/PublicationsLibrary/aldcafrica2018\\_en.pdf](https://unctad.org/en/PublicationsLibrary/aldcafrica2018_en.pdf) (accessed 14-05-2020).

110 Castles, Haas and Miller *The Age of Migration International Population Movements in the Modern World* 5 ed (2014) 1.

111 Viljoen, Wentzel and Pophiwa “Movement of People and the Right of Residence and Establishment: A Focus on South Africa” 2016 *Africa Insight* 29.

112 Haas “Migration and Development: A Theoretical Perspective” 2010 *International Migration Review* 228.

113 Aspiration 2 AU Agenda 2063: The Africa we Want [https://au.int/sites/default/files/pages/3657-file-agenda2063\\_popular\\_version\\_en.pdf](https://au.int/sites/default/files/pages/3657-file-agenda2063_popular_version_en.pdf) (accessed 07-05-2020).

114 See s 2.3.1 in discussing the African Union.

115 Hamilton and Whalley “Efficiency and Distributional Implications of Global Restrictions on Labour Mobility” 1984 *Journal of Development Economics* 61.

116 Qureshi and Ziegler *International Economic Law* 3 ed (2011) 547.

117 Segatti (2011) 25.

### 3.2 Application to the SADC

Overall, what is being argued from the aforementioned is the fact that migrants can be an effective economic bridge to other countries, facilitating trade and investment, especially in services between host and sending countries. This is so because people as service suppliers or workers can gain skills and experience in the host country if there is a broader set of jobs requiring their skills to choose from. Regional mobility can promote the return transfer of tacit knowledge to sending countries.<sup>118</sup> In this way, migration enables a faster diffusion of knowledge and skills from more to less developed countries and even helps the latter to catch up.

The free movement of people intra-regionally can potentially reduce the significant impact the SADC region continues to face from “brain drain.” Practically, every SADC national who moves within and also remains in the region is a gain to the community as there is constant competition for scarce skills with the rest of the world. Some countries like South Africa in the region have lost expertise to the western world.<sup>119</sup> Notwithstanding the significant economic value of remittances, the regulated movement of people across the region can reduce the unavailability of skilled labour even as the region might be experiencing high unemployment. SADC has to have a comprehensive law with specific and gradual implementation timeframes. The current Facilitation Protocol provides for a securitised or controlled approach to movement of people. This can inhibit regional flow of people for easy service supply across the region limiting to potential regional gains. Adopting such measures to control or manage migration prove contradictory and it is therefore suggested based on these developmental influence of the movement of people, the SADC becomes liberal and go beyond strict reliance on national laws in its approach.

The free movement of people within an integrated region is crucial to the success of regional objectives.<sup>120</sup> With a liberalised and harmonised approach to movement of people encourages more unity and integration in that region.<sup>121</sup> Barriers to the free movement of people as seen earlier include non-harmonised procedures for immigration, cumbersome and duplicated immigration procedures in connection with applications for work or study visas,<sup>122</sup> corruption, and xenophobic sentiments. The combination of these barriers tends to cumulatively reduce the transfer of experienced and qualified labour amongst SADC Member States and tends to stifle the enthusiasm of Member States for harmonious cooperation.<sup>123</sup>

The emphasis on the SADC approach should, therefore, be shifted from this restrictive and protectionist approach which views migration management as a national competency issue encouraging bilateral negotiations as opposed to a mutual regional agreement to a more comprehensive and gradual approach. Accompanying the challenge of reaching consensus as mentioned earlier is ignorance of regionalism and globalisation as well as the view that “potential foreign entrants to the professions are unnecessary competition, and a desire to bar them from penetrating the jealously protected national markets as a strategy that will ‘preserve’ opportunities for citizens.”<sup>124</sup> There needs to be a shift in thinking, and migration policy within the region should fully harness the benefits of free flowing migration, while minimising the strain that mass migration can cause over time. This entails shaping policies that are more comprehensive and progressive in nature.

Considering the current restrictive approach towards movement of persons and the Article 5 objective of the SADC Treaty referred to above, which based on current trends is far from being achieved, what can the SADC do to further its integration agenda? The subsequent heading argues towards a pragmatic approach in regulating movement of persons.

118 UNECA “Assessing Regional Integration” 16.

119 Rasool and Botha “The Nature, Extent and Effect of Skills Shortages on Skills Migration in South Africa” 2011 *South Africa Journal of Human Resource Management* 1.

120 Nshimbi and Moyo *Migration, Cross-Border Trade and Development in Africa: Exploring the Role of Non-State Actors in the SADC Region* 1 ed (2017) 6.

121 Mwanawina “Regional Integration and Pacta Sunt Servanda: Reflections on South African Trans-Border Higher Education Policies” 2016 *PELJ* 2.

122 Trachtman “Economic Migration and Mode 4 of GATS” in Chetail and Bauloz (eds) *Research Handbook on International Law and Migration* (2014) 346.

123 Mwanawina 2016 *PELJ* 2.

124 Ngandwe “Challenges Facing the Harmonisation of the SADC Legal Profession: South Africa and Botswana Under the Spotlight” 2013 *CILSA* 380.

#### 4 PRAGMATIC HANDLING IN REGULATING MOVEMENT OF PEOPLE

The SADC Facilitation Protocol is the key document regulating the movement of people in the SADC. Paramount to this section is the fact that this instrument mentioned is yet to be ratified.

Article 5 of the SADC Treaty called for the development of policies aimed at the progressive elimination of obstacles to the free movement of capital, labour, goods and services and of the people of the region.<sup>125</sup> Some policies refer to movement of people in passing<sup>126</sup> with no synergy existing between these policies. For instance, the Facilitation Protocol on the face of it allows for general movement of persons by facilitating free entry of people and the right of residence and establishment.<sup>127</sup> Article 17 of the Trade in Services Protocol narrows the scope towards mobility rights by stipulating that the Protocol shall not extend to measures affecting natural persons seeking or taking employment in the labour market of a State Party, or confer a right of access to the market of another State Party.<sup>128</sup>

As this paper has noted, some interaction exists between trade and the movement of people. As Henry argues:

The movement of people that is likely to intersect with trade agreements will benefit from negotiators achieving a better understanding of the different policy context or perspective particularly those of trade, immigration and labour market development. These officials in negotiating trade agreements need to understand that they are partners, not adversaries.<sup>129</sup>

The same analogy can be adopted to the SADC current approach towards regulating the movement of people. The discussion on the free movement of persons in a push towards a united Africa should be holistic, taking cognisance of economic development and integration as well as the need for political and security cooperation. The movement of persons is as good an economic and social issue as it is a security and political one. Therefore, holistically, a mind-set shift has to occur between the Member States, having a restrictive approach focused on security will not aid in meeting integration targets. Amendments to the current policy framework will be key as well as having a regional policy on migration taking cognisance of an integrated effect of easy service supply by natural persons and labour movement is needed in the SADC.

SADC as a regional group was founded to promote economic development and integration, alleviate poverty and ensure peace and security.<sup>130</sup> The promotion and securing of peace and stability in the region involves having a common security regime that functions to prevent and resolve inter- and intra-state conflict.<sup>131</sup> Currently, in dealing with public security, movement of people in SADC is handled by the Organ on Politics, Defense and Security.<sup>132</sup> This suggests that migration is viewed primarily as a security issue, rather than one of rights and protections for migrants themselves.

First and foremost, the focus on the movement of people either needs to shift to an organ solely dedicated to issues pertaining to migration or within the SADC structure; the organ relating to Economic Development, Social and Human Development, or Poverty Eradication and Policy Dialogue. The rationale of this is that if the primary aim of the organ is to maintain security and ensure peace, whatever output will mirror that objective. As Segatti mentions, in discussions on free movement, SADC Member States always cite their "fears regarding national security, the spread of communicable diseases, cross-border crime and the influx of

125 Article 5 of the SADC Treaty 1992.

126 Article 3(f) of the Protocol on Education and Training. See also the SADC Protocol on Employment and Labour. See also, the SADC Protocol on Trade in Services. See also the SADC Regional Indicative Strategic Development Plan of 2003 which views migration in the light of facilitating tourism in the region.

127 Article 3(a)–(c) of the SADC Draft Protocol on the Facilitation of movement of Persons 2005.

128 Article 17(2) of the Protocol on Trade in Services 2012.

129 Henry "Mode 4: Through a Canadian Policy Lens" in Mattoo and Caarsaniga (eds) *Moving People to Deliver Services* (2003).

130 Article 5(1)(a) of the Consolidated Text of the Treaty of the SADC. See also, Nathan *Community of Insecurity: SADC's Struggle for Peace and Security in Southern Africa* 1 ed (2012) 4.

131 Nathan "SADC's Uncommon Approach to Common Security, 1992 – 2003" 2006 *Journal of Southern African Studies* 606.

132 SADC Organ on Politics, Defense and Security <https://www.sadc.int/sadc-secretariat/directorates/office-executive-secretary/organ-politics-defense-and-security/> (accessed 14-05-20). See also Landau and Vanyoro "Adoption of the SADC Labour Migration Policy Framework 2" <http://www.miworc.org.za/docs/MiWORC-PolicyUpdate-1-Adoption-of-SADC-Labour-Migration-Policy-Framework.pdf> (accessed 14-05-20).

illegal migrants among others.<sup>133</sup> This security perspective unsurprisingly leads to policies and practices geared towards restriction and exclusion.<sup>134</sup> Therefore, there is a need to broaden the lens through which migration is viewed within the region. To that effect, an organ that views movement of people holistically as an opportunity towards economic development while still considering the security risk is needed rather than one primarily focused and within a securitised prism. If such an organ is to be established, it will require a synergy with relevant domestic bodies like immigration, labour and defence.

In shifting focus, it will be imperative that the SADC Facilitation Protocol is signed and ratified by non-signatory member states and the SADC Secretariat should be tasked with urging them to do so going forward, emphasising the socioeconomic benefits to the region and the continent as a whole as an incentive. With the AfCFTA signed and ratified as well as the adopted AU Free Movement of Persons Protocol, both will create the necessary impetus for the SADC to move towards adopting ratification of the Facilitation Protocol and a common position on migration. Ratifying and implementing the Protocol could be a step towards strengthening integration in SADC. Greater regional integration will in turn increase SADC Member States' global economic standing and increase its trade and investment. The Facilitation Protocol based on its provisions does not go beyond national and bilateral agreements which are already in place, and certainly does little to further regional ties or a SADC community. If the Facilitation Protocol is to come into effect, it could have some symbolic significance, but it will not do much on its own to either protect the rights of migrants or to facilitate free cross-border movement across the region if its provisions are strictly tied to national laws. That notwithstanding, reviews or amendments should be made to the overall outlook in approaching movement of persons as well as the Protocol to bring about some comprehensiveness to certain provisions to reflect the objective of the SADC Treaty<sup>135</sup> and the current AU Protocol on the movement of people.

In promoting this comprehensiveness, common documentation in the form of a SADC Passport linked with the current push towards an African Passport can be adopted. The SADC Passport should be based on a regional and continental design and specifications agreed upon by the Member States. The necessary technical support to the Member States should be given by the Commission to enable them to produce and issue the SADC Passport to their citizens. In essence, all passports are national passports, issued in accordance with an agreed regional or continental format. The practicality of this is to completely exempt SADC citizens from completing immigration or emigration forms when crossing borders between the Member States. The essence of this will be to facilitate easy movement. Furthermore, complementing a regional passport at a deeper level will be proposing a regionally agreed SADC residence permit or visa, issued by the relevant ministry or authority, dealing with migration issues is imperative to improve the flow of people within the region and bring about deeper integration. This regional residence permit can be adopted following the examples of RECs such as the Economic Community of West African States (ECOWAS) and the East African Community (EAC). ECOWAS utilises an ECOWAS residence card<sup>136</sup> or permit issued by the host State<sup>137</sup> which allows Community citizens to seek and carry out income earning employment in host ECOWAS states.<sup>138</sup> The EAC on the other hand proposes classified standards and procedures in obtaining a residence permit.<sup>139</sup> Achieving this, however, requires a high level of

133 Segatti in Nita *Migration* 47.

134 Nshimbi, Moyo and Gumbo "Between Neoliberal Orthodoxy and Securitisation: Prospects and Challenges for a Borderless Southern African Community" in Magidimisha *et al Crisis, Identity and Migration in Post-Colonial Southern Africa* eds (2017) 167–186 176.

135 To develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the region generally, among Member States. See Article 5(2) (d) of the Consolidated Text of the Treaty of the SADC.

136 Resident Card means the document issued by the competent authorities of a Member State granting right of residence in the territory of the Member State. See Article 1 of definitions in the Supplementary Protocol on the Right of Residence A/SP.1/7/86

137 Community members however must harmonise their policies and rules in issuing the Residence Card based Article 9 of the Supplementary Protocol on the Right of Residence A/SP.1/7/86; this is currently lacking in the ECOWAS region.

138 Article 2 of the Supplementary Protocol on the Right of Residence A/SP.1/7/86.

139 Regulations 6 of Annex IV relating to the Right of Residence.

harmonisation of laws and procedures relating to the movement of people.

From the SADC perspective, in trying to regulate a permit system under Article 13(e)<sup>140</sup> in providing for harmonisation of current immigration practices states that a uniform border permit shall be agreed by way of bilateral agreements between the State Parties concerned. In essence, bilateralism of this nature will be exclusive and does not take into consideration the interests of countries outside the bilateral agreements. Having this flexible approach can also trigger competing bilateral agreements between the two agreeing States and the other SADC States. It therefore does not take into consideration the interests of other countries, but isolates the contracting parties from the regional context, often forcing them to compete with one another and bringing about inequalities.<sup>141</sup> This in turn means there will be a risk of treating some SADC countries better than the other. Paramount in SADC is the principle of sovereignty and the right to determine who enters its country. This is a position that has been strictly maintained by individual countries and forms the basis of imposing visa requirements for entry and residence. It is imperative that in adopting such a flexible approach, non-participating States are offered the option to join in on such agreements to further consolidate and ensure regional objectives.

## 5 RECOMMENDATION

The economic mismatch in SADC has proved to be a key challenge in the region. The perception that exists within the region is that in the event free movement of people is granted, it may open up advanced economies to an influx of migrants. However, less developed economies' outlook of allowing free movement is the potential loss of skills, hence the need to secure talents and guard against brain drain. Key to advancing integration in SADC, it is prescribed that SADC approaches the movement of people as a matter of urgency and in a pragmatic manner. As a general recommendation, there must be a shift in thinking towards the movement of people in the SADC. Thus, the key to effective responses and to realising a progressive regional human mobility instrument lies primarily in changing policymakers' attitudes and allaying their fears of migration. This protectionist approach has reflected in some immigration laws domestically which in turn has influenced public perception towards the entry of people even at the grass-roots level. This is often evidenced in the negative public perceptions and xenophobia, fuelled by fears that foreign nationals will take away job opportunities from locals. Movement of people should therefore be viewed as a possible solution to economic needs as opposed to a problem. Having an attitude of protectionism at a regional level could hinder the adoption of a liberal and less restrictive system towards movement of people at a national level. It is necessary and recommended that an informed response by intellectuals and experts to explain the developmental benefits of a gradual and more liberal approach to movement of people be adopted by Member States to enhance the dialogue. Going forward, awareness campaigns on such developmental impacts be the order of the day at grass-roots levels across respective countries, to allay public fears and negative perception towards movement of people.

The Facilitation Protocol has some important provisions towards free movement of people. Ideally, as a further recommendation, full and effective implementation of the Protocol is vital. Furthermore, considering the ever-growing number of migrants and the complexity of migratory movements within and across SADC, based on the AU Migration Policy Framework, political commitments is imperative. Also, working towards more co-coordinated and harmonised policies and programmes is crucial to develop a common language when addressing movement of people. This is, however, an ongoing and evolving process.

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140 Article 13(e) states that by way of bilateral agreements between the State Parties concerned, issuance of a uniform and simple border permit/ border pass to citizens of State Parties who reside in the border areas of the territories of such State Parties.

141 Fagbayibo "Flexibility Arrangements in the African Union: A Way out of the Integration Conundrum?" 2016 *African Review* 2 159.



## **6 CONCLUSION**

In conclusion, from the discussion it is noted that the discourse around regional migration is set in a negative tone, resulting in themes of control and restriction of access to SADC citizens. This arises due to the responses to the Free Movement Protocol and the watered-down approach adopted by the Facilitation Protocol. The Facilitation Protocol which still remains unenforced, is noted based on its provisions to place major reliance on national laws towards regulating the movement of nationals from neighbouring states and this reflects a broader issue at play regionally. There is a need for the SADC to ensure a more liberal approach to movement of people to further intra-SADC integration. Further to this, ratifying and implementing regional instruments is imperative.