THE UNIVERSITY OF THE WESTERN CAPE
FACULTY OF LAW

FACILITATING INTRA-REGIONAL TRADE THROUGH THE MOVEMENT OF PEOPLE IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC).

A thesis submitted in fulfilment of the requirements for the degree of Doctor of Laws (LLD) in the Faculty of Law, University of the Western Cape

BY

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June 2019
DECLARATION

I declare that, Facilitating Intra-Regional Trade through the Movement of People in the Southern African Development Community (SADC) is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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ACKNOWLEDGMENTS

This is a perfect opportunity to express my sincere gratitude to the outstanding individuals for the roles they have played directly or indirectly in the realisation of this study. First of all I would like to give thanks to the almighty God, for his continuous grace and giving me the wisdom, strength, guidance and courage to carry out this research. I give all glory, praise and thanks to Him for showing me His great love, mercy and unprecedented favour from the beginning until the completion of this journey.

I am particularly thankful to my supervisor, Professor Patricia Lenaghan, for having selected me to pursue this study and without whose vital guidance, patience and continuous encouragement this piece of work would never have come to being. Thank you for your, intellectual input, for mentoring me and constantly encouraging me to push harder. Above all, thank you prof for your constant happy and joyous mood, you always wore a warm smile across your face that encouraged me even more not to give up as all was and would be well.

Special thanks also goes to the organisers and respondents of the Doctoral Colloquium, where I received constructive feedback to my respective chapters. Also, thanks goes to the Law Faculty’s Graduate Lecturing Assistant Programme for the financial support provided in the early years of this research.
DEDICATION

I dedicate this work to the Almighty God for the wisdom he gave me. Also, I dedicate this work to my father Mr Tennyson Amadi and my late mother, Mrs Patience Amadi as well as my siblings for their overwhelming support through this study.
KEYWORDS

Trade Facilitation
Regional Integration
Intra-regional Trade
Trade in Services
Movement of People
Southern African Development Community
European Union
Economic Community of West African States
East African Community
Harmonisation
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<td>AfCFTA</td>
<td>African Continental Free Trade Area</td>
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<td>AEC</td>
<td>African Economic Community</td>
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<td>ASEAN</td>
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<td>MFN</td>
<td>Most Favored Nation Treatment</td>
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<td>NDP</td>
<td>National Development Plan</td>
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<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>OECD</td>
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<td>RECs</td>
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SEA  Single European Act
SNA  System of National Accounts
StatsSA  Statistics South Africa
TFEU  Treaty on the Functioning of the European Union
TEU  Treaty on the European Union
UDHR  Universal Declaration of Human Rights
UK  United Kingdom
WTO  World Trade Organisation
ABSTRACT

Regional integration has been part of Africa’s overarching strategy for economic transformation. To further enhance sustainable development and economic growth, in the African continent intra-regional trade is equally as important as international trade. Therefore, African countries are faced with the daunting task of adopting comprehensive and well-structured measures to ensure the movement of goods and people across borders are seamless and unrestrictive. Free movement of persons in particular is one of the core tenets of regional integration, building towards a common market. To that effect, the African Union (AU) based on Agenda 2063 has agreed on a Continental Free Trade Area and a Protocol on Movement of Persons indicating a commitment of attaining a single market where goods, persons and services can move freely across national borders. With the Southern African Development Community (SADC) being a Regional Economic Community (REC) recognised under the AU, this thesis seeks to argue for deeper integration by ensuring the movement of persons in the SADC is regulated beyond the scope that is recognised internationally under the International laws influencing the movement of persons. Also, this thesis argues for amendment of certain provisions in the SADC Protocol on the Facilitation of the Movement of Persons to further facilitate intra-regional trade.

The SADC operates to an extent as a Free Trade Area (FTA) where goods are traded duty free across borders and the intention is to go higher up the integration ladder to become a Common Market by 2015 and an Economic Union with a Single Currency by 2018. Targets which has not been met to date. Article 5(2) (d) and Article 23 of the SADC Trade Protocol realises the significance of policy development in promoting free movement of people and services within the SADC region. To facilitate the movement of people, the SADC drafted a Protocol on the Free Movement of People in 1995. This Protocol never materialised and it was subsequently replaced by a Protocol on Facilitation on Movement of People which is limited in scope and is not yet operational as ratification by two third majority of Member States has not occurred. In 2012, a Protocol on Trade in Services which also within a limited scope influences the movement of persons in the region was also concluded but is not yet ratified by Member States of the SADC. The absence of a single consistent and comprehensive framework makes people vulnerable to informal practices at the border. Thus, the issue of ensuring free movement of people between SADC Member States still remains debatable and unresolved.
Several regions across the world and within the African continent have established laws that facilitate the movement of people. This thesis generally seeks to investigate how these regional groupings have adopted laws to further ensure the movement of people and supply services. The Economic Community of West African States (ECOWAS) is looked at as one regional group because it has an enforceable Protocol on Free Movement of People, Residence and Establishment since the early 1980s. The East African Community (EAC) is also investigated because it has the Common Market Protocol signed and ratified by all six Member States and lastly, the European Union (EU) is assessed because it is notable for having the most ambitious regime for the free movement of people and services in the world. Also, this thesis delves deeper at the approaches used by the ECOWAS, EAC and EU to achieving noticeable results, highlighting the problems and challenges faced currently and in the past by all three regional groupings to reach an optimised form of movement of people and then adopting this format as a model to pursue the SADC goal on deeper regional integration through the free movement of people.

The SADC region is characterised by vast differences in economic size and development and as a result, the trade outcomes will also differ clearly by countries. This is one reason for the delay and reluctance of Member States to ratify those agreements. Despite this diversity, most SADC countries face challenges in shortages of skilled workers but have stringent immigration regulations restricting the flow of people particularly non-national service suppliers to cater for this challenge. This thesis argues for a gradual, comprehensive and flexible approach in regulating the movement of persons in which changes occurs in stages and not drastically for a successful deeper regional integration to occur. Regional integration should take into account the differences in economic and political conditions in the countries for it to thrive.
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CHAPTER 1

INTRODUCTION

1.1 Background to Research

International trade is an activity carried out by all countries to different degrees, since no country is self-sufficient to such an extent that it can put up barriers and ignore the rest of the world.1 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.2 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.3 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.4

On a regional basis, in Southern Africa,

‘leaders have consistently expressed the desire to deepen regional integration through the creation of a Free Trade Area (FTA) that will lead to a common market for goods and services and having this greater integration could remove most of the supply-side constraints on regional and international trade and potentially facilitate the region’s participation in the global trading system, they judge.’5

Despite this agenda, realisation of this goal of deeper integration and economic transformation has been elusive. Evidently, in a 2011 World Bank Report by Gillson, he highlights that:


http://etd.uwc.ac.za/
Compared to other regions, Southern Africa is lagging behind in regional trade: in Europe, regional trade has reached 60 percent of total trade; in North America, 40 percent; in Association of South East Asian Nations (ASEAN), 30 percent; and, in Southern Africa just 10 percent.6

The question that therefore arises is; what causes a low percentage of trade regionally or internationally? The key reason for restricted trade for goods and services regionally and internationally is simply because of the existence of tariff and non-tariff barriers.7 Tariffs have progressively fallen as a result of successful multilateral and regional negotiations as well as the ratification of the Articles of the General Agreement on Tariffs and Trade (GATT)8. Using the Southern African Development Community (SADC) as an example of tariff reductions, ‘a Free Trade Area (FTA) was launched in 2008 when a phased programme of tariff reductions that had commenced in 2001 resulted in the attainment of minimum conditions for the FTA-85% of intra-regional trade amongst the partner states attained zero duty.’9

Non-tariff barriers on the other hand have become more prevalent and are now a key challenge to regional trade since they can stifle the movement of goods and services across borders.10 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.11 The WTO General Agreement on Trade in Services (GATS) classifies these barriers in three types namely: market access barriers or at-the-border barriers that prevent entry into a national market,12 national treatment barriers that discriminate between domestic and foreign services providers13 and domestic regulation barriers that apply to all providers but create de facto additional hurdles for foreign providers.14 This thesis argues for fostering intra-regional trade

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8 General Agreement on Tariffs and Trade the Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (1994).
14 Article VI General Agreement on Trade in Services 1995.
with reference to curtailing non-tariff barriers that hamper the movement of people and consequently those that supply services.

In a Working Paper by the European Union (EU), it is noted that ‘virtually all services trade barriers are non-tariff barriers; that is, they include a wide-range of regulatory measures whose trade impact is often difficult to quantify and compare across sectors and countries.’¹⁵ 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.¹⁶

One key instrument as will be seen in the subsequent chapter influencing the movement of persons from an economic standpoint¹⁷ is the GATS. Prior to the GATS coming into force in 1995, the primary trade focus was in tangible goods under the GATT.¹⁸ The GATS is the World Trade Organisation’s (WTO) legal instrument aimed at regulating multilateral trade in services. The GATS was negotiated in light of the recognition of the increase in trade in services around the world as well as the substantial role services can play in the world economy.¹⁹ So there was an urgent need to have a regulatory framework in this area of trade.²⁰

The GATS identify four modes²¹ of service supply and this thesis primarily refers to Mode 4, which is the ‘presence of natural people’.²² The rationale for this as will be seen later in the chapter is that most of the services transactions require a physical proximity between the producer of the service and the consumer of the service.²³ While in some transactions the consumer has to move to the location of the producer in instances of tourism. In other instances, the producer has to move to the location of the consumer. Central to both instances is the fact that the movement of people in general is key to utilise and supply a service. This forms the basis and central argument of this entire thesis, that progressively allowing easy

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¹⁷ See chapter 2 section 2.2.3.1.
²¹ The various modes are: Cross Border Supply of Services (Mode 1), Consumption Abroad (Mode 2), Commercial Presence (Mode 3), and Presence of Natural Persons (Mode 4).
²³ See chapter 1 section 1.2.3.
movement of people will necessitate the easy movement of economically active persons like service suppliers and deepen SADC trade.

The GATS deals with the movement of natural people in two points: First, Article 1 of the main text of the GATS and secondly, in the Annex on the movement of natural people, both of which will be referred to in subsequent chapters.\(^\text{24}\) Article 1 of GATS defines Mode 4 generally as ‘a service supplier of one Member, through the presence of natural people of a Member in the territory of any other Member.’\(^\text{25}\) The movement of natural people therefore refers to the entry and temporary stay of people for the purpose of providing a service in the country of another. For mode 4 to yield positive outcome, people ought to move with little or no restrictions. The GATS is however limited in scope that it does not cover natural people seeking access to employment permanently or issues regarding immigration services,\(^\text{26}\) hence, the GATS is confined and explicitly excludes allowing residency and establishment which are further phases recognised in regional integration efforts towards the movement of people.

From a continental and regional standpoint, the African Union (AU) seeks to establish an African Economic Community (AEC) and Article 4(2)(i) of the Treaty Establishing the AEC provides for the gradual removal among Member States of obstacles to the free movement of people, goods, services and capital and the right to residence and establishment.\(^\text{27}\) Article 71(e) of the same Treaty urges:

> ‘AU Members to cooperate towards developing, planning and employing human resources by adopting employment policies that allow people to move freely within the community through strengthening and establishing labour exchanges that facilitate the employment of available skilled manpower of one Member State in other AU states where such manpower shortages exist.’\(^\text{28}\)

The SADC a regional group recognised by the AU,\(^\text{29}\) has attempted to liberalise the movement of natural persons generally within the region with no success.\(^\text{30}\) First, there was a

\(^{24}\) See chapter 2 section 2.2.3.1.
\(^{25}\) Article 1 of GATS 1995.
\(^{27}\) Article 4 Para 2(i) of the Treaty Establishing the African Economic Community (AEC Treaty) 1991.
\(^{28}\) Article 71(e) of the AEC Treaty 1991.
Draft Protocol relating to the free movement of people in 1995. The Protocol would ‘confer on SADC citizens the right to free entry, residence and establishment of oneself in the territory of another Member State’, offering more towards complete movement of people. However, the prospect of complete abolition of border controls on people’s movements within SADC did not sit well with some Members, South Africa, Botswana and Namibia in particular declined to support this Protocol, which was consequently dropped. This draft Protocol was clearly highly contentious and thereafter, there was a re-drafted version in the form of the Draft Protocol on the Facilitation of Movement of People in 1997 to date has only been signed by thirteen States, where from only six States have ratified the Protocol in 2005. Until ratification has occurred by a two-thirds majority of SADC Members, the SADC lacks a harmonised and cooperative framework governing movement of people within the region. Consequently, intra-SADC movement of people will be regulated by national immigration legislation and also bilateral agreements between States. The import and export of services require a sustained focus on facilitating easy movement of people.

In 2012, the SADC Trade in Services Protocol was also concluded. The Protocol was concluded on the basis of Article 22 of the SADC Treaty which permits the conclusion of Protocols as the need arises and Article V of the GATS which permits regional economic integration agreements in the context of Trade in Services. Services trade is entrenched by the movement of natural people as many service sectors need the applied knowledge, expertise and technical skills of individuals if they are to be supplied successfully. So the ability to move key personnel into foreign markets in order to provide a service is an essential component of an economic development strategy. Based on that perspective, in reaching an agreement on Trade in Services by the SADC, it is expected that the Protocol elaborately

35 South Africa, Zambia, Lesotho, Mozambique, Botswana and Swaziland (eSwatini).
regulates services supply through the presence of natural people but no specific provisions\textsuperscript{41} on the movement of natural people is included.\textsuperscript{42} This in effect fails to guarantee the movement of people regionally.

As it stands, the SADC Trade in Services Protocol has not yet come into force since the requisite number of Member States again have not signed\textsuperscript{43} and ratified the Protocol. This illustrates an enthusiasm on the part of Members to draft Protocols on the subject matter but also indicates an issue of implementation as well as an issue of commitment\textsuperscript{44} within the region and how there is a lack of both aspects towards regional integration. This is not just prevalent to this Protocol but also to the Protocol on the Facilitation of the Movement of People as mentioned in the earlier paragraph. So, this is indicative of a generalised issue within the SADC because it at times may appear that what the SADC has been doing is drafting Protocols and not implementing these Protocols. This portrays a negative image to the region. Mupangavanhu rightly illustrates the above fact when she highlights:

‘the SADC for example has adopted 15 Protocols, but the Democratic Republic of Congo (DRC) a Member of the SADC, has neither ratified nor signed any of them, the Seychelles has signed three but has not ratified them and Botswana is the only country that has ratified more than eleven Protocols.’\textsuperscript{45}

The delay in signing and ratifying instruments slows down integration efforts because the agreements of Heads of State remain on paper. For the SADC to realise the benefits of regional integration, there is need for a strong and sustained commitment from Member States.

\subsection*{1.1.1 Explanation of thesis title and Scope of Thesis}

Although from a trade in goods perspective, the WTO adopts a definition of trade facilitation as ensuring the removal of trade barriers on goods and on or around borders. The WTO defines and limits the term trade facilitation to:

\textsuperscript{41} See further discussion in section 1.3.
\textsuperscript{42} Stern M, Truen S & Ramkolowan Y ‘SADC Trade in Services: Negotiating the National Interest’ (2011) 93 SAIJA 28
\textsuperscript{43} The countries that have signed the Protocol thus far are The Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, The Republic of the Seychelles, Swaziland (eSwatini), United Republic of Tanzania and Republic of Zambia.
\textsuperscript{44} Africa needs a deeper integration Agenda’ 2011 available at https://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_5july11_e.htm (accessed 07 April 2016).
\textsuperscript{45} Mupangavanhu Y The Regional Integration of African Trademarks Laws: Challenges and Possibilities (unpublished LLD thesis, University of the Western Cape, 2013) 63.
‘the simplification and harmonisation of International trade procedures where trade procedures are the activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade.’

Accordingly, the scope of the WTO definition of trade facilitation refers to administrative processes at the border which are the focus of trade negotiations in the WTO. While this concept is novel to the realm of services trade, an extensive literature exists on goods-related trade facilitation and its objective of reducing transaction costs by expediting the movement of goods. An aspect towards trade is supplying services through the presence of natural people in the territory of another Member state and a fundamental step to deeper regional integration is the ability of citizens to move freely across national borders with no restriction.

The level at which the SADC as a region have managed regulating the movement of persons to reduce or completely eliminate, rigorous administrative requirements can pose a challenge towards easy services supply and indicates a lack of commitment towards creating an effective large scale integrated community. Intra-regional trade in the SADC is at a low as seen in the introductory section of this chapter and this thesis 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 beyond what is prescribed under international law and also the SADC Facilitation Protocol.

The international frameworks as highlighted under GATS above and as will be seen in subsequent chapters are limited in scope in the sense that they fail to afford entry, stay or even guarantee establishment of people. It is from regional platform and perspective that such rights are guaranteed. From a regional integration perspective, achieving the common market stage of economic integration necessitates the free movement of factors of production such as people in the context of this thesis amongst the integrating States. Associated with

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49 See chapter 4 section 4.2.2.
50 See chapter 1 section 1.1.
51 See chapter 2 section 2.2 and chapter 4 section 4.2.2.
this freedom are the rights of entry, residence and establishment, all of which are key for the attainment of the objectives of having a common market.

A fundamental effect of deeper regional integration at a common market level is the ability of citizens to move freely across national boundaries. An effectively comprehensive and implemented framework on the movement of persons is therefore a key indicator of the depth of any regional integration process and this is currently lacking in the SADC. The underlying logic and hypothesis of this thesis is that in a way similar to free trade in goods, the movement of persons can stimulate economic development by furthering economic activities like services supply and encourage deeper integration in the SADC. Consequently, the movement of people becomes a crucial and central point of discussion in this thesis and is integral to the regional integration process and discourse\textsuperscript{53} to further trade and integration in the SADC.

1.2 Definitions

Based on the aforementioned, for the purpose of this thesis, concepts such as regional integration, international trade, services and movement of people will be unpacked to augment and give clarity to the broader discussion towards allowing unrestricted movement of people in the SADC.

1.2.1 Understanding Regional Integration

Central to the discussion in this thesis is the focus on the SADC as a regional community and ensuring the SADC deepens its intra-regional trade.\textsuperscript{54} It is therefore imperative to understand what Regional Integration (RI) is and this section will unpack the concept.

According to Mukamuana and Moeti, regional integration (RI) is a process through which two or more countries in a particular area join together to pursue common policies and objectives in matters of general economic development or in particular economic field of common interest to the mutual advantage of all the participating States.\textsuperscript{55} Integration is defined as a process of expanding relationships through deepening and strengthening ties


\textsuperscript{54} See chapter 1 section 1.1.

between actors. This translates to forming blocs or groups with common interests and goals. Regional blocs are central to the idea of RI. In creating a regional bloc, Member countries' can alleviate their positions on the global political landscape and bargaining power on international issues and also collectively deal with the region's economic progress. Individual countries within any given regional bloc often cannot deal with the economic challenges single-handedly; hence the proposals of the idea of RI.

RI is often understood as the voluntary collaboration among states within the same territorial region for the purposes of increasing the level of cooperation on issues involving security, political stability and the economy among other issue areas. It is concerned with achieving greater cooperation among states in order to improve the domestic conditions of a state’s citizenry. Additionally, regional integration requires that states defer their sovereignty to a supranational institution which is aimed at coordinating the efforts of each state in collaboration with other Member states. RI ‘appeals as a concept to many economists, politicians and business people for one simple reason: it promises to increase the wealth and the well-being not just of one, but of a number of countries at a rate greater than just the sums of the development of the participating countries’ economies’. Consequently, RI is regarded as a key strategy for economic development and intra-regional trade and developing countries equally see it as an opportunity to economically integrate and compete on a global scale.

Bischoff’s proposed definition of RI is:

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57 Collection of countries within a geographical area.
‘a process where a group of states voluntarily and to various extents get access to each other’s markets and establish mechanisms and techniques that minimise conflicts and maximise the internal and external economic, political, social and cultural profits of their co-operation.’

Haas adopts a similar notion and was of the view that RI involves explaining:

‘how and why states cease to be wholly sovereign, how and why they voluntarily mingle, merge and mix with their neighbours so as to lose factual attributes of sovereignty while acquiring new techniques for resolving conflicts among themselves.’

This ties with the notion of supranationalism as referred to above. Supranationalism refers to governance arrangements where States decide to delegate some responsibility for decision making to a body or decision making forum that stands above the nation State. So this approach takes inter-state relations beyond just cooperating into an integration sphere, and involves some loss of national sovereignty. In essence, RI can be seen as a process whereby boundaries between nation-States are indifferent and States are able to foster ties and work together for mutual benefits.

Countries integrate to further economic and social ties and one can term this as development integration. This is so based on the fact that if one partner is more developed than others, it enables the less developed partners to overcome the obstacles represented by their relatively small domestic markets. In essence, RI is expected to combine national markets into a single market which will allow Member States to benefit from production and trade, economies of scale which will then maximise the welfare of their nations. There are however arguments as to whether having a regional market distorts or creates better trade and the view directed by this thesis is towards the latter.

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68 Economies of scale refer to reductions in unit cost or the cost advantage that an enterprise obtains due to the expansion: Baumol WJ & Blinder AS Microeconomics: Principles and Policy 12ed (2011) 142-143.
69 The economies of scale allow enterprises to be able to run their businesses efficiently from a microeconomic point of view: Knoop TA Recessions and Depressions: Understanding Business Cycles 2ed (2010) 29.
70 Trade diversion involves the displacement of lower cost production from non-Members by higher cost production from Member countries due to lower barriers. It reduces the welfare of the people: UNECA Assessing Regional Integration in Africa (ARIA II): Rationalising regional economic communities (2006) 11.
RI can also be understood from a theoretical perspective and theories on RI focus primarily on the European integration process. The first theory focusing on EU integration was proposed by Haas. Haas builds an approach on Neo-functionalism and he defines RI as:

‘The process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new and larger centre, whose institutions possess or demand jurisdiction over the pre-existing national states.’

From Haas theoretical perspective, RI is a process which is voluntary in the sense that political actors willingly shift their loyalty away from their national stance to a supranational governing body. As a process, countries reach agreements on policies relating to sectors they share similar interest and this creates a burden to reach further agreements to maintain, upgrade and even expand the status quo. This is commonly referred to as the ‘spill over effect.’ In essence, in order to fulfil and satisfy a goal of integration it is necessary to take further actions from one sector or area to another which then starts off another action. Whilst this can further integration, integration is not an automatic process that can be easily predicted. First of all, countries are not entirely willing to cede their sovereignty to one trumping body. Also, central to deeper integration it is viewed that recognising diversity before having an aligned or coincided interest as a group is key. Haas perspective is not reflective of the diversification of development economically and politically of different national States.

RI is an evolutionary concept. Post Haas, Linberg in his study of the European Economic Community (EEC) now the EU proposes two perspectives of RI. He views RI first of all as a process whereby nations forgo the desire and ability to conduct foreign and key domestic policies independently of each other, seeking instead to make joint decisions or to delegate

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the decision making process to new central organs and the process whereby political actors in several distinct settings are persuaded to shift their expectations and political activities to a new centre.\textsuperscript{75} This perspective raises further questions of control like who are the drivers of integration or, more simply, who is in charge?

Another theory of RI is in the perspective of intergovernmentalism\textsuperscript{76} promulgated by Hoffmann and refined by Moravcisk,\textsuperscript{77} which puts national governments at the forefront of integration agendas. This theory of Hoffmann argues that every international system owes its inner logic and it’s unfolding to the diversity of the domestic determinants.\textsuperscript{78} He contrasts integration to diversity as diversity sets the limit at which countries negotiate with each other.\textsuperscript{79} From his theoretical view, governments have a strong and autonomous position in integration and this theory entrenches the fact that only State preferences are crucial and important when deciding on policies regarding integration. Moravcisk on the other hand argues that integration goes as far as Member States want it to go and European institutions exist due to the deliberate will of Member States to satisfy their interests and are instruments for achieving Member States’ objectives.\textsuperscript{80} Problematic to this theory of intergovernmentalism is the constant change in governmental administration and ideologies and these changes influence national interest as well as policies of Member countries in further negotiations. And this consequently impairs the process of meaningful integration.

There is also the transactionalism theory of RI which is based on the assumption that integration is enhanced by high volumes of transactions between States.\textsuperscript{81} Increased transactions lead to more interaction, trust and an enhanced feeling of mutual benefit between States. Applying this theory to an African context may however prove difficult because trade

\textsuperscript{75} Linberg LN \textit{The Political Dynamics of European Integration} 1 ed (1963) 6.
\textsuperscript{76} Intergovernmentalism refers to arrangements whereby nation States, in situations and conditions they can control, cooperate with one another on matters of common interest. Under such circumstances States are free to cooperate or not and are able to set the level or cooperation. In essence, States are at the forefront of integration efforts and can basically cooperate when they want and don’t cooperate when they don’t want to. See Nugent N \textit{Government and Politics of the European Union} (2003) 475. See also Schmidt VA ‘The New EU Governance: New Intergovernmentalism, New Supranationalism, and New Parliamentarism’ (2016) IAI Working Paper 16 2 available at \url{https://www.iai.it/sites/default/files/1aiwp1611.pdf} (accessed 19 January 2019).
\textsuperscript{77} Hailu BM ‘Regional Economic Integration in Africa: Challenges and Prospects’ (2014) 8 \textit{Mızan Law Review} 303.
\textsuperscript{78} Hoffmann S ‘Obstinate or Obsolete? The Fate of Nation-State and the Case of Western Europe’ (1966) 95 \textit{Daedalus} 864.
\textsuperscript{80} Hailu BM ‘Regional Economic Integration in Africa: Challenges and Prospects’ (2014) 8 \textit{Mızan Law Review} 304.
\textsuperscript{81} Mupangavanhu Y \textit{The Regional Integration of African Trade Mark Laws: Challenges and Possibilities} (unpublished LLD thesis, University of the Western Cape, 2013) 42.
within the continent or amongst African States is low and large portions of African imports are sourced from other regions.\textsuperscript{82}

Economic integration is another approach to RI. It is a process that requires proper formulation and planning and consequentially materialises over time. It occurs in different stages and these stages were originally formulated by Professor Balassa in 1961.\textsuperscript{83} According to Balassa, the first stage of integration is the Free Trade Area (FTA). FTA brings about the abolition of tariffs between participating countries while each country maintains its own tariffs against non-Member states.\textsuperscript{84} Second stage to deepen integration involves the creation of a Customs Union (CU) and this requires Members to maintain a uniform external tariffs.\textsuperscript{85} Third stage involves creating a common market in which there is free internal trade, a common tariff for external trade, as well as free movement of different factors of production among Member States. A common market thus removes the restrictions on the movement of capital and labour allowing the free movement of goods and services.\textsuperscript{86} The third and fourth stages of regional integration are forming an economic union\textsuperscript{87} and a political union\textsuperscript{88} respectively.

This thesis however comes from an economic integration perspective.\textsuperscript{89} In theory, according to Lee, certain conditions must exist for gains to be realised from economic integration and they include: harmonisation of macroeconomic policies, regional economic stability, and significant intra-regional trade, complementary industrial development of the Member countries, regional political stability and willingness to cede sovereignty to a supranational

\textsuperscript{82} Intra-trade among African countries is very low so much that in 2011 it stood at 10 per cent: WTO ‘Africa should trade more with Africa to secure future growth’ available at \url{http://www.wto.org/english/news_e/news12_e/ddg_12apr12_e.htm} (accessed 10 March 2017).

\textsuperscript{83} Hailu BM ‘Regional Economic Integration in Africa: Challenges and Prospects’ (2014) 8 Mizan Law Review 300.

\textsuperscript{84} Hailu BM ‘Regional Economic Integration in Africa: Challenges and Prospects’ (2014) 8 Mizan Law Review 300.

\textsuperscript{85} Hailu BM ‘Regional Economic Integration in Africa: Challenges and Prospects’ (2014) 8 Mizan Law Review 300.

\textsuperscript{86} Hailu BM ‘Regional Economic Integration in Africa: Challenges and Prospects’ (2014) 8 Mizan Law Review 300.

\textsuperscript{87} The Member States establish a single monetary authority which sets out harmonised fiscal and monetary policies including a single or common currency. See Lee MC \textit{The Political Economy of Regionalism in Southern Africa} (2003) 20.

\textsuperscript{88} This is the final stage for regional integration in which Member States become a single nation-state. National governments cede sovereignty over economic and social policies to a supranational authority establishing common institutions, judicial and legislative processes, including a common parliament. See UNECA \textit{Assessing regional integration in Africa I: Accelerating Africa’s integration} (2004) 10 available at \url{http://new.uneca.org/Portals/aria/aria1/Chap1.pdf} (accessed 11 March 2017).

\textsuperscript{89} Economic integration is a process that encompasses measures designed to eliminate trade barriers between different national States. See Lee MC \textit{The Political Economy of Regionalism in Southern Africa} (2003) 19.
body that has enforcement authority. From his perspective also, African countries are currently at different levels of development, macroeconomic policies are not harmonised and there are low levels of political stability, to say the least. Dlagnekov also argues along similar lines, stipulating that economic integration entails the coordination, harmonisation and ultimately the merging of the existing regional economic groupings to form a larger market. Central to this thesis is the aim of increasing intra-regional trade within the SADC to bring about economic gains. It is viewed that going forward, having a harmonised and cooperative system in terms of policies can deepen integration and further create trade. Having this system in play is largely dependent on the overall will of Member States as well as considering the economic demographics of the region and how its policies are created. Schmitt argues that a well-crafted trade bloc can raise efficiency and economic welfare in its Member countries by facilitating consumer choice and increasing the competition that producers face.

Irrespective of the way RI is defined or theorised, RI agendas are essentially aimed at addressing, directly and indirectly, the perceived or actual national interests of participating Members individually and collectively. It is deemed to be welfare producing to the extent that it creates more trade and from Lee’s viewpoint, increases production arising from specialisation, increased output arising from the better exploitation of scale, as well as effectiveness as a result of increased competition. Peculiar to the regions that will be discussed subsequently is the fact that they all adopt the Balassian Model of RI highlighted above. In their model of integration, movement of people, goods, capital and services are central to their goal of deeper integration.

1.2.2 International Trade

Trade is a concept that involves the exchange of goods and services between two entities. This concept of exchange transcends national borders and countries tend to carry out transactions in this case exchange goods and services with each other and this leads to the overarching concept of ‘international trade’. From an ordinary perspective, international trade is viewed as commercial dealings carried out between different states, multinational

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http://etd.uwc.ac.za/
organisations or individuals. From a dictionary perspective, international trade has to do with the ‘exchange of goods or services along international borders’. There are two basic forms mentioned by Sherlock and Reuvid in which trade occurs;

‘the first occurs when the receiving country itself cannot produce the goods or provide the services in question, or where they do not have enough and the second occurs when a country has the capability of producing the goods or supplying the services, but still imports them’.

These reasons for trade align with the theory of comparative advantage which will secure better revenue from goods and/or services, and result in more efficient production. Comparative advantage is viewed as the ability of a country to produce a specific good at a lower opportunity cost than its trading partners.

So by interpretation, international trade occurs because a receiving country does not have a particular good or service and has the capability of acquiring that good or service or the receiving country has a particular good or service but chooses to import from other places because it is cheaper and could bring about fair competition in the domestic market.

International trade is one activity that is carried out by all countries to different degrees, since no country is so self-sufficient that it can put up barriers and ignore the rest of the world. Countries can choose to trade in goods, which is the most popularly traded entity in the world and also in services which is a fairly new area in the trading sphere. In essence, trade law is more goal-oriented.

Furthermore, from the perspective of Garcia, trade law, in particular, is at the core of economic law, and is based on the efficiency model which aims at improving ‘the economic wellbeing of human beings through the facilitation of efficient exchanges.’ This is the central focus of this thesis ‘people’ and the need for a right to move freely towards furthering services supply within an integrated arrangement like the SADC. This is so because across

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trade and regional integration discourse, there is reference to people as factors of production alongside other, factors of production like capital and services. As will be seen subsequently delivery of services is driven by people.\textsuperscript{102}

1.2.3 Services

Services are viewed as things purchased by consumers that do not have physical characteristics. Along the same thinking, services have been described as `everything you cannot drop on your foot.'\textsuperscript{103} From an everyday practical perspective, as individuals, we consume services. Lovelock illustrates this point and highlights different instances in which individuals consume a service like `turning on a light, watching television, talking on the telephone, catching a bus, visiting the dentist, posting a letter, getting a haircut, refueling a car, writing a cheque or sending clothes to the cleaners.'\textsuperscript{104} As illustrated above, going with a colloquial thinking, different activities could easily be identified as a `service', but what exactly is a `service' has been a contentious issue and has been conceptually difficult to understand.\textsuperscript{105} So, there is no agreed definition of services as it has been an active area of debate and research among economists and marketing scholars.\textsuperscript{106} The Manual on Statistics of International Trade in Services (MSITS) has maintained\textsuperscript{107} this perspective of services as:

\begin{quote}
`a term that covers a heterogeneous range of intangible products and activities that are difficult to encapsulate within a simple definition. Services are also often difficult to separate from the goods within which they may be associated in the varying degrees'.\textsuperscript{108}
\end{quote}

However, the Manual acknowledges and gives credit to the System of National Accounts (SNA) 1993 perspective of the concept of a service which is:

\begin{quote}
`Services are not separate entities over which ownership rights can be established. They cannot be traded separately from their production. Services are heterogeneous outputs
\end{quote}

\textsuperscript{102} See chapter 1 section 1.2.3.
\textsuperscript{103} Public Citizens Lori Wallach and EU trade Commissioner Pascal Lamy Sound Off on GATS available at \url{http://www.citizenarchive.org/print_article.cfm?ID=10940} (accessed 14 July 2016).
\textsuperscript{106} Kayastha S ‘Defining Services and Non-Service Exchanges’ (2011) 3 Service Science 4 314.
produced to order and typically consist of changes in the condition of the consuming units realised by the activities of the producers at the demand of the customers. By the time their production has been completed they must have been provided to the consumers."  

This perspective rather outlines the universal characteristics of a service that would be highlighted subsequently in this discussion and which has formed a basis for understanding the concept of a service.

Rathmell in defining services says that ‘a service is an act, a deed, a performance, or an effort and when a service is purchased, the buyer incurs an expense.’ Hoffman and Bateson also adopt the same point of view on services because based on their understanding; services are, ‘deeds, efforts, or performances’. From Kayastha’s point of view,

‘implicit in this definition is that acts are performed after buyers and sellers finalise the deal, acts are performed by sellers or their agents, and acts are physical in nature and this definition can be called an acts-based definition of services.”

Another perspective in defining services is viewed as excluding the transfer of ownership. Judd adopts this approach in his definition of the concept. He defined services ‘as market transactions where the object of the market transaction excludes the transfer of ownership and title of any of a tangible commodity.’ In essence, despite parties paying or transacting for services, ownership cannot be transferred from the producer to the consumer of the service. Quinn and Gagnon also define services by exclusion. According to them, ‘services are actually all those economic activities in which the primary output is neither a product nor a construction.”

Grönroos defines a service as;

‘a process consisting of a series of more or less intangible activities that normally, but not necessarily always, take place in interactions between the customer and service employee

113 Kayastha S ‘Defining Services and Non-Service Exchanges’ (2011) 3 Service Science 4 314.
and/or physical resources or goods and/or systems of the service provider, which are provided as solutions to customer problems.\textsuperscript{118}

Notwithstanding these definitions, there is a common understanding that services is a process or an act and has certain unique characteristics.\textsuperscript{119} Services are often viewed to be ‘intangible,\textsuperscript{120} heterogenous,\textsuperscript{121} perishable\textsuperscript{122} and inseperable’\textsuperscript{123} Hill for instance defines a service as:

‘a change in the condition of a person, or of a good belonging to some economic unit, which is brought about as the result of the activity of some other economic unit, with the prior agreement of the former person or economic unit.’\textsuperscript{124}

From Welsum’s perspective, this definition points to some specific nature and characteristics attributed to a service,\textsuperscript{125} traditionally considered to be non-storable, intangible and inseparable.\textsuperscript{126} She further illustrates that:

‘the non-storability aspect was seen as having two important implications. First, it meant that the service had to be consumed at the same time as it was produced, and secondly, the producer and the consumer had to be in the same location.’\textsuperscript{127}

However, this definition can be subject to some criticism. For instance, this definition fails to describe the many peculiarities of the various services, for example watching films and television programmes do not require any direct interaction between producer and consumer.

\textsuperscript{118} Kayastha S ‘Defining Services and Non-Service Exchanges’ (2011) 3 Service Science 4 314.
\textsuperscript{120} Services are immaterial and not palpable. That is they cannot be seen, touched, smelt, touched or tasted. See Moeller S ‘Characteristics of Services-a new approach uncovers their value’ (2010) 24 Journal of Science Marketing 361.
\textsuperscript{121} Services are difficult to standardize and tailored to customer needs therefore the degree of variation is very great. See Moeller S ‘Characteristics of Services-a new approach uncovers their value’ (2010) 24 Journal of Science Marketing 363.
\textsuperscript{122} It is impossible to store services in an inventory implying that it is not only difficult to trade services across space but also difficult to trade across time.
\textsuperscript{123} Services usually require simultaneous production and consumption.
Stern and Hoekman adopt a distinct approach to explaining a service. Rather than propose a definition, they provide a generalised overview of services, somewhat similar to the GATS modes discussed subsequently in this chapter. They characterised services into four broad categories and each are further subdivided by distinguishing services that are related to goods from services that are independent of goods.\textsuperscript{128} The categories are:

\begin{itemize}
    \item[a)] ‘No movement of providers or demander (separated services) which can be considered to be ‘pure’ or independent services insofar as they can in principle be traded just like goods, without there being any necessity for a foreign presence. So the consumer and the producer are not required to move.
    \item[b)] Demander located services where physical proximity is necessary for the supply of services. So the producer has to move to the consumer.
    \item[c)] Movement of demanders only (provider located services), here the services are provided in the country in which providers are physically located. So the consumer has to move to the producer
    \item[d)] Movement of providers and demanders (footloose, non-separated services), here both producer and consumers move.’\textsuperscript{129}
\end{itemize}

Having seen some scholarly discussion on the concept of services or a service, from a practical point of view, having a concrete definition of services would be problematic. The GATS, the WTO key document regulating international trade in services surprisingly does not clearly define a service,\textsuperscript{130} rather it adopts a more generalised approach or a definition by inclusion and exclusion as it specifically provides for what should not be categorised as a service based on Article 1.3 of the GATS.\textsuperscript{131} Article 1.3(b) of the GATS states that services are:

‘any service from any sector except those services that are supplied in the exercise of governmental authority.’\textsuperscript{132}

\textsuperscript{131} Service includes all services with the exception of those supplied in the exercise of governmental authority. The latter means any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers. See Article 1.3(b) & (c) of the GATS 1995.
\textsuperscript{132} Article 1.3(b) of the GATS 1995.
From the GATS perspective, 'a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.'\textsuperscript{133} In terms of this definition, if a service area falls within one of the service sectors that the WTO has identified, and if such service is made available in the exercise of governmental authority on a non-commercial or non-competitive basis then it is not considered a service for purposes of the agreement. This provision gives a very broad scope to the GATS with respect to the services potentially covered by its disciplines.\textsuperscript{134}

Services cannot be restrained to mean one thing. This is so due to the very nature of a service which is intangible and also uncountable and also because service is an evolutionary concept, influenced by technological advancements. This point of contention was highlighted by Abu-Akeel as he mentions that:

‘there is no practical purpose to be served by an attempt to define services given the enormity of tradable services and the continuous change in the description, content, and characteristics of any given services due to constant technological advances.’\textsuperscript{135}

Despite this difficulty, common to all the above definition of a service given is the in-existing nature of a service. Services are understood to be an act or performance offered by one party to another\textsuperscript{136} as well as intangible, heterogeneous, and perishable and usually require simultaneous production and consumption.\textsuperscript{137} Having a pragmatic understanding of the concept, incorporating several aspects of services been an act as well as involving all the characteristics would be a useful approach. Therefore, for the purpose of this thesis, to better grasp the essence of services, a holistic view of the concept would be adopted. Services would be seen as something that varies to consumer needs, is intangible, in other words, we cannot hold a service in our hand, smell it or break it in two and does not normally result in ownership. The concept would also recognise the agreed characteristics which are perishability and simultaneity of production and consumption.

\textsuperscript{133} Article 1.3(c) of the GATS 1995.
\textsuperscript{135} Abu-Akeel AK ‘Definition of Trade in Services under the GATS: Legal implications’ (1999) 32 Geo Wash. J. Int’l & Econ 190-191.
\textsuperscript{137} Cattaneo C & Others Assessing the Potential of Service Trade in Developing Countries in Cattaneo C and Others International Trade in Services: New Trends and Opportunities for Developing Countries 1-28 7.
In looking at services, this thesis specifically comes from the perspective towards ensuring
easier movement of natural persons and views natural persons as the carriers and providers of
this intangible and perishable commodity known as a service. Movement of these services
requires human movement. Consequently, people can be entities or seen as mechanisms for
the realisation of a particular goal like service delivery. Therefore, the unrestricted
movement of this entity across a wide range of services sectors like construction,
engineering, repair and maintenance, health, legal, and accountancy services, among others,
can arguably, bring about deeper integration in SADC. For this to be attained people must
first have the right to move generally without restriction.

1.2.3.1 Importance of Services.

The services sector encompasses a wide range of areas and activities, ranging from traditional
areas such as transport, communication, tourism and more dynamic areas like software,
environmental and educational services. Service trade in these areas are presently on the
rise in the global commerce and are contributing significantly to better economic growth
worldwide. To highlight this rising trend, Mattoo for instance states:

‘many Countries allow foreign investments in newly privatised and competitive markets for
key infrastructure services like energy, telecommunications and transport, people travel
abroad to consume tourism, education and medical services, and to supply services ranging
from construction to software development.

In essence, foreign providers can bring the skills, and experience to recipient countries that
can be used intensively in their services sectors like education, tourism and telecommunications to mention a few.

Furthermore, from a statistical standpoint, based on the International Standards Organisation
(ISO) news, it was reported from a World Bank perspective that ‘services account for some
75% of Gross Domestic Product (GDP) and employment in most developed countries.
Sauve and Stern propose that ‘services account for more than 70% of production and

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employment in advanced industrial societies, levels that many of the developing world’s emerging economies are today fast approaching. From Chanda’s perspective, services output and employment have also witnessed rapid growth in developing countries during the past two decades. And in some developing countries, services today constitute over 50% of the economic activities, significantly more than traditional sectors such as agriculture. Coming more closer to home and in citing the SADC as an example of this ongoing growth, services trade is of economic importance as ‘they provide the bulk of employment and income in many countries and they are major contributors to GDP and trade within the region and in 2006, the services sector contributed an average of 50 per cent to the region’s GDP.’

So, the ongoing contribution and importance of services cannot be overemphasised. By inference, services trade can provide an alternative engine of growth economically, enabling the developed and the developing world to further economic development alongside trading in goods, manufacturing and even agriculture. So, trade in services has been growing consistently, several benefits accompany a liberalised services trade and one of the main sources of services supply is through movement of people. It is therefore vital that one gets to understand the frameworks that guide the movement of people so as to ease the process towards services supply.

As highlighted above, the movement of people can influence all other freedoms to achieve a common market. It is critical to the supply of services, even the movement of labour and capital. If people are able to move with little or no restrictions, there will be easier service supply by natural persons. The services sector is important since trade in services has exponentially outstripped trade in goods over the last decade. At the same time the services export can be viewed as a viable alternative to the export of goods. From the aforementioned, any region that creates an enabling environment for the free movement of people invariably paves the way for the free movement of services. Movement of people can therefore be seen as a legitimate tool for enhancing the skills, age and sectoral composition of national and regional labour markets. Circular movement of persons can become an essential feature in

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meeting economic and labour market challenges because when people move from one region or country to another, they carry with them their skills and know how.

1.2.4 Movement of People

Movement of persons is a global and natural phenomenon. It is viewed generally as the movement of people from one country to another. Movement of people is seen as the ability of individuals, families or group of people to choose or change their place of residence. It is a universal principle that prompts the movement of people from areas of social and economic distress to those with better economic opportunities. The ‘free movement of persons’ concept is inherent to an article in the Universal Declaration of Human Rights (UDHR) of 1948. Article 13 states that:

‘Everyone has the right to freedom of movement and residence within the borders of each state and the right to leave any country, including his own, and to return to his country’.

This underscores the right to emigrate and move circularly without any inhibition. Inherent in this provision is the outflow of people and underpins an international form of voluntary movement. As argued by Hollifield, the necessary conditions for people to move may be social and economic, but the sufficient conditions in which people move are also political. From a regional integration and trade perspective, the rationale for the movement of persons is essentially economic. This proposition is best supported by the development and evolution of the free movement provisions within the EU as will be seen in chapter 3 of this thesis. The EU is arguably one of the earliest and still surviving regional integration schemes, which serves and will serve as a model for SADC integration scheme in this thesis. Essentially, the law from the EU on the free movement of persons recognises the right of entry, residence and establishment. Such movement based on earlier discussion can be a propeller of economic development, as it can ease and reinforce service delivery, diversify the labour force, which are also key factors of production.

150 Nwonwu F ‘The Neo liberal Policy, Free Movement of People and Migration’ 2010 40 African Insight 1 149.
151 Article 13 of the Universal Declaration of Human Rights 1948.
153 See chapter 3 section 3.2.
154 See chapter 3 section 3.2.3.
In discussing movement of people in from an African perspective the United Nations and the Economic Commission for Africa highlights that free movement:

‘consists in enabling REC nationals to move freely in all the REC Member states (and thus to exempt them from needing a visitor’s visa or residence permit), allowing them to reside in a Member state other than their country of origin and eventually to establish in one country and exercise an employment there or undertake commercial and industrial activities.’\textsuperscript{155}

In the context of this thesis, movement of people will be viewed from the perspective of SADC citizens moving from their own country to another country with the ability to choose their place of residence as well as establishment within the context a comprehensive regional law. Such movement will be general, covering all people to better influence specific categories of persons like service providers that can aid in economic development and deeper regional integration. In essence, people are exempted from needing a visa for entry and allowed to reside in another country and eventually to establish themselves in that country or undertake any commercial and industrial activities\textsuperscript{156} within the scope of a comprehensive regional law. It is at this point of establishment citizens of Member States get to supply services. Therefore, movement of people within the SADC will be interpreted in a much broader term with the aim of asserting it as a fundamental right of SADC citizens to move and partake in economic activities in another country and push towards a common market. So at the basic level, movement of persons will involve removal of visa restrictions for short term visits. At a deeper level, this movement will involve gradually fostering the right to reside and establishment\textsuperscript{157} of SADC citizens and having a harmonised migration policy, procedure and travel documentation. Adopting this creates a community of SADC citizens to move with less restriction. People and persons will be used interchangeably throughout this thesis viewed broadly and will be recognised as citizens of Member states of regional groups.

That being said, what is contentious to attain this level of movement in the SADC is an incomprehensive regional law, restrictive nature of national laws and a strong hold on to national sovereignty and this will be explored further in the next heading.


\textsuperscript{156} See chapter 1 section 1.2.

\textsuperscript{157} The right of establishment falls under Mode IV the supply of the services by a supplier of a Partner State, through the presence of a natural person of a Partner State in the territory of another Partner State.
1.3 Problem Statement

In the SADC, to further regional integration, creating a Free Trade Area (FTA) was aimed to be achieved by 2008. Subsequently, a Customs Union by 2010, a Common Market in 2015, a Monetary Union in 2016 and a Single Currency in 2018. These integration targets have not been met in accordance with the timetable that was originally agreed upon under the Regional Indicative Strategic Development Plan (RISDP). For instance, the plan envisaged the establishment of the FTA by 2008 however; maximum tariff liberalisation was only attained in early 2012. In consequence, meeting other integration milestones like forming a Customs Union and the Common Market are being delayed.

A Common Market is a ‘Customs union, with harmonised regulation and policies on the free movement of factors of production’ such as goods, capital, people and services. Being a common market exceeds the scope of GATS in the sense that it does not just guarantee free movement of services but also ensures holistically, people the carriers of such services can move freely under a harmonised system. As it stands, there is no consensus and ratified agreement within the SADC region for regulating the movement of people. This thesis therefore argues that for successful and stable deeper regional integration, efforts must be geared towards ensuring free movement of people with the aim of furthering regional trade and development,

Furthermore, in looking at the international framework that permits movement of persons in chapter 2 of this thesis, the GATS does not cover natural persons seeking access to employment hence, regional groups have rules intending to regulate the movement of people for the purpose of residence and establishment. So countries are left to their own devises to address movement of people seeking employment. Regionally, despite adopting the Article V

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161 A Customs Union is a Free Trade Area with a Common External Tariff.


164 See chapter 1 section 1.1.
mandate of the GATS, not a lot of effort has been invested by Member States of the SADC in ensuring that free movement of persons is achieved.\textsuperscript{165} Looking at the SADC Treaty, Article 5(2)(d) requires the SADC to ‘develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally, among Member States.’\textsuperscript{166} This SADC Treaty does not comprehensively regulate the movement of people. The Protocol on the Facilitation of the Movement of People was adopted as a policy measure to progressively eliminate obstacles to free movement of people based on Article 5(2)(d) with no ratification to date. The SADC Protocol on Trade in Services as mentioned in the introduction of this chapter has also been adopted and it also does not comprehensively regulate the movement of natural persons and is also not in operation.\textsuperscript{167}

Within the region, much has been said about attaining economic development, laws and policies as seen above have been developed with regard to ensuring the movement of people. However, regulation of the movement of people originates from bilateral agreements and national laws which are restrictive towards promoting easy movement of people and labour.

In analysing existing provisions allowing the movement of people, rather than elaborating and unifying services supply through the movement of natural people, Article 17 of the SADC Trade in Services Protocol for instance promotes the domestification of national laws as it provides:

‘Nothing in this Protocol shall prevent a State Party from applying its national laws, regulations and requirements regarding entry and stay, work, labour conditions and establishment of natural people provided in doing so, it does not apply them in a manner as to nullify or impair the benefits accruing to another State party under the terms of a specific provision or specific market access or national treatment commitment under this Protocol.’\textsuperscript{168}

From this provision, the Protocol has no influence on national laws, leaving it as the basis to regulating entry, residence and establishment of SADC citizens in the territory of another Member State.

Article 14(d) in regulating market access of services stipulates that:

\textsuperscript{165} See chapter 4 section 4.2.
\textsuperscript{166} Article 5(2)(d) of the Treaty of the Southern African Development Community (SADC) 1992.
\textsuperscript{167} See chapter 1 section 1.1 and chapter 4 section 4.3.2.
\textsuperscript{168} Article 17 of the SADC Protocol on Trade in Services 2012.
‘In those sectors and modes of supply where specific commitments are undertaken pursuant to Article 16, in line with individual countries levels of development and subject to any conditions and limitations stipulated in the State parties list of commitments, no State shall adopt or maintain limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or a requirement of an economic needs test.’

Furthermore, just like the GATS, the SADC Protocol on Trade in Services does not regulate entry for the purpose of seeking employment. In terms of Article 17(2) the Protocol stipulates that ‘this Protocol shall not extend to measures affecting natural people seeking or taking employment in the labour market of a State party or confer a right of access to the labour market of another State party’.

Current trend is that national interests, as opposed to those of the region seem to be at the forefront of migration management within the SADC. Looking at some SADC Member State immigration laws, Botswana which has not signed or ratified the Facilitation Protocol, under Section 19(4)(c) of their Immigration Act of 1966 states that ‘in determining an application for a resident permit, the Board shall have primary regard to the interests of Botswana.’ Also, in Namibia though a signatory of the Facilitation Protocol under Section 26(3)(e) of their Immigration Control Act provides that a board;

‘Shall authorise a permanent residence visa provided the applicant does not and is not likely to pursue any employment, business, profession or occupation in which a sufficient number of people are already engaged in Namibia to meet the requirements of the inhabitants of Namibia.’

The SADC can better integrate regionally if there is a comprehensive law that shifts away from giving national laws control over migration rules and allows citizens the right to move freely, reside and establish themselves. Having a regional Facilitation and Trade in Services Protocols promoting a diversified approach as opposed to an integrated approach hinders

169 Article 14(d) of the SADC Protocol on Trade in Services 2012.
170 Article 17(2) of the SADC Protocol on Trade in Services of 2012.
economic opportunities that are associated with movement of people\textsuperscript{174} for service growth. This diversified approach reflects a viewpoint that regionally, Members are unwilling to subject their immigration policies to a single regulatory documentation aimed at liberalising trade. So, in essence, diversity promotes restrictiveness and complexities of dealing with the numerous national immigration laws first affects the region’s trade potential and opportunities, and this is further exacerbated by the absence of a harmonised system. Furthermore, this creates a struggle for the attainment of free access of natural people to Member States, and more broadly deeper intra-SADC trade is significantly weakened.

Trade is and will continue to make tremendous contribution to many developing countries and if it is a vehicle for growth and development, then removing the non-tariff barriers that inhibit it can only help increase its impact.\textsuperscript{175}

Despite having a Protocol on the Facilitation of the Movement of People one still has to ask, what possible reforms can be taken at a regional level to reach a harmonised system implementable by majority of the SADC Member States to ensure full realisation of the movement of people in Southern Africa?

This thesis would be guided by the following sub questions which would assist in answering the primary research questions. These sub-questions are as follows:

- What are the standards set by international law regarding the scope and coverage of the movement of natural people?
- How have other regional groups (EU, ECOWAS and the EAC) approached the movement of people over time? This basically analyses the legal frameworks of these groups with regards to the movement of people.
- How can the SADC reform or optimise its legal framework specifically on the movement of people to facilitate attainment of the SADC goal of deeper integration?

1.4 **Significance of Study**

Mbeki argues that after centuries of capitalism, few people cannot claim not to know what must be done to develop a modern economy. The formula boils down to four requirements,

one of which is the country must have a pool of workers with no choice but to sell their labour in order to live.\textsuperscript{176} Whilst this is accurate, the statement has challenges, the constant need to sell labour or services potentially results in brain drain to some countries and this can in effect lead to an influx of people in the labour market of another. Hence, there is a need for people to constantly move around with ease for purposes of selling such skill or service; this is basically suggestive of a form of circular movement of people. The regular movement of people to afford their services is an important issue for both developed regions and a developing region like the SADC. The changing demographic profile in countries, together with a rise in ageing populations, diminishing workforces and growing skills gaps in key sectors, undoubtedly calls for less restrictive movement of people to fill the gaps where skills are lacking and maintain economic viability. As such, the movement of natural persons constitutes a key to further integration and development. Having a harmonised system towards regulating the movement of people can be beneficial to a region like the SADC. So there’s a need for countries to open up their borders to people for economic reasons like supplying a service.

Highlighting the importance of supply of services in particular, Mattoo for instance illustrates that a liberalised trade in services in developing countries can bring about enhanced competition, it creates employment and it enhances productivity.\textsuperscript{177} Trade in services particularly can help create opportunities for countries to expand their outputs of services in sectors where they have a comparative advantage, thus creating jobs, contributing more to their GDP and generating foreign exchange.\textsuperscript{178} This can be especially important for those countries that are relatively landlocked or have poor infrastructures.\textsuperscript{179} Despite this positivity of trade in services illustrated in preceding paragraph, the utilisation of service trade particularly through movement of people has remained largely low and untapped by developing countries especially within the SADC. It is paramount to utilise service trade by ensuring unrestricted movement of people for easier supply because it can enhance economic growth and bring about poverty reduction.\textsuperscript{180} Giving that the SADC region intended to

\begin{flushleft}
\textsuperscript{180} Cattaneo C \& Others Assessing the potential of Service Trade in Developing Countries in Cattaneo C and Others \textit{International Trade in Services: New Trends and Opportunities for Developing Countries}1-28 9.
\end{flushleft}
become a common market by 2015 whereby factors of production was envisioned to freely move within the region, it becomes imperative to research current SADC laws and regulations, measures and practices towards the free movement of persons\textsuperscript{181} and how such laws should be improved or if a different approach can be adopted to deepen integration.

As such, this thesis gives detailed insight on the importance of having a comprehensive law on migration in furthering regional economic integration. It has been proved in other successful Regional Economic Communities (RECs) such as the EU, ECOWAS and EAC to a lesser extent that if a region is more integrated and harmonised, the level of intra-regional trade would also be higher.\textsuperscript{182} This study will seek to draw lessons from these regional groups on how to push towards deeper intra-SADC integration.

The significance of this study will lie in its contribution to the academic discourse aimed at providing insight into enhancing the integration process within the SADC.

\subsection*{1.5 Objective of Research}

The main research objective is to advocate for an optimised legal framework towards regulating the movement of people to enhance intra SADC trade in services. This thesis seeks to argue for a revised system of rules to further regional integration. Furthermore, this research aims to compare and analyse existing labour migration policies and frameworks in key regions particularly, the EU, the ECOWAS and the EAC.

\subsection*{1.6 Research Methodology}

The thesis consists of a desk-top analysis of primary sources, such as international instruments governing Trade in Services and labour migration as well as secondary sources such as textbooks, journal articles and internet sources. Also, the study uses a legal comparative method in other to find solutions to the SADC challenges in realising deeper integration. This method is useful in addressing any interpretive challenges pertaining to free movement of people and labour or the legislation around it. The method compares different regional groups’ approach to enhance trade in services with specific reference to the free

\textsuperscript{181} Saurombe A ‘Regional Integration Agenda for SADC “Caught in the winds of change” Problems and Prospect’ (2009) \textit{Journal of International Commercial Law and Technology} 4 103.

movement of people and labour. The selected groups are the EU, \(^{183}\) ECOWAS, \(^{184}\) and the EAC. \(^{185}\)

Nshimbi highlighted the fact that:

‘the EU has made the most significant strides towards achieving total freedom of movement of people and labour in the region and also exhibit a high level of implementation of protocols and legislation and policies relating to the movement of people.’ \(^{186}\)

Having this region with an overwhelming wealth of experience is a good comparator to improve the current SADC approach which faces issues of implementation of Protocols.

The ECOWAS in brief has a Protocol on the Free Movement of People, Residence and Establishment currently ratified by majority of Member States using a phased implementation approach \(^{187}\) and it is viewed as the ‘most ambitious and advanced free movement scheme within the African continent.’ \(^{188}\) Indicative of this achievement, ‘the ECOWAS common passport is being used by six Member States and this passport affords ECOWAS Members to travel to any country of the region without a visa.’ \(^{189}\)

The EAC also is advanced and one of the most dynamic regions in the continent in terms of integration. \(^{190}\) The region in terms of the EAC Common Market Protocol has a common passport in operation utilised by three of the five Member States allowing multiple entries and exits of citizens of Member States for six months. \(^{191}\) The Protocol ‘introduces a regional framework for creating a stable and progressive policy environment to govern the free

\(^{183}\) See chapter 3 section 3.2.
\(^{184}\) See chapter 3 section 3.3.
\(^{185}\) See chapter 3 section 3.4.
movement of people. The codifying of processes and requirements in the Protocol means that standards are being set for all partner states to follow.\textsuperscript{192}

1.7 Chapter Outline

Chapter 1: Introduction and background.

This chapter gives a general overview of the whole research. It presents a general background to the research problem in order to vividly understand the significance of the research. The chapter also contains the premise of the research, offering definitions of key concepts, research methodology as well as other formal introductory aspects to this thesis such as structure that will be followed holistically in this thesis.

Chapter 2: International Laws Regulating the Movement of People.

The chapter discusses the relevant international organisations and international law principles that inform the movement of natural persons. In doing that, the chapter examines how the movement of people is influenced and regulated from a human rights, labour and trade perspective. The chapter further discusses the influence regional law has on the concept with key focus on the AU.

Chapter 3: Comparison between the EU, EAC and ECOWAS.

This chapter goes deeper into the discussion on different regional approaches to regulating the movement of persons. The chapter investigates and analyses the EU, ECOWAS and the EAC. The comparison analyses the relevant legal frameworks of these regions and highlights certain similarities and distinctions between them toward attaining the movement of people. The chapter further highlights the problems and challenges, both current and old encountered by these regional groupings to reach an optimised regulatory model for the movement of people.

Chapter 4: Movement of people in the SADC with focus on South Africa.

The chapter examines how the SADC as a region has approached the movement of people. It presents a detailed analysis of SADC Protocols influencing the movement of persons to highlight the loopholes that exist within the current framework. Furthermore, South Africa as

a regional powerhouse is discussed to elucidate the current trend of migration governance with no key influence from a comprehensive regional law.

Chapter 5: Reassessing the SADC Approach towards the Movement of Persons.

The chapter builds on the discussion in Chapters 3 and 4 to present a different approach as a model towards legal reforms to the current SADC system. This is done in order to create a more optimised system and create a platform towards a harmonised law.

Chapter 6: Conclusion and Recommendation

This chapter provides a conclusion to the thesis. Additionally, the chapter draws on the discourse in Chapter 5 and provides practical recommendations for improvement of the SADC intra-regional trade through the free movement of people and labour.
CHAPTER 2

INTERNATIONAL LAWS REGULATING THE MOVEMENT OF PEOPLE

2.1 Introduction

This chapter discusses the existing international and African policy instruments and normative laws that regulate the movement of people. To get this chapter into perspective, as will be seen later under international law, one has a right which is not absolute to leave (emigrate) his or her country of birth or residence and the inability to leave a country amounts to deprivation of liberty.\textsuperscript{193} Conversely, one has no right to enter the territory of another State.\textsuperscript{194} It is therefore argued that there is no existing right for aliens to enter the territory of a foreign State except permitted by Treaties.\textsuperscript{195} That notwithstanding, movement of people is a natural phenomenon peculiar to human beings. Movement in the context of this chapter and the thesis overall will be viewed as individuals moving from their own country to another.\textsuperscript{196}

The chapter starts with a discussion on the current legal framework towards regulating movement of persons. From the discussion, it will be seen that such laws are scattered throughout a wide array of principles and rules belonging to numerous branches of international law including human rights law, labour law, trade law and each subset will be discussed subsequently. In looking at these laws, the discussion starts from a human rights perspective. Thereafter, a labour and an economic perspective will be looked at focusing on the International Labour Organisation (ILO) and the GATS. Lastly, the African Union (AU) and the continental viewpoint of movement of people will be discussed. Looking at the AU, key policies influencing migration management will be discussed as well as the African Continental Free Trade Area (AfCFTA) and the Protocol relating to free Movement of People, Right of Residence and Establishment both of which aim at creating a single market for the movement of people and services. This chapter sets a basis for the analysis of different approaches to free movement of people in the subsequent chapters.

\textsuperscript{194} Cornelisse G Immigration Detention and Human Rights: Rethinking Territorial Sovereignty ed (2010) 175.
\textsuperscript{196} See chapter 1 section 1.2.4.
2.2 Influence of International Law on the Movement of People

This thesis comes from the perspective that movement of persons can offer means to ensure easy service supply and increased availability of skills where needed to spur economic development. This is crucial due to the potential of exploiting diverse professional and technical competencies in services supply regionally. It is the practical means for expanding regional trade and commerce throughout the world and particularly in a region such as the SADC, specifically towards locally-produced service suppliers.

Therefore, what is sought to be achieved in this section is a discourse on the rules and principles governing the movement of persons between States, gathering all the relevant norms that apply to individuals leaving their own country and entering another one and/or staying therein.

The international norms that guide this movement of natural persons will now be looked at.

2.2.1 International Human Rights Law on Movement of People

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.\(^\text{197}\) Several international instruments touch upon international movement of people first from a human rights perspective. They provide for movements within States,\(^\text{198}\) 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.\(^\text{199}\) Article 13 of the UDHR,\(^\text{200}\) as referred to in the previous chapter,\(^\text{201}\) 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. In effect, the decision of whether a person is allowed to enter another

\(^{197}\) Betts A Global Migration Governance 1 ed (2011) 2.


\(^{200}\) 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’

\(^{201}\) See chapter 1 section 1.2.4.
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.\textsuperscript{202} The ICCPR has been ratified by 168 countries worldwide.\textsuperscript{203} Citing Article 12 of the ICCPR, it provides that

\begin{quote}
‘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’.\textsuperscript{204}
\end{quote}

Having this provision in place, constituted an important human right and one which was an essential part of the right to personal liberty.\textsuperscript{205} However, like most human rights, the right to leave is not absolute and is restricted under Article 12(3).\textsuperscript{206} 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.

Still from a human rights perspective but from a continental standpoint, the African Charter on Human and Peoples’ Rights of 1981. This charter is a regional human rights instrument adopted by the then Organisation of African Unity (OAU) now the AU.\textsuperscript{207} In the year 1999, the African Charter attained full ratification by 53 Members of the then OAU\textsuperscript{208} but the AU has extended Membership to 54 with the inclusion of South Sudan and this country is yet to sign and ratify the charter.\textsuperscript{209} In looking at the charter, it makes provision for civil and political rights as well as economic rights. One of such rights provided for in the charter stipulates under Article 12(1) that:

\begin{quote}
\textsuperscript{204} Article 12.1 and Article 12.2 of the International Covenant on Civil and Political Rights of 1966.
\textsuperscript{205} Beyani C Human Rights Standards and the Movement of People within States 1ed (2000) 2.
\textsuperscript{206} 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.
‘individuals have the right to freedom of movement and residence within the borders of a state and the right to leave any country, including their own, and to return to their country provided he abides by law.’

These aforementioned provisions 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. 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 regards to the internal laws they propose. An example was illustrated in the earlier chapter of some Member States under the SADC and will be further discussed in the next chapter.

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. 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 and the World Trade Organisation’s (WTO) General Agreement on Trade in Services (GATS) which regulates trade in services, the presence of natural persons (one of four modes of service supply).

Despite Panizzon’s view, the International Labour Organisation (ILO) proposes other policies that deal with issues relating to the movement of people, specifically migrant workers. These laws include the ILO Multilateral Framework on Labour Migration which provides for non-

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210 Article 12(1) of the African Charter on Human and Peoples Right.
211 See Chapter 1 section 1.2 and Chapter 3 section 3.4.
213 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.
binding principles to protect migrant workers.\textsuperscript{215} Supplemented this framework, the ILO also has some legally binding Conventions that are relevant to the protection of migrant workers like the ILO Convention on Migration for Employment (1949),\textsuperscript{216} and the Convention on Migrant Workers.\textsuperscript{217}

A discussion on these various international instruments follows below.

\textbf{2.2.2 \textit{The International Labour Law on Movement of Persons}}

The ILO functions as an organisation keen on creating coordinated policies and programmes that are directed at resolving labour issues on a global scale. One of its main roles is to create and adopt international labour standards that must be followed by its Members.\textsuperscript{218} Also, the main aim of the ILO based on its Decent Work Agenda are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.\textsuperscript{219} This makes it easier for the ILO to aid its Member States to solve social and labour problems affecting these countries.

The ILO is governed by its Constitution that was enacted in 1919 as part of the Treaty of Versailles.\textsuperscript{220} The Constitution is regarded as the first attempt to construct a universal organisation to address the social and economic problems that the world was facing at that time.\textsuperscript{221} The ILO’s Constitution laid out the rationale for the organisation, spelled out its aims and purposes as well as its detailed design and also identified certain methods and principles for regulating labour conditions that are of special and urgent importance which all industrial communities should endeavor to apply so far as their special circumstances will permit.\textsuperscript{222}

\begin{itemize}
\item \textsuperscript{215} ILO International Migration Programme \textit{ILO Multilateral Framework on Labour Migration; Non-binding principles and guidelines for a rights-based approach to labour migration} (2006) 4.
\item \textsuperscript{216} ILO Migration for Employment Recommendation Convention, (Revised), 1949 No 97.
\item \textsuperscript{217} ILO Convention on Migrant Workers Recommendation, 1975 No. 151.
\item \textsuperscript{218} Mbah SE ‘Core Conventions of the International Labour Organisation (ILO): Implications for Nigerian Labour Laws’ (2011) 2 International Journal of Business Administration 2 130.
\item \textsuperscript{220} Mbah SE ‘Core Conventions of the International Labour Organisation (ILO): Implications for Nigerian Labour Laws’ (2011) 2 International Journal of Business Administration 2 129.
\item \textsuperscript{222} Article 19 of the ILO Constitution of 1919.
\end{itemize}
The ILO is also committed to setting standards for the protection of migrant workers. The ILO expressly addresses migrant labour issues through the ILO’s Multilateral Framework on Labour Migration of 2005\textsuperscript{223} which is non-binding Convention on Member States.\textsuperscript{224} Also, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW) of 18 December 1990 and Migration for Employment Convention (Revised), 1949 (No. 97).\textsuperscript{225} These frameworks do not expressly regulate the movement of natural persons nonetheless, it is important to discuss them because of the influence they have towards movement of a category of persons in this context, economic migrants.

\textbf{2.2.2.1 ILO Convention on Migration for Employment of 1949}

The ILO Migration for Employment Convention, regarding the rights of migrant workers, was adopted in July 1949 and entered into force on January 22, 1952.\textsuperscript{226} Unlike the Multilateral framework, the Convention for Employment is binding on Member States upon ratification.

The Convention covers the recruitment and working conditions, standards for migrant workers.\textsuperscript{227} It establishes the principle of equal treatment of migrant workers and nationals with regard to laws, regulations and administrative practices that concern living and working conditions, remuneration, social security, employment taxes and access to justice. This can be seen in terms of Article 6.1 which provides that:

\textquote{each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters.}\textsuperscript{228}

Based on Article 11.1 of this Convention,

\textsuperscript{223} ILO International Migration Programme \textit{ILO Multilateral Framework on Labour Migration; Non-binding principles and guidelines for a rights-based approach to labour migration} (2006).
\textsuperscript{225} ILO Migration for Employment Recommendation Convention, (Revised), 1949 No 97.
\textsuperscript{227} ILO Convention on Migration for Employment 1949.
\textsuperscript{228} ILO Convention on Migration for Employment 1949.
‘For the purpose of this Convention the term migrant for employment means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.’

Implicit to this provision is that individuals can move from their country to a host country for labour purposes, with the aim of securing employment. The next heading looks at the GATS which also does not regulate movement of people but allows for the liberalisation of movement of people to supply services in another country. Within the SADC to date, only Madagascar, Malawi, Mauritius, Tanzania and Zambia has ratified this Convention.

2.2.2.2 The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPRMW) 1990

The ICPRMW Convention is a very comprehensive international tool promoting the human rights of migrants. The Convention promotes a degree of convergence with the human rights norms discussed above and several provisions reiterate the civil and political rights in the ICCPR alluded to above. The strength of the Convention lies in enabling all those people, who qualify as migrant workers under its provisions, to enjoy their human rights regardless of their legal status. Sadly, its scope is limited because out of the 193 United Nations (UN) Member countries, the Convention has been ratified by only 46 States and signed by 35. Within the context of the SADC, only Lesotho, Mozambique and the Seychelles have ratified this Convention.

The Convention provides the first international definition of the term migrant worker, which is defined under Article 1 as ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.’ Article 8 provides

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234 Article 2 of the ICPRMW.
‘Migrant workers and Members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognised in the present part of the Convention.’

Article 39(1) just like the ICCPR under Article 12 further reinstates this position towards easy movement of persons and choice of residence as it provides that ‘Migrant workers and Members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.’ A remunerated activity is not defined by this convention. By interpretation, anyone who seeks a remunerated activity in the country of another is free to leave their state of origin which is their country of birth to work or supply a service or work in another country. Implicit to this right, is the fact that individuals are permitted to move from one place to another, without any unjustified restriction.

However, this Convention has no bearing in regulating the right of entry of these categories of people. That exclusively is determined by the host country. Just as the host country determines who enters and stays in their countries, Article 52(2) of the Convention specifies instances where restrictions to this right of movement whilst in the host country can be justified. Article 52(2)(a) specifically provides that

‘for any migrant worker, a state of employment may restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation.’

This is an aspect that is largely capitalised upon by some States and in their national laws based on the wording used in their legislation particularly within the SADC as will be discussed in the next chapter.

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235 Article 8(1) of the ICPRMW.
236 Article 39(1) of the ICPRMW.
237 Article 52(2)(a) of the ICPRMW.
238 See discussion on Chapter 4 section 4.4 on the domestic approach to Movement of People, citing South Afric as an example.
2.2.2.3 The ILO Multilateral Framework on Labour Migration 2005

The ILO’s Multilateral Framework on Migration contains non-binding principles and guidelines for labour migration\textsuperscript{239} and deals with issues pertaining to effective management of labour migration, protection of migrant workers, as well as issues pertaining to migration and development.\textsuperscript{240} As a key guideline towards allowing the movement of persons, the framework asserts that:

“All States have the sovereign right to develop their own policies to manage labour migration. International labour standards and other international instruments, as well as guidelines, as appropriate, should play an important role to make these policies coherent, effective and fair.”\textsuperscript{241}

In consequence, the Framework in adopting a rights-based approach towards regulating the movement of labour does so within a guideline that recognises the sovereign right of all States to determine their own migration policies. Building on this guideline, countries are further encouraged to formulate and implement coherent, comprehensive, consistent and transparent policies to effectively manage labour migration in a way that is beneficial to all migrant workers and Members of their families and to origin and destination countries.\textsuperscript{242}

Challenges are however arising from increasing cross-border movements of people in search of work opportunities outside their home countries. Challenges pertaining to irregular cross-border migration of people, to human trafficking, to exploitation of migrants, and beyond. The ILO drafted the Framework on Labour Migration to address these challenges. Due to its non-binding nature, the framework is merely an appeal to uphold these principles.\textsuperscript{243}

2.2.3 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

\textsuperscript{241} Guideline 4 of the ILO International Migration Programme \textit{ILO Multilateral Framework on Labour Migration; Non-binding principles and guidelines for a rights-based approach to labour migration} (2006).
\textsuperscript{242} Guideline 4.1 of the ILO International Migration Programme \textit{ILO Multilateral Framework on Labour Migration; Non-binding principles and guidelines for a rights-based approach to labour migration} (2006).
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\textsuperscript{245} and this instrument will be discussed subsequently.

2.2.3.1 General Agreement on Trade in Services (GATS)

Unlike the aforementioned migration agreements, the GATS in its design does not regulate international migration but serves to progressively aid the liberalisation of temporary movement of people within the scope of service suppliers from a different WTO Member state.\textsuperscript{246} This is the WTO’s legal instrument aimed at regulating multilateral trade in services.

The GATS is one of the landmark achievements of the WTO Uruguay Round of trade negotiations from 1986 to 1993 and came into force in 1995.\textsuperscript{247} The GATS is the first, and only, set of binding multilateral rules covering international trade in services\textsuperscript{248} and also provides for the movement of natural persons for the purpose of supplying a service. Prior to GATS coming into force, no multilateral agreement existed on rules for trade in services based on a general view that services were not tradable and non-productive.\textsuperscript{249} Prior to GATS coming into force, the primary trade focus was on tangible goods which were regulated at the multilateral level through the General Agreement on Tariffs and Trade (GATT).\textsuperscript{250}

The GATS was introduced following pressure for rules that would provide for transparency, development, predictability and non-discrimination in international trade in services. This can be seen within the purpose of the agreement

‘wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalisation and a means of promoting the economic growth of all trading partners and the development of developing countries.’\textsuperscript{251}

\textsuperscript{244}See chapter 1 section 1.2.2.
\textsuperscript{245}General Agreement on Trade in Services 1995.
\textsuperscript{246}Panizzon M Trade & Labor Migration GATS Mode 4 and Migration Agreements Occasional Working Paper 47 2010 8.
\textsuperscript{251}Para 2, preamble of the GATS 1995.
Looking at the GATS provision, as mentioned earlier, it has no definition of services, the Agreement however embraces a more pragmatic approach of defining services, in which all commercially tradable services are services. The WTO in not defining services drew up a list of service sectors and this list is neither binding nor final but elaborates on sectors covered by the GATS. The service sectors include ‘business services, communication services, construction and other engineering services, distribution services, educational services, environmental services, financial services, health related and social services, tourism and travel related services, recreational, cultural and sporting services and transport services.’

The GATS is the framework within which states, firms and individuals can operate and by implication also sets the ambit of how far these organisations can go, and what they can do in terms of fulfilling their obligations under the agreement. The GATS as an instrument rests on three categories. The first consists of general obligations as well as some obligations that apply only where commitments for a particular service sectors are made and is applicable to all WTO Member States. Article II(i) provides for one of such obligations which is the Most Favored Nation Treatment (MFN) and this requires

‘each Member to accord immediately and unconditionally to services and services suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.’

The MFN requirement applies to all WTO Members and to all sectors, irrespective of whether the countries involved have made specific liberalisation commitments or not.

Apart from the general obligations arising directly from the GATS which are binding on all WTO countries, all other GATS commitments only go as far as a Member State negotiates for itself. This is the second category of the GATS which sets out the framework under which countries can commit to service sectors they want to allow foreign suppliers to enter, and

252 See chapter 1 section 1.2.3.
253 See chapter 1 section 1.2.3.
254 Cattaneo C & Others Assessing the Potential of Service Trade in Developing Countries in Cattaneo C and Others International Trade in Services: New Trends and Opportunities for Developing Countries 1-28 7.
255 The third pillar comprises special arrangements that have been made in individual service sectors. These are dealt with in a series of annexes dealing with air transport services, financial services, maritime transport services, telecommunications and, most relevantly, movement of natural persons.
256 Article II(1) of the GATS.
258 Part II Article II to XV of the GATS 1995.
under what conditions through successive rounds of trade negotiations based on Article XIX. These commitments can be either horizontal (across all sectors) or specific (on a sectoral basis). Specific commitments can be done towards general obligations relating to market access (Article XVI), national treatment (Article XVII) and additional commitments (Article XVIII). Theoretically, each of the 153 WTO Members enter into a commitment for each of the four different modes of service supply defined in Article 1. These commitments are then entered into a country’s own “schedule of commitments” and can either stipulate no access (none), full access (unbound), or partial access (a bound commitment). Once a commitment is made by a Member State, they must abide by them. This category also recognises the fact that trade in services can be hampered by either discriminatory regulatory requirements imposed only on foreign services or by restrictive regulations that are imposed on both domestic and foreign services.

In accordance with Article XVI in regulating market access, Members are required to allow services and service suppliers treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule. The GATS provisions, under Article XVI further cover six types of restrictions that must not be maintained in the absence of limits in sectors where market access commitments are undertaken. Article XVI(2)(d) specifically provides avoiding limitations on the total number of natural people that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test.

260 Article XIX of the GATS 1995.
262 Part III of the GATS 1995.
266 Article XVI(1) of the GATS 1995.
268 Article XVI(d) of the GATS 1995.
By interpretation, if a Member State makes a commitment to allow service supply through the presence of natural persons for instance, having undertaken that commitment, Article XVI offers a conclusive list of measures which are in principle prohibited and in this particular instance, Article XVI(2)(d). Regarding this second category, it is therefore important to note that GATS does not require a State to open its borders to foreign labour: States need only do so to the extent that they have made binding commitments with respect to their general market access or national treatment.

The third category, comprises of special arrangements that have been made in individual service sectors. These are dealt with in a series of annexes dealing with air transport services, financial services, maritime transport services, telecommunications and, most relevantly, movement of natural persons.

Under the GATS, negotiators reached an agreement on what is meant by ‘trade in services’ which encapsulates the modes of service trade and particularly defines the movement of natural persons.269 Prior to the formal formulation of the GATS, in explaining the term trade in services, during the Uruguay Round of Negotiations, a GATT Secretariat provided a detailed note on the concept of ‘trade in service’. From the discussion, international trade in services:

‘is any service or labour activity across national borders to provide satisfaction to the needs of the recipient or consumer other than the satisfaction provided by physical goods (although they might be incorporated in physical goods), or to furnish an input for a producer of goods and/or services other than physical inputs (although the former might be incorporated in the latter).’270

The GATS Article 1.2 defines the concept of ‘trade in services’ as the supply of service through one of four defined modes of supply.271 The GATS states:

‘trade in services is defined as the supply of a service;

a) from the territory of one Member into the territory of any other Member
b) in the territory of one Member to the service consumer of any other Member

271 Article 1.2 of the GATS 1995.
c) by a service supplier of one Member, through commercial presence in the territory of any other Member

d) by a service supplier of one Member through the presence of natural people of a Member in the territory of any other Member.\textsuperscript{272}

These modes would be discussed in greater detail below.

\subsection*{2.2.3.2 Cross-border Supply}

The first of the four modes laid down by Article 1 of the GATS is the cross border supply of services. Article 1.2(a) of the GATS illustrates this mode as ‘the supply of services from the territory of one Member into the territory of any other Member’.\textsuperscript{273} This mode is commonly referred to as ‘Mode I and is similar to the traditional notion of trading in goods wherein both the consumer and the supplier remain in their respective territories when the product is delivered.’\textsuperscript{274} In other words, cross border trade corresponds with the normal form of trade in goods and maintains a clear geographical separation between the seller and the buyer.\textsuperscript{275} In this case, services flow from the territory of one Member into the territory of another Member crossing national frontiers. For example, an importing Member A receives services from abroad through the telecommunications or postal network and such supplies may include consultancy or market research reports, medical advice, distance training, or architectural drawings.\textsuperscript{276}

\subsection*{2.2.3.3 Consumption Abroad}

The GATS defines this mode of supply as ‘the supply of a service in the territory of a Member to the service consumer of any other Member.’\textsuperscript{277} Consumption abroad therefore refers to situations where a service consumer moves into another Member’s territory which is the supplier to obtain a service.\textsuperscript{278} This happens in instances when a national of a country

\textsuperscript{272} Article 1.2(a-d) of the GATS 1995.

\textsuperscript{273} Article 1.2(a) of the GATS 1995.


\textsuperscript{277} Article 1.2(b) of the GATS 1995.

moves abroad as a tourist, student, or medical patient to consume the respective services. The consumer although being abroad, remains a resident of his/her home country, thus giving rise to transactions between residents and nonresidents.

2.2.3.4 Commercial Presence

Commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises in the territory of another Member to supply a service. This mode of supply effectively means foreign investments which can take various forms. For example when the service is provided within a Member country A by a subsidiary, or office of a foreign-owned and controlled institution like a bank, restaurant, construction company, insurance companies, hotel chains) (Mode III).

2.2.3.5 Presence of Natural Persons

Within the GATS framework, presence of natural people is commonly known as Mode IV and is often conceptualised as temporary movement of natural persons despite GATS not setting any temporary limits. 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 entering the territory of another Member to supply a service.

Looking at Article XXVIII, the definition section, the GATS, defines a ‘service supplier” as ‘any person that supplies a service.’ A person is defined as a natural person or a juridical person. A natural person of another Member State is understood to mean

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285 Article I.2(d) of the GATS 1995.
286 Article XXVIII(g) of the GATS 1995.
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. 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. So this definition by interpretation focuses on the ability of a foreign national to cross the 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.

Based on the fourth services category in GATS referred to above, 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.'

From the aforementioned, two distinct categories of natural persons are covered by GATS. First will be self-employed individuals and secondly, employees. Paragraph 2 offers further clarification of the scope of the GATS provision in that people seeking employment and labor 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. Furthermore, the provision allows all measures of domestic regulation that prevents foreign natural persons from seeking job opportunities or access the employment market within the Member State.

287 Article XXVIII(k) of the GATS 1995
288 Article XXVIII(j) of the GATS 1995
291 Paragraph 1 of the Annex on the Movement of Natural Persons Supplying Services under the GATS Agreement.
292 See chapter 2 section 2.2.3.1.
293 Individual Foreign Service suppliers who move to the territory of a consumer for the supply of their service.
294 Individuals who are employed by a service supplier.
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.’\footnote{Kategekwa J \textit{Opening Markets for Foreign Skills: How can the WTO Help? Lessons from the EU and Uganda’s Regional Service Deals} 1ed (2014) 45.} 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.\footnote{Kategekwa J \textit{Opening Markets for Foreign Skills: How can the WTO Help? Lessons from the EU and Uganda’s Regional Service Deals} 1ed (2014) 45.}

Paragraph 2 equally excludes important parts of immigration policies relating to the regulation of residency and citizenship from scope of application of the GATS.\footnote{Paragraph II of the Annex on the Movement of Natural Persons Supplying Services under the GATS Agreement.} This caveat has regulatory implications that technically differentiates GATS commitments from immigration laws, and services from labour and the fact that GATS again does not address permanent migration. Mode 4 does facilitate the movement of persons but they 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.\footnote{Dawson LR ‘Labour Mobility and the WTO: The Limits of GATS Mode 4 (2013) 51 \textit{International Migration} 1 10.}

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.\footnote{Kategekwa J \textit{Opening Markets for Foreign Skills: How can the WTO Help? Lessons from the EU and Uganda’s Regional Service Deals} 1ed (2014) 45.} 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.\footnote{Arup C \textit{The New World trade Organisation Agreements: Globalizing Law through Services and Intellectual Property} (2000) 125.}

The provision of a service in this context is possible only through the simultaneous physical presence of the producer and the consumer as mentioned in the definition of services earlier\footnote{See chapter 1 section 1.2.3.} and having such provision showing an unwillingness to subject immigration policies to GATS will potentially hinder movement of service suppliers.

Based on the aforementioned provisions, the number of service providers and sectors committed under Mode IV is left to each country’s discretion and some countries have complained that the current commitments are limited to highly skilled professionals, such as...
doctors, lawyers and business leaders. Trachtman highlights that more than 40% of Mode IV commitments are for intra-corporate transferees whose mobility is intimately related to foreign direct investment (FDI) and another 50% cover executives, managers and specialists.  

In addition, Mode IV currently grants to the rich countries an advantage because they have many skilled people and is of no significance to developing and least developed countries. Furthermore, the GATS Members have made very limited commitments to market access based on this Mode compared to other modes of supply, in fact, from Chandas perspective, no Member has provided for full market access in Mode IV in all service sectors. Panizzon also highlights this low commitment to mode IV liberalisation through statistics, he mentions;

‘Levels of liberalisation obtained for Mode 4 of the GATS are quite low and account for only 0–4% of all GATS commitments to date. Mode 4 flows stand at less than 5% of world services trade, compared to 55–60% of worldwide services delivered by Mode 3 (commercial presence), 25–30% by Mode 1 (cross-border supply) and 10–15% by Mode 2 (consumption abroad).’

Having this restriction on market access and national treatment is problematic and adding to that, the commitments filed in Mode IV, in most cases, do not provide for unconditional liberalisation. With regards to Mode IV commitments, little progress has been made in the liberalisation of the movement of service suppliers. Even by the modest standards of services trade liberalisation in the Uruguay Round, where the GATS commitments are guaranteed to a minimum level of treatment, the result was that countries tended to be conservative, with most committing to temporary labour migration frameworks that were even more restrictive than those they were already employing.

Overall, Mode IV is so far very limited in scope, applying only to a narrow group of people, skilled, contractual service providers engaged in intra-firm movement and will be limited to the specific visa commitments that individual states are prepared to make in the context of broader WTO negotiations.

This thesis seeks to go beyond the scope of the respective international norms discussed to allow for SADC citizens to reside and establish themselves, therefore affording them opportunities to undertake commercial activities like the supply of a service.

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 particular reference and focus on the African Union (AU).

2.3.1 The African Union

The effort to integrate the African continent economically can be traced directly to the Lagos Plan of Action and to the Organisation of African Unity (OAU) Charter. This effort resulted in the adoption of the Treaty Establishing the African Economic Community (Abuja Treaty) in June 1991. The Treaty which entered into force on 12 May 1994 can arguably be considered as the most important agreement regarding economic, social and political convergence in Africa. Movement of people across borders is also a key aim to deepen regional integration in Africa. The African Union (AU) through the Abuja Treaty of 1991 is vehemently pursuing this goal of movement of persons. Chapter IV of the Abuja Treaty based on Article 43, forms the foundational basis for 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.\footnote{Article 43 of the Abuja Treaty of 1991.}

Based on that provision, it proposes a wider scope towards movement of persons, ensuring at the basic level entry and at deeper level establishment. This further ensures the facilitation of employment, 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, and the Migration Policy Framework for Africa (both adopted in 2006). Both frameworks are not binding on AU Member States but adopt guidelines that can be utilised for better migration management. These frameworks will be discussed briefly subsequently below.\footnote{Klavert H ‘African Union Frameworks for migration: Current Issues and questions for the future’ European Centre for Development Policy Management Discussion Paper 108 (2011) 3.}

\section*{2.3.2 African Common Position on Migration and Development (ACPMD)}

The ACPMD is a recommendatory policy document with no binding effect that emphasises the strong nexus between migration and development.\footnote{Fagbayibo B ‘Policy Discourse on the Possibility of a Pan-African Framework on the Free Movement of Persons (2015) 34 Politeia 19.} It stipulates eleven policy measures directed towards enabling a comprehensive approach towards movement of persons, which is a key aim better the migration strategy in Africa. Policies with influence towards the movement of persons and of particular importance to this thesis will be those relating to;

\begin{itemize}
\item Labour migration (establishing regular, transparent and comprehensive labour migration policies and legislation at the national and regional levels)
\item Migration and human rights (ensuring the protection of fundamental rights of migrants)
\item Regional initiatives (the need to develop common regional policies for the management of migration within the RECs.\footnote{Article 43 of the Abuja Treaty of 1991.}}
\end{itemize}

This ACPMD framework is very detailed in its scope and provisions. Overall, the policy document encourages Member States to mainstream migration in their development strategies.
and as advocating for the necessary financial support to ensure the implementation of regular migration.

2.3.3 **Migration Policy Framework for Africa (MPFA)**

The Migration Policy Framework for Africa (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.\(^{314}\) As an objective, the MPFA framework aims to contribute in 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; work towards the free movement of people and strengthen intra-regional and inter-regional cooperation in matters concerning migration, on the basis of the established processes of migration at regional and sub-regional levels; create an environment conducive to facilitating the participation of migrants, in particular those in the diaspora, in the development of their own countries.\(^{315}\)

The MPFA focuses on the following nine thematic areas: labour migration, border management, irregular migration, forced displacement, human rights of migrants, internal migration, migration data, migration and development, and inter-state cooperation and partnership. Social aspects of migration such as health, environment, gender and conflict are also covered. Under each of the thematic areas, the framework provides policy recommendations for AU Member States and individual RECs to emulate.\(^{316}\) The MPFA emphasises the critical role migration plays in development and encourages members to formulate policies to manage and harness migration for development.\(^{317}\) 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).\(^{318}\) This

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\(^{315}\) Migration Policy Framework for Africa 2006 EX.CL/279(IX).

\(^{316}\) Migration Policy Framework for Africa 2006 EX.CL/279(IX).


revised document builds on the achievements and challenges of the previous MPFA to guide Member States and RECs in the management of migration.319

In the revised MPFA, in dealing with migration and trade and noting the importance of the relationship between economic development, trade and migration, the 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.320 Furthermore, it recommends strengthened co-operation in the area of migration and trade amongst RECs, on bilateral and multilateral bases between African States, and beyond Africa.321 These are key strategies that are recommended towards bolstering the SADC approach to regulating movement of persons. Just like the ACPMD referred to above, the MPFA document is not binding on Member States but offers recommendations to enhance migration governance.

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. That notwithstanding, the frameworks though not binding do not propose an institutional mechanism to monitor compliance regarding their content. In effect, if Members were to commit to these frameworks, there is no guide whatsoever available to ensure better implementation.

Going forward, the AU Members in 2015, adopted a Declaration on Migration, which reaffirms the AU’s commitment at accelerating mobility and integration on the continent, as well as migration in development, while addressing regular and irregular migration. 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.322 Building on this, the AU Members have reached legally binding Agreements on a continental free trade area.

and the free movement of people, rights of residence and right of establishment as provided for under Article 43 of the Abuja Treaty.\footnote{Article 43 of the Abuja Treaty of 1991.}

\subsection*{2.3.4 Agenda 2063}

Building on the Abuja Treaty, in September 2015, the AU Member States adopted Agenda 2063 as a robust framework for addressing past injustices (slavery, colonialism, apartheid and so on) and the realisation of the Pan African vision of an integrated, prosperous and peaceful Africa.\footnote{AU Agenda 2063: The Africa we want available at https://au.int/sites/default/files/pages/3657-file-agenda2063_popular_version_en.pdf (accessed 13 August 2016).} This Agenda provides a framework for comprehensive and accelerated regional integration and development in Africa. The AU Agenda 2063 highlights the importance of free movement of Africans in Africa for meaningful integration, and increased trade. Aspiration two specifically illustrates that viewpoint, providing for

\begin{quote}
\end{quote}

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.\footnote{Paragraph 24 ‘AU Agenda 2063: The Africa we want’ available at https://au.int/sites/default/files/pages/3657-file-agenda2063_popular_version_en.pdf (accessed 13 August 2016).} To implement this agenda, the AU has undertaken some flagship priority programmes to kick start the agenda like establishing a continental free trade area. Also, to reiterate this vision and the provision of Article 43 of the AU Treaty, a Draft Protocol relating to Free Movement of People, Right of Residence and Right of Establishment was completed in 2017\footnote{Draft Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment 2018.} as another flagship plan to push the agenda. Both programmes will be looked at subsequently.

\subsection*{2.3.5 AU Continental Free Trade Area (AfCFTA)}

In 2012, AU Member States held the 18th Ordinary Session of the Assembly of Heads of State and Government of the African Union and adopted a decision to establish a Continental Free Trade Area (AfCFTA) by an indicative date of 2017 with negotiations set to begin in
2015. 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 pave the way for accelerating the establishment of a continental Customs Union. The AfCFTA offers a wide-scope covering trade in goods, trade in services, investment, intellectual property rights and competition policy. This broad scope has the potential to facilitate a strategic transformation of African economies, from Nshimbi’s perspective, with the AfCFTA, Africa may have a more solid basis for a renaissance.

In the context of movement of people, the Agreement offers in the first phase of negotiation, a Protocol on Trade in Services which is rather ambiguous with no specific provision on the different modes of service supply especially on the temporary movement of natural persons. Regarding the scope of the Agreement, just like the GATS, it regulates trading in services with no key focus on the movement of people. 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. Movement of persons is an essential component of a free trade area so one can argue that this aspect should be expansively regulated under the Protocol considering the fact that export of certain services like financial services requires people to move freely but that is not the case. 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. 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

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334 See chapter 2 section 2.3.6.
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.

As of April 29th 2019, twenty-two countries\(^{335}\) have placed their instruments of AfCFTA ratification with the AU Commission with one country, Zimbabwe having obtained parliamentary approval\(^{336}\) still awaits depositing their instruments of ratification to the AU. So to date, the total number of approved ratifications placed with the AU sits at 22\(^{337}\) paving way for the AfCFTA’s entry into force on the 30\(^{th}\) of May 2019. According to Article 23 of the Agreement, entry into force occurs 30 days after the 22 country threshold is reached.\(^ {338}\)

2.3.6 **AU Protocol Relating to Free Movement of People, Right of Residence and Right of Establishment**

The AU Protocol is a Protocol stemming from the vision of the Abuja Treaty and part of an implementation strategy in the Agenda 2063 referred to above in this chapter to award African citizens the right to free movement residence and establishment.\(^ {339}\) 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.’\(^ {340}\)

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\(^ {341}\) to the highest phase as mentioned above in Article 43 of the Abuja Treaty which is the right of establishment.\(^ {342}\) The Protocol therefore works towards a united Africa in which post abolishing visa requirements, African citizens will enjoy the right to reside and establish themselves in another Member State. Based on this Protocol, nationals of a Member

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335 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](https://www.tralac.org/resources/by-region/cfta.html) (accessed 17 May 2019).


338 Article 23 of the Agreement establishing the African Continental Free Trade Area 2018.

339 See chapter 2 section 2.3.4.


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

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. 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 days period. The right of establishment includes the right of any African citizen to set up a business, trade or be self-employed in any African country. The right of residence includes the right to become a resident in any African country and may be accompanied by a spouse and dependants. 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. 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. 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 as will be seen in a subsequent chapter based on its content. It is not only bound to facilitate entry, residence and establishment of all nationals of AU Member States. It also governs many other key issues, including the proposal of universal travel documentation in the form of an African passport, the principle of non-discrimination, the mutual recognition of academic and professional qualifications, the protection of property rights and the portability of social security benefits. The implementation of the Free Movement of People Protocol can unlock the continent’s economic potential and stimulate 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 important to foster a synergy among the RECs and in the context of this thesis, the SADC from this Protocol which will enable them review their regional texts.

343 Article 6(2) of the AU Protocol on the Free Movement of Persons 2018.
344 Article 6(2) and (4) of the AU Protocol on the Free Movement of Persons 2018.
345 Article 17(2) of the AU Protocol on the Free Movement of Persons 2018.
346 Article 16(2) of the AU Protocol on the Free Movement of Persons 2018.
348 Article 15(3) of the AU Protocol on the Free Movement of Persons 2018.
349 See chapter 4 section 4.2.1.
In March 2018 at an Extraordinary Summit on the AfCFTA in Kigali, Rwanda, this Protocol Free Movement of People, Right to Residence and Right to Establishment was presented for signature with a total of 30 out of 55 countries having signed to date\textsuperscript{353} with a minimum number of 15 ratifications required for it to come into force.\textsuperscript{354} This Protocol is a recent development and it will be worthwhile keeping track of how it progresses.

2.4 Conclusion

The chapter provided an extensive discussion of different international laws that offer guidance the regulation of the movement of people. One key conclusion based on the discourse is as it stands to date, no single law exists that regulates the movement of people globally. Several international instruments were therefore examined that pertain to the movement of people from a human right, labour and trade perspectives. One instrument is the ICPRMW which from a human rights-based perspective under Article 11 permits individuals seeking employment to move from one place to another, without any unjustified restriction. Further discussion was made from an ILO perspective, which from a human rights perspective promotes and protects the movement of people under the Multilateral Framework on Labour Migration, which is not binding and the Convention on Migration for Employment.

As opposed to the human rights perspective, this thesis is based on a trade and economic development perspective. Hence, a discussion was made on the GATS. Article 1.2(d) which specifically promotes progressive liberalisation through the temporary movement of natural persons for the purpose of supplying a service. From the aforementioned discussion, cross border movement of people is on the rise and it was viewed that despite this array of frameworks promoting the movement of different categories of people, there is no single comprehensive international legal framework governing the cross-border movement of people.

International migration law today is at a point that requires reflection. In essence, the admission of people into a State's territory remains one of the most jealously guarded privileges of national governments, into which international law has made few real inroads to


\textsuperscript{354} Article 33 of the AU Protocol on the Free Movement of Persons 2018.
ensure entry of foreign nationals. As seen above, legal norms regulating international migration exist conversely, those norms do not present themselves in a coherent and integrated form. From an international law perspective, movement of persons as a legal entitlement is much narrower in scope, focusing mainly on individuals leaving one country as a form of personal liberty, to supply a service, not catering for the right to enter another State. Whether or not to introduce a universal right of entry is still a contentious issue. To date, right of entry is negotiated largely at a regional and national level.

Despite the lack complimentary norms towards movement of persons at an international level, it is within the regional level that we see much more regulation and ambitious commitments towards movement of persons. From a regional perspective, the AU was also looked at with key policy documents pushing towards a pan African framework for regulating migration. Based on current events, the AU developed an Agenda 2063 which has led to further progress in governing migration through the AfCFTA and the Protocol relating to Free Movement of Persons, Right of Residence and Establishment. Upon ratification of these agreements, states consent to being bound by such agreements. So, it is indicative that, as state parties to the agreement in question, they accept and will implement the obligations agreed upon. The AfCFTA, once entered into force, only binds the States that are parties thereto.

The next chapter discusses selected regions and their approach to regulating movement of people to offer guidance for reform of SADC’s current approach.
CHAPTER 3

COMPARISON BETWEEN THE EUROPEAN UNION, THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES AND THE EAST AFRICAN COMMUNITY IN REGULATING MOVEMENT OF PEOPLE

3.1 Introduction

The preceding chapters examined the international law on migration. The potential of movement of persons to advance integration, support development and spur the well-being for people and countries concerned can be realised when it is effectively governed, properly regulated under a comprehensive rule of law. This chapter therefore presents a detailed examination of laws that govern migration in selected regional blocs with a view of determining how their approach and development can influence the SADC’s current migration scheme. This will be an explorative research and heavily relied on various past and present literature on both the European Union (EU), Economic Community of West African States (ECOWAS) and East African Community (EAC) integration policies.

The selected regions are the ECOWAS, the East African Community (EAC) and lastly, the European Union (EU). All three regional blocs have created a legal framework for the free movement of people and goods within their respective regions. These free movement regimes were born out of the need of participating States concerned to create stability and the conditions for prosperity and peace within the external borders of the region. These regional blocs were selected on the basis of the significant progress they have made towards opening their borders to labour migrants or service suppliers.

The EU is assessed because it is notable for having the most ambitious free movement of people in the world. The ECOWAS as one regional group has an enforceable Protocol on Free Movement of People, Residence and Establishment since the early 1980s. The ECOWAS region is also viewed as the region with more experience regarding movement of people. Lastly, the EAC is also investigated because right from its inception, the Treaty

establishing the EAC provides for free movement of people in terms of Article 104\textsuperscript{356} and going forward, it has the Common Market Protocol\textsuperscript{357} signed and ratified by all six Member States. The chapter also highlights challenges both present and old to achieving a system where movement is feasible. All three selected regional blocs envisioned achieving a common market as an integration goal. The EU has achieved an internal market and the ECOWAS and EAC have also reached the stage of establishing a common market, where there is minimal or no restriction towards the movement of people. The selected regional groups will be discussed in detail under subsequent headings. It should be noted that in order to get a first grasp on the different regional approaches to free movement of people, it makes sense to build context by first looking at primary law provisions related to the subject as laid down in founding treaties.

Based on the discussion in chapter 2 of this thesis, the right to enter and remain in another country is subject to the laws of a particular country.\textsuperscript{358} Just as that is the case, regulating the right of entry, residence and establishment can also be imposed on a country by a supranational organisation like the EU or by any multilateral regional Agreement like that of the ECOWAS and EAC that a particular country may have concluded that allows for free or liberalised movement. It is for this reason that it is necessary to explore the purpose, ambit as well as content of these regional groups towards regulating free and liberalised movement of persons.

Chapter 3 therefore as a start, unpacks the selected regional blocs individually, to expound on the content of their laws regarding movement of people, indicate implementation challenges and draw lessons from their experiences.

### 3.2 The European Union (EU)

Of all the regional blocs to be discussed in this thesis, the EU is viewed to have made the most significant stride towards achieving total freedom of movement of people in a region. The EU exhibits high levels of implementation of Treaties, Protocols, legislations and policies relating to movement of people. Freedom of movement of people in the region is


\textsuperscript{357} East African Community Common Market Protocol (2010).

\textsuperscript{358} See chapter 2 section 2.2.1.
enshrined in the EU Treaty as will be seen in subsequent headings and is central to the EU’s common market objective and all these laws will be unpacked in subsequent headings.

To better understand the EU’s approach to regulating the movement of persons and the law that influences mobility such as the EU Directive of 2004, it is imperative to have a brief historical perspective of the EU. This discussion is done because it offers a guide towards enabling migration governance within the region. Post discussion on the history of the EU, the legislative basis in allowing free movement of persons, leading to the current EU Directive of 2004 is looked at. Thereafter, the Schengen Agreement is referred to as an exemplary model where progress is stalled at a regional level.

3.2.1 Brief History of the European Union

Europe had a history of instability and war; it was envisioned that tying countries together politically and economically is a way to consolidate democracy and resolve the traditional causes of conflict. Therefore, the now EUs’ formation process was initiated in the 1950s and was set up with the aim of ending the frequent and bloody wars between neighbours, which culminated during and after the Second World War. In May 1950, the then French Foreign Minister proposed the pooling under a supranational authority of French and German coal and steel resources. This led to the formation of the European Coal and Steel Community (ECSC) with the aim of bringing together European countries economically and politically in order to secure lasting peace. The ‘Schuman Plan’ as it was called finally became a reality with the conclusion of the founding Treaty of the ECSC by the six founding States which were Belgium, Germany, France, Italy, Luxembourg and the Netherlands on 18 April 1951 in Paris (Treaty of Paris) and its entry into force on 23 July 1952. The integration of the steel and coal industry is significant as the first step towards integration and a universal Europe. The Members relinquished part of their sovereignty which demonstrated willingness to integrate and realise an internal market with regards to coal and steel.

359 See chapter 3 section 3.2.1.
The ECSC Treaty created four institutions: the Council, the High Authority (later to be known as the Commission), the Assembly and the Court. The Treaty terminated in 2002 after 50 years and the ECSC’s functions as well as the institutions were merged with those of the European Community (EC). Thereafter, the European Economic Community (EEC) was formed in March 1957 and this materialised through the Treaty of Rome which led to establishing the European Free Trade Area and Customs Union. This Treaty mainly aimed at creating a framework for cooperation with regards to trade in goods and leaving policy creation in this area to the Community institutions. The period between 1950s and 1980s witnessed progress in the integration process as six countries joined the EEC. In 1986, the Single European Act (SEA) was signed and entered into force in 1987. This Treaty brought about a turning point in the development of the EU by ensuring steps were taken towards the creation of the Single Market. The Act introduced far-reaching institutional reforms with respect to the realisation of a single market, facilitating the free movement of people, workers and capital in addition to the free movement of goods achieved through the Treaty of Rome and also ensured cohesion as a key Community objective. As the objective of the SEA were not focused on economic activity the EEC became known as the European Community (EC).

In 1992, the Treaty of Maastricht was signed and this established the EU to replace the EC. It created a new political dimension to the integration process and introduced the concept of European Citizenship confirming EU citizens the right to enter, live and work anywhere in the EU. The fundamental aim of the EU Treaty was to fuse together the economies of the

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364 Primarily charged with representing Member States.
365 A Supranational Executive body.
Member States to create an integrated or a common market in which all factors of production\textsuperscript{375} could move freely without any hindrance.\textsuperscript{376} The European common market is centred on attaining the ‘four freedoms’: the free movement of goods; people (and citizenship), including free movement of workers, and freedom of establishment; the freedom to provide services; and the free movement of capital. This thesis to reiterate is particularly focused on the aspect of free movement of people so as to promote or influence the supply of services.

The Lisbon Treaty which came into force on 1 December 2009 replaced the ‘old’ EU under the Maastricht Treaty.\textsuperscript{377} The three fundamental reasons for the Lisbon Treaty were to enhance the efficiency and democratic legitimacy of the Union, and to improve the coherence of its actions.\textsuperscript{378} The EU body currently comprises of twenty eight Member States,\textsuperscript{379} who have delegated their competencies to common institutions whose responsibility is to coordinate their policies.\textsuperscript{380} With the increase in Membership, the EU needed the Lisbon Treaty to be able to function properly.

3.2.2 Migration Law in the European Union

Mobility of people particularly for labour has been an ongoing trend in the EU. Several small-scale attempts have occurred over time to construct a liberalised labour mobility regime currently in place.\textsuperscript{381} For instance, Belgium, the Netherlands and Luxembourg (BENELUX), devised a novel plan in 1948 to eliminate border controls among the three countries.\textsuperscript{382} This effort was followed in 1954 by the formation of the Nordic Passport Union, which permitted free travel and eliminated border controls among Denmark, Sweden, Iceland, Norway and Finland.\textsuperscript{383}

\textsuperscript{375} Such as Goods, Services and Capital.
\textsuperscript{377} See the Preamble to the TEU. The object is to achieve over a period of time a better allocation of resources.
\textsuperscript{378} Preamble to the Lisbon Treaty of 2009.
\textsuperscript{379} The Member States are: Austria, Belgium, Bulgaria, Cyprus, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom available at http://europa.eu/about-eu/countries/Members-countries/ (last accessed on 19 March 2017). With the exit of the UK following Brexit which will be discussed in section 3.2.5 of this chapter.
\textsuperscript{380} Article 4 of the TEU 1992.
\textsuperscript{381} Davis D & Gift T ‘The Positive Effects of the Schengen Agreement on European Trade’ (2014) 37 The World Economy 11 1542.
\textsuperscript{382} Davis D & Gift T ‘The Positive Effects of the Schengen Agreement on European Trade’ (2014) 37 The World Economy 11 1542
Thereafter, there was the goal of creating a single market through the SEA in 1986, meaning a big wide EU was envisioned with no barriers of any kind. In achieving this, integration was built around four freedoms: goods, capital, services and people. Initially, the free movement of people only concerned workers. As Ruhs points out, that the beneficiaries of this freedom to move primarily included jobseekers, that is EU citizens who move to another EU country to look for a job. It then became clear that to make the free movement of workers really effective, the EU law had to be holistic, giving workers’ families the same right to move. Subsequently, the free movement of people further expanded to include more and more individuals who were not solely job seekers.

A major development took place with the formal introduction of Union citizenship in the Treaty of Maastricht in 1992 as several free movement rights were attached directly to the status of EU Citizen. Free movement means that any EU citizen that is any person holding citizenship of one of the twenty eight Member States of the EU is entitled to move and freely take up employment in any other EU country. The legislative basis for the general right to move and reside freely within the EU is embodied in Article 18 of the Treaty Establishing the European Community, now Article 22 of the Treaty on the Functioning of the European Union which reads:

1. every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. if action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

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387 Article 20 on the Treaty on the Functioning in the European Union (TFEU): 1) Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. 2) Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States.
3. for the same purpose as those referred to in paragraph 1 and if the Treaties have not provided the necessary power, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.\footnote{Article 21 of the Treaty on the Functioning of the European Union OJ C 202, 2016. See also Article 18 of the Treaty Establishing the European Community, OJ 1997 C 340.}

Accompanying the aforementioned right is Article 39 which also provides for the free movement of workers. It stipulates that ‘freedom of movement for workers shall be secured within the Community. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.’\footnote{Article 39(1) and (2) of the Treaty Establishing the European Community1997. See also Article 45 of the Treaty on the Functioning of the European Union OJ C 202, 2016.} This right shall entail subject to limitations justified on grounds of public policy, security or health, the right to accept offers of employment, move freely within the territory of Member States for this purpose.\footnote{Article 39(1) and (2) of the Treaty Establishing the European Community1997. See also, Article 45 of the Treaty on the Functioning of the European Union OJ C 202, 2016.} Article 43 further entrenches the right of establishment by providing that:

‘Restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed people and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.’\footnote{Article 43 of the Treaty Establishing the European Community, 1997. Article 49 of the Treaty on the Functioning of the European Union OJ C 202, 2016.}

At this point, one can see that the EU law regarding the movement of persons has developed through the adoption of Treaties and this is the primary source of EU law. That notwithstanding, EU laws are created by the European Parliament acting jointly with the Council; the Council and the Commission make legislative acts in the form of regulations, directives and decisions and non-legislative acts in the form of recommendations or deliver opinions.\footnote{Article 289 and 290 of the Treaty on the Functioning of the European Union.} A regulation has general application, binding in its entirety and is directly

\http://etd.uwc.ac.za/
A directive is binding as to the result to be achieved upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. The EU directive constitutes the appropriate measure when existing national legislation must be modified or there is a need for national provisions to be enacted for the sake of harmonisation. A directive is therefore adopted by the EU if a particular objective is sought to be achieved.

The main developments made with regards to the right to move freely have come through the form of a Directive in 2004. This directive entrenches limitations and conditions stipulated in Article 18 of the TEU or Article 21 of the TFEU referred above and gives three ‘layers’ of movement and residence rights, subject to increasingly stringent criteria. This EU Directive will be looked at below.


The principle of free movement of people was mainly implemented through several Regulations and Directives which were adopted in 1968. These fragmented Regulations and Directives have been repealed and amended overtime, and have been consolidated into a single framework in the form of Directive 2004/38 which came into force on 1 May 2004. The Directive creates a single legal regime in the context of European Citizenship and gives effect to the rights established by the treaty to move and reside freely for EU citizens. In terms of the preamble,

1. ‘Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

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2. The free movement of people constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.\textsuperscript{400}

Looking at some key provisions of the Directive, Article 4 promotes the right of exit as citizens of Member States ‘without prejudice to the provisions on travel documents applicable to national border controls, ought to be granted leave to enter the territory of another Member State with a valid identity card or passport and shall grant family Members who are not nationals of a Member State leave to enter their territory with a valid passport. No entry visa or equivalent formality may be imposed on Union citizens.\textsuperscript{401} As mentioned earlier, the directive provides for three layers of the right to move and reside. First, Articles 5 and 6 give a right of entry and the right to reside for up to three months to all Union citizens who move to or reside in a Member State other than that of which they are a national, as well as to their family Members. The right of entry under Article 5 entails that Member States may only require a valid identity card or passport, but no other documentation or formalities upon entry.\textsuperscript{402} Citizens of Member States and their family Members are also entitled to reside for three months without formalities other than holding a valid identity card or passport.\textsuperscript{403} Residence for more than three months is subject to some very light procedures.

Regarding those procedures, for periods of residence longer than three months, the host state may require Union citizens to register with the relevant authorities. The deadline for registration may not be less than three months from the date of arrival. For the registration certificate to be issued, Member States may only require that;

\begin{quote}
‘workers or self-employed people in the host state; or have sufficient resources for themselves and their family Members not to become a burden on the social assistance system of the host state during their period of residence and have comprehensive sickness insurance cover in the host state; or are enrolled at a private or public establishment, accredited or financed by the host state on the basis of its legislation or administrative practice, for the principal purpose of following a course of study.’\textsuperscript{404}
\end{quote}

As long as a Union citizen falls in one of these categories, he or she has the right to reside. This right extends, furthermore, to the family Members of the Union citizen, even if these

\textsuperscript{400} Preamble EU Council Directive 2004/38/EC.
\textsuperscript{401} Article 4 of the EU Council Directive 2004/38/EC.
\textsuperscript{402} Article 5 of the EU Council Directive 2004/38/EC.
\textsuperscript{403} Article 6 of the EU Council Directive 2004/38/EC.
\textsuperscript{404} Article 7(1) (a)-(d) of the EU Council Directive 2004/38/EC.
family Members are not EU citizens themselves. The main reasoning behind these three categories of citizens with open ended residence rights as suggested by Cuyvers is that EU citizens and their family Members should have a right to freely reside in the EU as long as they do not become a burden on the host state.\textsuperscript{405} The Directive towards the right of residence embodies an obvious proof of pro-migratory developments in terms of EU law. The regulation of residence rights promotes a more collective liberal and citizen-friendly approach instead of relying solely on the competences of individual Member States as regards controlling and managing migration.

The third, and most far reaching, right of residence is granted when a citizen has resided legally for a continuous period of at least five years in the host Member State and acquires permanent residence.\textsuperscript{406} Once acquired, the right of permanent residency is only lost where the Union citizen is absent from the host state for a period exceeding two consecutive years.\textsuperscript{407} Acquiring this status means EU citizens need not meet the requirements under Article 7 of the Directive to have residence rights and they acquire more rights to equal treatment as contained in Article 24 of the Directive. The establishment of this right of permanent residence is a key novelty in the Directive.

To allow free movement, it is encouraged that equal treatment form the basis of such initiative thus eliminating any discrimination on the basis of nationality. This principle of Non-discrimination has been a tool favouring the integration of European citizens in their host Member State under Article 24 of the Directive. It states that ‘Union citizens residing on the basis of this directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty’.\textsuperscript{408} Furthermore, Article 27 of the Directive allows for certain restrictions on the right of residence on grounds of public policy, public security or public health.\textsuperscript{409} In line with the Treaty exceptions, these are interpreted very narrowly, and a proportionality check has to be satisfied, based on individual behavior and the fact that the individual presents a future risk as well.\textsuperscript{410} In addition, Articles 28 to 32 regulate the protection against possible expulsion of Union citizens on the grounds of public policy, public security or public health.

\textsuperscript{406} Article 16(1) of the EU Council Directive 2004/38/EC.
\textsuperscript{407} Article 16(4) of the EU Council Directive 2004/38/EC.
\textsuperscript{408} Article 24 of the EU Council Directive 2004/38/EC.
\textsuperscript{409} Article 27(1) of the EU Council Directive 2004/38/EC.
\textsuperscript{410} Article 27(1) of the EU Council Directive 2004/38/EC.
Essentially, from the aforementioned, the Directive offers to EU citizens the possibility to move free from immigration control, the opportunity to obtain permanent residence in the host Member State with guarantees of equal treatment in almost every respect with nationals of the host Member State.

3.2.4 Schengen Agreement

It is important to first note that at first, the Schengen Agreement was not an EU Agreement, however was later included under the umbrella of EU law. Considering early developments in EU integration, the idea of creating a passport free zone in the EU was met with resistance with Denmark, Greece, Ireland and the United Kingdom (UK) resisting the idea of free movement of people. Mixed opinions were had on the subject matter, some nations preferred to have a system that only applied to European Union citizens while keeping internal border controls for non-EU citizens, other nations envisioned free movement for everyone leaving the debate on free movement of people redundant.

In the absence of progress at EU level, selected countries agreed to define new ways to give impetus to the integration process. This new measure was about defining conditions that will ensure real freedom of movement of people within Europe and this in effect, led to the Schengen Agreement. The Schengen “acquis” meaning all the applicable Schengen rules as is referred to currently refers to rules that were originally adopted outside the EU in the framework of intergovernmental cooperation first as general agreement in 1985 between Belgium, the Netherlands, Luxemburg, France and Germany and at a later stage became a detailed convention in 1990. This agreement created the ever so popular Schengen area, growing overtime with twenty six countries now participating in the Agreement and covering a 4.3 million square kilometre area that has eliminated passport requirements for

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411 Davis D & Gift T ‘The Positive Effects of the Schengen Agreement on European Trade’ 1541.
415 Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland available at https://www.schengenvisainfo.com/schengen-visa-countries-list (accessed 11 March 2017).
cross-country European travel and work. The 1985 Agreement was conceived as an instrument to realise the common market, in accordance with Article 2 of the Treaty of Rome alluded to above which founded the EEC in 1957. Being part of the Schengen area without controls at internal borders means that participating countries no longer carry out border checks at borders between two Schengen States and have stepped up controls at their external borders.

The Treaty of Amsterdam would later lead to the integration of Schengen Agreement into the European Union’s acquis communautaire, bring it to the core of EU Law, meaning that all Member States of the EU, with the exception of the United Kingdom and Ireland, were obligated to implement the Schengen compact. The Schengen Agreement was later supplemented by the 1990 Convention Implementing the Schengen Agreement (CISA) and set forth the arrangements and safeguards for implementing the freedom of movement. This Convention amongst other things, set out the final abolition of internal border control, strengthened external border checks, defined procedures for issuing uniform visas. In analysing this Schengen approach, one can surmise that the Schengen represents a very close group built on the reliance and unanimity between participating Members.

EU integration is always progressive, in 2006, the European Parliament and the Council passed a secondary legislation in the form of Regulation (EC) No 562/2006. This Regulation established a Community Code on the rules governing the movement of people across borders, commonly known as the Schengen Borders Code. The Code added to and

417 Article 2 provides that ‘The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.’
418 See chapter 3 section 3.2.1.
420 Davis D & Gift T ‘The Positive Effects of the Schengen Agreement on European Trade’ (2014) 1541.
422 Article 2 of the Convention Implementing the Schengen Agreement of 14 June 1985.
repealed parts of the Schengen Convention but particularly emphasised the need for an area without internal borders where the free movement of people is ensured.\footnote{Article 20 EU Regulation (EC) No 562/2006}

The Schengen system interestingly is not rigid in regulating free movement of people. It guarantees its Members a certain degree of flexibility in reintroducing controls at internal borders. These controls were put in place mainly to counter potential threats to national security as well as mass and illegal migration. Article 23 of the Schengen Borders Code allows for reintroducing border controls albeit on a temporary basis of no more than 30 days in the case of a serious threat to public policy or internal security.\footnote{Regulation (EC) No 562/2006 of the European Parliament and of the Council.} This rule was put to the test in 2011 when Italy did not return, but temporarily legalised over 20 000 Tunisian nationals trying to enter the EU illegally. France was mainly concerned as a probable destination country for these French-speaking migrants that it decided to temporarily re-establish controls at its internal borders with Italy.\footnote{’Internal border controls in the Schengen area: Is Schengen crisis-proof?’ 23 available at \url{http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571356/IPOL_STU%282016%29571356_EN.pdf} (accessed 11 March 2017).}

Terrorist attacks in Paris and Brussels in 2015 and 2016 respectively also prompted moves to re-establish border controls or even build walls within the Schengen Area.\footnote{Evrad E, Nienaber B & Sommaribas A ‘The Temporary Reintroduction of Border Controls Inside the Schengen Area: Towards a Spatial Perspective’ (2018) \textit{Journal of Borderlands Studies} 1.} The progressive reintroduction of border controls can however unbalance the EU process of deeper integration. The Schengen Agreement can be reassessed emphasising very strong securitisation of the external borders of the Schengen Area.

Free movement of people is not without challenges and one contemporary challenge to mobility is the ongoing British exist (Brexit) from the EU.

\subsection*{3.2.5 Brexit}

Looking at the EU approach to movement of people, adding to the challenge of security and mass migration, the actual mobility of EU citizens signifies a challenge that curbs State sovereignty. The EU policy limits the state’s control over the people that enter and reside across the region. This line of thought is evidenced by the UKs announcement of its desire to renegotiate terms with the EU for an exit in terms of Article 50\footnote{Article 50(1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.} of the Lisbon Treaty which
was led by its Prime Minister David Cameron.\textsuperscript{431} As mentioned by Gordon, one of the primary reasons for the UK exit (Brexit as it is popularly known) was the need to re-establish State Sovereignty.\textsuperscript{432}

The exit from the EU will bring a measure of Sovereignty to the UK meaning for the first time since its accession to the EU, the UK will not be expected to implement EU law within their domestic system\textsuperscript{433} neither will EU law be supreme above the UK domestic policies. The UK will no longer be under the jurisdiction of the Court of Justice of the European Union (CJEU). To be specific, one of the main principles of EU Membership is the free movement of people, which means EU citizens do not need to get a visa to go and live as well as work in another EU country. After Brexit, British citizens will cease to be citizens of the EU while the rest of the EU Members will continue to hold this status. Therefore, questions arise that what will happen to EU citizens currently living in the UK and the UK citizens residing in the EU also? And how about the EU nationals who want to work and offer services in the UK and same for the UK citizens who want to work in the EU.

Brexit comes with the uncertainty of the future unless new rules are agreed upon. There are still many issues to be discussed and decided on regarding Brexit and the uncertainty regarding these decisions remains high. So far, academia is silent on the potential political, social and economic implications of Brexit. It is therefore worth keeping tabs on the progress of these negotiations for further research.

### 3.3 Economic Community of West African States (ECOWAS)

The Economic Community of West African States (ECOWAS) will be discussed as a comparator. Within the African context, ECOWAS adopted a Protocol on Free Movement of People and the Right of Residence and Establishment in 1979. The 1979 Protocol is accompanied by supplementary laws which testify to Member countries’ determination to place the free intra-regional movement of people at the heart of the regional integration.
process. In essence, ECOWAS happens to be the regional group within Africa with a depth of experience considering the very long history it has in ensuring the free movement of people.

This section of the chapter will first discuss briefly the history of ECOWAS. Post discussion on the history, the legislative basis for allowing free movement of persons is looked at from primary Treaty laws to the different Protocols. Thereafter, implementation challenges are referred to alongside current initiatives to foster the movement of persons so as to draw lessons for the SADC.

3.3.1 **Brief History of the Economic Community of West African States**

Although the ECOWAS was not officially established until 1975, there were several events which preceded the signing and led to what is now known as ECOWAS. Former Liberian President William Tubman is credited with developing the idea of creating a West African economic community.\(^{434}\) His idea spurred the signing of an agreement between Côte d’Ivoire, Guinea, Liberia, and Sierra Leone in February 1965; however, the agreement was more of a formality than an actual call to action.\(^{435}\) General Gowon of Nigeria and General Eyadema of Togo reintroduced the idea in 1972.\(^{436}\) These generals drafted proposals for a new Community and then spent July and August of 1973 traveling to 12 countries in West Africa to assess interest and to elicit support.\(^{437}\) The treaty draft was further examined in several meetings of potential Member States in Lomé, Togo, during December 1973, subsequently that of experts and jurists was held in Accra, Ghana in 1974 thereafter, a meeting of ministers in Monrovia, Liberia in 1975.\(^{438}\)

ECOWAS was established on the 28th of May 1975 through the signing of the Treaty of Lagos\(^{439}\) in Lagos, Nigeria.\(^{440}\) The original fifteen signatories of the ECOWAS Treaty were Dahomey,\(^{441}\) the Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Liberia, Mali, Dahomey was the name of the now known Peoples Republic of Benin, this name change officially happened in 1975.\(^{442}\)

\(^{439}\) Treaty of the Economic Community of West African States 1975.
\(^{441}\) Dahomey was the name of the now known Peoples Republic of Benin, this name change officially happened in 1975.
Mauritania, Nigeria, Senegal, Sierra Leone, Togo and Upper Volta. Establishing ECOWAS through the Treaty of Lagos represented a major landmark in African integration form Zagaris’ perspective. Zagaris highlights that the treaty established a cohesive trade relation between French and English speaking African countries among which trade and commercial intercourse had been virtually non-existent.

The ECOWAS was set up with the aim of promoting integration in stages from eliminating custom duties to having a harmonised system of monetary policies and encouraging any activity necessary to further the community goals. Following the desire of ECOWAS to accelerate the economic integration process in the region the Treaty was revised in 1993 and the objectives of the Community was streamlined:

‘to promote cooperation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its people, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent.

In order to ensure these aims, the Community was to establish a common market through:

‘the liberalisation of trade, the adoption of a common external tariff and a common trade policy vis-à-vis third countries; and the removal, between Member States, of obstacles to the free movement of people, goods, service and capital, and to the right of residence and establishment.

According to its constitutive Treaty, ECOWAS has set itself the mission of promoting integration in all domains of economic activity. With this in mind, the Member States have to agree to the removal of barriers to the free movement of persons, goods, services and capital. Furthermore, to better accelerate these goals of the region, the Treaty lists eight institutions: The Authority of Heads of State and Government, the Council of Ministers; the Community Parliament; the Economic and Social Council; the Community Court of Justice; the Executive

442 Currently known as Burkina Faso, this name change officially happened in 1984.
444 Article 2(a)-(j) of the Treaty of the Economic Community of West African States (ECOWAS), 1975.
445 Article 3(1) of the Revised Treaty Establishing the Economic Community of West African States (ECOWAS) 1993.
446 Article 3(2)(d) (i)–(iii) of the Revised Treaty Establishing the Economic Community of West African States (ECOWAS) 1993.
Secretariat; the Fund for Cooperation, Compensation, and Development; and Specialised Technical Commissions.\textsuperscript{447}

ECOWAS has developed different legal instruments related to intra-community migration, all of which will be discussed below.

3.3.2 Migration Law in the Economic Community of West African States

Right from the inception of ECOWAS, the Treaty of Lagos based on Article 27 sets out a long-term goal of ‘freedom of movement and residence’ objective for citizens of the organisation’s Member States. Article 27 provides that:

‘Citizens of Member States shall be regarded as Community citizens and accordingly Member States undertake to abolish all obstacles to their freedom of movement and residence within the community.’\textsuperscript{448}

This provision envisioned the region to be less restrictive towards mobility and considered individuals from Member States as ECOWAS Community citizens.\textsuperscript{449} Member States were further encouraged to mutually agree to exempt citizens of the Community from visitors’ visa and residence permit requirements as well as allow Community citizens to engage in employment or commercial activities in host countries under Article 27.\textsuperscript{450} This provision was also reaffirmed under Article 59 of the Revised Treaty of 1993. Article 59 provides that:

‘citizens of the Community shall have the right of entry, residence and establishment and Member States undertake to recognise these rights of Community citizens in their territories in accordance with the provisions of the Protocols relating thereto’\textsuperscript{451} and Member States were to adopt appropriate measures in order to ensure these rights and the implementation of this article.\textsuperscript{452}

To further encourage and ensure the implementation of free movement of people based on primary Treaty, several secondary legislative and policy texts have been entrenched in

\textsuperscript{447} Article 4 of the Treaty of the Economic Community of West African States 1975.
\textsuperscript{448} Article 27(1) of the Treaty of the Economic Community of West African States 1975.
\textsuperscript{450} Article 27(2) of the Treaty of the Economic Community of West African States 1975.
\textsuperscript{451} Article 59(1) of the Revised Treaty Establishing the Economic Community of West African States (ECOWAS) 1993.
\textsuperscript{452} Article 59(2)-(3) of the Revised Treaty Establishing the Economic Community of West African States (ECOWAS) 1993.
ECOWAS like the EU based on the 2004 Directive discussed earlier.\textsuperscript{453} In 1979, ECOWAS Member States voted on Protocol A/P.1/5/79 relating to Free Movement of People, Residence and Establishment.\textsuperscript{454} Accompanying this 1979 Protocol are four other supplementary Protocols relating to residence and establishment which further aid the implementation of the 1979 Protocol, each of which will be discussed in more detail below.

\subsection*{3.3.3 Protocol on Free Movement of People and the Right of Residence and Establishment}

In May 1979, four years after the promulgation of the Treaty, Member States adopted the Protocol relating to the Free Movement of People, Residence and Establishment,\textsuperscript{455} which was ratified in 1980. This Protocol derives its constitutional strength and legitimacy from an enabling provision, Article 27 in the 1975 Treaty which was subsequently reaffirmed and reformulated under Article 59 of the Revised Treaty of 1993.\textsuperscript{456} To very well recognise the objective of attaining a common market through free movement of people, Article 2 of the Protocol provides ‘Community citizens have the right to enter, reside and establish in the territory of Member States.’\textsuperscript{457} Just as Member States were entitled to allow citizens enter freely, Member States could also expel citizens and were required to notify the citizen concerned as well as the government of which he is a citizen and the Executive Secretary of ECOWAS.\textsuperscript{458} Also, the expenses incurred in the expulsion of a citizen vested on the Member State which expels him and that Member had to guarantee the security of the citizen concerned as well as that of his family and their property.\textsuperscript{459}

To actualise mobility of people, the Protocol provides for a three-phased programme of action to complete freedom of movement that entails recognition, conferment and enjoyment of a right of entry, residence and establishment in the territory of any ECOWAS Member

\textsuperscript{453} See chapter 3 section 3.2.3.


\textsuperscript{455} Adepoju A, Boulton A & Levin M ‘Promoting Integration through Mobility: Free Movement under ECOWAS’ (2010) 29 \textit{Refugee Survey Quarterly} 121.


\textsuperscript{457} Article 2 of the Protocol Relating to the Movement of Persons, Residence and Establishment 1979.

\textsuperscript{458} Article 11(1) of the Protocol Relating to the Movement of Persons, Residence and Establishment 1979.

\textsuperscript{459} Article 11 (2) and (3) of the Protocol Relating to the Movement of Persons, Residence and Establishment 1979.
state for citizens of the Community.\textsuperscript{460} These three phased programmes was aimed to be achieved over fifteen years and is articulated under Article 2(3) of the Protocol and it reads:

‘The right of entry, residence, and establishment, which shall be established in the course of a transitional period, shall be accomplished in three phases, namely: Phase I- Right of Entry and Abolition of Visa, Phase II- Right of Residence, Phase III- Right of Establishment.’\textsuperscript{461}

Essentially, the Protocol on Free Movement was designed to function as progressive, transitioning within specified time frames of five years effective from the date of definitive entry into force of the Protocol. Also, an experience accumulated from each of the phases provides a guide in implementing the next phase of the protocol.\textsuperscript{462} This Protocol is premised on Community citizens’ fundamental Human Rights. Thus, migrants of ECOWAS origin are to enjoy those rights irrespective of their migratory status and whether they are de jure or de facto migrants in country of transit or in the country of destination.\textsuperscript{463} They are to enjoy the rights just as citizens of the host nations.

\textit{Phase I Right of Entry}

The 1979 Protocol revealed the first phase of implementation and ratification of the Protocol made this phase operative and Members were to transition in a space of five years.\textsuperscript{464} This phase is entrenched in Article 3 of the Protocol and this provision stipulates that:

1. ‘Any citizen of the Community who wishes to enter the territory of any other Member State shall be required to possess valid travel document and international health certificate.

2. A citizen of the Community visiting any Member State for a period not exceeding ninety (90) days shall enter the territory of that Member State through the official entry point free of visa requirements. Such citizen shall, however, be required to obtain permission for an extension of stay from the appropriate authority if after such entry that citizen has cause to stay for more than ninety (90) days.’\textsuperscript{465}

\textsuperscript{460} Bolarinwa OJ ‘The ECOWAS Free Movement Protocol: Obstacle or Driver of Regional Integration?’ (2015) 7 Insight of Africa 157.
\textsuperscript{461} Article 2.3 of the Protocol Relating to the Movement of Persons, Residence and Establishment 1979.
\textsuperscript{465} Article 3 of the Protocol Relating to the Movement of Persons, Residence and Establishment 1979.
In essence, Member States had to dispense with the necessity to obtain a visa for all ECOWAS citizens by requiring only a valid travel document and an international health certificate for the purpose of entry and exit across the region. Further to this, citizens could visit for a ninety days period with no visa required. This principle is however curtailed by Article 4 of the Protocol which states that:

‘Notwithstanding the provisions of Article 3 above, Member States shall reserve the right to refuse admission into their territory any Community citizen who comes within the category of inadmissible immigrants under its laws.’

Accompanied by this inadmissibility provision is Article 11 which sets out certain requirements for expulsion of illegal migrants. This provision under Article 4 entrenches State sovereignty or arguably offers a reasonable limitation towards inadmissibility which can undermine the whole purpose of the Protocol. First and foremost, not all Community citizens will get entry into another country across the region and the Protocol fails to define who qualifies as an inadmissible immigrant, leaving national laws at the forefront of regulating inadmissibility. Adepoju in analysing the Protocol argues that by;

‘acknowledging State sovereignty in such unambiguous terms, ECOWAS virtually invites national provisions to be more restrictive than and perhaps antipathetic to the non-discrimination, regional social cohesion and promotion and protection of human and peoples’ rights objectives at the heart of the ECOWAS initiative.’

The coming into force of the 1979 Protocol coincided with a period of economic recession in most of West Africa, especially in the countries bordering Nigeria, which at that time was itself booming economically through the huge oil sector earnings. Due to the oil boom, employment opportunities was at its largest and the oil-led employment opportunities in

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467 Article 11 of the Protocol provides that ‘1. A decision to expel any citizen of the Community from the territory of a Member State shall be notified to the citizen concerned as well as the government of which he is a citizen and the Executive Secretary of ECOWAS. B. The expenses incurred in the expulsion of a citizen shall be borne by the Member State which expels him. 3. In case of expulsion, the security of the citizen concerned as well as that of his family shall be guaranteed and his property protected and returned to him without prejudice to his obligations to a third party. 4. In case of repatriation of a citizen of the Community from the territory of a Member State, that the Member State shall notify the government of the state of origin of the citizen and the Executive Secretary. 5. The cost of repatriation of a citizen of the Community from the territory of a Member State shall be borne by the citizen himself or in the event that he is unable to do so by the country of which he is a citizen.
Nigeria were a magnet especially for unskilled workers, who came in their numbers from neighbouring countries like Ghana, Togo, Chad, Mali and Cameroon to work in the construction and services sectors.\(^{470}\) The short-lived oil boom resulted in a rapid deterioration in living and working conditions within Nigeria. In early 1983, Alhaji Ali Baba the then Nigerian Federal Minister of Internal Affairs expelled illegal unskilled workers\(^{471}\) and in mid-1985, the Nigerian Government revoked Articles 4 and 27 respectively of the 1979 Protocol.\(^{472}\)

To better enhance mobility, additional Protocols were voted on to supplement the 1979 Protocol specifically on the different phases towards residence and establishment. These Protocols were annexed to the founding treaty of the ECOWAS and offered substance towards regulating the movement of persons.

**Phase II Right to Residence**

Phase II, on the free movement agenda aimed at extending residency to Community citizens.\(^{473}\) In 1986, the Supplementary Protocol on the Right of Residence A/SP.1/7/86 on the Second Phase was voted.\(^{474}\) Central to this supplementary Protocol, is enabling Community citizens to seek employment and reside in any Member State free of discrimination. The Protocol highlights that this right of residency included:

\[\text{the right to seek and carry out income earning employment, to Community citizens in host ECOWAS states, provided they had obtained an ECOWAS residence card or permit.}\]

Members were given one-year period to harmonise their rules and regulations on issuing an ECOWAS residence card.\(^{475}\) Additionally, Article 23 stipulates that

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\(^{475}\) 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.

\(^{476}\) Article 2 of the Supplementary Protocol on the Right of Residence A/SP.1/7/86.

\(^{477}\) Article 9 of the Supplementary Protocol on the Right of Residence A/SP.1/7/86.
‘no matter the conditions of their authorisation of residence, migrant workers who comply with rules and regulations governing residence, shall enjoy equal treatment with nationals of the host Member State.’

This provision therefore imposes an obligation on Member States to grant migrant workers, complying with the regulations governing their residence under ECOWAS, equal treatment with nationals in areas such as security of employment, participation in social and cultural activities and, in certain cases of job loss, re-employment and training.479 The Protocol goes further to define who qualifies as a ‘migrant worker’480 under Article 1 and excludes;

‘people employed by international organisations or a State whose entry are governed by international law, people employed by a State for implementing cooperation programmes for development agreed on with the host country, people whose work relations with an employer have not been established in the host country, people whose main income does not come from the host Member State, and people who become residents in their capacity of investor in a country other than their State of origin.’481

**Phase III Right to Establishment**

The Phase III, the final five-year period, focused on the facilitation of business through the right of Community citizens to establishment.482 Its realisation was intended to occur seamlessly, following the five years dedicated to implementing the right of residence.483 This Phase is facilitated through the Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free movement of People, Right of Residence and Establishment. Based on this Protocol, the Right of Establishment means;

‘the right granted to a citizen who is a national of the Member State to settle or establish in another Member State other than his State of Origin, and to have access to economic activities, to carry out these activities as well as to set up and manage enterprises, and in particular

478 Article 23 of the Supplementary Protocol on the Right of Residence A/SP.1/7/86.
479 Article 23(1)(a)-(f) of the Supplementary Protocol on the Right of Residence A/SP.1/7/86.
480 Any citizen who is a national of one Member State, who has travelled from his country of origin to the territory of another Member State of which he is not a national, and who seeks to hold or proposes to hold or is holding or has held employment”.
481 Article 1.2 (a) – (e) of the Supplementary Protocol on the Right of Residence A/SP.1/7/86.
companies under the same conditions as defined by the legislation of the host Member State for its own nationals. 484

Very particular to this Protocol is the fact that all Member States are urged in matters of establishment and services to accord non-discriminatory treatment to nationals and companies of other Member States. 485 If this cannot be attained, Members must indicate in writing to the executive secretariat and other Members shall then not be bound to accord non-discriminatory treatment to nationals and companies of the State concerned. 486 This provision in all likelihood limits itself by awarding sovereignty to States. From the above discussion, regarding labour and employment, the Protocols defer mainly to the national laws of Member States, and in the absence of guiding principles or common minimum standards for legislative harmonisation, they leave considerable discretionary powers to Member States to determine who they allow in and under what conditions migrants can work. Despite this shortcoming, the Protocols offer a solid basis for establishing free movement and are widely recognised as a best practice for international cooperation on labour migration.

Thirty nine years down the line only Phase I has been implemented. The implementation of phases II and III has been slow with certain challenges experienced by the region. Such challenges will be discussed below.

3.3.4 Implementation Challenges of the Protocols on Free Movement of People in the Economic Community of West African States

To best ensure implementation of the laws alluded to above regarding intra ECOWAS migration, a dispute resolution mechanism is provided for in case of differences between Member States regarding the interpretation or implementation of the provisions of the Treaties and Protocols or regulations. Article 7 of the 1979 Protocol offers an opportunity for disputes to be taken ‘by one of the parties before the Community tribunal, whose decision is final and without appeal’ 487 if an amicable settlement is not reached by direct agreement between the parties. The revised Treaty of 1993 takes a further step to ensure implementation by allowing for a hearing before the Court of Justice of the Community in the event that an amicable settlement is not reached. 488 An institutional framework aiming to manage

484 Article 1 of the Supplementary Protocol on the Right of Establishment A/SP.2/5/90.
486 Article 4.1 of the Supplementary Protocol on the Right of Establishment A/SP.2/5/90.
488 Article 76 of the Revised Treaty of the ECOWAS 1993.
compliance with intra-regional migration has been developed under the auspices of ECOWAS. Alongside this supervisory body, several other bodies based on the 1975 Treaty have been set up to monitor the implementation of the provisions relating to free movement of persons, rights of residence and of establishment. But the question is how successful has its implementation been in ensuring movement of persons, despite the body of legislation introduced to address the subject matter?

The ECOWAS free movement agenda has come a long way. Despite the comprehensive and well-structured nature of the Protocols, it is not without implementation challenges. One peculiar challenge referred to in a thesis by Ayamga relates to the fact that the Protocol remains unknown to many ECOWAS Citizens. This lack of awareness makes citizens susceptible to harassment and extortion at border posts in their attempt to cross into other states within the sub-region.

The Protocol as aforementioned, is designed in phases and implementation was to occur in those phases within fifteen years. Phase I, Right of Entry came into force in 1980. The effect of this was the abolishment of visa requirement for the ECOWAS citizens within the region and awarding them automatic right of entry and movement within the community for a ninety days period. Regarding this phase entry visas for Member State nationals have been effectively abolished. Referring to Adepoju, the travel document required has only been issued in seven of fifteen ECOWAS countries: Burkina Faso, the Gambia, Ghana, Guinea, Niger, Nigeria and Sierra Leone. In 2000, the Authority of Heads of State and Government adopted at its meeting in Abuja a uniform ECOWAS passport, modelled on the EU passport

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489 Commission of business, customs, immigration and of monetary questions and payments required under Article 9(4)(a) of the 1975 Treaty to present periodical reports and recommendations through the Secretariat to the Council of Ministers. Commission on political, judicial and legal affairs, regional security and immigration under Article 22(1)(f) of the Revised Treaty of 1993 replaced the previous commission, extending its mandate in terms of Article 23 to preparing programmes and community projects, ensuring harmonisation and coordination of projects and community programmes as well as monitoring and facilitating the implementation of the provisions of the Treaty and its Protocols.


and with the ECOWAS emblem on the front cover. A five-year transitional period was foreseen during which national passports would be used in conjunction with ECOWAS passports while ECOWAS passports were phased in and became more widely available.\textsuperscript{495} These passports are yet to be issued in most Member States.\textsuperscript{496}

In an analysis of these phases, Bolarinwa indicates that these rights particularly the second and third phase have not yet been meaningfully implemented in the sub-region due to political and economic instability.\textsuperscript{497} In her view, progress:

‘have fallen victim to the sub-regional decline in economic performance in the 1980s and massive prolonged displacement from the wars in Liberia and Sierra Leone through the 1990s and into the early twenty-first century.’\textsuperscript{498}

Boulton also mentions that ‘the main shortcoming of these highly favourable provisions in the free movement protocols is that they are either not known or not implemented.’\textsuperscript{499} He further asserts that on the theoretical level, all three phases are complete and the entitlements set out in the free movement protocols are the law of the region. Nonetheless, the glaring reality is that only the first of the three phases has been fully implemented.\textsuperscript{500}

Looking at the Protocol, further implementation challenges can be seen in the form of an absence of adequate mechanisms to control the infiltration of criminals, perverse corruption of border officials, diverse and incompatible national laws and policies on migration and labour to regional laws. These incompatibilities of national migration laws are rife across Member States through prohibiting citizens from working in certain sectors within Member States. For example, Article 27(1)(a)-(h) of the Ghana Investment Promotion Centre Act 865/20.\textsuperscript{501} Aduloju draws attention to the fact that:

\textsuperscript{495} Bolarinwa OJ ‘The ECOWAS Free Movement Protocol: Obstacle or Driver of Regional Integration?’ (2015) 7 Insight of Africa 163.
\textsuperscript{500} Boulton A ‘Local Integration in West Africa’ (2009) Forced Migration Review Issue 33 32.
\textsuperscript{501} ‘A person who is not a citizen or an enterprise which is not wholly owned by citizen shall not invest or participate in;
‘for travellers, migrants, job seekers, tourists and traders in the sub-region, the difficulties in moving across West African borders are imposed by obnoxious activities of border officials who exploit to their own ends the restoration of the barriers that the protocol sets out to remove. This makes movement within the community a stressful and harrowing experience.’502

Going forward, there has to be a push to harmonise national laws that conflict with regional laws as well as amend national laws that restrict foreign nationals including those from ECOWAS states.

Furthermore, ECOWAS states should also identify areas of the Protocols that they can progressively implement to further enhance intra-regional mobility of people. Member States need to implement other supplementary agreements such as those relating to residence and establishment using the variable speed approach, whereby sets of common objectives are agreed upon but Member countries move at different speeds towards implementation, some rapidly and others slowly. Hence allowing for an element of flexible integration.

3.3.5 The Economic Community of West African States Common Approach to Movement of People

In 2006, to further enhance intra-regional migration, Members were given a mandate to define a common regional position on migration503 adding to the existing laws on migration. As a result, during the 33rd ordinary session of the Conference of Heads of State and of Government, held in Ouagadougou, January 2008, a common approach to migration was adopted by ECOWAS. In adopting this common approach, six key principles were decided on which involved:

- ensuring the free movement of people within the ECOWAS zone; the promotion of legal or regular migration as an important part of the development process; combating human

- the sale of goods or provision of services in a market, petty trading or hawking or selling of goods in a stall at any place;
- the operation of taxi or car hire service in an enterprise that has a fleet of less than twenty five vehicles;
- the operation of a beauty salon or a barber shop;
- the printing of recharge scratch cards for the use of subscribers of telecommunication services;
- the production of exercise books and other basic stationery;
- the retail of finished pharmaceutical products;
- the production, supply and retail of sachet water; and
- all aspects of pool betting business and lotteries, except football pool.’


trafficking; the protection of the rights of migrants, asylum seekers & refugees; the harmonisation of national policies & lastly, the recognition of the gender dimension of migration.\footnote{ECOWAS Common Approach on Migration’ available at \url{http://www.unhcr.org/49e47c8f11.pdf} (accessed 17 March 2017).}

Additional emphasis was placed on six action plans to achieve these principles.\footnote{Actions promoting free movement within the ECOWAS Zone, Actions to promote the management of regular migration, Actions for policy harmonisation, Actions for controlling irregular migration and human trafficking particularly of women and children, Action to protect the rights of migrants, asylum seekers and refugees, Action to take into account the gender and migration dimension.} Implementation of these plans might be challenging due to their incomprehensiveness and lack of strategy thereof. Judging from this approach, it is imperative to note that ECOWAS has a vision to ensure that the Community gets to the next level of migration governance by formulating a regional migration policy. It will be worthwhile keeping tabs on recent progress to this policy for further research.

### 3.4 East African Community (EAC)

The EAC as will be seen in the discussion is the most recent group to venture into having a common market and an unrestricted approach to the movement of people. That notwithstanding, the EAC is at the most advanced stage of conceptualising and implementing a binding framework for the cross-border movement of workers.\footnote{Basnett Y Labour Mobility in East Africa: An Analysis of the East African Community’s Common Market and the Free Movement of Workers (2013) 31 Development Policy Review 2 132.}

#### 3.4.1 Brief History of the East African Community

The EAC is an intergovernmental and supranational organisation in which cooperation goes back to pre-colonial times. The first moves towards cooperation between the member States can be traced back to 1919 when Kenya, Tanganyika and Uganda, under British administration, formed a customs union.\footnote{Reith S & Boltz M ‘The East African Community Regional Integration Between Aspiration and Reality’ (2011) KAS INTERNATIONAL REPORTS 92.} The EAC was formed in 1967 with its founding three Members and is a regional inter-governmental organisation.\footnote{Kategekwa J Opening Markets for Foreign Skills: How can the WTO Help? (2014) 191.} Political differences and disagreement on how to manage the community on aspects of revenues led to its collapse in 1977.\footnote{Kategekwa J Opening Markets for Foreign Skills: How can the WTO Help? (2014) 191.} In 1993, an Agreement was signed for the Establishment of the Permanent Tripartite Commission for East African Cooperation and in 1997 this commission was agreed to be
upgraded into a Treaty. In 1999, the Treaty re-establishing the East African Community (hereafter the EAC Treaty) was signed and came into force in 2000 post ratification by all three Partner States.

The EAC currently consists of six Members with its headquarters in Arusha, Tanzania. As stated in the founding EAC Treaty, Article 5(1), the objectives of the EAC is to develop policies aimed at widening and deepening co-operation among partner States in political, economic, social and cultural fields. To achieve this aim, the EAC adopted a four stage process in its regional integration efforts. Many of the said stages have already been achieved despite the fact that the negotiation process may have taken longer. Countries in the EAC have a couple of similarities because of their common location, climate and history.

3.4.2 Migration law in the East African Community

Article 76 of the EAC Treaty provides for a Common Market as a key pillar of cooperation and trade liberalisation in the EAC. The Common Market is to provide for free movement of labour, goods, services, capital and the right of establishment. Suffice to note that this Article comes under the chapter of the EAC Treaty entitled ‘Co-operation in Trade Liberalisation and Development’, which is basically centred on trade related aspects of integration. This placement emphasises the EAC common market as a key phase of economic integration aimed at bolstering trade among the Partner States. Essence, what, Article 76.1 provides for is the free movement of factors of production, in a purely economic sense.

512 Members of EAC are Republics of Burundi, Kenya, Rwanda, the United Republic of Tanzania, South Sudan and the Republic of Uganda see About EAC available at http://www.eac.int/about/partner-states (accessed 12 March 2017).
513 Article 5 of the Treaty Establishing the East African Community.
514 Article 5 (2) of the Treaty Establishing the East African Community stipulates that: ‘Partner States undertake to establish among themselves and in accordance with the provisions of the Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation.
515 A Customs Union was established by 2005, a Common Market by 2010 and a Monetary Union and a Political Federation are in the process of being established. See Masinde W & Omolo CO ‘The Road to East African Integration’ in Ugirashebuja E, Ruhangisa JE, Ottervanger T & Cuyvers A (eds) East African Community Law I ed (2016) 17.
517 Article 76(1) of the Treaty for the Establishment of the EAC.
Article 104 however lays the foundation for migration rights provisions within the EAC legal framework. When compared to Article 76(1), the provisions of Article 104 are much broader and comprehensive consistent with the broad objectives of the EAC Treaty referred to above.

Article 104(1) of the EAC Treaty provides for a scope of cooperation providing that Partner States agreed to adopt measures towards achieving the free movement of people and labour as well as guaranteeing the right of establishment and residence of citizens within the Community. The Article goes further to express the means by which partner states are to achieve this objective by:

a) ‘Easing border crossing by citizens of partner states
b) Harmonising and maintaining common employment/labour policies, programmes and legislation

A shortfall of this provision is the fact that it fails to specifically mention the need for harmonisation of migration laws which is necessary for establishing a uniform EAC free movement of persons’ regime. That notwithstanding, both Articles 76 and 104 envisage the conclusion, respectively, of a Protocol on the Common Market and a Protocol on the Free Movement of People, Labour, Services and the Right of Establishment and Residence to give effect to their provisions. The EAC Protocol Establishing the Common Market (hereinafter, the Common Market Protocol or CMP) is presently in force from July 2010 and it incorporates the requirements of the EAC Protocol. However, the EAC is yet to formulate a regional Protocol on the Free Movement of People as per Article 104(2). The overall objective of the Common Market is to widen and deepen cooperation among the partner states in the economic and social fields through removal of restrictions on the movement of goods as well as people, labour, services and capital and the rights of establishment and residence. So the Protocol in some way is the core EAC instrument that regulates as well as offers specificities to migration rights in the region.

518 Article 104(1) of the Treaty for the Establishment of the EAC.
519 Article 104(3) of the Treaty for the Establishment of the EAC.
520 Article 76(4) of the Treaty for the Establishment of the EAC.
521 Article 104(2) of the Treaty for the Establishment of the EAC.
524 Preamble of the EAC Common Market Protocol.
3.4.3 The East African Community Common Market Protocol (CMP)

The Common Market Protocol (CMP) is quite detailed in scope as it provides distinctively for four freedoms of goods, people and labour, services and capital as well as entrenches rights to reside and establish oneself or business venture anywhere within the boundaries of the Community. Article 2(4) of the CMP lists the very essence of the Protocol as including provisions on: the free movement of people, the free movement of labour, the right of establishment and the right of residence. For the attainment of these freedoms and rights, Article 5(2) provides for measures to be undertaken by the Partner States. These measures elaborate upon those enumerated in Article 104(3) of the EAC Treaty referred to above.

The Protocol further adopts key General Agreement on Trade in Services (GATS) principles of non-discrimination as well as Most Favoured Nation (MFN) obligation in terms of Article 3(2).

With regard to regulating migration, the CMP contains elaborate provisions under various Articles which are: free movement of people (Articles 7-9); free movement of workers (Articles 10-12); right of establishment (Article 13); and right of residence (Article 14). The implementation of each of these freedoms and rights is provided for under respective regulations that are annexed to the CMP.

Free Movement of Persons

The Protocol demonstrates a general trend of flexibility in the process of regional integration especially towards the movement of persons. The provision particularly relevant to this is Article 7 as well as Article 10. Based on Article 7, EAC citizens are guaranteed the freedom to move within the territories of any Partner State without being discriminated against on the basis of their nationalities. This is ensured through four measures namely,

‘citizens should enter the territory of another Partner State without a visa, be able to move freely within the territory of that Partner State, stay in there and exit the country without undue limitation.'

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525 Article 2(4) of the EAC Common Market Protocol.
526 Article 5(2) of the EAC Common Market Protocol.
527 See chapter 3 section 3.4.2.
528 Article 3(2) of the EAC Common Market Protocol.
529 Citizen means a national of a Partner State recognized under the laws governing citizenship in the Partner State. See Article 1 of the EAC Common Market Protocol.
530 Article 7(1) of the EAC Common Market Protocol.
531 Article 7(2) of the EAC Common Market Protocol.
While in the territory of another partner state, the citizens are guaranteed the right to protection based on the national laws of that Partner State.\(^{532}\) This movement is however restricted in terms of Article 7(5) on grounds of public policy, public security or public health\(^{533}\) but such restrictions should be communicated to the other Partner States.\(^{534}\) Implementation of the free movement of people has got to be in accordance with the EAC Common Market Free Movement of People Regulations specified in Annex 1 to this Protocol for the purpose of uniformity.\(^{535}\) Regarding implementing these provisions, visa requirements for citizens was abolished. All that is required is a valid national passport. In 1999, the EAC launched the East African Passport and all citizens are entitled to this passport upon applying for it and based on recent events, the EAC is set to issue electronic EAC passports.\(^{536}\)

Further to this, to better facilitate this process of free movement and to identify the citizens of the EAC Partner States, the Partner States are required to establish a common standard system of issuing national identification documents.\(^{537}\) Nationals of Partner States wishing to travel to another Partner State are also required to have a valid common standard travel document.\(^{538}\) Partner States who choose to use machine readable and electronic national identity documents can do so but are required to work out the modalities for the implementation of such documents.\(^{539}\)

**Free Movement of Labour**

The Protocol does not only grant free movement of people but also allows for movement of labour. Article 10 regulates and guarantees the free movement of labour for each other’s citizens within their territories. It stipulates ‘entry’ and ‘stay’ for workers from partner states. The Article in general guarantees citizens’ free movement within the partner states and non-discrimination in national labour markets,\(^{540}\) outlines their entitlements, and provides the hierarchy between national and Community laws. Article 10(1) reflects partner states’ binding commitment to create an environment whereby citizens are ‘guaranteed’ unrestricted entry and movement between different national labour markets for the purposes of providing

\(^{532}\) Article 7(3) of the EAC Common Market Protocol.
\(^{533}\) Article 7(5) of the EAC Common Market Protocol.
\(^{534}\) Article 7(6) of the EAC Common Market Protocol.
\(^{535}\) Article 7(9) of the EAC Common Market Protocol.
\(^{537}\) Article 8 of the EAC Common Market Protocol.
\(^{538}\) Article 9(1) of the EAC Common Market Protocol.
\(^{539}\) Article 9 (2) and (3) of the EAC Common Market Protocol.
\(^{540}\) Article 10(2) of the EAC Common Market Protocol.
In other words, the use of the word ‘guarantee’ signifies that the partner states are expressing their commitment to not simply passively provide for the free movement of workers but proactively to ensure the elimination of barriers. Article 10(3) further outlines the entitlements of the workers. It provides that for the purpose of this Article, the free movement of workers shall entitle a worker to:

- a) Apply for employment and accept offers of employment actually made;
- b) Move freely within the territories of the Partner States for the purpose of employment;
- c) Conclude contracts and take up employment in accordance with the contracts, national laws and administrative actions, without any discrimination;
- d) Stay in the territory of a Partner State for the purpose of employment in accordance with national laws and administrative procedures governing the employment of workers of that Partner State;
- e) Enjoy the freedom of association and collective bargaining for better working conditions in accordance with the national laws of the host Partner State; and,
- f) Enjoy the rights and benefits of social security as accorded to the workers of the host Partner State.\(^\text{543}\)

In order to realise the free movement of workers, the Partner States are obliged not to apply national laws or administrative procedures whose effect is to deny citizens of other Partner States employment that has been offered,\(^\text{544}\) to harmonise their labour laws, policies and programmes in order to facilitate the free movement of labour,\(^\text{545}\) and to harmonise their national social security policies, laws and systems to provide for self-employed people who are citizens of other Partner States.\(^\text{546}\)

Though the Protocol guarantees the right to free movement of workers, it makes it a mandatory requirement under Annex II for citizens of other Partner States to obtain a permit.\(^\text{547}\) A worker is required to present a travel document and a contract of employment at the point of entry based on Regulation 5(2) of the Annex.\(^\text{548}\) The immigration officer, on examining the documents, will issue the worker a permit to enter the partner State for a

\(^{541}\) Article 10(1) of the EAC Common Market Protocol.


\(^{543}\) Article 10(3) of the EAC Common Market Protocol.

\(^{544}\) Article 10(9) of the EAC Common Market Protocol.

\(^{545}\) Article 12(1) of the EAC Common Market Protocol.

\(^{546}\) Article 12(2) of the EAC Common Market Protocol.

\(^{547}\) Regulations 5 and 6 of Annex II of the CMP.

\(^{548}\) Regulation 5(2) of Annex II of the CMP.
period of up to six months in order to complete the formalities for obtaining a work permit as seen in Regulation 5(4). Upon entry, the worker has to apply for a work permit at a national designated authority within fifteen working days of entering the country. As a requirement for obtaining a work permit, the Protocol specifies a regional standard in that the applicant must present an employment contract of more than ninety days. Also, those securing employment for periods less than ninety days are exempted, but they must then apply for special passes. Furthermore, if the worker changes his or her employment or is no longer employed they are required to notify the relevant authority or leave the country. The Protocol attempts to regulate this process by restricting the issuance of permits to a maximum period of thirty days and requiring harmonisation of the processing and issuance fees by the EAC Council of Ministers.

Having such provisions provides performance benchmarks for the relevant authority and creates a predictable system moving further away from restrictive national laws or the discretion of relevant national authorities.

Significant differences exist in regulating the acquisition of a work permit across the five partner States such as the application process, fees, and the relation between work and resident permits. For instance, as Basnett illustrates, in Burundi a ‘work-permit’ is issued by the Ministry of Labour as opposed to the Ministry of Immigration as is the case in Uganda, Kenya and Tanzania. Furthermore, in Burundi one is required to convert the ‘work-permit’ to a ‘residence-permit’ at the Ministry of Immigration, while in Uganda, Kenya and Tanzania, the ‘work-permit’ acts as a ‘residence-permit’.

The Protocol does not offer a clear guide for harmonising these differences in migration formalities or support the need for coherent EAC wide policy on migration. The Protocol and the Annex are silent on the deadlines for harmonisation of the fees and the penalties for countries not implementing these safeguards to the letter. This has made countries pull in different directions, make their own rules on the issuance of these permits by creating

Regulation 5(2) of Annex II of the CMP.
Regulation 6(1) of Annex II of the CMP.
Regulation 6(4) of Annex II of the CMP.
Regulation 6(4) of Annex II of the CMP.
Regulation 6(4) of Annex II of the CMP.
Regulation 6(7) and (9) of Annex II of the CMP.
elaborate application procedures, high application and issuance costs and refusals to issue the permits if there are locally qualified people. Kenya for instance, has elaborate application and issuance procedures, taking up to three months to process a new work permit and imposes charges of about 10,000 Kenyan Shillings (ksh) on processing fees and Ksh. 200,000 per year as issuance fees.\textsuperscript{557} This fee is general and therefore applicable to citizens of EAC Member States. This defeats the purpose of the Protocol in the first place as it makes employment of citizens of other EAC Partner States an expensive affair and it potentially locks out common workers from other Partner States from the local labour market. Rather, the CMP and the regulations on the free movement of workers aim to ensure harmony and uniformity of laws relating to labour and social security which are essential to attaining a common market in which workers can move freely.

Articles 11 and 12 provides for the harmonisation of professional qualifications and labour practices respectively. Under Article 11, there has to be mutual recognition of academic qualifications granted, experience obtained, requirements met, licenses or certificates granted in other Partner States.\textsuperscript{558} Under Article 12, Partner States are to harmonise labour policies, national laws and programmes to facilitate the free movement of labour within the region.\textsuperscript{559} All these provisions are however subject to regulations of the Council.

**Right of Establishment and Residence**

The right of establishment is also provided for under Article 13 of the CMP. The right of establishment entitles a ‘national of a Partner State’ to take up and pursue economic activities as a self-employed person, and to set up and manage economic undertakings in the territory of another Partner State.\textsuperscript{560} In essence, this provision allows for the right of natural persons to engage in economic activities not under any contract of employment or supervision and earn a living from such activities and secondly, the right to set up a legal entity and manage economic activities under it. Complementing this Article are Regulations in Annex III on the Right of Establishment. Annex III ensures that there is uniformity among the Partner States in the implementation of Article 13 of the Common Market Protocol. According to the Regulations on the right of establishment,\textsuperscript{561} a national of a Partner State seeking to enter another Partner State as a self-employed person only need present a valid passport or national

\textsuperscript{557} Ninth Schedule on Fees in the Kenya Citizenship and Immigration Act 12 of 2011.
\textsuperscript{558} Article 11 of the EAC Common Market Protocol.
\textsuperscript{559} Article 12 of the EAC Common Market Protocol.
\textsuperscript{560} Article 13(3)(a) of the EAC Common Market Protocol.
\textsuperscript{561} The East African Community Common Market (Right of Establishment) Regulations, Annex III to the CMP.
ID and declare all information required at the point of entry based on the immigration laws of the host State. In complying with those requirements the self-employed person is then issued with a special pass at no cost, which entitles him or her to enter the territory of the host Partner State for a period of up to six months, for purposes of completing the formalities for establishment.

Article 14 of the Common Market Protocol and implemented in accordance with the East African Common Market (Right of Residence) Regulations Annex IV of the Common Market Protocol further guarantees the EAC citizens who have been granted the freedom to work and establishment within the territories of other Partner States the right to reside in those territories. Annex IV ensures that there is uniformity in the implementation of Article 14 and that the process is transparent, accountable, fair, predictable and consistent with the Common Market Protocol.

Upon entry into the territory of the Partner State, a self-employed person and his/her dependents who intend to reside in the territory of the Partner State are required to apply for a residence permit, within thirty days from the date of entry. The residence permit is however issued by the host Partner State on the basis of the work permit hence a valid work permit must accompany an application for the residence permit. Based on Article 14, the right of residence is applicable to the spouses, children and dependents of workers or self-employed people. The procedure and requirements for the application of a work permit by a self-employed person are contained in Annex II of the Common Market Protocol. Once the self-employed person is in possession of a valid work permit, he/she is required to apply for a residence permit which is issued within 30 days of the application. Furthermore, Annex IV on the right of residence prescribes the procedure to be followed in applying for a residence permit. In doing so application for a permit shall be supported by:

‘a valid common standard travel document or a national identity card where a partner State has agreed to use the national identity card as a travel document, a copy of the

562 Regulation 5(2) of Annex III of the CMP.
563 Based on Regulation 3 of Annex III of the CMP, the pass means a pass to enter and remain temporarily in, or to re-enter the territory of a Partner State, issued by the host Partner State and includes any class or description of pass which may be so prescribed.
564 Regulation 5(5) of Annex III of the CMP.
565 Regulation 5(3) of Annex III of the CMP.
566 Article 14(1) of the EAC Common Market Protocol.
567 Regulations 6(1) of Annex IV of the CMP.
568 Article 14(2) of the EAC Common Market Protocol.
569 Regulations 6(4) of Annex IV of the CMP.
work permit of the worker or of the self-employed person and any other document the immigration officer may require.\textsuperscript{570}

The duration of the residence permit for the self-employed person cannot exceed the duration of the work permit.

However, the right of residence is not absolute, it is restricted based on public policy, public security or public health grounds but such restrictions should be communicated to the other Partner States accordingly.\textsuperscript{571} Further limitation on the application of this provision was also highlighted in Article 14(6) which states ‘the provisions of the Article on Right of Residence shall not affect the provisions of national laws, administrative processes and practices of a Partner State which would be more favourable to the nationals of the other Partner States.’\textsuperscript{572}

In essence, the right of residence for EAC citizens, other than workers, self-employed people and Members of their families, is not exactly regulated by Community law, but is at each State’s discretion. One can argue that this particular provision renders the Article in its entirety redundant if it has no influence on national laws.

The right of residence under regional integration is understood to mean the right of community citizens to settle anywhere within the territory of the Community. In the EAC an interesting caveat is adopted to this right. The right of residence apparently does not apply to all citizens of the Community. It is only applicable to those citizens of other Partner States who have been granted work permits, either as workers or self-employed people.\textsuperscript{573}

Furthermore, Part F of the Common Market Protocol and Article 16 in particular, Partner States guarantee the free movement of services and service suppliers of each other’s nationals within the EAC.\textsuperscript{574} This replicates the GATS mode IV approach. Mode IV is defined as the presence of a service supplier who is a citizen of a Partner State in the territory of another Partner State.\textsuperscript{575} Also, the scope and definition of service supply are similar to the GATS. Services include services in any sector except services supplied in the exercise of governmental authority, which are not provided on a commercial basis or in competition with one or more service suppliers.\textsuperscript{576} The Protocol adds another scope which is services normally

\textsuperscript{570} Regulations 6 of Annex IV of the CMP.
\textsuperscript{571} Article 14(4) and (5) of the EAC Common Market Protocol.
\textsuperscript{572} Article 14(6) of the EAC Common Market Protocol.
\textsuperscript{573} Article 10 of the EAC Common Market Protocol.
\textsuperscript{574} Article 16(1) of the EAC Common Market Protocol.
\textsuperscript{575} Article 16(2) of the EAC Common Market Protocol.
\textsuperscript{576} Article 16(7) of the EAC Common Market Protocol.
provided for remuneration, in so far as they are not governed by the provisions relating to free movement of goods, capital and people.\textsuperscript{577}

To give effect to the above freedoms and areas of cooperation, the Protocol has six annexes which detail how the various phases of the protocol will be realised. The six annexes are on: Free Movement of People, Free Movement of Workers, Right of Establishment, Right of Residence, Free Movement of Services, and Free Movement of Capital. The Protocol in essence introduces a regional framework for creating a stable and predictable policy environment to govern the free movement of people, including service providers and workers. Codifying of process and requirements in the Protocol means that standards are being set for all partner States to follow. The point to emphasise is that all the aforementioned phases of the Protocol are inextricably linked and cannot be realised without the free movement of persons.\textsuperscript{578} Currently, the provisions of the Protocol are effective, having been ratified by the five Partner States. After ratification, the Protocol entered into force on 1 July 2010.

There are however challenges involved in the implementation of this right to unrestricted movement of people. Accompanying the right to move, is the right to reside and establish oneself. These accompanying rights result in the need for land and housing for the migrant and possibly their families. Article 15 of the Protocol allows for the access to and use of land and premises but subjects this provision to national policies and laws of Partner States.\textsuperscript{579} Gaining access to housing can be problematic particularly in countries that are already experiencing housing shortages such as Kenya.

Oucho and Odipo present some key shortcomings to the Protocol. First, they argue the Protocol is unnecessarily bold and presumptuous:

‘It presumes that the EAC Partner States will strictly adhere to the Protocol, and that their responses and actions will not flounder in a context where they are subject to pressure from the other RECs to which they belong to implement other Protocols.’\textsuperscript{580}

\textsuperscript{577} Article 16(7) of the EAC Common Market Protocol.
\textsuperscript{578} Oucho JO & Odipo G ‘Prospect for free Movement of particular persons in the East African Community; The Feasibility and dilemas of Integration’ in Nita S, Pecound A, Lombaerde DP, Neyts K & Gartland J (eds) Migration, Free Movement and Regional Integration (2017) 137.
\textsuperscript{579} Article 15 of the EAC Common Market Protocol.
Oucho and Odipo further highlight issues of economic disparities and political incompatibilities amongst EAC partner States.\textsuperscript{581} Also, institutional challenges, specifically by the EAC secretariat due to lack of finances and resources to adequately ensure the implementation of all the freedoms highlighted in the Protocol.\textsuperscript{582} Further challenges alluded to is the lack of coherence regarding national migration policies within the EAC. From the discussion above the CMP did not envision the need for an EAC wide policy targeted towards migration. In this regard, formulating a regional migration policy framework can be adopted to further integration efforts.

The point to emphasise regarding the EAC approach is that all freedoms towards a Common Market are inextricably linked and cannot be realised without the free movement of persons. The EAC has made significant progress on visa free movement of EAC citizens, but has not implemented free residence and establishment. The EAC has however begun harmonising and lowering requirements and fees for EAC applicants for temporary and permanent residence and it will be worthwhile keeping track on the developments.

3.5 \textbf{Comparison of the European Union, Economic Community of West African States and East African Community Approach to Free Movement of People}

It is worth noting that a comparison of EU, ECOWAS and EAC regional integration policies especially the free movement policy has to take into consideration the very different levels of institutional and social development across all three regions. Also, the level of implementation, content in the respective Treaties and Protocols governing the integration process has to be considered. Looking at EU Treaties regarding regional integration and free movement shows how detailed and complex the regulating movement of people can be compared with ECOWAS Protocols and that of the EAC, which is more recent and less well established.

From the earlier discussions, economic disparity within a region can constitute a significant challenge for attaining free movement. Where this is the case, meaningful progress towards the regional management of the movement of people appears to become less likely as seen in

\textsuperscript{581} Oucho JO & Odipo G ‘Prospect for free Movement of particular persons in the East African Community; The Feasibility and dilemas of Integration’ in Nita S, Pecound A, Lombaerde DP, Neyts K & Gartland J (eds) \textit{Migration, Free Movement and Regional Integration} (2017) 140.

\textsuperscript{582} Oucho JO & Odipo G ‘Prospect for free Movement of particular persons in the East African Community; The Feasibility and dilemas of Integration’ in Nita S, Pecound A, Lombaerde DP, Neyts K & Gartland J (eds) \textit{Migration, Free Movement and Regional Integration} (2017) 140.
the case of the SADC. However, this lack of progress due to deep economic disparity may be contrasted with other regions discussed above, in this case, the EU, ECOWAS and the EAC. Economic inequalities prevail across these regions but are less pronounced and did not constitute a challenge to their integration efforts. In effect, developing regional policies to manage the movement of people as discussed above was not a hurdle due to economic differences making them a suitable example for SADC to follow.

Looking at all three regions discussed above, certain similarities can be noted in their approach to free movement of people. One key similarity for all the regions referred to, is premised on the fact that movement of people was viewed to be an issue of significance, borne out of the need to promote a regional identity and trade as well as prompt deeper regional integration. As seen earlier in the discussion, stemming from their individual primary Treaties, a legal mandate was entrenched. Each region aimed for a full or complete free movement of people in the framework of a common (or single) market, including the free movement of goods, services, capital, and people. So from their perspective, the free movement of people is usually conceived as a long-term goal to be established gradually. This consequently led to progressive attempts to regulate the movement of people through individualised regional policies. Therefore, it can rightly be argued that a strong feature of the free movement of person’s regime across these RECs is the legal protection afforded by their respective laws to their respective ‘citizens’ moving between Member States. This has consequently resulted in reducing or diluting the traditional notion of state sovereignty most especially in the EU. Some reluctance however persists in the ECOWAS and EAC considering the lack of implementation of residence and establishment rights.

Common to all three regions is also the fact that they have devised a simplified documentation system required for trans-border travel. In the EU, Member States have to allow Union citizens to enter their territory with a valid identity card or passport, and family Members who are not nationals of a Member State can enter with a valid passport. No entry visa or equivalent formality may be imposed on Union citizens. The EU grants full visa exemption from two distinct perspectives. First, courtesy of the Schengen Agreement referred to above, all people in Europe are allowed to move freely across the Schengen Area.

583 See chapter 4 and chapter 5.2.
584 See chapter 3 sections 3.2.2, 3.3.2 and 3.4.2.
585 See Article 18, Article 39, Article 43 and Article 47 of the Treaty Establishing the European Union, Article 3 of the Revised ECOWAS Treaty, Article 104 of the EAC Treaty.
However, under the EU Directive, every EU citizen is automatically entitled to enter another Member State without a visa, only to be restricted on grounds of public policy, public security or public health.\textsuperscript{587} In ECOWAS, the Protocol dispenses with the necessity of obtaining a visa for all citizens of ECOWAS possessing a valid travel document and an international health certificate.\textsuperscript{588} In 2000, the ECOWAS common passport was adopted and as of 2015, Fagbayibo reports that ten out of fifteen states have adopted the regional passport.\textsuperscript{589} In the EAC, citizens may use a passport or common travel document, conversely, citizens can also present a national identity card where the Partner State has agreed to the use of a machine readable electronic identity card as a travel document.\textsuperscript{590} In the 35th EAC Council of Minister’s meeting after the consideration of the different status of preparedness by the Partner States during, the EAC directed Partner States to commence issuance of the EA e-Passport by 31st January 2018.\textsuperscript{591}

Accompanying the right of entry, across all three regions is the elaborative right of residence and the right of establishment. Differences however exist with regard to the requirement of documents necessary to reside in another Member State for a maximum three-month period. From all selected regional arrangements, the EU grants residence rights independently from economic activity. In other words, the right of residence is usually granted to all categories of people for an unlimited period of time, without any formalities, although Member States may require that citizens announce their presence within a reasonable period of time.\textsuperscript{592} However, in the ECOWAS and EAC residence rights are subject to the undertaking of income-earning employment. ECOWAS explicitly link the right of residence to income earning employment, for an unspecified period of time so far as the citizen acquires an ECOWAS residence card or work permit.\textsuperscript{593} The EAC on the other hand grants the right to reside on the basis of a work or residence permit for the duration of the work permit to workers or self-employed people and their families.\textsuperscript{594} For residing post three months, a citizen of the region may be asked to fulfil certain formalities which are more elaborate in the EU\textsuperscript{595} compared to the ECOWAS which

\textsuperscript{587} Article 27(1) of the EU Council Directive 2004/38/EC.
\textsuperscript{588} Article 3 of the Protocol Relating to the Movement of Persons, Residence and Establishment 1979.
\textsuperscript{590} Article 9(1) of the EAC Common Market Protocol.
\textsuperscript{592} Article 6 of the EU Council Directive 2004/38/EC.
\textsuperscript{593} Article 2 of the Supplementary Protocol on the Right of Residence A/SP.1/7/86.
\textsuperscript{594} Article 10 of the EAC Common Market Protocol.
\textsuperscript{595} See chapter 3 section 3.2.3.
requires a health certificate. Comparing the right of residence in all three regions, it is apparent that the scope of application of the EAC and ECOWAS right of residence is restrictive than in the EU where the right of residence applies to all citizens of the Union without the need for them to be economically active.

For effective movement of people, it is necessary that a regional enforcement mechanism as well as legal remedies are available for violations of this right. Across all three regions, the free movement of people has not been accompanied by regular monitoring of the conferred rights of entry, residence and establishment. Rather, what has strengthened the free movement rights laid down in primary and secondary law are key enforcement mechanisms. In the case of the EU, violations of these rights have been dealt with by both the ECJ and the European Commission which have substantially interpreted migration laws within the region. Regional mechanisms in the EAC and ECOWAS do exist in the context of the East African Court of Justice and ECOWAS Tribunal and a Commission of enquiry respectively. However, their contribution to the effective enforcement of regional free movement rights has not been fully experienced thus far.

### 3.6 Conclusion

Cooperation between Member States in ensuring a borderless and stress free movement of people, goods and trade relations can contribute to tackling the root causes of irregular migration, employment and economic development at a regional level. The EU has progressed remarkably towards creating a region in which free movement of people is a daily occurrence. This progress stems from a continuous political will to achieve the goals of integration. Primary and secondary laws have been enacted progressively to secure this right of free movement. At one level, the Treaty of Rome establishing the European Community secures the free movement of workers. The Maastricht Treaty brought about further change by introducing the concept of Union citizenship, together with a number of associated rights, such as the right to move and reside freely in all Member States courtesy of absorbing the Schengen Agreement. The provisions of the Treaties were given further detail by secondary legislation through the EU Directive of 2004.

The ECOWAS has adopted a similar progressive approach to the EU. It adopted a substantive Protocol, along with supplementary texts to the right of residence and establishment respectively. This testifies to countries’ determination to place the free intra-regional
movement of people at the heart of the regional integration process. The EAC a more recent regional economic group is adequately regulating the movement of people through a collectively agreed system under the Common Market Protocol. Having discussed these regions, a peculiar lesson can be taken is the fact that seamless movement of people is a progressive process that necessitates continuous and concerted political commitment on the part of Member States to work and overcome the numerous challenges to regional integration and economic development. Furthermore, the success of this process is best achieved if the required check and accountability measures are in place just like the European Court of Justice, the East African Court of Justice and ECOWAS Tribunal. This is necessary because critical issues of violations and non-compliance with provision by Member countries need be tackled pragmatically without favour.

Having compared different regional approaches towards movement of persons, the next chapter therefore examines how the Southern African Development Community (SADC) has negotiated or approached the movement of people as a region. The perception of individual Members towards the concept especially South Africa is also looked at with reference to its domestic law on immigration.
CHAPTER 4

MOVEMENT OF PEOPLE IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) WITH REFERENCE TO SOUTH AFRICA

4.1 Introduction

The previous chapter discussed the relevant international laws that promote the movement of people as well as the laws that govern the movement of people within the selected regional groups. Having also highlighted the mandate to further movement of people under the Abuja Treaty under Article 43 and the African Union (AU) Protocol on Free Movement of Persons in chapter two of this thesis and the different approaches adopted by the European Union (EU), Economic Community of West African States (ECOWAS) and the East African Community (EAC), this chapter builds on the discussion by examining how the SADC as a regional group as well as Member States such as South Africa a prominent country in the region has gone about regulating the movement of people.

Southern Africa is viewed as a region of international migration since the last two decades of the nineteenth century, when development became focused on the mining industry. The countries in Southern Africa have been sending and receiving migrants as labour migrants came to work on the Kimberley diamond mines, including from modern day Lesotho, Zimbabwe and Mozambique. Mining as well as commercial farming expanded to Zambia and Zimbabwe which gave rise to unskilled labour migration. Peberdy and Crush also illustrates a similar stance of the region’s history of migration as he mentions:

‘Southern Africa perhaps epitomises the shape of African migration. It is a region with a rich history of migration that dates back long before the arrival of Europeans on the continent.’

596 See chapter 2 section 2.3.1.
The SADC aims to maintain this history by encouraging deeper integration in terms of Article 5 of the Treaty Establishing the SADC (hereafter, the SADC Treaty). Article 5 provides for:

‘developing 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.’

The desire for deeper regional integration, therefore, calls for further instruments for facilitating the free movement of people. Despite this history of migration and aim of integration, the current attitude towards migration in the region has been focused on competing and at times conflicting interests of individual Member States.

Attempts have been made to afford individuals the right to move freely but not much progress has been made. In 1995, the SADC adopted a Draft Protocol on the Free Movement of People which would confer on SADC citizens the right to free entry, residence and establishment of oneself in the territory of another Member State. This Protocol was however disregarded due to concerns from South Africa, Namibia and Botswana. In 2005, the 1995 Draft Protocol was superseded by a Protocol on the Facilitation on the Movement of People which has been signed by thirteen States but only six States have ratified the Protocol. In essence, views of migration in the region between individual Member States differ, so do their respective policies on migration.

The discussion in this chapter is centred on how the SADC has approached the movement of people by giving a detailed analysis of the laws regulating the subject. Discussions in the chapter begins with a look at the SADC as a Regional Economic Community (REC). Thereafter, laws influencing the movement of people are discussed. To exemplify status quo of migration governance within the SADC, South Africa’s immigration law is also discussed.

601 Article 5(2)(d) of the Treaty Establishing the SADC.
604 South Africa, Zambia, Lesotho, Mozambique, Botswana and eSwatini.
4.2 Southern African Development Community

Regional integration within the Southern African region has its roots in the sense of a common destiny that developed through the involvement of African states, particularly those located in Southern Africa, in the fight against apartheid in South Africa. This sense of a common destiny led to the establishment of the Frontline States who spearheaded the fight against white minority rule in the region. As more and more states attained majority rule in the region reasons for the liberation struggle became redundant. The focus of the Frontline States had to change and this shift in focus led to the creation of a regional bloc, the present day SADC.

The creation of the SADC can be traced back to April 1980, when the then nine independent States of Southern Africa, Angola, Botswana, Lesotho, Malawi, Mozambique, Eswatini, Tanzania, Zambia and Zimbabwe met at a summit level in Lusaka, Zambia. At this summit, these countries adopted the Lusaka Declaration entitled ‘Southern Africa: Toward Economic Liberation’ under the Southern African Development Coordination Conference (SADCC). The SADCC as it were had a more elaborate aim to foster economic development and reduce dependence on South Africa. When it became clear, that a democratic South Africa was becoming an irreversible prospect, and against the background of changes in the global economy and severe droughts in the sub-region, the Heads of States of SADCC on 17 August 1992 turned SADCC into the now SADC. This transformation of the organisation from the SADCC into the now SADC took place in Windhoek Namibia in 1992 changing the entity from a loose association into a legally binding arrangement through the SADC treaty. South Africa subsequently acceded to the SADC Treaty in 1994 at the Heads of State Summit in Gaborone, Botswana.

The SADC includes all of the Southern Africa Customs Union (SACU) Members\textsuperscript{612} plus Angola, the Democratic Republic of Congo, Madagascar, Malawi, Mauritius, Mozambique, Zambia, and Zimbabwe. The countries of the region range in size from extremely large in surface area and population (for example Democratic Republic of Congo) to extremely small like Lesotho, characterised by economic imbalances, with South Africa earning 65.7\% of the total regional gross domestic product (GDP). Angola has the second largest economy at 6.1\% of GDP, Botswana at 3.1\% and Namibia is at 1.9\%.\textsuperscript{613}

The SADC envisions a region with a;

‘high degree of harmonisation and rationalisation, to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of people in the region.’\textsuperscript{614}

Article 5 of the SADC Treaty enshrines further objectives by promoting complementarity between national and regional strategies and programme.\textsuperscript{615} This is to be achieved by harmonising political and socio economic plans and policies of Member States.\textsuperscript{616} Having such vision and objective has led to several signed and ratified Protocols as well as ‘to be’ ratified Protocols.\textsuperscript{617} One of such Protocols signed and ratified is the SADC Protocol on Trade.\textsuperscript{618} As a key objective, the Protocol on Trade aims to strengthen intra-regional trade in goods and service linkages between SADC countries\textsuperscript{619} as well as improve cross-border and foreign investment, economic development within the region.\textsuperscript{620}

\textsuperscript{612} South Africa and Botswana, Lesotho, Namibia and Swaziland


\textsuperscript{614} SADC vision http://www.sadc.int/about-sadc/overview/sadc-vision/ (accessed 26 April 2017).

\textsuperscript{615} Article 5 of the Treaty Establishing the SADC 1992.

\textsuperscript{616} Article 5(2)(a) of the Treaty Establishing the SADC 1992.

\textsuperscript{617} Protocols relating to Tourism, Trade, Transport, Education and Training all of which recognises increased cooperation and also increased movement of capital and goods.

\textsuperscript{618} SADC Protocol on Trade in Goods 1996.


However, integration efforts based on the Protocol on Trade aimed at launching a Common Market in 2015 with harmonised regulation and policies on the free movement of factors of production \(^{621}\) such as goods, capital, people and services are yet to be accomplished.\(^{622}\)

Free movement of persons across the SADC has been at the heart of SADC from its inception as seen in Article 5(2)(d)\(^{623}\) referred to in the introduction of this chapter.\(^{624}\) Within the SADC, several legal instruments for the management of migration have been drafted which includes the Draft Protocol on the Free Movement of People,\(^{625}\) the Draft Protocol on the Facilitation of Movement of People,\(^{626}\) Trade in Services Protocol,\(^{627}\) Protocol on Education and Training,\(^{628}\) Protocol on Labour and Employment\(^{629}\) and Regional Migration Policy Framework.\(^{630}\) However, despite these initiatives taken in this direction over more than three decades, little progress has been made. These laws will be discussed in subsequent headings.

Regarding the adoption of the Protocols relating to Free Movement of Persons, discourse on the Protocol have been extensively documented by Oucho, Crush and Williams. The subsequent discussion refers extensively to their work.

### 4.2.1 Draft Protocol on the Free Movement of People of 1995

The SADC Draft Protocol on the Free Movement of People (henceforth the Free Movement Protocol) was developed and championed by the SADC Secretariat\(^{631}\) in the mid-1990s under the general guidance of former Secretary General, Dr. Kaire Mbuende, and SADC Chief Economist, Dr. Charles Hove.\(^{632}\) This Protocol came into existence after a workshop held in

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621 Saurombe A ‘Regional Integration Agenda for SADC “Caught in the winds of change” Problems and Prospect’ (2009) *Journal of International Commercial Law and Technology* 4 103.

622 Saurombe A ‘Regional Integration Agenda for SADC “Caught in the winds of change” Problems and Prospect’ (2009) *Journal of International Commercial Law and Technology* 4 100.

623 It is stated that the organisation shall 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. Article 5(2)(d) of the Treaty Establishing the SADC of 1992.

624 See chapter 4 section 4.1.


626 SADC Protocol on Trade in Services of 2012.


629 Regional Migration Policy Framework of 2014.

630 The SADC Secretariat is the principal executive institution of SADC responsible for the strategic planning, facilitation and co-ordination and management of all SADC programmes available at [https://www.sadc.int/sadc-secretariat](https://www.sadc.int/sadc-secretariat) (accessed 13 June 2018).

1993 and a subsequent meeting of the SADC Council of Ministers in 1994.\textsuperscript{633} The first draft of the Free Movement Protocol was circulated for comment and the responses obtained from Member States was swift. South Africa for instance was against the Protocol and the Department of Home Affairs immediately commissioned an expert opinion from a government funded research think tank, the Human Sciences Research Council (HSRC).\textsuperscript{634} The report urged summary rejection of the Protocol by South Africa. Peberdy and Crush mentions the objections into seven areas:

a. ‘The report argued that there had never been any kind of free movement in the region.

b. The report argued that the Protocol would add to South Africa’s already sizeable unemployment problem.

c. The report suggested that the use of foreign labour in mines would be phased out, creating a demand for jobs from retrenched non-South African mineworkers

d. The report suggested that it would legitimise an over-inflated number of irregular migrants already resident in South Africa

e. The report suggested that freer movement of southern Africans would lead to an increase in xenophobia and attacks on non-South Africans.

f. The report suggested that the porosity of the borders of the region would lead to an increase in irregular migration from outside the region, particularly into South Africa

g. Finally, the report concluded that South Africa should only encourage the free movement of goods and capital.’\textsuperscript{635}

These objections were largely flawed. Contrary to the report Oucho and Crush argue first that,

‘there has been attempt to regulate cross-border movement of people since the imposition of colonial boundaries in the late nineteenth century. In some cases, there were no border controls at all (as between South Africa and its immediate neighbours of Botswana, Lesotho and Swaziland (now Eswatini) until 1963).’\textsuperscript{636}

Furthermore, from their perspective, regarding the notion that the Free Movement Protocol would increase the already unmanageable flow of work seekers and would mean increased

pressure of work seekers on available jobs, no evidence was advanced to support this notion. In their view the report was rather ‘more confused and contradictory on the subsidiary question of whether freer movement within the SADC might be desirable now or in the future.’

Mpedi further highlights some reasons for the rejection of this Protocol by certain SADC Members. He highlights the claim that adopting this protocol will lead to disorderly migration within the region. Just as Oucho and Crush mentioned no evidence was advanced supporting this claim that the mobility of persons will be unmanaged.

Also, the report’s concern on labour migration ignores the long standing role of labour from the region in South Africa’s economy, while also disregarding the evidence that migrants may create work, rather than take it. It subsequently came to light that South Africa was not the only delegation with serious concerns about the Protocol. Namibia and Botswana also shared similar views.

The Free Movement Protocol was based on a clear vision of a region with a shared history and a future where capital, goods and people could move freely across national borders. The Preamble notes that the objective of attaining the free movement of people is intimately related to the promotion of interdependence and integration of the SADC region. Having this vision recognises the interest of the SADC by encouraging amongst other factors, the need for visa free entry into territories. Article 3 of the Protocol highlights the ultimate objective which was to achieve the progressive elimination of all controls on SADC citizens so that there would be free movement of people in the region within ten years from the date of entry into force of the Protocol.

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Referring to the Protocol, Oucho and Crush highlight some key aspects of the instrument. Based on their submission, the Protocol aimed for a gradual abolition of barriers to movement across national borders of Member countries and sought to achieve this in phases:

a. ‘Phase One (within twelve month) visa free entry from one State to another would be effected for visits of up to six months, provided that the individual has a valid travel document and enters through an official border post.

b. Phase two (within three years) any citizen would have the right to reside in another State in order to take up employment, and to enter freely for the purpose of seeking employment.

c. Phase three (within five years) States would abolish all restrictions on the freedom of establishment of citizens of other Member States in its territory.’

Accompanying these phases was the overall aim to eliminate all internal national borders between SADC Member States. In essence, citizens of Member States would not be subject to any checks or control at points of entry. Despite this phased approach proposed by the Protocol, the SADC Member States refused to adopt this Protocol. The primary reason for their refusal was based on the premise that the draft Protocol espoused an ‘open border policy’, as well as failed to acknowledge the existing economic disparities among Member States. The Protocol was viewed in a negative light with some countries through their representative viewing an unrestricted movement strategy as a potential treat. South Africa particularly maintained a stance against the open borders and this was captured by the then Minister of Home Affairs Honourable M.G. Buthelezi, who mentioned that;

‘South Africa is faced with another threat, and that is the SADC ideology of free movement of people, free trade and freedom to choose where you live or work. Free movement of people spells disaster for our country.’

In essence, the Protocol did not alleviate certain fears and concern of some Member States. Simultaneously, in an effort to keep the free movement ideal alive and present a more unified

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Protocol, the SADC Secretariat commissioned one of its original consultants to review and redraft the Free Movement Protocol to try and take account of the concerns expressed by certain Member States.\textsuperscript{650} The Secretariat went ahead with its own re-draft and brought about the Draft Protocol on the Facilitation of Movement of People. This Protocol will be discussed in subsequent heading.

4.2.2 \textbf{Protocol on the Facilitation of Movement of People of 2005}

The Protocol on the Facilitation of Movement of People (hereafter, the Facilitation Protocol) was set up as the follow up legal instrument to the Free Movement Protocol and currently is the key instrument developed to regulate the movement of persons in the SADC. The Facilitation Protocol was drafted as a commitment to further support the efforts of the African Union (AU) in encouraging free movement of people across the continent\textsuperscript{651} and to redress imbalances in large scale population movements within SADC. The Facilitation Protocol particularly aimed to develop policies directed at the progressive elimination of obstacles to the movement of people of the region generally into and within the territories of State Parties.\textsuperscript{652}

The Facilitation Protocol in terms of its provisions does not differ significantly with the Free Movement Protocol. However, the idea of ‘facilitation of movement’ rang fewer alarm bells than the notion of ‘free movement and was a generally acceptable terminology for Member States. This was so because the language was diluted to conform to the needs of opposition without completely abandoning the core principles and objectives of the initial Free Movement Protocol.\textsuperscript{653} The final draft of the Facilitation Protocol was tabled and circulated in late 1997 to Member States.\textsuperscript{654} To date, this Protocol still remains ineffective.

The overarching objective of the Facilitation Protocol toward progressive realisation of movement of persons ties particularly with Article 5(2)(d)655 of the SADC Treaty referred to earlier in the introduction of this chapter. Accompanying the overall objective are specific objectives which are to facilitate:

a. ‘entry, for a lawful purpose and without a visa, into the territory of another State Party for a maximum period of ninety (90) days per year for bona fide visit and in accordance with the laws of the State Party concerned;

b. permanent and temporary residence in the territory of another State Party; and

c. establishment of oneself and working in the territory of another State Party.’ 656

In terms of implementation of the provisions of the Facilitation Protocol, the Protocol specifies that the ‘objectives of this Protocol shall be determined by the Implementation Framework to be agreed upon by States Parties six months from the date of signature of this Protocol, by at least nine Member States.’ 657 This provision creates some uncertainty on the way forward after becoming enforceable. A primary concern in negotiating regional policies amongst Member States involves a question of how will implementation occur and what will be the cost and processes involved in implementation? Considering there is no agreement on a Draft Implementation Framework to better give effect to the Protocol means consensus between Member States on the way forward will remain elusive. To bring ease and some guarantee of enforcement, it will make sense to prepare a draft Implementation Framework that Member States can consider during the process of ratification. The recent signing and ratification of the African Continental Free Trade Area (AfCFTA) with a Protocol on Free Movement of Persons, Right to Residence and Right to Establishment may help to strengthen this effort.

Another key provision in the Facilitation Protocol is the call for the harmonisation of migration legislation and practices of SADC Member States through amendments therefore

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655 SADC Members are 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.


bringing them in line with the objectives of the Protocol.\textsuperscript{658} Thus, the question faced by all Member States that have or will become party to the Facilitation Protocol is the extent to which they would need to amend their existing policies and legislation. Is a complete overhaul necessary or not? It is possible that restrictive and out-dated national laws will require significant changes and this will be a welcomed development. Article 13 however, proposes a gradual step process to harmonisation post enforcement of the Protocol. It aims at achieving harmonisation of laws and administrative practices for easier entry of people for the 90 days period,\textsuperscript{659} standardisation of immigration forms used by traveling citizens,\textsuperscript{660} abolition of visa requirements where they still exist.\textsuperscript{661} Furthermore, the Article provides for: ‘by way of bilateral agreements between 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.’\textsuperscript{662} This particular article fragments the whole process to free movement by promoting bilateral agreements considering the time these agreements will be reached and the different requirements or standards that will be set to obtain these permits. One will imagine a regional permit system towards residence in which there is a mutual recognition of required documents for these permits can be an ideal approach just like the EU, ECOWAS and the EAC.\textsuperscript{663} This regional permit system creates a unified approach and will be less time consuming to citizens.

The Facilitation Protocol further proposes three phases of implementation with no specific implementation timeline of these phases.\textsuperscript{664} This phased approach is somewhat similar to the Free Movement Protocol but as a difference, does not award citizens of Member States a

\textsuperscript{663} See chapter 3 section 3.3.3 and 3.4.3.
‘right to entry, residence and establishment’ like the preceding Free Movement Protocol. Article 5 of the Facilitation Protocol proposes these phases and states that

‘entry, residence, establishment and controls at borders under this Protocol shall be regarded as phases in the process of building the Community and the implementation of the phases shall be consistent with the Implementation Framework referred to under Article 4.’

Each of these phases will be discussed more fully below.

**Phase I Entry**

Article 14 regulates the first phase which involves the entry of people. Based on this provision, a citizen of a State Party may enter the territory of another Member State without the requirement of a visa.666 This visa free entry is subject to the conditions that the-

a. ‘visit lasts for a maximum period of ninety days per year, but without prejudice to the visitor’s right to apply for the extension of such period if a longer stay is deemed necessary subject to the laws of the State Party concerned;

b. the visitor possesses a valid travel document;

c. the visitor has or produced evidence of sufficient means of support for the duration of the visit;

d. the visitor is not a prohibited person under laws of the intended host State; and

e. entry is through an official port of entry.’

Outside the requirement of a valid travel document, the SADC proposes additional formalities of offering proof of financial support, a requirement that is distinct from the EU, ECOWAS and EAC which require proof of only a valid travel document.668 What constitutes ‘a sufficient means of support’ is not defined within the Protocol, meaning it is within the discretion of respective States to define this. With regards to what the person may do during these three months, the Protocol is completely silent and possibly open to determination by individual Member immigration laws. There is no specification as to whether the person may

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668 See chapter 3 section 3.2.3, 3.3.3 and 3.4.3.
be economically active by taking up short-term employment, engage in trade or business of any sort, or attend an educational institution. This provision therefore allows for only temporary visits.

**Phase II Residence**

The second phase is referred to as ‘residence’. 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.’ Obtaining residence in the territory of another SADC country is regulated under Article 16 of the Facilitation Protocol and is expressed in terms where citizens have to comply with the laws of the host States. First of all, permission to reside in another SADC State can only be obtained by applying for a residence permit. This permit application is to be made by the applicant to the appropriate authorities of the relevant State in accordance with the laws of that State Party. Based on this Article, States are only committed in terms of their national laws to review and, where necessary, relax the criteria for granting residence permits. The right of residence was therefore based on an unexceptional stipulation that permission to reside in another State had to be by application for a permit.

Furthermore, each State Party whose authorities are handling an application for residence permit shall ensure that the processing of such application is not unduly delayed and such permit issued pursuant to this Protocol shall be in accordance with the laws of the State Party concerned. These provisions in general offer much power to States to regulate the issuance of residence permits. While sovereignty is justified in terms of determining who stays in a host country, there tends to be undue delays in issuing permits from a practical perspective. Article 17(3) refers to terms like ‘undue delay’ which is undefined and no timeframe is stipulated to offer guidance to what will be regarded as sufficient time for the purpose of

673 See discussion on South Africa below in section 4.4.1.
issuing a permit. A required timeframe with necessary institutions to ensure compliance can aid in holding countries accountable and facilitate the process of issuing these permits.

**Phase III Establishment**

The third phase is referred to as establishment. Based on Article 19, each State Party shall, in terms of its national laws grant permission for establishment to citizens of other State Parties. 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;

a) exercise of economic activity and profession either as an employee or a self-employed person;

b) establishing and managing a profession, trade, business or calling.’

Based on the wording of this provision, ‘in terms of its national laws’ the individual State’s domestic legislation remains the key determinant of whether a citizen of one Member State can establish themselves in another Member State. In essence, there is no regional policy framework that guides SADC Member States in granting residence and establishment to SADC citizens.

This Protocol was not intended to be a legal framework facilitating easy movement between Member States as it were under the Free Movement Protocol considering its formulation, but to serve as a control mechanism, easing the movement of people across borders. The Protocol whilst calling for a harmonised system of migration policies and legislation, does not in itself propose an overarching regional policy and legislative framework granting people the right to move with no restriction. It focuses primarily on enhancing the capacity of States to individually and bilaterally regulate migration and strengthen border control as well as security. From Williams and Carrs’ perspective, ‘the Protocol is counter-intuitive in that despite the Protocol’s aims to facilitate the movement, it also calls for the management of the movement of people by increasing infrastructure and personnel.’

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SADC Facilitation Protocol remain subject to constraints imposed by domestic laws. Domestic laws can completely negate the provisions of the Protocol and run counter to the Protocol’s goal of promoting mobility and inter-connectivity within SADC. In discussing the significance of the Protocol, William and Carr see the Protocol as still maintaining the status quo in regulating mobility as opposed to adopting a change in terms of the content towards having a regional framework. The Protocol in their view affirms the current state of play in the SADC which is domestic legislation and bilateral agreements which are mostly restrictive are the main regulatory norms. In their argument in summary is that the Protocol merely elevates to a regional level what already obtains in domestic legislation of individual Member States. In essence, national interests, as opposed to those of the region seem to be at the forefront of migration management within the SADC. Briefly looking at some SADC Member States’ immigration laws in general to illustrate this restrictive and protectionist trend towards migration, in Namibia, Section 26(3)(e) of the Namibian Immigration Control Act of 1993 provides that:

‘a board shall authorise a permanent residence visa provided the ‘applicant does not and is not likely to pursue any employment, business, profession or occupation in which a sufficient number of people are already engaged in Namibia to meet the requirements of the inhabitants of Namibia’.

In Zimbabwe, the Immigration (Amendment) Act 1999 (No. 8 of 2000), Section 41.3(a)(ii) requires regional citizens to secure employment before arriving in the country. Botswana for instance has a separate legislation on issuing residence and employment permits. The Immigration Act of 2011 governs migration and the Control of Employment of Non-Citizens Act 11 of 1981 governs employment permits. Looking at the Immigration Act, it provides under Section 23(7) ‘in determining an application for a resident permit, the Board shall have

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681 Zimbabwe Immigration Amendment Act 8 of 2000.
primary regard to the interests of Botswana." Foreign nationals are required to obtain a permit before seeking employment in the country.

The Control of Employment of Non-Citizens Act of 1981 like its South African equivalent that will be discussed in greater detail later, similarly requires migrant workers to have a work permit before they can assume employment. It determines that no non-citizen shall engage in any occupation for reward or profit unless he is the holder of a work permit issued to him under the Act, permitting him to be so employed. Alternatively, such a person should be the holder of a certificate of exemption issued to him under the Act. It further requires that no person shall employ a non-citizen unless the non-citizen is the holder of a work permit issued to him under the Act, permitting him to be employed, and is employed in accordance with the terms thereof, unless the non-citizen is the holder of a certificate of exemption issued to him under the Act.

The Facilitation Protocol in essence entrenches the sovereignty of individual States over establishing substantive norms on movement of people. So to a large extent, the Facilitation Protocol endorses at a regional level the position that domestic legislation takes precedence and is the key determinant to regulate movement of people. Maintaining this status quo makes one to question the ambition of the SADC and its Members commitment to governing movement of people. Furthermore, the Protocol does not provide a clear framework or timetable for free movement and only encourages States to utilise their domestic laws and act along bilateral lines. Having this approach in play might jeopardise the chance of reaching a coherent system. At a regional economic and social integration setup like the SADC, it requires harmonisation of domestic policies and legislation that are aligned to regional goals but for this to happen standards have to be set at a regional level.

From the discussion on the provisions of the Facilitation Protocol, cooperation among SADC Members is limited to safeguarding national and regional security by exchanging crime and security intelligence, and ‘preventing the illegal movement of people into and within the region’. One of the reasons for its slow uptake can be related to the fact that the Protocol still looks at movement of people and labour through a lens peculiar to national security. The


683 See chapter 4 section 4.4.1.

684 Sections 4(1) and (2) Control of Employment of Non-Citizens Act 11 of 1981

SADC conservative approach has also placed it at odds with the overall African Union’s (AU) goal of promoting the movement of people within African Regional Economic Communities (RECs); and encouraging the positive role of migrants within their host communities and ensuring their socio-economic development. It will be in the best interest of the SADC if reforms are undertaken to the current approach.

Thus far, there appears to be little appetite for the Facilitation Protocol at this stage and there is little momentum among Member States, to push the Protocol further towards enforcement. To date, the two thirds majority required for ratification to enforce the Protocol has not been attained. The Protocol so far has now been signed by some Member States, but ratified by only six Botswana, Lesotho, Mozambique, South Africa, Swaziland (now eSwatini) and Zambia. It is suggested that regulating the movement of people at a regional level should be less rigid and mean more than ensuring border security and control. It should rather be built on identifying long term interests as well as labour market needs amongst these countries. With the AfCFTA and the African Union Free Movement Protocol on the horizon, efforts towards free movement of people in the SADC can be strengthened.

4.3 Other Protocols Influencing the Movement of People in SADC

Despite the two aforementioned Protocols primarily dealing with movement of people, some other laws and policies have some bearing on allowing movement of some categories of people. These will be looked at next. Protocols such as the Protocol on Education and Training, Employment and Labour as well as the Protocol on Trade in Services will be discussed briefly. Also the recently concluded Labour Migration Policy will be looked at below.

4.3.1 SADC Protocol on Education and Training

Article 3(a) of this Protocol states as an agreed objective of Member States ‘to work towards the relaxation and eventual elimination of immigration formalities in order to facilitate free

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686 See chapter 2 section 2.3.
687 Botswana, Democratic Republic of Congo, Lesotho, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zimbabwe.
movement of students and staffs within the region for the specific purposes of study, teaching, research and any other pursuits relating to education and training institutions.\textsuperscript{689} Article 7 of the Protocol encourages cooperation amongst higher education and training. Member States agree to encourage universities in devising mechanisms to facilitate credit transfer of subjects from one university to another within the SADC region and in order to contribute towards the mutual recognition of qualifications throughout the region.\textsuperscript{690} To better ensure cooperation and facilitate mobility of students and staff, on 23 September 2011 a Regional Qualifications Framework (RQF)\textsuperscript{691} was approved by SADC Member States. To better understand this step the SADC has taken in agreeing a RQF, it is important to understand holistically what a qualifications framework is.

First of all, a qualification is a connotation attached to the fact that an individual has gone through a prescribed system linked to education or a training programme offered in an education institution.\textsuperscript{692} A qualifications framework ‘is an instrument for the development and classification of qualifications according to set criteria for levels of learning achieved.’\textsuperscript{693} Tuck in explaining a qualifications framework made reference to the above definition. He highlights that is worth emphasising that a qualification framework is an instrument for the development, classification and recognition of skills, knowledge and competencies along a continuum of agreed levels. Levels based on some kind of criteria and also, it must employ some means of ensuring that qualifications registered on the framework meet criteria related to matters such as quality and accessibility.\textsuperscript{694} It is a way of structuring existing and new qualifications which are defined by learning outcomes, that is a clear statement of what the learner must know or be able to do whether learned in a classroom, on the job or less formally.\textsuperscript{695} The SADC RQF is a ten level framework which defines the RQF as:

\begin{itemize}
  \item SADC Regional Qualifications Framework becomes a reality available at \url{https://www.skillsportal.co.za/content/sadc-regional-qualifications-framework-becomes-reality} (accessed 5 May 2017).
\end{itemize}
‘a regional framework that consists of a set of agreed principles, practices, procedures and standardised terminology intended to ensure effective comparability of qualification and credits across borders in the SADC region. To facilitate mutual recognition of qualifications among Member States, to harmonise qualifications wherever possible and create acceptable regional standards where appropriate.’\(^696\)

Having a RQF is a major step in the region because aside from immigration law, recognition of qualifications of foreign workers can limit the entry of foreign labour. For instance, as will be seen in subsequent discussion, South Africa requires applicants for a work visa to have their qualifications vetted by the South African Qualifications Authority (SAQA).\(^697\)

**4.3.2 SADC Protocol on Trade in Services**

All the SADC Members are Members of the World Trade Organisation (WTO) with the Seychelles being the latest Member to accede to the WTO in 2015.\(^698\) All these countries have made commitments under the WTO General Agreement on Trade in Services GATS to varying degrees. Acceding to the GATS initiative led to negotiations for a regional trade in services framework which began in early 2000 and a Trade in Services Protocol was finally adopted in 2012.\(^699\) This Protocol was concluded based on Article 22\(^700\) of the consolidated SADC Treaty\(^701\) and Article V of the GATS which permits regional economic integration agreements in the context of trade in services.\(^702\) This Protocol sets out a framework for the liberalisation of services trade and serves as a basis for further negotiations across different service sectors. Negotiations focus mainly on six priority sectors: construction, communication, transport, tourism, financial and energy related services.\(^703\)

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\(^697\) See discussion in chapter 4 section 4.4.1.

\(^698\) [https://www.wto.org/english/thewto_e/acc_e/a1_seychelles_e.htm](https://www.wto.org/english/thewto_e/acc_e/a1_seychelles_e.htm) (accessed 10 May 2017).


\(^700\) Members shall conclude such Protocols as may be necessary in each area of cooperation, which shall spell out the objectives and scope of and institutional mechanisms for cooperation and integration.


\(^702\) The General Agreement on Trade in Services 1995.

\(^703\) SADC Protocol on Trade in Services.
Just like the GATS, the SADC Trade in Services Protocol allows for four modes of service supply. Regarding Mode 4, the movement of natural people, Article 17 of the Protocol stipulates that:

1. ‘Nothing in this Protocol shall prevent a State Party from applying its laws, regulations and requirements regarding entry and stay, work labour conditions, and establishment of natural people provided that, in so doing, it does not apply them in a manner as to nullify or impair the benefits accruing to another State Party under the terms of a specific market access or national treatment commitment under this Protocol.
2. This Protocol shall not extend to measures affecting natural people seeking or taking employment in the labour market of a State Party or confer right of access to the labour market of another State Party.’

Consequently, this Protocol does not contain a specific provision on the movement of natural persons just like the GATS referred to in chapter two of this thesis. Regulations that affect movement of natural people of one Member State seeking employment in the territory of another Member are left in the ambit of each individual state. So while the Facilitation Protocol will give access to people, the Trade in Services Protocol limits the access in services sectors and unequivocally provides that there is no obligation to extend access to natural persons seeking employment in the labour market of a SADC country as seen in Article 17 referred to above.

This conflict will be problematic considering the fact that services supplied through other modes highlighted in the previous chapter as well as other factors of production to be a common market requires natural persons to move. If no specific provision is available to adequately regulate this aspect, it hampers the effect of the Protocol and the overall objective of the SADC Treaty. For extensive mobility to occur, the Protocol on Trade in Services may have to be reviewed or be supplemented by another Protocol dealing more extensively with free movement of people like the Facilitation Protocol or one specific to workers like the Protocol on Employment and Labour.

The Facilitation Protocol discussed earlier was created to regulate the free movement of people but in looking at its substance, prevalence of sovereignty and security management

704 Article 3(2) (a)-(d) of the SADC Protocol on Trade in Services.
705 Article 17(1) and (2) of the SADC Protocol on Trade in Services.
706 See chapter 2 section 2.2.3.1.
707 See discussion on services in chapter 1 section 1.2.3.
through bilateral agreements and national laws is the approach adopted to regulate mobility of people. This is further illustrative of the current trend regarding migration regulation in SADC.

Post the Protocol on Trade in Services, the SADC has continued towards a regional strategy to enable migration. Efforts post 2012 resulted in the Protocol on Employment and Labour as well as a Regional Labour Migration Policy Framework, both of which will be discussed briefly subsequently.

### 4.3.3 SADC Protocol on Employment and Labour

To cater for migrant workers, the Protocol on Employment and Labour was adopted in 2014. The SADC Protocol on Employment and Labour was developed to serve as a legal framework for the cooperation of SADC Member States on matters concerning employment and labour in line with Article 22 of the SADC Treaty. Regarding the influence of the Protocol on movement of people, Article 3(e) of this Protocol:

> requires Member States to ‘promote the development of employment and labour, as well as social security, policies, measures and practices, which facilitate labour mobility, and embrace industrial harmony and increase sustainable productivity and descent work in Member States.

So Member States are in essence required to develop policies that champion easy movement of labour once the Protocol is enforced. Further to this, Article 10 provides for decent work for all in the region. Article 19 allows for migration management and control, enabling environment, protection of fundamental rights, special needs of migrants, women, children and youth, facilitate remittance transfers, coordination and portability of social security benefits, policy coherence, and common approach to migration and data. These provisions are indicative of a step towards more rights based migration governance in the region.

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709 Member States shall conclude protocols as may be necessary in each area of cooperation, which shall spell out the objectives and scope of, and institutional mechanisms for cooperation and integration.

710 Article 3(e) of the SADC Protocol on Employment and Labour.

711 Article 10 of the SADC Protocol on Employment and Labour.

However, the question remains as to whether the Protocol on Employment and Labour will have any greater ratification success compared to the Facilitation Protocol.

4.3.4 **Regional Labour Migration Policy**

Accompanying the Protocol on Employment and Labour in 2014 was the Labour Migration Policy Framework. This policy framework also offers a rights based approach towards migration and focuses on integrating migrants into their host societies and providing for their safety. This framework was developed to assist SADC Member States in addressing labour, employment and social protection towards migrants and their families. Key aspects of the policy require Member States to have labour migration policies in place by 2020. The policy also recommends that bilateral or multilateral agreements ensure that they conform to the regional labour migration policy framework. Also, there is a need to create a national and regional labour migration database and this will be recommended in the policy framework in the concluding chapter. This policy framework is new and it will be difficult to track current progress as yet. Further research has to be undertaken in that regard.

4.4 **Domestic Approach to the Movement of People: The Case of South Africa**

As seen in the previous chapters, there is no one international law or organisation that governs movement of people. Instead, mobility is governed by a patchwork of international laws and regional arrangements. The implementation of international and regional agreements is about achieving the objectives agreed in these agreements. This requires the necessary implementation by the State Parties. Ideally, domestic preparation should begin before the necessary ratification of such agreements. Thereafter, the State Parties should adopt the necessary amendments aligned to the Treaty obligations. There is thus a need for enhanced laws specifically at a regional level informing government policies in order to

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713 No ratification to date but DRC, Lesotho, Madagascar, Mozambique, Namibia, Seychelles, Zambia and Zimbabwe have signed the Protocol.


715 Section 5.1.6 of the Regional Migration Policy Framework.

716 Section 5.2 of the Regional Migration Policy Framework.

717 See chapter 6 section 6.3.

718 See chapter 2 section 2.4.
increase the openness of regional markets for services and labour exchange to shape the
growth of intra SADC trade.

To better understand the need for such a law, this section of the thesis takes a closer look at
the laws adopted by South Africa towards allowing the movement of people. These laws are
discussed to give a clear perspective of the ongoing trend within the region.

4.4.1 South Africa

South Africa is uniquely placed among other developing African countries to explore and
advance trade with its neighbours. Geographically, it is located at the foot of the African
continent and has a versatile and diverse economy in sub-Saharan Africa. It is one of the
largest economies\(^\text{719}\) compared to the rest of sub-Saharan Africa and boasts better
infrastructures for a developing country. One also must note that South Africa is the
destination of an increasing immigration from different parts of the world.\(^\text{720}\) That
notwithstanding, Tati also highlights that the country is experiencing a massive emigration of
its skilled labour to such developed countries as the United Kingdom, Australia, New
Zealand and the United States.\(^\text{721}\) This emigration probably occurs as a response to the lack of
opportunity in the professional’s home country as well as the availability of opportunities
outside and deliberate promotion of immigration by the host State.

Despite South Africa’s versatility and level of development in Africa and within the Southern
Africa region, the National Development Plan (NDP) recognises that South Africa faces
severe skills shortages which can consequently choke the economy.\(^\text{722}\) These skills shortages
if not resolved could place heavy constraints on the economic growth and significantly limit
South Africa’s potential to compete with other countries in the world. It can also prevent the
country from taking advantage of growth opportunities provides by technological
advancement which can depend on that particular skill. Referring to a 2015 survey by the

\(^{719}\) African Economic Outlook 2017 available at
July 2018).

\(^{720}\) Tati G ‘The Immigration issues in the Post-Apartheid South Africa: Discourses, Policies and Social

\(^{721}\) Tati G ‘The Immigration issues in the Post-Apartheid South Africa: Discourses, Policies and Social

\(^{722}\) National Development Plan Vision 2030 (2011) 323. See also Bhorat H., Meyer JB, & Mlatsheni C ‘Skilled
Labour Migration from Developing Countries: Study on South and Southern Africa.2002 2 available at
South African Department of Higher Education and Training and the World Economic Forum, the African Competitiveness Report highlights the country experienced decline in scientists and engineers between 2008 and 2016. However, if South Africa seeks to be a global force, then it requires a more expansive and robust laws on skills immigration.

South Africa became a Member of the WTO in 1994, subsequently, South Africa made certain commitments under the GATS. Commitments offer, among other things, grant service suppliers of another Member State temporary entry to the South African market to engage in services trade and the supply thereof. Providing access to a market does not automatically guarantee foreign qualified professionals local recognition in South Africa to practice their profession. According to the country’s GATS schedule of specific commitments these categories of people mentioned above are afforded ‘temporary presence for a period of up to three years, unless otherwise specified, without requiring compliance with an economic needs test.’ The permitted duration of stay for services salespeople was set at a maximum of 90 days. Once a Member State has undertaken liberalisation commitment under the GATS, in specific service sector, it is under obligation not to maintain or introduce discriminatory and/or quantitative measures unless such a measure has been listed in the Member States schedule of specific commitments. With respect to other agreements referred to in this thesis, South Africa has not ratified the ILO Convention on Migration for Employment and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPRMW) referred to in chapter two. However, South Africa is among the few Member States that has signed the key instrument allowing movement of persons in the SADC which is the Facilitation Protocol as seen earlier in this chapter.

Despite the unenforceability of the Facilitation Protocol, provisions granting entry, residence and establishment of SADC citizens put domestic immigration laws at the fore of migration

726 General Agreement on Trade in Services 1994, South Africa Schedule of Specific Commitments GATS/SC/78.
727 General Agreement on Trade in Services 1994, South Africa Schedule of Specific Commitments GATS/SC/78 1.
728 General Agreement on Trade in Services 1994, South Africa Schedule of Specific Commitments GATS/SC/78 1.
730 See chapter 2 section 2.2.2.2.
731 See chapter 4 section 4.2.2.
governance in the region as seen in earlier discussion.\textsuperscript{732} Also, South Africa follows a dualistic approach\textsuperscript{733} meaning that international laws are not directly enforceable in the domestic sphere unless parliament gives such laws the force of national law under section 231(4) of the Constitution of the Republic of South Africa, 1996 (the Constitution).\textsuperscript{734} To this effect, South Africa has domestic national law giving effect to migration governance. Therefore, the discussion in the section below will cover the trend of immigration policies in South Africa as well as current initiatives towards migration governance.

\textbf{4.4.1.1 Immigration Policies and Legal Frameworks}

The Alien’s Control Act (1991) represented the first attempt at consolidating previous apartheid era immigration legislation in South Africa.\textsuperscript{735} This Act was South Africa’s first legal framework for regulating all migration-related issues during the initial years of democratic governance. It was amended in 1995 and was finally repealed in 2003 when the Immigration Act (No. 13 of 2002) came into effect.\textsuperscript{736} The period between 1991 and 2014 saw further changes in the immigration policies of South Africa through the Immigration Amendment Act 19 of 2004 and the Immigration Regulations of 2014\textsuperscript{737} in an endeavour to facilitate the movement of skilled workers and investors into South Africa to contribute to the country’s economic growth.\textsuperscript{738} For the purpose of this thesis and discussion, references will be made to provisions of the Immigration Regulations of 2014 as it is reflective of the current immigration regulation framework in South Africa.

The Act of 2002 notably substituted the word ‘alien’ for ‘foreigner’ marking a major distinction from past legislation. The first objective of the 2002 Act was to promote a

\textsuperscript{732} See chapter 4 section 4.2.2.
\textsuperscript{734} Section 231(4) of the Constitution stipulates that ‘any international agreement becomes law in the Republic when it is enacted into law by national legislation but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.’
\textsuperscript{737} Rasool F, Botha C & Bisschoff C ‘The Effectiveness of South Africa’s Immigration Policy for Addressing Skills Shortages’ \textit{Managing Global Transitions} 10 (2012) 4 403. See also Viljoen J, Wentzel M & Pophiwa N ‘Movement of People and the Right of Residence and Establishment A Focus on South Africa’ \textit{African Insight} 46 (2016) 2 37. This Regulation became effective from 26 May 2014.
\textsuperscript{738} Viljoen J, Wentzel M & Pophiwa N ‘Movement of People and the Right of Residence and Establishment A Focus on South Africa’ \textit{African Insight} 46 (2016) 2 37.
‘human-rights based culture in both government and civil society’,\textsuperscript{739} echoing an earlier statement in the preamble.\textsuperscript{740} The Act also proclaimed South Africa’s commitment to issue ‘temporary and permanent residence permits expeditiously and on the basis of simplified procedures and objective, predictable and reasonable requirements and criteria, without consuming excessive administrative capacity.’\textsuperscript{741} Furthermore, the Act stated that the ‘South African economy must have access at all times to the full measure of needed contributions by foreigners.’\textsuperscript{742} Adding to this, the regulation of foreign immigration must occur in order to ‘promote economic growth by ensuring that businesses in the Republic can employ foreigners who are needed by enabling exceptionally skilled or qualified people to sojourn in the Republic.’\textsuperscript{743} Granting entry and residency into South Africa is compliance based, with the Act and Regulations proposing certain requirements as will be seen later in this discussion.

Despite these notable intentions to allow skilled people entry, the Immigration Act of 2002 is restrictive in its application,\textsuperscript{744} not allowing for easy movement of people. This restrictiveness arises due to the complexities involved in obtaining visas to entry and establish oneself. Neumayer expands on this complexity and difficulty by noting that:

\begin{quote}
‘it represents an important hurdle to and deterrent against unwelcome visitors that is binding before visitors even arrive at one’s borders. First, there is the additional cost and hassle of applying for the visa before travel, secondly, the issuing consulate or embassy can of course and sometimes does, deny the application without giving any reason.’\textsuperscript{745}
\end{quote}

Procedures and requirements are largely burdensome, lengthy. Also, requiring certification from the department of labour exists making it more difficult for employers to hire foreigners on work permits or to make investments in South Africa. For instance, a prospective foreign national seeking entry into South Africa for employment purposes will have to apply for a general work visa under the backing of Section 19(2) of 2002 Act and Section 18 of the Immigration Regulations of 2014. Such an application based on the Regulations would have to include:

\begin{itemize}
\item Section 2(1)(a) of the Immigration Act 13 of 2002.
\item See Preamble Paragraph 1 of the Immigration Act 13 of 2002.
\item See Preamble Paragraph a of the Immigration Act 13 of 2002.
\item See Preamble paragraph h of the Immigration Act 13 of 2002.
\item Section 2(1)(i)(ia) of the Immigration Act 13 of 2002.
\item Neumayer E ‘Visa Restrictions and Bilateral Travel’ The Professional Geographer 62 (2010) 2 171.
\end{itemize}
a. ‘a written undertaking by the employer accepting responsibility for the costs related to the deportation of the applicant and his or her dependent family Members, should this become necessary;
b. a police clearance certificate;
c. a certificate from the Department of Labour confirming that despite a diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant; proof that the applicant has qualifications or proven skills and experience in line with the job offer; that the salary/benefits are not exploitative and a copy of the contract of employment; proof of the qualifications evaluated by South African Qualifications Authority (SAQA), full particulars of the employer, an undertaking by the employer to inform the Director-General should the applicant not comply with the provisions of the Act or the conditions of the visa; and an undertaking by the employer to inform the Director-General upon the employee’s no longer being in the employ of the employer or when he or she is employed in a different capacity or role.’

Looking at this provision, of major concern in these requirements is the certificate from the Department of Labour that has to accompany the application, confirming that the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant. This particular requirement is exclusionary and impractical for implementation purposes for reasons that it has the possibility of frustrating most job seekers in the SADC region, keeping skills at arm’s length.

Since the process of recruiting a foreign national is accompanied by numerous requirements and red tape, most employers are hesitant to follow such a long process, which leads to disinterest every time a foreign applicant is to be considered. Even if a foreign national is considered, the whole process of shortlisting and interviews prior to appointment are almost fruitless, since the Department of Labour, through Section 8 of the Employment Service Act of 2014, would have to be satisfied that there are no South Africans or permanent residents with the required skills and that the employer has made use of public and private employment agencies to ascertain this.

This is indicative of the effect in lacking a coherent and comprehensive migration policy that addresses all migration-related matters and are in line

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746 Section 18(1) – (3) of the Immigration Regulation of 2014.
747 Section 8(2) of the Employment Services Act of 2014, which allows the Minister, after consulting the Board, to make regulations to facilitate the employment of foreign nationals, which regulations may include the following measures: (a) The employers must satisfy themselves that there are no other persons in the Republic with suitable skills to fill a vacancy before recruiting a foreign national; (b) the employers may make use of public employment services or private employment agencies to assist the employers to recruit a suitable employee who is a South African citizen or permanent resident.
with other policies that can ease trade or services supply at a regional level. As such, the national governance of migration is compartmentalised with some aspects governed by different and often contradictory practices by different state departments.

Practically, holding a work permit is a prerequisite for some employers before issuing a job offer. These consequences do not make movement any ‘freer’, as required by Article 2 of the Facilitation Protocol and does not facilitate the movement of people particularly for employment purposes. The implementation of commitment under this Protocol requires close cooperation among various government departments and agencies such as the departments of Home Affairs and Labour. From the discussion in earlier paragraph, it is apparent that there no such cooperation between both departments currently in play considering no complementarity exists in the requirements afforded by both bodies and compliance with their requirements is very cumbersome.

South Africa as mentioned earlier made commitment to grant market access and national treatment to ‘professionals’. Using the legal profession as a practical example of the restrictive practices. In terms of Section 3 of the Admission of Advocates Act 74 of 1964, ‘a person can be admitted to practise and enrol as an advocate if that person is a South African citizen or a permanent resident and is ordinarily resident in the Republic.’ Also, to be admitted as an attorney, a requirement under the repealed Attorneys Act 53 of 1979, stipulates that; ‘a person can be admitted if that person is a South African citizen or a permanent resident’. The admission and enrolment of attorneys is now governed by Section 24 of the Legal Practice Act 28 of 2014 and it still maintains the same requirement as in the repealed Attorneys Act namely, under the Legal Practice Act, ‘a person may practise as a legal practitioner only if he or she is admitted and enrolled to practise as such in terms of this Act. The High Court is directed to admit an applicant who satisfies the court that he or she is duly qualified, is a South African citizen or a permanent resident, is a fit and proper person to be so admitted, and has served a copy of the application on the Council, containing

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748 Natural persons who are engaged, as part of a services contract negotiated by a juridical person of another Member in the activity at a professional level in a profession set out in Part 11, provided such persons possess the necessary academic credentials and professional qualifications which have been duly recognized, where appropriate by the professional association of South Africa. See Cronje JB ‘Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective’ available at http://www.tralac.org/files/2013/10/D13TB042013-Cronje-Admission-of-foreign-legal-practitioners-in-SA-20131029.pdf (accessed 10 May 2017).

749 Section 3(1)(c) of the Admissions of Advocates Act 74 of 1964.

750 Section 15(1)(c) of the Attorneys Act 53 of 1979.
the information as determined in the rules within the time period determined in the rules. The admission of foreign legal practitioners entails their presence in South Africa for the purposes of delivering legal services under GATS, but with such stipulations, entry will be cumbersome.

Expanding on the requirement of obtaining a permanent residency permit, under the Immigration Act, it is required that a foreign national has to stay in the Republic on the basis of a work visa for a period of five years and has received an offer for permanent employment. On the other hand, in applying for a work visa, certification from the Department of Labour that no South African or permanent residence is available to take up the employment position is required. Obtaining this certificate is a non-transparent process, filled with numerous red tape and delays, and could serve as a deterrence. The result of non-compliance with this requirement can see a work visa not issued. This potentially has an impact in obtaining a permanent residence in the long run. In this context, despite the efforts made to bring about reform, South Africa's requirements for the admission of non-nationals into the legal profession continue to fall short of its GATS commitments and defeats the vision proposed under the preamble of the Act to ensure easy entry of skilled people. The residency requirement hinders the overall GATS’ bid to liberalise the trade in services particularly the ‘presence of natural people’.

Another restrictive provision can be seen in the application for a business visa. This category of visa is available to foreigners who are contemplating investing in the South African economy by establishing a business or by investing in an existing business in the country must apply for a business visa. This business visa is applied for under Section 15 of the 2002 Act and Section 14 of the 2014 Immigration Regulations. The following documents must form part of a business visa application:

- A certificate issued by a Chartered Accountant or a Professional Accountant registered with the South African Institute of Professional Accountants to the effect that you have at least an amount available in cash, or at least an amount available in cash and capital to be invested in the Republic.

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751 Section 24 of the Legal Practice Act 28 of 2014.
752 Article XXVIII (k) of the GATS.
753 Section 26(a) of the Immigration Act of 2002.
754 See Section 8(2) of the Employment Services Act of 2014

http://etd.uwc.ac.za/
• A recommendation from the Department of Trade and Industry regarding the feasibility of the business and the contribution of the business to the national interest of the Republic.

• An undertaking that at least 60% of the total staff compliment to be employed in the operations of the business shall be South African citizens or permanent residents employed permanently in various positions.755

A minimum investment of R5 million in cash is required or capital equivalent in the form of new machinery or equipment.756 Requiring an aspiring investor to pay R5 million has the effect of rendering the South African market accessible to only a few privileged in Southern Africa and the world as a whole. Meeting the requirement of having such capital to invest might not be practically achieved by small and medium enterprises, which in most instances do not require that actual amount to start a business in the Republic.

The Immigration Amendment Act of 2004 and Regulations of 2014 also incorporates the sentiment expressed in the National Development Plan that the country adopts a more open approach to skilled immigration to enable expansion of skill supply in the short term.757 An important change in the Immigration Amendment Act and Immigration Regulations refers to the introduction of a critical skills visa under the category of a work visa to assist in attracting critical skills to South Africa.758 To acquire this visa, the application must be accompanied by:

'a confirmation of the skill or qualification, in writing, from the professional body, council or board recognised by SAQA in terms of section 13(1)(i) of the National Qualifications Framework Act, or any relevant government Department; if required by law, proof of application for a certificate of registration with the professional body, council or board recognised by SAQA in terms of section 13(1)(i) of the National Qualifications Framework Act; and proof of evaluation of the foreign qualification by SAQA and translated by a sworn translator into one of the official languages of the Republic.'759

The visa is issued for a period of up to five years,760 provided that the applicant can furnish proof of falling within a critical skills category as published from time to time by the Minister

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758 Regulation 18(1) of the Immigration Regulation of 2014.
759 Regulation 18(5)(a)-(c) of the Immigration Regulation of 2014.
760 Regulation 18(6) of the Immigration Regulation of 2014.
of Home Affairs. Amongst others, foreigners possessing critical skills can apply for a critical skills work visa without having a job, and are allowed to remain in South Africa for 12 months to find suitable employment. The South African migration legislation thus supports the employment of migrants who can demonstrate that they will fill vacant positions in professions lacking sufficiently skilled South Africans to meet the country’s needs. These types of migrants, however, account for a small number of people entering the country.

Peberdy argues that:

‘reflecting increasing concern over skills shortages and high rates of emigration of professionals, the 2002 Act and the Amendment of 2004 were intended to facilitate the entry of skilled migrants and immigrants to boost South Africa’s economy.’

However, it is viewed that the South African government and administration continue to find it difficult to move away from a restrictive approach towards migration in both legislation and practice. From a practical standpoint, the actual number of work and business permits issued apparently fall short of the intentions of the Act. From a statistical point of view, to further illustrate the skills shortage in South Africa Nshimbi and Fioramonti relying on Statistics South Africa (StatsSA) data highlights that:

‘against the 1011 new economically active immigrants the South African government recorded in 2003, the nation witnessed a net loss of 9529 economically active people, who included among other professionals, 703 accountants, 693 medical personnel, 547 industrial and production engineers and 542 natural scientists.’

Bearing the above mentioned in mind, the number of temporary residence permits issued increased from 106,173 in 2011 to 141,550 in 2012 and decreased to 101,910 in 2013 and the reason for the fluctuations were based on the ineffective processing procedure and regulations. Of the 141,550 temporary residence permits issued and processed in 2012, 33,253 (23.5 per cent) included work permits and 1585 (1.1 per cent) were business permits.

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In 2011, a total of 10,011 permanent residence permits were approved and these decreased drastically to 1,283 in 2012 and then increased to 6,801 in 2013. In 2014, there was an increase to 4,136 permanent residence permits issued. Out of a total 4,136 permanent resident permit, the Department of Home Affairs processed for 2014, 1,228 was issued under a work category and 41 permits were issued for business purposes.

South Africa has shown considerable effort in facilitating the movement of people. However, looking at the immigration policies in place, they remain protectionist, control-oriented, and non-rights based. Getting a permit be it for entry, work, business or critical skills permits are extremely challenging with cumbersome requirements. South African migration legislation supports those who can demonstrate that they will fill vacant positions in professions lacking sufficiently skilled South Africans to meet the country’s needs. The Immigration Act can accordingly be regarded as having created a very restrictive regime towards that selected category of people. This view is expressed by McGuire, he mentions ‘trade conditions for the movement of people tend to be restrictive. Many developed economies are capital intensive and permit entry of highly skilled labour but not entry of low skilled workers from labour abundant developing economies.’ Cornelissen mentions ‘South Africa’s first minister of Home Affairs, Mangosuthu Buthelezi, was less sanguine about the matter, decrying the ‘SADC ideology of free movement of people, free trade and freedom to choose where you live spells disaster for our country’. This perspective creates a disconnection between movement of persons and development as migrants are viewed as threats to the national economy and citizens’ rights and welfare.

Furthermore, while South Africa had signed SADC’s Facilitation Protocol, to promote better migration management and skills transference within the region, this restrictive nationalistic laws get in the way of skills mobility and general migration. It is therefore imperative to have a regional instrument with a binding mechanism that actively influences national laws and not have national laws at the helm of regulating mobility.
4.4.1.2 Current Initiatives through the Green and White Papers on International Migration

Migration Policy reform has culminated through a Green Paper on International Migration which was first introduced in 1997. This document provided a liberal perspective on immigration, promoting the facilitation of skills recruitment, a positive view on migration and a more rights-based emphasis. Post 1997, in 1999, a White Paper on International Migration was introduced which was less liberal compared to the 1997 Green Paper and subsequently resulted in the current Immigration Act No. 13 of 2002 which was discussed earlier. This was the last real review on migration policy in South Africa. Forward to present time, a Green and White Paper was introduced in 2016 and 2017 respectively to further review migration policies. Both are national policy documents and are not binding.

The Green Paper of 2016 argues for a reform in migration policy one that is underpinned by the Constitution and the NDP. As a vision, this reformative approach should contribute to national interest, oriented towards a South African nation, building and social cohesion by giving the country a competitive edge in a knowledge based world economy, and this reform must enable South Africans living abroad to contribute to national development priorities.

One key area of intervention peculiar to this thesis involves the management of international migration in the African context. This relates to the desire to attract professionals and academics to the country as well as retain them. Although insufficient detail is provided on how exactly this will be achieved. Some proposed intervention and initiatives includes granting special exceptions for foreign graduates who graduate from South African universities with degrees recognised on the critical skills list by awarding such students permanent residency and a post graduate visa upon graduation as well as encouraging training and transfer of skills. This is also an aspect that was further recognised in the 2017 White Paper. However, the White Paper appears to be restrictive towards obtaining a
permanent residency as it proposes removing the category of permanent resident and replacing it with a ‘long-term residency’ visa which runs for a 10 year period.\textsuperscript{781} This draft ‘White Paper’ seeks to articulate changes in South African governmental thinking on issues of migration. It seeks, in general, to move towards a ‘migration management’ approach that is aimed at excluding ‘undesirable’ migrants and welcome highly skilled migrants.\textsuperscript{782}

Furthermore, to better manage and regulate economic migration within SADC, an incremental implementation of three types of visas is proposed. These include ‘the SADC special work visa which will not allow holders to obtain permanent residence, secondly, SADC traders’ visa which is a long-term multiple entry visa for frequent cross-border traders and thirdly, SADC Small and Medium Enterprise visa, targeted at self-employed people who pay taxes and follow South African business regulations.\textsuperscript{783} Issuing of the following visas will be tied to a programme to regularise undocumented SADC migrants currently residing in the country.\textsuperscript{784}

Broadly, the trend with migration regulation in Southern Africa, is a highly restrictive towards granting residence and establishment from a regional to a national level.

\textbf{4.5 Conclusion}

This chapter was set out to discuss how the SADC has approached the movement of people with reference to South Africa. In 1995, the Free Movement Protocol was submitted as the key policy framework. The Protocol encouraged a phased approach to attaining free movement between SADC States, but it was immediately rejected by the power houses of the region (South Africa, Namibia and Botswana). Thereafter, the Facilitation Protocol replaced the Free Movement Protocol in 2005. This Protocol proposes a phased approach and also that the movement within the region of SADC citizens should be determined by domestic legislation of each State. Members were also encouraged to cooperate in harmonising their legislation to make movement easier and feasible. This proposition was a marked deviation from the Free Movement Protocol which proposed that free movement should be the right of every citizen of a Member State and such movement should not be tampered with.

\textsuperscript{784} The Green Paper on International Migration 63 (published in GG 40088 of 24 June 2016).
Rights of residence and establishment in the territory of another SADC country are currently expressed in terms of accordance with the laws of individual states, which in most countries remain highly restrictive. So discourse around regional migration policy set a negative tone, resulting in themes of control and restriction of access. The state of migration dynamics and responses to the Free Movement Protocol discussed earlier more often than not reflects the poor understanding of migration positives like temporarily filling skills gaps. South Africa’s Immigration policies are against mobility of people. From their point of view, if granted, free movement of people may open up the country to the necessity of giving legal recognition to irregular migrants. South Africa as seen above has adopted a controlled approach to the movement of people. Placing major reliance on security towards the movement of nationals from neighbouring states. This reflects a broader issue at play regionally. In essence, safeguarding national interests and borders is more important than really combating irregular migration, promoting economic development or encouraging circular economic migration within the SADC region.

Article 5 of the Treaty establishing the SADC explicitly called for the development of policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally, among Member states. However, the current approach towards freer movement is not reflective of that. The realisation of a united Southern Africa will require determination, effort and dedication. The absence of an enforceable framework on the free movement of people for over a decade remains a key obstacle to deeper integration within SADC. The varied levels of formulation and implementation of migration laws indicate the absence of political will and the lack of interest and commitment to realising a common market. Rigid and cumbersome laws on migration and a regional framework that does not extensively entrench free movement are the factors that continue to influence the realisation of movement of people in the region.

The next chapter looks to argue towards reassessing the current SADC approach, proposing amendments to the current Protocol and an alternative approach to attain free movement of persons.

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CHAPTER 5

REASSESSING THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY APPROACH TO MOVEMENT OF PEOPLE

5.1 Introduction

The proposed common market target of 2015 remains elusive and the finalisation of free movement of people is long overdue in the Southern African Development Community (SADC).\(^{786}\) The Common market has a specific objective which is to widen and deepen integration and cooperation among the Member States in the economic and social fields for the benefit of the Partner States.\(^{787}\) This is to be achieved through the attainment of freedoms and rights to the respective communities which include the following: Free movement of goods; free movement of people; free movement of labour; the right of establishment; the right of residence; free movement of services and free movement of capital. In 2017, in a report by the Organisation for Economic Co-operation and Development (OECD) it is highlighted that intra-regional trade in SADC is 10% of total trade compared to about 25% in the Association of Southeast Asian Nations (ASEAN) or 40% in the EU.\(^{788}\) It was suggested that better implementation of existing Protocols and agreements would advance integration and create jobs. Furthermore, reducing non-tariff barriers would reduce trade costs in the region.\(^{789}\) As it stands, there is no enforced or implementable law regulating the movement of people within SADC.

Chapter 3 of this thesis examined the approaches towards the movement of people in selected regional blocs.\(^{790}\) Common to all the regional groups discussed is the fact that, their existing regional arrangements aim for a comprehensive liberal and gradual approach to the free movement of people in their framework allowing visa-free entry to granting the right of establishment where citizens can have access to economic activities and take up employment. From the experiences of these Regional Economic Communities (RECs), free movement of

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786 See chapter 1 section 1.3.
787 See chapter 1 section 1.2.
790 See chapter discussion on the European Union, the Economic Community of West African States and the East African Community.
people is viewed as a situation where citizens of a regional group are allowed to move from
country to country within the region without the need of applying for a visa to a point of
establishment and partaking in commercial activities. At a deeper level, this involves
harmonisation of migration laws, processes and travel documents.791

Just like these regional blocs, Member States of the SADC adopt a similar approach but one
that is conservative and restrictive.792 Member States are required to develop policies aimed
at progressive realisation of the free movement of capital and labour, goods, and services, and
of the people of the region under Article 5(2)(d) of the Treaty Establishing the SADC.793
However, the current policy situation as will be seen later is more cautious. A discussion on
the European Union (EU), Economic Community of West African States (ECOWAS) and
East African Community (EAC) in chapter 3 was therefore done with a view of determining
how their approach and development can influence the SADC current migration scheme. This
chapter, therefore, builds on that to determine the appropriate approach for the SADC
towards migration in order to deepen integration in the region.

Based on this premise, this chapter proposes reassessing the SADC conceived approach to the
free movement of people based on the Facilitation Protocol, arguing that the Member States
and indeed the region would benefit economically from a revised free movement of persons
Protocol. Furthermore, a flexible approach is looked at as a possible alternative to push
forward the SADC integration effort. Discussions in the chapter begins with a look at the
ongoing challenge in SADC towards ensuring the movement of persons. Thereafter, the
relevance of movement of persons is discussed. Drawing lessons from the EU, EAC and
ECOWAS, this chapter further discusses amending the current Facilitation Protocol and also
argues towards adopting a flexible integrated approach which concept will be unpacked in a
later section of this chapter.

5.2 Challenge towards achieving movement of persons in the Southern African
Development Community

Within RECs, Nita makes mention of the fact that:

791 See chapter 1 section 1.2.4.
792 See chapter 4 section 4.2.2.
793 Article 5(2)(d) of the 1992 Treaty Establishing the SADC.
‘major challenges to the implementation of a policy include the level of success of an agreement regarding the scope and degree of liberalisation of movement, as well as the incertitude of actual ratification of a signed agreement.’

From her perspective, once a legal text is drafted, the first challenge is to reach a consensus on the content of the Agreement and subsequently ratifying the Agreement. This challenge is also prevalent in the SADC. The SADC aimed at being a common market by 2015 based on the Regional Indicative Strategic Development Plan (RISDP). A Common Market to reiterate, is a Customs Union, with harmonised regulations and policies on free movement of factors of production, such as people, labour, services and capital. Attaining this level of integration requires a collective effort from all Member States. On the other hand, Member States have to promote the SADC integration agenda among their national investors, conversely, Member States are bound to discover that their national objectives differ.

As seen in the previous chapter, a Protocol on the Free Movement of Persons was drafted in 1995 with the aim of progressively abolishing internal border controls. This Protocol was disregarded by South Africa, Botswana and Namibia, putting their national interest first and subsequently, the Protocol was abandoned by the SADC. This rejection was also based on the argument that the region was not ready for ‘free movement of people’ given the economic disparity between Member States. This is a valid issue, pertinent within SADC, South Africa has a dominant presence economically within the SADC region, arguably alongside Namibia and Botswana. Solomon highlights this issue:

‘One of the problems dogging regional integration efforts in the Third World is that labour and capital gravitate to the most developed country in the region. The reasons are obvious better economic infrastructure, as well as the fact that there is a larger supply of workers used to the rigours of industrial labour in the regional hegemon.’

797 See chapter 4 section 4.2.1.
The aforementioned was a primary concern of South Africa and other economic powerhouses within the region. Simply put, they maintained that allowing a region with no internal border control will mean an influx of migrants to their respective countries. Subsequently, a more diluted text in the form of a Draft Protocol on the Facilitation of Movement of Persons (hereafter, the Facilitation Protocol) was agreed on. The Facilitation Protocol shifted terms from “free movement” to “facilitation of movement” indicating the level of political willingness amongst Member States to promote full-scale mobility of people. As was mentioned in the previous chapter, the Facilitation Protocol also differs from the Free Movement of People Protocol, as it makes almost all rights (visa-free travel, residence and establishment rights), subject to domestic legislation and strongly encourages Member States to develop bilateral agreements to ensure the movement of persons.

Furthermore, the Facilitation Protocol promulgates the prevalence of sovereignty and indicates an actual preference for security management through bilateral agreements and national laws. Muladzi identifies the SADC as a statist organisation, leaving States at the helm of defining the scope of integration.800 Oucho and Crush have alluded to this, indicating the specificity within SADC is the consistent opposition by a regional powerhouse like South Africa to the idea of free movement.801 Segatti also alludes to this, mentioning that ‘the current state of affairs underscores the enduring prevalence of sovereignty in the face of weak institutional capacity at the SADC level, and an actual preference for the integration of labour markets and security management through bilateral agreements.’802

SADC is a heterogeneous community803 with lingering growing socio-economic disparities between the Member States. This heterogeneous setting as Mapuva points out is a challenge;

‘because such economies cannot be integrated, especially given that stronger economies, like South Africa, end up dictating the terms of reference and operation to poorer and weaker Members of the regional grouping.’804


http://etd.uwc.ac.za/
This is particularly accurate looking at the discussion on how the Facilitation Protocol came about in chapter 4 of this thesis with South Africa, Namibia and Botswana running the show.\textsuperscript{805}

That notwithstanding, considering the heterogeneity of the region and looking at both sides of the spectrum of both low to high-income groups. To upper-middle income States like South Africa, Botswana and Namibia,\textsuperscript{806} the free movement of people will arguably place an additional burden on their socio-economic infrastructure which will in turn, put a strain on the political sphere in tackling social issues like social welfare or security and xenophobia. To lower income States like Malawi or Zimbabwe,\textsuperscript{807} the free movement of people will intensify brain drain movement to the more upper-middle-income States in the region which puts a stamp on their underdeveloped status within the region. The reality is for as long as some economies are strong and more stable than others and opportunities abound in some compared to others, free movement of people will remain a challenge in SADC. This particular challenge has translated to adopting a protectionist approach rather than creating a more collective approach towards the movement of people. Segatti also shares the same viewpoint, stating:

‘As far as migration is concerned, the current state of play reveals two factors: the low level of priority assigned to migration issues by States in the region, and the lack of trust between them on the issue.’\textsuperscript{808}

Also, the predicament of the SADC was forthrightly summed up in a recent report in the following words:

‘The SADC has actively resisted free movement, diluting a protocol initially aiming for free movement and eventually delaying the ratification process, paving the way for the proliferation of bilateral agreements.’\textsuperscript{809}

\textsuperscript{805}See chapter 4 sections 4.2.1 and 4.2.2.
Frayne and Segatti also highlight this trend indicating that contemporary policy discourse views migration with much defiance indicating a lack of collective standing on the positive influence of labour mobility to curb brain drain and the lack of political will to push the process of free movement of person. This position is likely to remain the way it is unless economic parity exists or if there is a collective shift in the view of migration being a solution rather than a problem or cause of economic distress. As highlighted in the previous chapter, within the EU, ECOWAS and the EAC economic inequalities prevail but are less pronounced and have thus far not influenced their resolve to integrate.

The cautious, simple non-binding, progressive approach that was pushed through the 2005 Protocol has not succeeded in unifying Member States for over ten years after its adoption. Southern Africa needs a different approach to migration management, given the imbalances of the past and the debatable outcomes of current policies, with a view to strengthening sustainable development and regional cohesion. The subsequent heading addresses the relevance of movement of persons towards regional trade.

5.3 Assessing the Relevance of Movement of People to Regional Trade

The basic economic perspective of migration is rather straightforward. Migration enables human resources to locate where they are most productive. 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 stating the following:

‘It has been argued that migration can alleviate some of the problems facing developing countries. Migration may relieve labour market pressure and generate remittances, which constitute an important source of foreign exchange and income for migrants’

families. Financial and human capital transfers occurring through return migration can

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812 See chapter 3 section 3.5.
have a positive impact as they help improve the quality of life back home and promote socio-economic development. On the other hand, it has been stressed that emigration can also hamper the development of the sending country because the most dynamic and ambitious people have a greater propensity to go abroad. The loss of skilled manpower, the so-called brain drain may have detrimental effects as it weakens human capital.\textsuperscript{813}

The African Common Position on Migration and Development (ACPMD), referred to in chapter two of this thesis\textsuperscript{814} stresses the synergy that can exist between both concepts. It highlights the fact that:

\begin{quote}
‘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. However, poverty is one of the main causes of migration. Creating development opportunities in countries of origin would mitigate the main reasons for young people to engage in migration, thereby also dealing with the problem of brain drain.’\textsuperscript{815}
\end{quote}

From a practical standpoint, the free movement of people can bring about development to trade, particularly through services supply. In essence, both are interlinked or complimentary 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’.\textsuperscript{816}

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

\textsuperscript{814} See chapter 2 section 2.3.2.
systems. To origin countries, free movement can also spur economic development through remittance and can be a key livelihood strategy for people in hardship, and employment strategy encouraging skills transfer. The World Bank provides some indication of the significance of remittances:

'Remittances to developing countries are estimated at $436 billion in 2014, up 4.4 per cent over a year. Flows to developing countries are expected to accelerate to an annual average of 0.9 per cent in 2015, raising flows to $479 billion by 2017.'

Looking at this figure and the view of the ACPMD of creating developing opportunities, it highlights the fact that remittances have far-reaching benefits for individuals and the potential for families to 'reduce the depth and severity of poverty, promote human capital development, expand consumption, and contribute to asset accumulation.' This is a position SADC needs to capitalise on going forward.

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. That notwithstanding, 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 to both sending and receiving countries. Improved welfare schemes can aid retention but if people are to move, regional policies should not allow 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’.

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822 Haas HD ‘Migration and Development: A Theoretical Perspective’ (2010) 44 International Migration Review 1 228

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The central argument of this thesis is to foster or enhance regional ties in SADC by allowing less restrictive mobility of people. As mentioned in chapter 1, allowing the free movement of people will encourage cross-border investment which can result in services and skills transfer.823 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).824 Rodrik in a 2002 working paper argued that the biggest gains in terms of development and poverty reduction do not lie in the much-discussed issues surrounding free trade, but in the international movement of people particularly workers and that even a minor liberalisation in this field would massively foster the development of poor countries.825 According to Crush and Williams, ‘migration can facilitate the supply of qualified and skilled workforce while strengthening the economic ties among neighbouring countries’.826 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.827 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.828

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. Also, companies can more easily address shortages of skilled labour if the pool of candidates is larger. Conversely, the international mobility of

823 See chapter 1 section 1.2.3.
high-skilled workers can promote the return transfer of tacit knowledge to sending countries. 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 EU offers an example of how the free movement of people in general alongside allowing service supply privileges of natural persons can impact on the economies of both the sending and receiving countries. From Kahanec’s perspective circulation of skills was a key benefit giving the events that unfolded in the EU labour market following the accession of Member States from Central and Eastern Europe in 2004 as well as the most recent accession of Romania and Bulgaria in 2007 and Croatia more recently in 2013. Where there is free movement of people, privileges are accompanied by freedom to travel to and from the receiving countries at will, migrating workers can move freely to take advantage of employment opportunities that come up from time to time.

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 has lost expertise to the western world. 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. What the SADC has to do is 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. It inhibits regional flow of people for easy services supply across the region. Adopting measures to control or manage migration will often prove unsuccessful because migration is often motivated by structural factors such as; inequalities in wealth, labour market imbalances, and political conflicts in home countries. So people will always migrate and these are all factors a migration policy has little or no power to control. However, having an intention to control and manage migration like the SADC using restrictive

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http://etd.uwc.ac.za/
migration policy will rather change the ways in which people migrate, for example, they could skip formal border entry points.

The Protocol fails to address what is arguably the single most important obstacle to the level of co-operation required in migration management which is the willingness of governments to submit some of their sovereignty to the regional body in relation to decision-making about the entry of people in their countries. It is perhaps, therefore, not surprising that the provisions of the SADC Protocol are subject to domestic policies and legislation of Member States, which are merely encouraged to give effect to the Protocol’s provisions. While States are merely encouraged to modify their policies and legislation to give effect to the provisions of the protocol, there does not appear to be any mechanism to ensure compliance. In the context of regional economic development and integration, it is accepted that regional cross-border migration is a key issue, but that it cannot be adequately managed and regulated on the basis of the domestic legislation of individual Member States. Therefore, countries in the region need to co-operate to develop appropriate harmonised policies, legislation and mechanisms to govern a regional migration regime.

The free movement of people in general and particularly economic active people within an integrated region is crucial to the success of regional objectives. Only when the movement has been liberalised that a region can be deemed to be united. 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, 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.

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.

831 See chapter 5 section 5.5.4.
encouraging bilateral negotiations as opposed to a mutual regional agreement to a more comprehensive and gradual approach like the EU, ECOWAS and EAC. Accompanying the challenge of reaching consensus as mentioned earlier is ignorance of regionalism and globalisation as well the view that potential foreign entrants to the professions are unnecessary competition, and a desire to barn them from penetrating the jealously protected national markets as a strategy that will ‘preserve’ opportunities for citizens.

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 trend is far from being achieved, what can the SADC do in comparison to other regions to further its integration agenda? The subsequent headings argues towards this comprehensiveness and pragmatism in SADC approach in regulating movement of persons, with further suggestion towards amending the Facilitation Protocol.

5.4 Pragmatic Handling in Regulating Movement of People

The EU, ECOWAS and EAC have realised free movement of persons through actual implementation of successive treaties, directives and protocols. The Facilitation Protocol is the key document regulating the movement of people in the SADC. Alongside this, in 2012, the Protocol on Trade in Services was formulated aiming to establish an integrated regional market for trade in services which included the movement of natural persons to deliver services.

To further regulate the movement of persons, the SADC endorsed a Regional Labour Migration Action Plan 2013–2015, the first proper regional initiative on labour migration. Through the Action Plan, as an outcome, the SADC Members committed to harmonising labour data collection systems, immigration policies and legislation and address

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837 See chapter 4 section 4.3.2.
regional migrants' health vulnerabilities.\textsuperscript{839} Also, in 2014 Member States signed two documents that are significant to regional migration: the Draft SADC Labour Migration Policy Framework and the SADC Protocol on Employment and Labour which were crafted to strategically guide employment, labour and social security policies and promote policies that facilitate regional labour mobility.\textsuperscript{840} Paramount to this section is the fact all these instruments mentioned are yet to be ratified and the experience of the Facilitation Protocol suggests that ratification and implementation are yet to be experienced and may not happen any time soon.

Furthermore, unlike the SADC dropping these instruments, each successive EU, ECOWAS, EAC instrument has enhanced free movement of their regional citizens as seen in chapter 3 of this thesis.\textsuperscript{841} 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.\textsuperscript{842} Some policies refer to movement of people in passing\textsuperscript{843} 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.\textsuperscript{844} 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.\textsuperscript{845}

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

\begin{quote}
‘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
\end{quote}

\[\textsuperscript{839} \text{Regional Labour Migration Action Plan 2013-2015 available at}\]


\[\textsuperscript{840} \text{Article 2 of the SADC Protocol on Employment and Labour 2014.}\]

\[\textsuperscript{841} \text{See chapter 3.}\]

\[\textsuperscript{842} \text{Article 5 of the SADC Treaty}\]

\[\textsuperscript{843} \text{Article 3(f) of the Protocol on Education and Training. See also Section 4.11 on the SADC Regional Indicative Strategic Development Plan of 2003 which views migration in the light of facilitating tourism in the region.}\]

\[\textsuperscript{844} \text{Article 3(a) – (c) of the SADC Draft Protocol on the Facilitation of movement of Persons.}\]

\[\textsuperscript{845} \text{Article 17(2) of the Protocol on Trade in Services.}\]
particularly those of trade, immigration and labour market development. These officials in negotiating trade agreements need to understand that they are partners, not adversaries.\textsuperscript{846}

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 should be linked ultimately with economic development and integration as well as 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\textsuperscript{847} taking cognisance of an integrated effect of easy service supply by natural persons and labour movement is needed in the SADC.

With this pragmatic shift in focus, the subsequent paragraph will give light to suggestive amendments to the current Facilitation Protocol.

5.5 Amendment of the Facilitation Protocol

It will be imperative that SADC Facilitation Protocol is signed and ratified by non-signatory States and the SADC Secretariat should be tasked with urging such Members to do so going forward. 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. Implementing a ratified Protocol fosters trade and economic development. Implementation of the Protocol will strengthen regional economic integration. 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 national governments are at the helm of policy making. That notwithstanding, reviews or amendments should be made to the overall outlook in approaching movement of persons as well as the Protocol to

\textsuperscript{846} Henry P ‘Mode 4: Through a Canadian Policy lens’ in Mattoo A & Caarsaniga A (eds) \textit{Moving People to Deliver Services} (2003).

\textsuperscript{847} See chapter 6 section 6.3.2.
bring about some comprehensiveness to certain provisions to reflect the objective of the SADC Treaty.\textsuperscript{848}

5.5.1 Changing the Focus on Movement of People

SADC as a regional group was founded to promote economic development and integration, alleviate poverty and ensure peace and security.\textsuperscript{849} 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.\textsuperscript{850} Currently, in dealing with public security, movement of people in SADC is handled by the Organ on Politics, Defense and Security.\textsuperscript{851} 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 illegal migrants among others.’\textsuperscript{852} This security perspective unsurprisingly leads to policies and practices geared towards restriction and exclusion. So there is a need to broaden the lens through which migration is viewed within the region. Therefore, 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

\textsuperscript{848} To develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, foods 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.

\textsuperscript{849} Article 5(1)(a) of the Consolidated Text of the Treaty of the SADC. See also, Nathan L Community of Insecurity: SADC’s Struggle for Peace and Security in Southern Africa 1ed (2012) 4.


securitised prism. If such an organ is to be established, such organ will require a synergy with relevant domestic bodies like immigration, labour and defence.

5.5.2 Entry, Residence and Establishment

The EU, ECOWAS and EAC examined in the previous chapter allow for gradual movement of people under elaborative provisions. One primary similarity amongst these three regions is the fact that they all aimed for completely free movement of people, awarding every aspect relating to entry, residence and establishment as a ‘Right’ in a more comprehensive and liberated format. The Facilitation Protocol allows for visa-free entry of SADC citizens for a period of 90 days, just like the aforementioned REC’s. That notwithstanding, the Facilitation Protocol tends to halt the process of free movement across regional borders by avoiding any further commitment particularly in regards to the stages of residence and establishment. While it is not always clearly stated, it is implicit in the phrasing of provisions relating to Residence under Articles 16 and 17 as well as Establishment under Articles 18 and 19 that these provisions are subject to the domestic legislation of State Parties. In consequence, what this Protocol entrenches is the fact that even if a Member State has ratified the Protocol, it does not mean that their respective national policies and legislation will be amended to comply with the provisions of the Protocol.

Consequently, the extent to which Member States are obliged to comply remains unclear as well as the fact that enforceability of these provisions remains vague. Regarding residence, a State was only committed in terms of its national laws to review and, where necessary, relax the criteria for granting residence permits. So, in facilitating residence, what exists is unexceptional stipulation that permission to reside in another State has to be by application for a permit. 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 beyond the reciprocal 90 days’ visa-free entry of SADC citizens. Substantively, just like in the ECOWAS and EAC residence rights is targeted towards economically active persons. That is SADC citizens who undertake income-earning employment in another Member State

853 See chapter 3 sections 3.2.2, 3.3.3 and 3.4.3 respectively.
854 See chapter 3 section 3.5.
855 Article 14 of the SADC Protocol on the Facilitation of Movement of Persons.
856 See chapter 4 section 4.2.2
857 See chapter 4 section 4.2.2.
for an unspecified period of time like in the ECOWAS\textsuperscript{858} or for a specific period as in the EAC\textsuperscript{859} so far as the citizen acquires a residence permit recognised regionally.

As mentioned earlier, State Parties are encouraged to amend their national legislation, but there are no mechanisms in the Protocol to ensure that State Parties will indeed amend their legislation to give effect to the provisions because the precise implementation of the provisions is left to individual states. In essence, these provisions of the Protocol as well as implementation are ultimately subject to domestic legislation which renders its progressiveness towards a less restrictive movement of persons almost redundant. This level of freedom is one of the main reasons why SADC Member countries do not comply with regional migration law\textsuperscript{860} and adopt strict and restrictive laws that affect the free movement of SADC citizens. Member States going forward should be expressly required to harmonise their rules and regulations on issuing residence permits. If a bilateral approach is to be maintained, it is suggested that a close check is amplified and maintained at a regional level and the Protocol should allude to that.

For the SADC to thrive, each Member State has to relinquish a certain level of their sovereignty and pool it into the regional structure. Much can be gained in respect to allowing the right of residence and establishment across the region, some countries can gain access to much needed services and some can export surplus of these services and gain from remittances in a scheme that allows for mobility of people.

5.5.3 Common Documentation at a regional level

In the long term, it will be practical to work towards initiatives such as the SADC Passport, an initiative towards a regional identity similar to the ECOWAS and the EAC. Both regions currently provide their citizens with common travel documentation through the ECOWAS Passport and the EAC Passport respectively.\textsuperscript{861} This will work as a first step towards having a unified system of citizen identification. Currently, to gain entry under the Facilitation Protocol it is required to be in possession of a valid ‘travel document’. Under the Protocol,

\begin{quote}
‘a travel document means a valid passport used to identify a traveller which contains particulars and a clear photograph of the holder, issued by or on behalf of the government of a
\end{quote}

\textsuperscript{858} See chapter 3 section 3.3.3.
\textsuperscript{859} See chapter 3 section 3.4.3.
\textsuperscript{860} Scalabrini Institute for Human Mobility in Africa The African Approach to Regional Integration and Migration (2017) 25.
\textsuperscript{861} See chapter 3 section 3.3.3 and 3.4.3.
Member State of which the holder is a citizen and on which endorsements may be made by immigration authorities and shall include a laissez-passer or border permit/border pass as approved by the Ministerial Committee of the Organ.\textsuperscript{862}

Also, Article 12 a key provision in regulating travel facilities in the Facilitation Protocol provides under Article 12(1)(a) that; ‘State Parties undertake to introduces 'machine readable passports as soon as possible.'\textsuperscript{863} This indicates the standard required in SADC is a commitment towards, national passports as opposed to a SADC wide passport.

On that note, adding to the need of presenting travel documentation, the Facilitation Protocol should have a provision encouraging Member States to adopt the SADC Passport with links to the ongoing African Union (AU) African Passport initiative as well as encouraging the SADC Commission to facilitate this process. Also a common standard system of issuing this national identification document to their nationals should be provided. Taking cognizance of the African Passport initiative, 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 so as 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 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 travel

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. The ECOWAS region allows for an ECOWAS Residence Card/Permit\textsuperscript{864} through express provisions under the 1986 ECOWAS Protocol. Based on the Protocol, State Parties are required to grant Community citizens who are nationals of other Member States ‘the right of residence in its territory for the purpose of seeking and carrying out income earning employment,\textsuperscript{865} the conditions of entitlement to

\textsuperscript{862} Article 1 of the SADC Protocol on the Facilitation of movement of Persons.
\textsuperscript{863} Article 12(1)(a) of the SADC Protocol on the Facilitation of movement of Persons.
\textsuperscript{864} Residence Card/Permits 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 the Supplementary Protocol on the Right of Residence A/SP.1/7/86.
\textsuperscript{865} Article 2 of the Supplementary Protocol on the Right of Residence A/SP.1/7/86.
residence on possession of an ECOWAS Residence Card or Permit are provided for and also the necessary harmonisation by the Member States of rules pertaining to the issuance of these residence cards/permits is stipulated.

The EAC equally adopts a fashionable system whereby only a valid travel document in the form of national passports, East African Passports or machine readable national identification cards is needed for entry of persons in general. For workers and self-employed people they must apply for a residence permit within 30 days of entering the east African country that they plan to reside in. While such residence permits are to be applied for in the host country, applications are made based on predetermined requirements under the EAC Common Market Protocol. These requirements pertain to the residence permit application form, a valid common standard travel document as well as a copy of your work permit in which the necessary documentation are pre-determined under Annex II. The EU on the other hand offers a simple approach to avoid the burdensome bureaucratic requirements of unnecessary documents, a valid identity document or passport is needed for entry and residence. Also, for longer stay, the Directive specifies precisely the kind of proof that can be required from European citizens by the national authorities for issuing the registration certificate. In as much as respective national laws regulate issuing of work permits, adopting such approaches create a benchmark system moving further away from strict national laws or an over reliance on the discretion of relevant national authorities. This in the long run influences the measures respective countries adopt towards their permit system.

From the SADC perspective, in trying to regulate a permit system under Article 13(e) 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 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

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866 Article 5 of the Supplementary Protocol on the Right of Residence A/SP.1/7/86.
867 Article 9 of the Supplementary Protocol on the Right of Residence A/SP.1/7/86.
869 See chapter 3 section 3.4.3.
870 Article 5(1) and 6(1) of the EU Council Directive 2004/38/EC.
871 Article 5(1) and 6(1) of the EU Council Directive 2004/38/EC.
872 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.
contracting parties from the regional context, often forcing them to compete with one another. 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. As seen in Chapter 1 of this thesis, the primary barrier to movement of people is the requirement of Visas by some countries and the cumbersome process involved in obtaining them.\textsuperscript{873}

The SADC just like the ECOWAS and EAC can adopt a residence permit catering for economically active citizens. The permit scheme will allow for expanded mobility of this category of persons and having such a visa scheme can potentially create a very large income gain even if it results in a relatively small increase in cross-border labor flows. In essence, Member States therefore need to decide on regulations on a common visa policy as well as security checks within their borders. This means that all SADC countries produce visas under the same stipulations, taking into consideration each other’s interests. Within the SADC, a current initiative towards a standard visa scheme is one towards ensuring easy travel through the UNIVISA. The concept of the UNIVISA modelled along the lines of the European Schengen visa was promoted through Regional Tourism Organisation of Southern Africa (RETOSA).\textsuperscript{874} RETOSA is a SADC body responsible for the development of tourism in 14 Southern African countries: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, eSwatini, Tanzania, Zambia and Zimbabwe.\textsuperscript{875} In essence, the UNIVISA initiative will permit foreigners in this case tourists, not SADC citizens to enter all these 14 SADC Member countries for tourism purposes without the need to apply for a visa in each country visited. One begs to question why this kind of initiative has not been awarded to SADC citizens. SADC has to go a step further in adopting a standard visa system towards residency rights for economic active persons.

\textsuperscript{873} See chapter 1 section 1.1.
5.5.4 **Revising the SADC Institution and Dispute Settlement Mechanism**

Article 29 prescribes that ‘the institutions for implementing the Protocol shall in addition to those established by Article 9 of the Treaty,’\(^\text{876}\) be the Committee of Ministers responsible for Public Security; and any other committee established by the Ministerial Committee of the Organ.\(^\text{877}\) Having just a Committee on Public Security arguably is suggestive of the fact that movement of people reflects a trend entirely focused on ensuring national security and the need to focus on curbing border management challenges that may undermine the sovereignty of Member States.

Adding to this, Article 30 proposes that disputes regarding interpretation and application of the Protocol be resolved by negotiated agreement by the Chairperson of the Organ or by the Summit and if such dispute cannot be settled by agreement, it may be referred to the SADC tribunal, whose decision shall be final and binding.\(^\text{878}\) In the event no negotiated agreement can be reached by the Organ or the Summit, one serious barrier to effectively manage free movement based on this Protocol is the ongoing absence of a regional legal enforcement mechanism to cater directly for SADC Citizens. This is peculiar in the SADC considering the current state of the SADC Tribunal as discussed in more detail below.

The case of Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe SADC (T) (unreported case no 2/2007, 28-11-2008) offers perspective on the state of the SADC Tribunal. In this case, Mr Campbell and others successfully challenged Zimbabwe’s land policy and laws before the SADC Tribunal after meeting the exceptions to the exhaustion of local remedies rule.\(^\text{879}\) A majority of Zimbabwe’s white farmers were deprived of their right to compensation and access to justice after the expropriation of their agricultural land.\(^\text{880}\) The SADC Tribunal subsequently found such acts by the Zimbabwean government to be discriminatory and contrary to the SADC Treaty.\(^\text{881}\) The judgments against Zimbabwe resulted in efforts to cast suspicion over the Tribunal. These efforts culminated in a decision by the SADC Summit to remove the right of individual access to the Tribunal and at a later

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\(^{876}\) The following institutions are hereby established; the Summit of Heads of State or Government, the Organ on Politics, Defence and Security Co-operation, Council of Ministers, the Sectoral and Custer Ministerial Committees, the Standing Committee Officials, the Secretariat, the Tribunal, SADC National Committees. See the SADC Consolidated text of the Treaty of the Southern African Development Community as Amended.

\(^{877}\) Article 29 of the SADC Protocol on the Facilitation of Movement of Persons.

\(^{878}\) Article 30(1) and (2) of the SADC Protocol on the Facilitation of Movement of Persons.

\(^{879}\) Mike Campbell (Pvt) LTD and Others v Republic of Zimbabwe SADC (T) Case No. 05-2008.

\(^{880}\) Mike Campbell (Pvt) LTD and Others v Republic of Zimbabwe SADC (T) Case No. 05-2008.

\(^{881}\) Mike Campbell (Pvt) LTD and Others v Republic of Zimbabwe SADC (T) Case No. 05-2008.
stage, the SADC Summit adopted a resolution to suspend the Tribunal pending a review of its role, functions and terms of reference by an independent consultant.\textsuperscript{882}

In 2014, a new Protocol on the SADC Tribunal was signed.\textsuperscript{883} Article 33 of the 2014 Protocol reverts to the position under traditional international law regarding the settlement of disputes by restricting the scope of the Tribunal’s contentious jurisdiction to disputes between Member States only.\textsuperscript{884} Therefore, restricting the Tribunal’s mandate to interpreting the SADC Treaty and Protocols in the context of disputes between Member States and not individuals or SADC citizens as the case may be. Having this limitation cannot meet the demands of the legal problems associated with a REC and it will be difficult to see how the Tribunal will be able to further the cause of economic integration. Concern over the creation of a new Tribunal and the restriction it brings in disallowing individuals from lodging claims with the Tribunal led to a legal action against the President of South Africa, President Jacob Zuma in 2018.\textsuperscript{885} This action was based on the argument that by implication, such restriction will deny SADC citizens’ access to justice.\textsuperscript{886} In deciding the matter, the constitutional Court ruled that the participation of the President in abolishing the old Tribunal and signing the subsequent Protocol that creates a new Tribunal with no mandate to hear individual applications was irrational and unconstitutional.\textsuperscript{887} From the Courts perspective, the President had in fact made common cause with other Member States in the region to deprive South Africans and citizens from other SADC countries of access to justice, even in circumstances where domestic courts lack the jurisdiction to entertain human rights and rule of law-related individual disputes.\textsuperscript{888}

Having a strong and effective legal and institutional framework is key to integration. It creates the need to share some sovereignty on policy issues and to entrust enforcement of integration commitments to a supranational institution. Being more integrated, the EU is characterised by the novelty of its institutional arrangements. Successes in EU integration

\textsuperscript{884} Article 33 of the Protocol on the SADC Tribunal 2014.
\textsuperscript{885} Law Society of South Africa and Others v President of the Republic of South Africa and Others [2018] ZACC.
\textsuperscript{887} Law Society of South Africa and Others v President of the Republic of South Africa and Others [2018] ZACC para 85.
\textsuperscript{888} Law Society of South Africa and Others v President of the Republic of South Africa and Others [2018] ZACC para 81.
could largely be attributed to having an existing legal and institutional framework which ensured compliance with obligations arising from agreed policies and the ECJ is an example of this.

Though SADC has set itself ambitious objectives for deepening regional cooperation,\footnote{889 SADC Regional Indicative Strategic Development Plan available 67 at \url{http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf} (accessed 7 March 2018).} its institutions are weak and its administrative capacity is limited particularly relating to compliance and enforcement issues. Having institutions with limited power to drive integration processes hampers progress and is indicative of a weak institutional capacity of SADC. The SADC lacks a supranational authority to enforce decisions and what is required is a Tribunal capable of exerting significant influence not only over the course of integration, but also with the Member States seeking the court’s influence on interpretation of policies towards migration. Going forward, it is imperative that heads of state and government of SADC Member States reconsider their decision to suspend the SADC Tribunal and award it the necessary power it needs to function.

Regional integration as a political and economic process involves a devolution of power from the State to a regional entity.\footnote{890 Bischoff PH ‘Regionalism and Regional Co-operation in Africa: New Century Challenges and Prospects’ in Mbaku, Mukum J & Chandra S (eds) \textit{Africa at the Crossroads}. I ed (2004) 121-146 121.} These processes, therefore, entail some transfer of sovereignty from the State level to the regional level, in essence, creating a new dynamics to which states have to adapt. As a result, for SADC to thrive, Member States need to redefine or ease up on their hold to sovereignty. At a deeper level, free movement of people involves the removal of internal border controls with Member States, harmonisation of migration policies, procedures and travel documents. If achieved, the movement of people will be epitomised by the creation of a community of SADC citizens, who can move from country to country without restrictions which is an ingredient for a meaningful regional integration.

In the event the necessary ratification needed to enforce the Facilitation Protocol is not obtained, the SADC needs to recognise the existing realities prevailing in the organisation. Going forward, the SADC has to map out how in practice Member States can constructively achieve the organisations objectives and shape its future from their respective points of view and shared interest towards liberalised movement of people. This can be done through a means of flexible integration. This concept will be discussed in the subsequent heading.
5.6 Flexible Integration

The SADC RISDP in highlighting its scope and purpose mentions that;

‘while maintaining a development integration strategy, the RISDP, in view of the significant discrepancies existing among SADC Member States, recognises the need for a flexible approach towards deeper integration and the implementation of various policy reforms and recommendations.’\(^\text{891}\)

From the aforementioned, the SADC allows for flexibility in its integration efforts but offers no timeframes if such flexibilities are to be utilised. The target to be a common market remains elusive in the region. To deepen integration, the uniform and collective effort from all Member States is key but being collective has proved a challenge considering the delay with the Facilitation Protocol. The question therefore is; how far is the region and Members willing to go in terms of their willingness to achieve the movement of people and a common market?

Flexible integration has been a subject of academic discourse as will be seen subsequently for a long time albeit from an EU integration perspective since the 1990s. The understanding of the term flexible integration is quite difficult due to the nature of the subject and as subtly put by Brandi and Wohlgemuth is far from novel\(^\text{892}\) or will give someone a severe case of semantic indigestion due to its vast terminology as referred by Stubb.\(^\text{893}\) This varied terminologies proposed by Stubb included multi-speed integration,\(^\text{894}\) variable geometry,\(^\text{895}\) a la carte\(^\text{896}\) mode.\(^\text{897}\) Basak mentions that having this varying perspective of the concept brings

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\(^{894}\) Multi speed integration is described as a process whereby Member states decide to pursue the same policies and common objectives not simultaneously but at different times. See Stubb A ‘The 1996 Intergovernmental Conference and the management of Flexible Integration’ (1997) 4 *Journal of European Public Policy* 1 39.

\(^{895}\) Variable geometry is a mode which admits to the unattainable differences within the main integrative structure by allowing permanent or irreversible separation between the core of countries and lesser developed integrative units. This mode operates outside treaty framework as the binding treaty framework may be seen as limited and too restrictive for some Member states. See Stubb A ‘The 1996 Intergovernmental Conference and the management of Flexible Integration’ (1997) 4 *Journal of European Public Policy* 1 39.

\(^{896}\) A la carte model allows each Member state to pick and choose as from a menu in which policy area they would like to participate whilst at the same time maintaining a minimum number of core objectives. Stubb A
about a wide range of inference of either positive to the negative outcome. He further highlights that the concept from an Euro-sceptic point of view is perceived as a way of opting out from certain policies, whereas for the pro-integrationists it is the solution to by-pass the reluctant Member States to go further towards deeper integration.

Stubb illustrates the earliest debate on flexible integration began in the early 1970s from a political context. Referring to Chancellor Brandt’s speech in 1974, Stubb quotes him saying ‘the Community would be strengthened if the objectively stronger countries were to be more closely integrated first and the others followed at a later stage.’ In a 1975 report Tindeman, mentions that to avoid Europe crumbling away, the states which are able to progress, have a duty to forge ahead. Basically, differences exist in terms of the levels of economy among the Member States and to deepen integration, States which cannot progress, should not delay the process but allow others to forge ahead leaving an opportunity for them to catch up at a later stage.

Sutter in discussing the concept mentions that:

‘in general, flexible integration (sometimes called variable geometry integration) means that a subgroup of EU-Member States decides to go ahead with further integration in certain areas without committing the non-participating EU-Member States to necessarily join the subgroup, even at a later date.’

Naurine and Lindahl in a recent study observe that flexible integration may come in different forms, but the basic idea is that some Member States that are willing and able to cooperate further within a selected policy area do so, whereas other Members remain outside the
cooperative venture in the particular field. From the aforementioned, flexibility is viewed as a tool to enhancing productivity towards regional integration.

Flexible integration is explicitly made possible and institutionalised by the provision on ‘Enhanced Cooperation’ under Article 20 of the European Union Treaty of Lisbon. Referring to Article 20 under the Treaty, the provision;

‘allows for enhanced cooperation by Members with the aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it.’

The aforementioned provision serves as a tool for governing a diverse and heterogeneous Europe, an undertaking that can prove challenging to achieve through a standardised or harmonised system of integration. Metcalfe argues a uniform standardised approach to managing European policies will prove cumbersome, overcentralised and perhaps even unworkable. Also as noted by Nomden, the rationale of flexible integration post the Amsterdam Treaty is ‘aimed at making it possible to govern a Europe that in future will be much more heterogeneous in economic, political, social and cultural terms. It creates the possibility of reconciling enlargement on the one hand with deepening integration on the other.’

From the aforementioned, adopting flexibility means creating a novel possibility for cooperation by Member States that are willing and able to cooperate within a selected policy area whereas other Member States remain outside the cooperative venture in that particular field. It is no longer necessary that all Member States integrate and reach agreements at the same pace toward the same objectives. This in effect means that flexibility gives the EU the ability to push union agenda without going outside the EU structures and in principle,
delegitimises the need for agreements by Member States outside the formal Union structure. Therefore, closer cooperation between some Member States in certain fields of activity is allowed provided that all the relevant criteria set by the Treaties are met.

The challenges towards achieving the movement of persons SADC highlighted above calls for a reassessment of the SADC’s actual capacity as a whole to foster policy convergence in the region and implement such policies. The progressive yet minimalist approach which still remains unenforced in the form of the Facilitation Protocol still remains redundant and unsuccessful in achieving integration goals towards free movement of people. Key challenges that have impeded on the implementation of a regional policy in relation to free movement cited above are focus on national interests as well as economic diversity and heterogeneity of the region as well as preference towards bilateral agreements outside the SADC structures to foster such interests. States are predominately concerned with protecting and fulfilling their national interests before making provisions for regional interests based on overarching regional agreements. This misalignment has stalled the process of free movement. Learning from the EU experience discussed in Chapter 3 of this thesis, it can be beneficial to the SADC if the Member States who share common objectives towards fully liberalising movement of people are allowed to pursue them as a matter of joint policy cooperatively, delimiting the need for a bilateral approach. This sub group will be distinct from a bilateral approach because the group will be open to all SADC Member States and as exemplified by Article 20 provision referred to above should include a majority of Member States which in the context of the SADC will at least be eight Member States. Consequently, such Members with shared interests in furthering policies on the movement of people can cooperate towards that within the SADC formal structure or conversely, Member States who are disinterested in allowing the movement of persons can opt out completely of policies relating to it.

At the core of adopting flexibility towards the movement of people is the understanding and rationale that not all countries are willing and able to implement and achieve this on the same level. According to Warleigh two pertinent issues determine the existence of flexibility ‘the willingness of the Member governments to make progress and their willingness to do so as a sub-group if necessary.’ In the context of the EU, flexibility allowed for the integration process to move in accordance with the general will of the Member States interested in

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909 See chapter 5 section 5.2.
910 See chapter 5 section 5.2.
911 See chapter 3 section 3.2.4 on the discussion of the Schengen Agreement.
furthering movement of people and the overall aim of the EU rather than the needs of those inclined to participate, moving forward the overall Union agenda.\textsuperscript{913} This aligns with Fagbayibo’s perspective where it is mentioned that flexible integration as a tool serves as an antidote for inaction and static response to urgent policy needs.\textsuperscript{914} This therefore allows for active decision making on certain issues. So if countries are unable to push on the Facilitation Protocol to free movement at the SADC level because of differing political priorities, differing levels of development, as well as differing levels of immigration management, then perhaps as a model, a provision allowing convergence as a sub-group with similar interest, within the formal SADC framework affording this group of countries to forge ahead in integration like the Schengen area and allowing the rest to catch up later is needed. Where progress is stalled at REC level, the free movement agenda need not languish. As regards flexibility, the European example of allowing Member States willing to join, a common policy furthering the free movement of people can be adopted for SADC.

Adopting this approach was indicative that integration can be differentiated rather than uniform in certain instances but being flexible can further shape the integration process in a way that suggests an acceptance that these differences are unavoidable and aid in moving past stagnation. Despite the positivity of flexible integration, it is not without challenges or disadvantages. One issue that might however arise with flexible integration in this context is that participating States may agree on intended measures but non participating States can still have reservations or can still maintain the disinterest in such areas as seen currently with Brexit.\textsuperscript{915} If flexible integration is to be followed, there has to be a commitment towards a standard considering the preferences and interests of other States or the region as a whole.

Further challenges to flexible integration as identified by Fagbayibo include issues of exclusivity, lack of mutual trust, making the regional process more complex, democratic deficit and the creation of inequalities.\textsuperscript{916} He further illustrates that these challenges are interrelated to the extent that they are the manifestation of the selective/limited nature of flexibility and as such, provide a binary approach to the design and implementation of

\textsuperscript{913} See chapter 3 section 3.2.4.
\textsuperscript{915} See chapter 3 section 3.2.5.
common objectives. Despite these challenges, Moravcisk is of the view that the threat of exclusion from flexibility arrangements could push a Member state to find areas of convergence rather than non-agreement.

Flexibility can potentially add to the complexity already at play regarding the SADC institutional and normative framework if an agreement is reached outside the formal SADC institution. It is imperative that the SADC moves to formulate an overarching normative guideline to address the challenges alluded to above just like Article 43 of the Treaty of the European Union referred to above so as to offer a concrete base for this integration effort. This will therefore require an elaborate provision either as a general stand-alone Protocol or such flexible provisions and guidelines are inserted into specific instruments like the Facilitation Protocol. Such guidelines can illustrate allowing flexibility in circumstances that only furthers the SADC objectives, as a measure of last resort and decisions of such arrangements can only bind participating Member States and non-participating States must respect such decisions.

Having discussed the SADC, it reveals that furthering the movement of people is not a prominent item on the agenda regionally and in certain countries. If intra-regional trade is to thrive within the SADC, integration efforts should take into account the differences in economic and political conditions in the countries as well as collective interests that align to fostering movement of people.

South Africa, despite its restrictive policies as indicated in chapter 4 of this thesis, can be seen in the light of moving towards movement of people. South Africa has signed the Facilitation Protocol, has undertaken some policy formulation and regular legislation reforms as a country. South Africa’s latest migration policy paper, the 2017 White Paper on Migration mentions skills import as a core objective of South Africa’s immigration approach. Alongside South Africa, other States with indicative interest in furthering the movement of persons through signing and ratifying the Facilitation Protocol, Botswana, Lesotho, Mozambique, eSwatini and Zambia can equally cooperate towards enabling a comprehensive policy of migration. Smaller or weaker States within the SADC, are wary of

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919 See Chapter 4 section 4.4.1.1
920 See Chapter 4 section 4.4.1.2.
the hegemonic stance of South Africa and if flexible integration is to be utilised, South Africa cannot exert its dominance. In this light, the SADC ought to invest in promoting social cohesion within the region and providing tangible information that delineates the incentives for cooperation even at a smaller scale to further the region’s objectives. It becomes essential that policymakers engage in a deep reflection of integration imperial meaning, so as to devise measures that will promote deeper cohesion in the region such as ‘flexible integration’.

5.7 Conclusion

The SADC region has been and will continue to be a region in which people move. This is inevitable and will be an ongoing trend within the region. What the SADC lacks is a proper structure devoted to migration governance. This will transpose to processes and a law based on collective responsibility towards migration governance. The region has seen some positive if slight movement towards enhancing migration governance. Disappointingly, there has been no comprehensive change in terms of policy towards allowing the movement of people within the region. To date, enhanced regional migration governance has taken more cautious and bureaucratic form, and has been more about cooperation amongst States in strengthening border security and enforcing their separate national migration laws than about establishing a genuinely regional, rights-based migration regime. This chapter has argued that SADC has to reassess its approach towards the movement of people.

Emphasis was first put on amending certain provisions of the Facilitation Protocol to bring about comprehensiveness to the Protocol and ensure less restrictive approach is given to aspects of residence and establishment. It is therefore argued that there is a critical need for a SADC Law on movement of people that is comprehensively detailed as free movement of persons is a developmental initiative towards a common market. In other words, the soundness and expansiveness of the SADC Facilitation Protocol is key to dictate how the integration process is achieved in the region. This chapter in proposing amendments to the Protocol emphasised a shift in focus towards movement of persons.922 Emphasis on the subject should not solely be on ensuring security but rather on balancing aspects on the risk involved in free movement and the economic benefits. Furthermore, greater commitment is required to aspects of residence and establishment under the Protocol. Regarding both aspects, it is suggestive that there has to be a shift from the reliance on bilateral agreements and domestic laws in regulating the process.

922 See chapter 5 section 5.5.1.
Furthermore, the concept of flexible integration was looked at. When it comes to adopting this approach it is suggested that considering the heterogeneity of SADC, deeper integration can be attained if Members with common objectives and interests as a smaller group push towards free movement. In essence, these States are more favourable towards granting less restrictive movement of people. They should be afforded the flexibility to pursue this initiative as a matter of joint policy outside the formal SADC framework. Therefore, such policies can be pursued and negotiated amongst a smaller group of States by other means outside the SADC framework to further integration as a last resort. In essence, the SADC Member States can use a single piece of legislation at regional level to meet their objectives. In this sense, flexibility can be a means by which Member States are able to agree on legislation despite significant differences of opinion. According to Stubb, this approach serves as a way to find a compromise and avoid a log jam. Flexibility should therefore be viewed as a possible alternative in the integration process towards the free movement of people, consequently, a substitute if pursuing a harmonised system under the formal SADC structure still remains impossible.

The final chapter furthers the discussion by providing the conclusion of this thesis as a whole and presents recommendations for SADC. These recommendations are drawn from the discussions undertaken in chapters 2, 3, 4 and 5.

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CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

The need to bolster economic development of the region through intra-regional trade within the Southern African Development Community (SADC) is one that requires urgent attention. In the SADC, despite persistent ongoing efforts, intra-regional trade has remained on a persistent low compared to other Regional Economic Communities (RECs) as highlighted in chapter 1 of this thesis. To bolster trade, the movement of persons 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. That notwithstanding, the various policy and regulatory frameworks that have been adopted over the years have achieved little towards reversing the trend to low intra SADC trade. Going forward, this thesis argues that increased attention should be placed on implementation of a comprehensive policy towards the movement of persons on service supply. The aim is to ensure that the interventions being undertaken are effective in addressing restricted movement of people in the region. A comprehensive approach is vital for harnessing and easily exporting human resource and skill. This is premised on the basis that if all SADC citizens are awarded the right to enter, reside and establish themselves across the region, a substantial number of skilled persons will be available to areas of skills shortage. Therefore, the main purpose of this study is to analyse the SADC approach towards free movement of people to better aid intra-regional trade.

The study principally reviewed primary and secondary literature. In responding to the main research questions as to what possible reforms can be taken at a regional level in SADC to reach a harmonised system implementable by majority of the SADC Member States to ensure full realisation of free movement of people, the study elaborated upon different International frameworks and different RECs approach governing movement of people. Subsequently, an attempt is made throughout the study to advance a revised approach to that currently operating within SADC in a bid to ensure SADC meets its overall objectives and common market targets. This chapter provides an overall summary of the conclusions, responses to the research questions and the recommendations of the thesis. The first section of the chapter discusses the conclusions to the thesis and the second section provides practical

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924 See chapter 1 section 1.1.
recommendations for the regulation of movement of people in SADC. Finally, concluding remarks for the chapter are provided.

6.2 Summary of Conclusions

This summary of conclusions collates all the conclusions arising from the research questions and the objectives of the thesis. These questions are answered in detail in the previous chapters. The aim of this section is to bring all these conclusions together, to provide a basis for the recommendations that are made in the next section of this chapter.

Chapter 1 of this thesis brings to the fore the problems regarding the lack of enforced regional law regulating movement of people. SADC is the only African regional organisation that has failed to fully support, ratify and implement a policy framework for free movement of persons.\textsuperscript{925} Efforts are piecemeal and partisan, progress is slow, and ratification and implementation of protocols is lagging.\textsuperscript{926} Individual Members follow their own laws and this will not help the SADC and continental integration projects. As a result of such lack of effort and progress, restrictive national laws are at the helm of migration management despite the goal of attaining economic development and deeper integration. This thesis comes from a premise that there is a close link between intra-regional movement of people and development,\textsuperscript{927} by virtue of which movement of people can facilitate development through service supply, skills transfer and so on. This thesis is therefore guided by the question ‘Despite having a Protocol on the Facilitation of the Movement of People, what changes can occur at a regional level to ensure the realisation of the movement of people in SADC?’\textsuperscript{928}

In answering the research question, the central objective of this thesis is ensuring the movement of people so as to foster intra-SADC trade. The movement of people is viewed from the perspective of SADC citizens moving from their own country to another country with the ability to choose their place of residence as well as establishment within the context of a comprehensive regional law.\textsuperscript{929} From a regional integration and trade perspective, the rationale for the movement of persons is essentially economic. It is argued that the SADC should gradually liberalise the movement of people to better influence specific categories of persons like service providers that can aid in economic development and deeper regional

\textsuperscript{925} See chapter 1 section 1.3
\textsuperscript{926} See chapter 1 section 1.3 and chapter 4 section 4.3.
\textsuperscript{927} See chapter 1 section 1.2 and chapter 5 section 5.3.
\textsuperscript{928} See chapter 1 section 1.2.
\textsuperscript{929} See chapter 1 section 1.2.3.
integration. Furthermore, Chapter 1 discussed the concept of a service in an attempt to highlight its importance as people are carriers of services, which is a key aspect to trade.\textsuperscript{930} In looking at services, people are viewed as the carriers and providers of intangible and perishable commodity known as a service.\textsuperscript{931} This service translates to their skill and expertise which can be capitalised on if cross border movement is duly regulated in the SADC.

The international and regional framework regulating movement of people, is dealt with in Chapter two, which reviews several instruments such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW), International Labour Organisation (ILO) Multilateral Framework, ILO Convention on Migration and the General Agreement on Trade in Services.\textsuperscript{932} It also reviews the African Unions (AU) Policies on Migration and the recently concluded AU Draft Protocol Relating to Free Movement of People, Right of Residence and Establishment.\textsuperscript{933} Central to the discussion in the chapter was to investigate the standards set by international law regarding the scope and coverage of the movement of people. From the discussion, International law on the subject matter has developed in a piecemeal and fragmented fashion over a very long period of time.\textsuperscript{934} In essence, there is no coherency in the different International laws dealing with the movement of people. What was highlighted is that the current framework is scattered across a wide array of rules and movement of people is governed from a human rights perspective, from a labour perspective and also a trade law perspective.\textsuperscript{935} It was therefore noted that regulating movement of people is at a crossroad of many branches of International law and giving this existing interdisciplinary combination, it brings depth and captures the breadth of the subject matter.

The standard from a human rights perspective is noted to be more constrained in scope.\textsuperscript{936} The Universal Declaration of Human Rights (UDHR), International Convention on Civil and Political Rights (ICCPR) allows for a general right to freedom of movement of everyone and expressly specifies that people have the right to leave and re-enter any country including their

\textsuperscript{930} See chapter 2 section 2.2.
\textsuperscript{931} See chapter 2 section 2.3.6.
\textsuperscript{932} See chapter 2 section 2.2.1 to 2.2.3.
\textsuperscript{933} See chapter 2 section 2.3.2 to 2.3.4.
\textsuperscript{934} See chapter 2 section 2.2.
\textsuperscript{935} See chapter 2 section 2.4.
\textsuperscript{936} See chapter 2 section 2.2.1
country of origin.\textsuperscript{937} From the discussion this right excludes the right to enter another state bringing about some inconsistency in the international framework on migration\textsuperscript{938} and reaffirming State sovereignty on the subject. Also under the ILO instruments and the GATS, states have been reluctant to undertake binding and unrestricted commitments that limit their sovereign right to determine who enters and remains within their territories and under what conditions, although they increasingly recognise the need to facilitate certain types of movement.\textsuperscript{939}

Affording a right to enter a particular country in present day generally depends on national laws or regional agreements that promote the right to move and reside in another State.\textsuperscript{940} To get a better perspective on how RECs have regulated the movement of persons and what the SADC should do, chapter 3 of the thesis looked at how the European Union (EU), Economic Community of West African States (ECOWAS) and the East African Community (EAC) have approached the movement of people over time. The discussion in this chapter was based on evaluating the respective legal frameworks of these groups with regards to the movement of people. This thesis established that, all three regions have comprehensive policies on movement of people as a key aim to deeper integration and economic transformation.\textsuperscript{941} Development of these arrangements across these RECs stemmed from a legal mandate under primary Treaties law.\textsuperscript{942} Furthermore, it was also noted that these RECs promote the idea of free movement of persons as an economic benefit and their approach fixed on the ideals of having a regional identity by awarding entry, residence and establishment to respective citizens.\textsuperscript{943} Despite these progressive laws, it was noted that implementation of existing agreements has progressed remarkably in the EU but is still lacking in ECOWAS as well as the EAC. This stagnation is based on the attitudes of individual Member States ECOWAS has stalled on the residence and establishment phases due to the refusal of Member States to transfer some sovereignty to the regional level.\textsuperscript{944} Within the EAC, there is some reluctance by powerful Member States in this case Kenya to fully pursue free movement at the regional level.\textsuperscript{945}

\textsuperscript{937} See chapter 2 section 2.2.1.  
\textsuperscript{938} See chapter 2 section 2.2.1.  
\textsuperscript{939} See chapter 2 section 2.2.2 and 2.2.3.  
\textsuperscript{940} See chapter 2 section 2.2.1.  
\textsuperscript{941} See chapter 3 section 3.6.  
\textsuperscript{942} See chapter 3 section 3.2.2, 3.3.2 and 3.4.2.  
\textsuperscript{943} See chapter 3 section 3.6.  
\textsuperscript{944} See chapter 3 section 3.3.4  
\textsuperscript{945} See chapter 3 section 3.4.3.
Chapter four of the thesis then takes a look at the SADC as a region and how it has regulated the free movement of people citing South Africa as an example on the current state of play in regulating movement of people in the region. From the discussion it is noted that the discourse around regional migration is set on 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. In essence, safeguarding national interests and borders is more important than really promoting economic development or encouraging circular economic migration within the SADC region.

To better reflect this ongoing trend, South Africa was looked at based on its standing in the region. It was noted under South Africa’s Immigration laws they have a controlled approach to the movement of people and the need to protect their own interests and that of their citizens before others. The question then arises on how can the SADC reform or optimise its current legal framework towards the movement of people to promote the SADC goal of deeper integration?

The economic mismatch in SADC has proved to be a key challenge in the region. The perception that exists within the region is; in the event free movement of people is granted, it may open up advanced economies to an influx of migrants. On the other hand 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. In drawing lessons from the RECs discussed in chapter 3, it was prescribed to the SADC to approach free movement of people as a matter of urgency and in a pragmatic and comprehensive manner. To move past the stagnant state of the Facilitation Protocol, Member States keen to allow free movement of persons should negotiate an agreement outside the formal setup that they can progressively implement. SADC already allows for flexibility in the form of a variable speed geometry as seen in the Regional Indicative Strategic Development Plan (RISDP), whereby sets of

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946 See chapter 3 section 4.2.1.
947 See chapter 3 section 4.2.2.
948 See chapter 3 section 4.2.2.
949 See chapter 4 section 4.4.1.
950 See chapter 5 section 5.2.
951 See chapter 5 section 5.2.
952 See chapter 5 section 5.2.
953 See chapter 5 section 5.4.
common objectives are agreed upon but component countries move at different speeds towards implementation, some rapidly and others slowly and this is necessary.\textsuperscript{954} However, more flexibility is required to allow States with similar interest cooperate towards deeper integration.

Flexibility is recommended because it recognises the ongoing realities prevailing in SADC and helps to plot how Member States can, in practice, shape their future and that of the region. In context of the process leading to the EU Schengen Agreement,\textsuperscript{955} flexibility to the SADC can be a practical path to compromise among countries with diverse political and economic background eliminating diversity as an argument to not further integration efforts. SADC can accommodate some form of flexibility in the context of movement of people, Member States which intend to establish some cooperation between themselves may do so, as far as it furthers the objectives of the organisation. Conversely, reluctant Member States to the goal of free movement can opt out and join in later rather than oppose or stagnate the Facilitation Protocol.\textsuperscript{956} There can be unity in diversity. SADC needs to adapt and accommodate the diversity within the region.

6.3 \textbf{Recommendations}

As a general recommendation, there has to 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 experts to explain the developmental benefits of a gradual and liberal approach to movement of people be adopted by Member States to enhance the dialogue, Also, the benefits of implementation for Member States concerned should be noted. Going forward, awareness

\textsuperscript{954} See chapter 5 section 5.6.
\textsuperscript{955} See chapter 5 section 5.6.
\textsuperscript{956} See chapter 5 section 5.6.
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 general recommendation, full and effective implementation of the Protocol is key. This thesis however, in the previous chapter has proposed certain amendments to the Facilitation Protocol alongside adopting a more flexible approach to SADC integration efforts if stagnation persists towards ratifying the current Protocol. 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, working towards co-coordinated policies and programmes and the need to develop a common language when addressing movement of people is critical. This is however an ongoing and evolving process.

Adding to the aforementioned this thesis further recommends the following:

6.3.1 Political Will and Curbing of State Sovereignty

Geda and Kibert state that lack of a strong and sustained political commitment has played a significant part in hindering economic integration in Africa.957 This issue is paramount in the SADC considering the low amount of ratified policies and of relevance to this thesis, the Facilitation Protocol. Some possible reasons why this lack of commitment exists is because of the unwillingness to subordinate national interests for long term regional integration goals. South Africa’s apparent interest to avoid influx of migrants if an open border policy is adopted is evident of this notion.958 This need to elevate national interests particularly towards movement of people is borne out of the fact that there is a negative perception about the potential impact of movement of people once borders are open at a regional level. As a result, SADC Member States are motivated by national interests in pursuing regional migration matters. For instance, as seen in Chapter 4 of this thesis, South Africa views migration primarily as a matter of national interest, rather than an economic or social issue.959

This study has indicated that there exist a strong relationship between movement of people as well as development and economic integration960 but policies have to be designed

958 See chapter 4 Section 4.2.1.
959 See chapter 4 Section 4.4.1.
960 See chapter 5 Section 5.3.
comprehensively to utilise the economic potential of migrants. SADC as a region as well as Members States need to be well versed on the relevance of migration and development to the sub-region which will in turn influence policy discourse and their will to adopt a liberalised approach to movement of people. With the African Continental Free Trade Area (AfCFTA) coming to effect as from 30 May 2019, with goods, services and business persons afforded free movement under Phase I, this can bring about a positive spin to this commitment issue and the needed impetus for SADC towards actualising the free movement of persons.

Also, the reluctance by countries to cede power to regional organisations as well as the failure to implement decisions taken by these organisations negatively affect the functioning of supranational organs. SADC has demonstrated a reluctance to empower regional institutions and as Mulaudzi rightly mentions, SADC remains a statist organisation in which states play an active role in determining the nature and scope of regional integration. This is partly due to the fact that regional leaders are reluctant to surrender some element of sovereignty to a common institution like the SADC in shaping the course of integration and also, the institutions are sometimes perceived as politicised, a case in point being the SADC Tribunal, a sub-regional organisation which was suspended following its judgment in Zimbabwean cases dealing with land disputes and human rights abuses as seen in chapter 5.

SADC also suffers from the reluctance of powerful Member States to pursue free movement at the regional level South Africa particularly considering the process leading to the Facilitation Protocol. Currently, there is no devolution of power to any SADC or other supranational organ on issues of migration within the Community. Realistically speaking, Member States will want to retain their national sovereignty over the governance of their immigration policies, and the decision regarding who they decide to accept in and who they refuse entry to. That notwithstanding, thoughts have to be given to the fact that regionalism is a state-led project requiring will and supportive of growth and development. So an unconstrained commitment of Member States to the rights and obligations regarding harmonisation is necessary and this commitment has to be collectively reached.

961 See chapter 2 section 2.3.5.
963 See chapter 5 section 5.2.
964 See chapter 5 section 5.5.4.
965 See chapter 4 section 4.2.2.
So for integration efforts towards movement of persons to succeed in SADC, as recommendation, first of all, a regional law needs to be implemented which enjoys supremacy over domestic laws and the decisions made by regional institutions must be binding and enforceable in all Member States. The challenge now confronting the SADC is to govern and regulate movement of people in such a way that it can serve as a force for growth and development for every single Member State, while ensuring that these people are aware of their rights and are afforded the necessary protection. A regional issue needs a regional or multilateral response, not a Protocol that permits a national or bilateral approach to movement of people and moving past this approach requires assurance from each SADC State. European integration for instance has thus far so progressed that Members surrender aspects of their sovereignty to a supranational regional institution. EU law is superimposed on national laws of individual Member States and brings accompanying obligations and rights. Member states domesticate EU laws and policies.

### 6.3.2 Regional Migration Policy Framework

Based on the discussion in Chapter 4 of the thesis, it was highlighted that the Facilitation Protocol whilst calling for a harmonised system of migration policies and legislation, does not in itself propose an overarching regional policy and legislative framework granting people the right to move with no restriction. It focuses primarily on enhancing the capacity of States to individually and bilaterally regulate migration and strengthen border control as well as security. Bilateral agreements based on the Facilitation Protocol have the potential of creating a parallel system in regulating movement of people and it might appear that the prospects for regional policy on migration in this context are far-fetched.

The SADC as a recommendation going forward, has to capitalise on existing bilateral agreements between states and push them into a regional setup because interest across these fragmented bilateral agreements align towards a regional goal of allowing free movement of people. Basically, the SADC can adopt an approach characterised by, a preference for non-binding instruments over legally binding ones in the form of a regional policy. Also, the SADC has no single internal or external structure primarily devoted to migration policy development at the regional level. Learning from the EU, ECOWAS and EAC, referred to in

966 See chapter 4 section 4.2.2.
967 See chapter 4 section 4.2.2.
968 See chapter 4 section 4.2.2.
this thesis, SADC needs to be progressive and comprehensive in dealing with the movement of people. If States within a flexibly integrated setup are to regulate migration comprehensively as collective interest group, it is recommended that a body devoted to migration be developed to create a regional policy tailored to the AU policies on migration as well as the overall objective of the SADC. This will involve bringing all the necessary stakeholders towards migration governance, be it departments of defence, home affairs, trade, labour and so on. The Migration Dialogue for Southern Africa (MIDSA) is the one existing body open to both SADC and COMESA Member States to ensure frequent discourse on migration issues. It is not central to the SADC for one and cannot ideally deal with the disparity that persist within the region. Also, it has failed to achieve progress in ensuring the emergence of binding mechanisms and clear implementation plans towards migration governance. Going forward, a body tailored to the specific need of the SADC has to emerge.

Furthermore, in developing this policy, it should be formulated as a means to inform individual States on their immigration laws. This will be an all-inclusive policy which fosters harmonisation of migration laws aiming at furthering economic and social cohesion to reduce the gap between the development levels in the region. It will also aim at ensuring movement of people between States with different systems. Tapping into this aspect, a policy that will promote coordination in aspects informing the existing travel requirements for instance the issuance of residence permits, work permits, students’ permits as well as visas is key to facilitating movement of people in the SADC. Conversely, within the flexible framework, the policy can explore visa on arrival initiative or visa waivers amongst countries with these shared interests on the movement of persons. In essence, focus should be geared towards the standardisation and better implementation of these and other smaller and more manageable formalities just as highlighted in the EU, ECOWAS and EAC.

The policy framework will serve to provide the necessary guideline and principle to assist SADC Member States in the formulation of their own national migration policies as well as their implementation in accordance with their own priorities and resources. The policy framework is a comprehensive and integrated reference document which can be binding in nature and scope. The document provides a broad range of recommendations on various migration issues as a guide to governments. Based on that, Members can borrow elements as

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969 See chapter 3 section 3.6.
970 See chapter 2 section 2.3.2, 2.3.3 and 2.3.6.
971 See chapter 3 section 3.5.
they deem fit appropriate and applicable to their country-specific migration challenges and situations.

For movement of people to have a full developmental impact, the most beneficial approach is having a policy aimed at reducing the barriers to migration, at all levels and particularly for the poorest of countries. This however, will necessitate the political willingness to adopt such policies and also curbing of State sovereignty as recommended earlier in this chapter.

6.3.3 Circular Migration

One issue peculiar to the SADC highlighted in this thesis is that of skills shortages. To better address facilitating intra-regional trade, one key aspect this thesis sought to address is how to optimise the current SADC approach to movement of people. Several amendments to the Facilitation Protocol were highlighted in the preceding chapter. As a further recommendation, within the SADC, in enhancing the current migration framework based on the previous recommendation, increased attention should be given not just to a regional policy but one that capitalises on temporary movement of people by promoting increased circular movement of people. This will be a measure to promote mutual economic benefits to both sending and receiving countries and even respective SADC citizens as well as reveal areas in which interest align across SADC countries economically. This will call for fluid movement of people between countries, temporarily and such movement can be linked to the labour needs of countries of origin and destination.

In facilitating circular movement, this could ultimately cater for all categories of people, skilled to unskilled but gradually start off towards economically active persons just like the EU. In adopting this approach, ensuring the temporary repetitive movements between origin and destination countries is key. In the context of the SADC, brain drain is a cited issue to developing countries and with a measure of circularity in play, it means that developing countries do not permanently lose skills and skills gaps within host countries can be filled temporarily. This will be a mutually beneficial approach with countries meeting their labour market needs without having to provide for permanent settlement or integration. South Africa, Namibia or Botswana can argue they will be prime destinations of permanent

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972 See chapter 5 section 5.3.2.
973 See chapter 5 section 5.3.2.
974 See chapter 6 section 6.3.4.
975 See chapter 3 section 3.2.2.
976 See chapter 5 section 5.2.
residency based on their economic level, but if SADC citizens have the choice of easy and less expensive border travels that will not necessarily be the case.

This circular movement has to be managed and regulated in such a way to allow some degree of legal mobility back and forth between countries. In other words, there has to be a degree of freedom of movement which is progressive. Having a progressive and less restrictive law of free movement among countries with strong cultural and social ties can result in repeat movement, whereby economic migrants and traders need not reside solely in the receiving country to work and do business. Within Southern Africa, there is still some resistance to actual free movement, countries rely primarily on bilateral agreements to promote free movement between specific countries and this in effect distorts the regional flow of people. In the EAC and ECOWAS, movement of people between Member states is fairly fluid and recognisable.\(^977\) Also, as seen across Europe, circular movement of people would help to create economic opportunities and sustainable development in regions across borders, thus responding to the economic marginalisation of many peripheral areas across the continent.

### 6.3.4 Border Management

It goes without saying that if movement of people is to be effected within SADC, one outstanding concern will be that of security.\(^978\) This has been an issue highlighted as a reason for abandoning the 1995 Free Movement Protocol\(^979\) and is the prism within which the Facilitation Protocol is framed.\(^980\) Consequently, if movement of people is to be less restrictive within the region, it is imperative that the strengthening of border management systems in terms of technology, infrastructure, process for inspection of travellers, and training of border staff become a primary area of focus. To best facilitate and ease the process, reiterating a way forward, a better border management scheme will require the provision of a regional standard travel documents system through a well-structured registration and issuance system. These travel documents include passports, visas, and temporary travel documents, such as emergency passports. Also, there has to be recognition of identification cards that can be used to cross borders on the basis of a regionally agreed policy. Offering this provision and use of regional travel documents supports efforts to make

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977 See chapter 3 section 3.5.
978 See chapter 5 section 5.2.
979 See chapter 4 section 4.2.1.
980 See chapter 5 section 5.5.1.
cross border movement easier for most travellers. That notwithstanding, having this measure in place will ensure that migration data can easily be centralised.

6.4 Proposed Amendment to the SADC Facilitation Protocol

The following section puts forward a draft text of a proposed amendment to certain provisions of the Facilitation Protocol that seeks to comprehensively regulate the movement of persons in the SADC. The amended provisions recommended are based on comparisons of legislative text of the three regional groups considered in chapter 3 of this thesis. These recommendations are made to improve some of the provisions of the SADC text in light of recent developments.

Proposed Amended Provisions

DETERMINED to fulfil the objectives articulated in Article 5 of the SADC Treaty;

PURSUANT to Article 5(2)(d) of the SADC Treaty which requires the SADC to develop 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 generally, among Member States;

CONSIDERING Article 32 of the Facilitation of the Movement of Persons Protocol allowing for amendment;

This thesis hereby recommends the following amendments.

Article 1 Definitions

SADC Passport⁹⁸¹ means a passport establishing the identity of the holder, issued by or on behalf of the Partner State of which he or she is a citizen.

SADC Residence Card or Permit⁹⁸² means the document issued by the competent authorities of a Member State granting right of residence in the territory of the Member State.⁹⁸³

Article 12 Travel Facilities

2. Each Partner State shall undertake to introduce:

⁹⁸¹ See chapter 5 section 5.5.3.
⁹⁸² See chapter 5 section 5.5.3.
a) a standard travel document called the “SADC Passport" and shall work closely with the Commission to facilitate the processes towards developing and the issuing of this Passport to their citizens.

**Article 13 Harmonisation of Current Immigration Practices**

Each State Party hereby agrees to take steps to achieve the following from the date of entry into force of this Protocol:

e) agree on the issuance of a uniform and simple border pass to citizens of the State Parties within the community.

**Article 16 Right of Residence**

1. Residence means the right of a citizen who is a national of one Member State to reside in a Member State other than his State of origin and which issues him with a residence card or permit that may or may not allow him to participate in any commercial activity.

2. By virtue of paragraph 1, each Partner State shall grant to citizens of the Community who are nationals of other Partner States the right to residence in the territory for the purpose of seeking and carrying out income earning activities so far as they hold a valid national identity document or an SADC Passport and a residence card or permit.

**Article 17 Residence Card or Permit**

1. A citizen who intends to reside in the territory of a host Partner State shall apply to the appropriate authority for an SADC residence card or permit after three months from the date of entry into the territory of the host Partner State.

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984 See chapter section 5.5.3.
985 See chapter 5 section 5.5.2. See also chapter 3 sections 3.2.3, 3.3.3 and 3.4.3.
986 See chapter 5 section 5.5.2. See Article 2 of the Supplementary Protocol on the Right of Residence A/SP.1/7/86. Similarly, see Article 14(1) of the EAC Common Market Protocol. The EU under Article 6 of the EU Council Directive 2004/38/EC grants the right to residency subject to no formalities for a period of three months, post three months, based on Article 7 of the Directive, EU citizens have to comply with certain formalities, see discussion in chapter 3 section 3.2.3 of these formalities.
987 See chapter 5 section 5.5.3. In as much as respective national laws regulate issuing of permits, it is recommended that adopting a regional permitting system or approach creates a benchmark system moving further away from strict formalities of national laws or an over reliance on the discretion of relevant national
2. The appropriate authority shall, within thirty days of application for an SADC residence permit, issue a residence card or permit.

3. From the date of entry into force of this Protocol, each Party State shall work towards harmonising the rules and regulations relating to the conditions and requirements for the issuance of a residence card or permit in Member States with a view to establishing an SADC Residence Card or Permit.  

4. The SADC residence card or permit may be renewed in accordance with the laws of the host State concerned.

**Article 18 Right of Establishment**

1. The State Parties hereby guarantee the right of establishment of nationals of the other Partner States within their territories based on the laws and policies of the host State.

2. The right of establishment shall entitle a national of a Partner State to:
   
   a) exercise economic activities and profession as an employee or a self-employed person;
   
   b) establish and manage a profession, trade, business or calling.

**6.5 Concluding Remarks**

The chapter has discussed, the summary of conclusions of the thesis the need for the SADC to ensure a comprehensive and liberal approach to movement of people so as to further intra-SADC integration. If intra-regional trade is to become a reality in the SADC, movement of people has to be realised. Having said that, the recommendations provided in this chapter are mainly attributed to the SADC and may therefore be limited in application.

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authorities towards affording residence permits. This recommendation came about drawing lessons from the approach in the ECOWAS under Article 5 of the Supplementary Protocol on the Right of Residence A/SP.1/7/86 and Regulation 5 of the East African Community Common Market Protocol (Right of Residence) Regulations, Annex II to the CMP.

988 See Article 9 of the Supplementary Protocol on the Right of Residence A/SP.1/7/86. Similarly, see Regulation 6(5) of the East African Community Common Market Protocol (Right of Residence) Regulations, Annex II to the CMP.
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