

# The Development of the AU Free Movement of Persons Protocol: Origins, Objectives and Key Concerns

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This paper was produced with financial support from the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, but does not necessarily reflect the views of GIZ, the African Union, or any other parties.

## **Introduction:**

This document was composed to support discussions on the development of the AU Free Movement of Persons Protocol. It commences with an introduction to the AU's free movement of persons agenda, which entail the promotion of mobility<sup>1</sup> across the continent, by bolstering the rights of AU Member States' citizens to enter, reside and establish a profession or business in another AU Member State. This agenda is culminating in the development of the AU Free movement of Persons' Protocol, which originates from the Abuja Treaty, the primary AU instrument for continental integration. The implementation of the Protocol is expected to spur economic integration, and the promotion of human rights across the continent. Moreover, the Protocol's employment will further the aims of numerous AU policies and programmes, of which key ones are outlined in the second section of this document. The third section provides a synopsis of the multiple advantages that enhanced mobility is expected to bring.

The regional economic communities (RECs) are the building blocks of the AU, and their free movement regimes serve as the foundation for the development of the AU Protocol. The fourth section captures the state of play of free movement in the RECs. An overview of the scope and provisions of the legal instruments that outline free movement in the RECs are given, as well as a snapshot of the state of implementation of these instruments. A comparison of the various RECs' free movement provisions follow, with a view to delineate the parameters within which the free movement of persons have taken shape in Africa to date. The last section of this document is dedicated to measures to enhance the free movement of persons, by looking at key issues that need to be tackled during the negotiations and implementation of free movement regimes, with a view to aid the development of the AU Free Movement of Persons Protocol.

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<sup>1</sup> Mobility is generally defined as broader than migration, as it includes short term movements, such as tourism and business trips. The United Nations Department of Economic and Social Affairs (UNDESA) defines international migrants as people living outside their country of birth for at least a year, and by extension migration is understood to mean the movement of a person to another country for at least a year. (Caste et al., 2014: 7-8).

## **I. The AU's Free Movement of Persons Agenda:**

The central mission of the AU is regional economic integration, which is viewed as a key pathway to development. The drive for the continental free movement of persons originates from the Organisation for African (OAU) Unity Lagos Plan of Action for the Economic Development of Africa, 1980-2000, which calls for the establishment of an African Common Market, which by definition allows for the free movement of factors of production, including labour. The main instrument guiding continental integration is the Abuja Treaty (AUC DPA, 2016: 3). The Abuja Treaty set out a path for the achievement of the African Economic Community (AEC) through successive stages, that would harmonise and integrate existing and future RECs, and their various levels of regional integration. The RECs constitute the pillars and building blocks of the AEC and the harmonisation of their regional integration frameworks, such as their free trade areas and free movement of persons protocols, were envisioned to build the AEC. During the fifth stage the African Common Market would be established, which would provide for the free movement of persons, the rights of residence and establishment. The gradual removal of the obstacles to the free of movement of persons among Member States (MS) is listed in Article 4 of the Treaty as important for achieving the objectives of the Community, which include economic development and the integration of African economies. Regional economic integration demands labour mobility and other forms of economic engagement that necessitate the movement of persons. Enhanced mobility is therefore expected to deepen continental integration in Africa.

The Abuja Treaty does not explicitly define the free movement of persons, but implies that it refers to the right to enter and stay in another state for a period of time. The free movement of persons is mentioned jointly with the rights of residence and establishment in the Abuja Treaty, and in Article 43 of the Treaty MS *agree to conclude a Protocol on the Free Movement of Persons, Right of Residence and Establishment*. The AU's free movement of persons agenda is therefore understood as the promotion of the rights of AU MS' citizens to enter and stay in another AU Member State, for a period of time; reside in; and establish a profession or business in. In this document the term the free movement of persons will be used to refer to the rights to entry, residence and establishment. In Africa these rights are currently extended to different degrees under the free movement regimes of the East Africa Community (EAC) and the Economic Community of West African States (ECOWAS). The section in this document which analyses the free movement regimes of the RECs will provide information on the various degrees to which free movement is being implemented by the RECs.

In addition, the free movement of persons on the continent will contribute to the fulfillment of the AU's human rights agenda (AUC DPA, 2016: 6). The 1981 African Charter on Human and

Peoples' Rights, drew on the 1948 Universal Declaration on Human Rights, and, inter alia, affirmed the right of a person to leave any country and return to one's own country. The free movement of persons will facilitate movement between MS, thereby supporting the fulfillment of the above mentioned right. In addition, the economic development which should follow from greater mobility and integration, is expected to aid the fulfilment of other human rights, such as the right to economic and social development, which is captured in Article 22 of the Charter.

## **II. AU Policies and Programmes and the Call for the Free Movement of Persons:**

Subsequent to the Lagos Plan of Action, the African Charter on Human and Peoples' Rights and the Abuja Treaty, a number of AU policy documents and programmes were rolled out that further prioritised the free movement of persons agenda and the development of the AU Free Movement of Persons Protocol. This section provides a brief overview of some of the preeminent policy documents, programmes and objectives that the development of the AU Free Movement Protocol is linked to.

In 2004, the first Conference of Intellectuals of Africa and the Diaspora, organised by the AU Commission in Dakar, deepened the AU's free movement agenda, by calling for the promotion of the concept of African citizenship and the establishment of the African passport. A concept of African citizenship that would outline the rights, entitlements, and duties of African Citizens on the continent and in the Diaspora was expected to aid development and investment in Africa, as would an African passport, which would ease mobility across the continent. The 2005 AU Decision on Free Movement in Africa supported the issuance of an African Diplomatic Passport and requested the AU Commission to facilitate the free movement of persons at bilateral, sub-regional and regional levels, in line with the Abuja Treaty.

In 2006, the AU Executive Council adopted the African Common Position on Migration and Development and the Migration Policy Framework for Africa, which form the AU's overarching continental approach to migration, and support the free movement agenda. The Migration Policy Framework calls on states to facilitate free movement at bilateral, sub-regional and regional levels, with a view to build towards an Africa-wide framework on the free movement of persons. A number of RECs had developed, and to some extent implemented, protocols or agreements on the free movement of persons in their regions. RECs that had not yet developed free movement agreements were expected to do so, while the harmonisation of all REC's free movement arrangements were expected to lead to continental free movement. In 2009 the AU Minimum Integration Programme (MIP) was adopted and echoed the call for the adoption of free movement protocols by all the RECs.

In 2012 AU MS decided to establish a a Continental Free Trade Area (CFTA) by 2017, which is currently being developed. An Action Plan on Boosting Intra Africa Trade (BIAT) was also

endorsed (AU, 2014a: 2). BIAT identifies seven areas of constraint that need to be addressed to boost intra-African trade. Factor market integration is one of the constraints and programme clusters of the action plan. Under this cluster it highlights that labour mobility - which would be spurred by the free movement of persons - can aid productive capacity, intra-African trade, and a more equitable distribution of the costs and benefits of regional integration. It goes as far as to say that regional and continental factor market integration, which includes labour, must be prioritised if the objectives of the Pan-African Economic Community are to be achieved (AU, 2012: 16).

In 2015 the AU launched Africa's development strategy for the next half century, with the adoption of Agenda 2063, which aspires to an integrated and politically united Africa, and calls for the free movement of people, capital, goods and services. Agenda 2063 advocates for the free movement of people as part of the continental integration agenda. Free movement is expected to contribute to significant increases in trade and investment among African countries, which would in turn strengthen Africa's position in global trade. The AU Free Movement Protocol and the African passport are flagship projects of Agenda 2063, which also calls for the abolishment of visa requirements for all African citizens in all African countries by 2018.

Moreover, in 2015 the AU adopted the Joint Labour Migration Programme (JLMP), which promotes critical areas of facilitating the free movement of workers as a means of advancing regional integration and development. Key activity areas of the JLMP include skills portability and the mutual recognition of qualifications, and the development of an African Qualifications Framework. Most Sub-Saharan African countries face labour and skills shortages in specific sectors, while at the same time battling with unemployment and a growing youth bulge (Olsen, 2012: 3). Regional skills recognition and skills pooling can help to address this challenge and allocate labour where it is most productive and needed.

In 2015, AU leaders also made the Declaration on Migration in Johannesburg, agreeing to accelerate continent-wide visa-free regimes, expedite the African passport, and promote mutual recognition of higher education credentials. Then, following the request made at the Johannesburg summit, the AU Commission organised an Executive Council retreat in Mekele in January 2016. The Executive Council reaffirmed the importance of the free movement of people and recommended the adoption of an AU Free Movement Protocol by January 2018. In addition, the meeting requested the Commission Chairperson to present a draft decision to the Assembly of Heads of State and Government for the introduction of visas on arrival with the right to 30-day stays for all MS' passport holders. Finally, in July 2016, the AU e-passport was unveiled in Kigali, where they were issued to Heads of State and senior officials (AU, 2016).

Moreover, the February 2017 AU Peace and Security Council decision on the Free Movement of People and Goods affirmed that the benefits of the free movement of people outweigh the associated potential security and economic challenges, whilst also calling for building mutual trust, cooperation and collaboration in addressing the associated security concerns. It commended MS that have already started to issue visas on arrival to African citizens, namely Benin, Ghana, Mauritius, Rwanda and Seychelles, and urged other MS to follow suit, in addition to emphasising the need for a phased approach to implementing the free movement of persons.

### **III. The Case for the Free Movement of Persons in Africa:**

Free movement of persons is a key pillar of regional trade and economic integration, as it facilitates trade in goods and services and industrialisation, thereby contributing to socio-economic development and poverty reduction. Traders and service providers can deliver products on site and customers can visit suppliers abroad (UNECA, 2012: 62). By accessing larger markets, companies in countries with small and fragmented domestic markets are able to achieve economies of scale and compete internationally (AfDB et al, 2016: 81).

Africa's industrialisation and structural transformation is hampered by the little trade that takes place within Africa, which can be spurred by free movement. Only 10-12% of African trade takes place within the continent, and intra-African trade costs are 50% higher than in East Asia, the highest intraregional costs of any developing region (Mukeredzi, 2016). For Asia, Europe and the Americas, intra-regional trade represented 61%, 69% and 56%, respectively, of their total trade in 2014. At the same time, intraregional investment is low, with intra-African project finance investment accounting for 19% of total investment in Africa (AfDB et al, 2016: 88). Research shows that all RECs have achieved increases in intraregional trade and that RECs which have achieved greater free movement also seem to have achieved greater increases in intraregional trade. After abolishing work permits for EAC citizens to support its open-visa policy, Rwanda increased trade with Kenya and Uganda by at least 50% (Mukeredzi, 2016). Rwanda's trade with the Democratic Republic of the Congo alone increased by 73% since the implementation of the policy (De Freese, 2016). Furthermore, unlike other enablers of economic development with more quantifiable costs, like investment in infrastructure and human capital, implementing freedom of movement has been argued by the AU Commission Chairperson as requiring minimal upfront investment costs, making it a cost-effective way to promote economic growth (AfDB, 2016a: 7).

Moreover, regional integration can be argued to promote convergence between poor and rich economies through three key factors: 1) capital and labour mobility generate output and productivity increases; 2) economic integration benefits all countries involved, through increased trade volume; and 3) regional integration promotes the spread of technology through the exchange of goods, ideas and knowledge (AfDB et al, 2016: 81). The West African Economic and

Monetary Union (WAEMU) countries show the highest income convergence rate. Incomes have narrowed at an average rate of 19.6% between WAEMU's richest and poorest countries over 15 years. ECOWAS incomes have also narrowed, with a convergence rate estimated at 11.4%, and the EAC had a convergence rate of 8.5%. In the Southern African Development Community (SADC), countries showed a convergence rate estimated at 11.2%, while in the Central African Economic and Monetary Community (CEMAC), income convergence has been estimated at just 5.5% (AfDB et al, 2016: 81).

In addition, free movement promotes labour mobility and reduces the red tape which impedes companies from accessing and moving talent around the continent. Most Sub-Saharan African countries face labour and skills shortages in specific sectors (such as oil and gas, mining, telecommunication services) while at the same time battling with unemployment (Olsen, 2012: 3). *The continent currently has a gap of 4.3 million engineers. In order to implement the flagship projects of the first 10 year implementation program of Agenda 2063, the continent needs 1.6 million agricultural scientists and researchers and 2.8 million water and sanitation engineers* (ZNCC, 2016). Regional skills pooling enabled through mobility can assist in addressing this challenge and aid the efficient allocation of labour. West Africa's ability to increase agricultural production at the same rate as population growth was attributable in part to migration to areas with high agricultural potential. Also, the sub-region's artisanal marine fishing industry has thrived because of the ease of crossing borders at sea (Ratha et al., 2011: 34).

Moreover, Africa's youth bulge is one of the most important challenges and opportunities facing Africa today, as demonstrated by the AU's choice of the demographic dividend as its official theme for 2017. For Africa's large and growing youthful population to be a driver for the structural transformation of Africa and constitute a demographic dividend, they need to be presented with the right opportunities and capacitated to work in the necessary economic sectors. Student and labour mobility on the continent can defuse the pressure of the youth bulge and potentially result in "brain gain" if the youth can gain new and necessary skills through education and labour mobility. Free movement may also boost the economic productivity of the youth, by encouraging entrepreneurship. Free movement enables exchanges between entrepreneurs and allows entrepreneurs to meet customers and suppliers in other MS; and may enable migrants to establish businesses in their host countries (AfDB, 2016a: 9).

Free movement should also promote cultural exchanges and solidarity by increasing people-to-people exchanges between MS. It would enable Africans to experience other cultures across the continent, empower young people by facilitating educational exchanges, and such interactions can promote intercultural understanding and solidarity, and engender business opportunities and the sharing of best practices and lessons learnt across a range of sectors.

It is also argued that greater free movement within the continent would encourage more talent to stay in Africa, thus limiting the brain drain phenomenon. Currently, Africans migrating abroad possess a relatively high level of education (Ratha et al., 2011: 7). At the same time, Africans remit considerable amounts of money to support livelihoods and investments in their countries of origin (AfDB, 2016b: 34), and therefore free movement can promote development in Africa's migrant-sending countries. Remittance flows added \$65 billion to Africa's GDP in 2013, 13% of which came from Africa itself (AfDB, 2016a: 9).

A further benefit of free movement is that it boosts intraregional tourism, as it reduces the relative costs of visiting other African countries. In this regard, Rwanda and Mauritius have been cited as successful cases. Both countries have liberalised visa policies for African nationals, and have seen an increase in the numbers of African business and leisure travelers, in turn generating economic benefits (AfDB, 2016a: 18). In 2014, visa openness helped Rwanda to boost tourism revenues by 4%, with a 24% increase in conference visitors (AfDB, 2016a: 20). 8 out of the top 10 most open countries of the Africa Visa Openness Index have shown an upward trajectory on travel and tourism figures with respect to output, employment, visitor exports and investments (AfDB, 2016a: 20). Visa liberalisation schemes could increase tourism by 5-25% in Africa (AfDB, 2016c).

Moreover, as free movement entails the expansion of legal migration channels, it is expected to reduce irregular migration and potentially some of the crimes associated with migrant smuggling. Migrant smuggling is driven by material gain, and removing barriers to movement reduces the value of smugglers' services, which may also be linked to other criminal activities, involving the exploitation of migrants, such as human trafficking. It is important to note, however, that strengthened border control has also been argued to be necessary to prevent and detect human trafficking (UNODC, 2008: 217). Furthermore, under restrictive regimes, smuggling can be the only route to safety for refugees and the only channel for labour migrants. In addition, free movement has been argued to reduce corruption and harassment at borders, insofar as citizens are made aware of visa-free or free-of-charge entry. Free movement of persons can therefore reduce irregular migration and the exploitation of irregular migrants (GMPA, 2015: 4-6). Moreover, if the free movement of persons is well managed, it can potentially provide states with better information over who enters and stays on their territory, thereby aiding migration management and security.

## **IV. State of Play of Free Movement in Africa:**

### **IV.i Overview of the Free Movement of Persons in the Regional Economic Communities**

The AU recognises eight RECs as the building blocks of the AEC.<sup>2</sup> They are the Arab Maghreb Union (UMA); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel–Saharan States (CEN–SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD); and the Southern African Development Community (SADC).

This section provides an overview of the free movement regimes of the AU RECs by outlining the following categories per REC: the legal instruments covering the free movement of persons; the definition and scope given to the free movement of persons within the pertaining legal instruments; the provisions covered by the free movement of persons instruments in terms of the categories of entry, work, establishment and residence; the current state of implementation of the free movement; and next steps for enhancing free movement. The free movement provisions of the AMU and CEN-SAD are rudimentary and a synopsis of these provisions follow under the section, Other Free Movement Initiatives. The COMESA-EAC-SADC Tripartite negotiations on the movement of business persons is also briefly referred to, with a view to cover mobility-related developments among the AU RECs.

This section serves as the basis for the subsequent section, which compares free movement across the RECs and the lessons which can be drawn from their experiences. The analysis indicates that the definition given to the free movement of persons varies across the continent, with no global definition existing, as well as no common definitions of the categories or phases which normally fall within the scope of the free movement of persons, namely entry, residence and establishment. The order of the phases also varies across the RECs, with certain RECs first allowing for residence and then establishment, whilst others prioritise establishment over residence. Moreover, the protocols that are not in force often lack precise rules and modalities for what is covered under the phases of residence and establishment, and would need clear implementation frameworks to be applied. While the RECs that are implementing free movement regimes, largely lack supra-national authority and sanctions, and consequently the effective enforcement of these regimes. As a result free movement commitments are not uniformly implemented by MS and the suspension of such commitments decided by individual states.

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<sup>2</sup> These RECs are referred to as the AU RECs in this document.

## 1. Common Market for Eastern and Southern Africa (COMESA)

**i. Legal instruments:** Two main documents form the legal basis of COMESA's free movement regime: Protocol on the Gradual Relaxation and Eventual Elimination of Visa Requirements, 1984 (Visa Protocol); and the Protocol on Free Movement of Persons, Labour, Services, the Right of Establishment and Residence, 1998 (Free Movement Protocol).

**ii. Definition and scope of free movement:** Free movement is not clearly defined under either protocol. However, the Free Movement Protocol states the importance of ensuring that citizens can move freely, take up job offers, render services, pursue self-employment, and set up/manage undertakings without discrimination. The free movement of persons section of the Protocol, however, only covers entry requirements. Nonetheless, the Protocol's title indicates that free movement in the COMESA context encompasses free movement of persons (entry and visa liberalisation), free movement of labour (the right to accept (principally skilled) employment), and the right of establishment and residence.

**iii. Entry provisions:** The Visa Protocol outlines a two-phase process of visa liberalisation. First, citizens with valid travel documents shall not be required to apply for a visa before travelling. Then, visa-free entry for 90 days should be achieved within eight years of entry into force, with MS responsible for extensions. The paragraph that follows these provisions, however, states that nationals may be subject to the "holding of requisite permits" obtained from the destination MS, without specifying whether this refers to entry or residence permits. Similar to the EAC, ECOWAS and SADC, MS have the right to refuse entry and suspend provisions on public security and health grounds.

The Free Movement Protocol restates the Visa Protocol's two-phase provisions on entry, but requires implementation of visa-free entry within two years of entry into force, and the removal of "all restrictions to the movement of persons" within six years of entry into force. However, it is not specified which restrictions are to be removed.

**iv. Work provisions:** COMESA differs from other RECs in that the Free Movement Protocol outlines provisions for the Free Movement of Labour in a separate article, preceding establishment and residence. The vision of free movement is restricted, first, by the definition of labour as skilled labour of persons with special skills not available in the destination MS, and second, by only allowing citizens the right to *accept* employment (similar to ECCAS and the EAC), before staying in another MS to work. In addition, there is an inconsistency created by differing definitions of labour and employment, as the latter is defined as "business, calling, craft, art, employ, job, line, occupation, pursuit, services, trade, vocation or work". Regarding implementation, MS are required to progressively remove labour market restrictions and abolish nationality-based labour market discrimination within six years.

**v. Establishment provisions:** The Free Movement Protocol does not clearly define establishment. Article 11 on establishment (preceding residence) is brief and states that Council will outline within two years a programme to abolish restrictions in stages, as well as define the extent of the right, implementing measures and provisions for the mutual recognition of qualifications. Provisions would appear, however, to refer to establishing enterprises, while the treatment of self-employed persons is unspecified.

**vi. Residence provisions:** The Free Movement Protocol, like ECCAS, contains few residence provisions. There is no clear definition of residence, while Article 12 on the subject (after establishment) states merely that MS will grant citizens the right of residence in accordance with conditions to be adopted by the Council, with no timeline specified for adoption.

**vii. Implementation:** The Visa Protocol is in force, having been ratified by all MS, but has not been fully implemented (Panapress, 2016). Mauritius, Rwanda and Seychelles have waived visas to all COMESA citizens, while Zambia has issued a circular waiving visas and visa fees for all COMESA nationals on official business (Lusaka Times, 2015). Conversely, the Free Movement Protocol, adopted in 2001, has been signed by Burundi, Kenya, Rwanda and Zimbabwe, though only Burundi and Rwanda have completed ratification (TMSA, 2014). It has therefore not entered into force.

Both protocols planned for staged implementation, starting with the gradual removal of visa requirements, and then allowing movement of skilled labour and services, right of establishment, and then finally right of residence 20 years from date of entry into force of the Treaty (COMESA, 2010: 1). However, little progress has been made beyond visa liberalisation (eight MS provide visas upon arrival for COMESA citizens at airports (AU, 2014b: 7), and the establishment of COMESA counters at some entry points in Djibouti, Uganda and Kenya (COMESA, 2013: 7-20). Visa restrictions are still the norm, as the majority of COMESA MS require visas - be it upon arrival or obtained in advance - for each other's nationals.

**viii. Next steps:** In July 2016, Zambia and Zimbabwe set up the first National Monitoring Committees (NMC) to monitor and expedite implementation of the Free Movement Protocol (COMESA, 2016a). In addition, a COMESA Business Visa was proposed by the COMESA Business Council in September 2016. *The business visa initiative is a follow-up to the recommendations that were presented to the COMESA Council of Ministers by the private sector in 2012 on the need to come up with an interim solution to facilitate the movement of business persons* (COMESA, 2016b). It is not yet operational (COMESA, 2016b) but the visa would allow COMESA business travelers to move freely among MS with one multiple-entry visa (BAL Global, 2016). Obstacles to moving forward with the business visa are said to include security concerns in the Horn of Africa and MS fears that some articles conflicted with national laws (COMESA, 2013: 5).

## 2. Economic Community of Central African States (ECCAS)

**i. Legal instruments:** The Treaty Establishing ECCAS, 1983 and the annexed Protocol Relating to the Freedom of Movement and Right of Establishment of Nationals of MS, 1983 form the legal basis for free movement of persons in ECCAS.

**ii. Definition and scope of free movement:** Free movement is not clearly defined, though Article 3 on “Movement of People” encompasses the free movement of tourists, business men (sic), and workers. Freelance professionals constitute the fourth category of persons covered by the Protocol, defined as someone who conducts “unsalaried liberal or craft profession(s)”. The preamble states the aim of the Protocol is to allow nationals to enter any MS, travel, establish residence and leave any time.

**iii. Entry and work provisions (Movement of People):** The Protocol lays down provisions for entry and movement of workers in one Movement of People article. On entry, it is stated that all nationals with valid travel documents shall have freedom of movement, adding that tourists must show proof of right of abode, and proof that they can support themselves and not take up a job while in the host MS. Tourists are permitted three-month stays, although there are no corresponding provisions for the other categories (business men, workers, and freelance professionals). The Protocol requires travelling business men to obtain a special certificate issued by their national chamber of commerce. The Protocol, therefore, is distinct in prescribing different entry requirements for different categories of persons (i.e. tourists and business men).

Regarding the movement of workers, defined as those who “exercise remunerated activities”, nationals have the right to *accept* a job offered in another MS, to stay there for work, and then to seek further work or establishment afterwards. Finally, the Freedom of Movement provisions were due to become effective four years after entry into force.

**iv. Residence provisions:** Unlike other RECs, the ECCAS Protocol does not include residence provisions, beyond the undefined statement in the general provisions that nationals shall have the right to “establish residence”.

**v. Establishment provisions:** Establishment, treated under Article 4, following Movement of People, includes access to freelance work and the establishment and management of enterprises, with non-discrimination. Similar to the entry provisions of ECOWAS, MS are given the right to expel nationals, with no limits prescribed. In addition, the distinction between free movement of workers and the right of establishment is unclear, as Article 4 provides for salaried workers to stay in the host MS even after ceasing their activity. The right of establishment was due to be implemented twelve years after entry into force.

**vi. Implementation:** The Treaty, to which the Free Movement Protocol is annexed, began functioning in 1985 when its founding members completed ratification (International Democracy

Watch, 2012). However, implementation has been slow. Gabon, Equatorial Guinea, Sao Tomé and Principe and Angola require visas for other ECCAS nationals to enter their territories (AU, 2014b: 7). An initiative to fast-track free movement of persons was adopted in January 1990 and amended in June 2000, with the intention of being effective by March 2005 (IOM, 2007: 12). However, there is no evidence of recent progress towards implementation.

Free movement is, however, effective in the four ECCAS states that form the Central African Economic and Monetary Community (CEMAC) – Cameroon, Chad, Republic of Congo and the Democratic Republic of Congo. Discussions have taken place in recent years on merging CEMAC with ECCAS - the former has made concrete progress on integration, with the CEMAC Conference of Heads of State deciding in May 2015 to implement visa-free travel within the Community (Cameroon Tribune, 2015). The decision represented the operationalisation of the 2005 Additional Agreement on the free movement of persons (UNECA, 2015a). Obstacles to implementation revolve around ECCAS MS' security fears, cited as the main reason for delaying implementing decisions, in addition to lack of political will to advance free movement (Munyuki, 2013: 59).

**vii. Next steps:** Work to restructure and reinvigorate the ECCAS programme and to merge ECCAS and CEMAC is ongoing.

### 3. East African Community (EAC)

**i. Legal instruments:** The Treaty for the establishment of the EAC and the Protocol for the Establishment of the EAC Common Market (CMP) form the legal basis for free movement among the EAC Partner States (PS).

**ii. Definition and scope of free movement:** The CMP does not explicitly define the free movement of persons, but it regulates free movement of persons and free movement of workers in a single part (D), and the rights of residence and establishment in another part (E). The “free movement of persons” is said to refer to the freedom to enter, leave, or stay in another PS, as a visitor, for medical treatment, as a traveler in transit, as a student, and for any lawful purpose other than as a worker or self-employed person. Therefore a clear distinction is made between freedom to move for work (as an employed worker or self-employed), and the freedom to travel for other (non-work) purposes.

**iii. Entry provisions (free movement of persons):** Entry provisions are outlined in the CMP's Free Movement of Persons Article 7. It states that PS should ensure non-discrimination of EAC citizens, by ensuring: visa-free entry, stay, free movement, and exit without restrictions; and reciprocal opening of border posts 24 hours a day. Free movement is subject to PS limitations on public policy, security and health grounds. The Protocol also requires PS to establish a common standard system of issuing national identification documents, and to issue a common standard travel document. The Free Movement of Persons Annex further states that citizens should be issued

with a pass entitling them to entry and a six-month stay in the host PS. This differs from other Protocols, first, in not mentioning the length of stay in the main text, and, second, in allowing a relatively long period (other RECs allow 90 days). Further provisions outline conditions for pass renewal, and prohibit pass-holders from undertaking employment, though students can undertake internships or industrial training.

**iv. Work provisions:** Article 10 treats the Free Movement of Workers as separate from the Free Movement of Persons, which covers entry for any non-work purposes. Labour is defined as a worker or self-employed person, which is inconsistent with Article 10, which only covers employed workers, with self-employment integrated into establishment provisions. Article 10 requires that PS guarantee the free movement of workers and ensure their non-discrimination, although citizens are only entitled to *apply for* and *accept* offers of employment. They may then move to and within the PS for the purpose of employment, and enjoy non-discrimination vis-à-vis host PS' social security. Rights are also extended to the worker's dependents, who may work or be self-employed in the host PS, and there are standard limitations on public policy/security/health grounds. In addition, Articles 11-12 provide for the mutual recognition of academic and professional qualifications, and harmonisation of labour policies. The related Annex states that workers are also accorded the six-month pass, but must obtain a work permit, free-of-charge, from the host PS. This is more detailed than the corresponding provisions of other RECs. Notably, each PS identifies the skills categories for which it permits the movement of workers, which varies from one PS to another. The contradiction between Article 10 and Annex II puts into question the establishment of a truly common labour market.

**v. Establishment provisions:** The right of establishment is outlined before residence in Article 13, and entitles nationals to take up and pursue economic activities as a self-employed person, set up and manage economic undertakings, and join the PS' social security scheme. The EAC therefore contrasts with COMESA and SADC, by including self-employment in establishment provisions, in addition to the establishment of companies. As with the free movement of workers, rights are also extended to dependents. The article further requires non-discrimination with respect to companies and self-employed persons, and calls for mutual recognition of companies' experiences, licenses and certificates. In addition, PS shall progressively remove national administrative procedures that restrict the setting up of multi-PS enterprises and the entry of personnel into managerial or supervisory positions in the host PS. There are also provisions for workers to take up self-employment, and a prohibition of national subsidies and state aid that impede the right of establishment. The related Annex states that self-employed persons must also first be issued with a six-month pass, allowing time to obtain the two-year work permit.

**vi. Residence provisions:** The right of residence, outlined after establishment, is not clearly defined, and is accorded to nationals admitted as workers or business owners/self-employed (both governed under the establishment provisions), as well as to their dependents. PS are

required to issue residence permits, subject to public policy/security/health limitations, while permanent residency is to be governed by national law. Residency can therefore be understood as a right derived from the other entry, work and establishment provisions. The Annex on Right of Residence provides further detail related to the issuance and prerequisites for residence permits.

**vii. Implementation:** The CMP was adopted and signed by EAC Heads of State in November 2009, and then entered into force in May 2010, after the completion of ratification (Ugandan Ministry of EAC Affairs, 2016). *The implementation of the CMP is fragmented; different aspects of it are implemented by the Partner States to varying degrees* (MME Partnership Support Project, 2013: 42). Nonetheless, the EAC, while not as advanced as ECOWAS, which has less restrictive work provisions, has made strong progress when compared with other RECs. The EAC passport is operational and allows multiple entries to citizens from other PS to travel freely within the EAC for six months (AU, 2014b: 7). Obstacles to implementation have included roadblocks along the Northern and Central corridors, which are prone to corruption and the lack of harmonisation of work and residence permits (Munyuki, 2013: 172). Recent positive steps have included Kenya's reform of its national immigration laws to facilitate EAC free movement; and both Kenya and Rwanda abolished fees for work permits for EAC nationals (UNECA, 2016: 27).

**viii. Next steps:** A new international EAC e-passport is being rolled out in 2017 (Ugandan Ministry of EAC Affairs, 2016). Meanwhile, Kenya, Uganda and Rwanda have reportedly been working on establishing a trilateral pact to move faster with the implementation of the CMP (New Vision, 2016). In addition, the EAC Legislative Assembly plans to introduce legislation to ensure that the social security benefits of workers are portable and accessible across borders throughout the region (URN, 2017).

#### 4. Economic Community of West African States (ECOWAS)

**i. Legal instruments:** The following texts constitute the legal basis for ECOWAS free movement: Protocol Relating to Free Movement of Persons, Residence and Establishment, 1979; Supplementary Protocol on the Code of Conduct for the Implementation of the Protocol, 1985; Supplementary Protocol on the Second Phase (Right of Residence) of the Protocol, 1986; Supplementary Protocol Amending and Complementing the Provisions of Article 7 of the Protocol, 1989; and the Supplementary Protocol on the Implementation of the Third Phase (Right to Establishment) of the Protocol, 1990.

**ii. Definition and scope of free movement:** No explicit definition is provided but the framework requires that citizens have the right to enter, reside and establish in the territory of MS. The 1979 Protocol outlines a progressive 15-year adoption process with three phases: 1) entry and visa abolition; 2) residence; and 3) establishment.

**iii. Entry provisions:** The 1979 Protocol states that nationals shall have the right to enter for visa-free stays of up to 90 days with valid travel documents. In contrast, to other RECs, this provision is tempered by the MS right to refuse admission to any citizen deemed to be “inadmissible immigrants” according to each MS’ laws. This clause has provided broader scope for MS to undercut free movement than other REC texts’ exemptions (Adepoju et al, 2010: 3). Finally, entry and visa abolition constituted the first of the three implementation phases, due to be implemented five years following entry into force.

**iv. Residence provisions:** The 1986 Protocol defines the right of residence as the right of a citizen to reside in another MS which issues him/her with a residence card or permit that may or may not allow him/her to hold employment. Article 2 adds that residence is granted for the purpose of seeking and carrying out income earning employment. Right of residence thus includes the right to apply for jobs, to travel freely for this purpose, to reside in the host MS to take up employment, and to live in the host MS after having held employment there. This contrasts with COMESA and EAC, which only provide the right to *accept* jobs in other MS. ECOWAS is also unique in treating employment as an aspect of the right of residence. The 1986 Protocol adds that citizens must obtain an ECOWAS Residence Card or Residence Permit from the host MS, and that regulations for the issuance of such documents are to be harmonised within one year of entry into force. The right of residence was due to be implemented over five years following ratification.

**v. Establishment provisions:** The right of establishment is the third and final phase of the ECOWAS free movement framework. Establishment is defined as the right to settle or establish in another MS, and to have access to economic activities, to carry out these activities as well as to set up and manage enterprises, under conditions defined by MS legislation for its own nationals (non-discrimination clause). This right also encompasses access to non-salaried activities. The Protocol goes further than other RECs with respect to non-discrimination in establishment, by adding provisions to protect from discriminatory confiscation or expropriation of assets or capital. The right of establishment was due to be implemented over five years following ratification.

**vi. Implementation:** ECOWAS is considered the REC which has achieved the greatest freedom of movement, in part indicated by its status as the sub-region with the largest migrant stock of 8.4 million (out of 19.3 million in Africa) (FMM West Africa, 2014: 9). All MS have ratified the protocols, visa-free entry has been achieved, and ECOWAS citizens possess a common passport (UNECA, 2017b).

Persistent obstacles to implementation include national governments’ abuse of the provision allowing MS to refuse “inadmissible immigrants” entry on the basis of their own national legislation (Adepoju et al, 2010: 3), and many border posts, though required to be open 24 hours

a day, close by 22:00. Corruption at borders and internal checkpoints also impede free movement, and national citizenship laws are not fully harmonised. ECOWAS citizens residing in another MS require residence permits, and investment and procurement codes still discriminate against other nationalities, impeding full right of establishment (Munyuki, 2013:165-167). Some overlapping free movement provisions are in place in WAEMU (covering 8/15 ECOWAS MS), though the two communities' passports have been harmonised, and a merger has been proposed. In July 2014, the Conference of Heads of State decided to revise the protocols, which involved the adoption of a biometric identity card and travel document to replace the ECOWAS travel certificate; withdrawal of the resident card; and the implementation of free access to employment in MS (UNECA, 2015b: 26).

**vii. Next steps:** In December 2016, the ECOWAS Authority of Heads of State and Government agreed to set up a Presidential Task Force on free movement, which has been instructed to intensify sensitisation for citizens on the protocols and regularly organise joint meetings between border security services and local populations (The Guardian Nigeria, 2016). In addition, ECOWAS will continue to operationalise the biometric identity card and support the Intra-African Talent Mobility Partnership (TMP) pilot programme, following the signing of an MoU in December 2016 by Benin, Côte d'Ivoire, Ghana and Sierra Leone. The TMP is a World Bank-funded voluntary programme seeking to establish Schengen-type mechanisms to accelerate economic integration, open borders, and common policies and laws in Africa (ACET, 2016).

## 5. Intergovernmental Authority on Development (IGAD)

**i. Legal instruments:** The Agreement Establishing IGAD, 1996 forms the sole legal basis for free movement initiatives among IGAD MS. A draft framework for a Free Movement Protocol was proposed in 2012 (IGAD, 2012) but has not yet been adopted.

**ii. Definition and scope of free movement:** Free movement of persons is outlined in Article 13 of the establishing Agreement, which mandates the promotion of the "establishment of residence". The Agreement also states that IGAD should promote and realise the objectives of COMESA and EAC. However, there are no specific requirements for entry, residence, nor establishment. It is believed that the draft Free Movement Protocol will gradually phase in visa-free entry, and will encompass rights of residence and establishment, as well as labour mobility (IGAD, 2016: 7).

**iii. Expected provisions of the draft Free Movement Protocol:** The draft protocol is believed to be ambitious, containing provisions for the harmonisation of migration policies, visa-free entry, rights of establishment and residence, and border management. It also calls for the mutual recognition of academic and professional qualifications. It is understood that implementation will be phased, similar manner to other REC protocols: with gradual relaxation of visas for IGAD citizens, culminating in the rights of residence and establishment (European Commission, 2016: 4).

**iv. Implementation:** While no formal free movement regime is being implemented in the region, some states are implementing bilateral visa waiving agreements. Ethiopia and Kenya waive visa requirements for each other's nationals, and Ethiopia and Djibouti have a similar bilateral agreement (AU, 2014b: 7).

IGAD has in place a Regional Migration Policy Framework (RMPF), adopted in 2012, and a 2015-2020 Migration Action Plan (MAP) to operationalise this framework. The RMPF urges IGAD MS to adopt protocols to progressively achieve free movement and the rights of residence and establishment, including access to legal employment “without adversely affecting the employment of nationals” (IGAD, 2014: 31). The MAP also emphasises the importance of addressing pastoralist communities (IGAD, 2014: 59). An assessment on the feasibility of free movement, customs and labour to prepare further discussions on the draft protocol was carried out in 2013, and concluded that such initiatives were welcomed by MS (IGAD, 2016: 4). Obstacles to progress include security concerns, a lack of coordination and cooperation between IGAD and MS, and within MS (EU, 2016: 3).

**v. Next steps:** Financial resources have been secured for the negotiation of the draft protocol and for complimentary policy harmonisation actions. A study on the challenges facing current free movement regimes will also be conducted, and MS are to nominate a core negotiating committee. Furthermore, IGAD is conducting awareness-raising efforts on the benefits of free movement, including through the recently-established National Consultative Mechanisms (NCMs) that coordinate migration efforts in the IGAD MS. Moreover, one stop border crossings are being promoted in the region (IGAD, 2016: 5-6). The protocol's negotiation and associated interventions were due to take 48 months from July 2016 (IGAD, 2016: 8). To support this process, the EU-funded project Free Movement of Persons and Transhumance in the IGAD Region: Improving Opportunities for Regular Labour Mobility, is being implemented by the International Labour Organisation (ILO) (ILO, 2017). This entails building the knowledge base of migration and labour market dynamics in the region, capacity-building activities on labour migration, and development of employment and skills opportunities in migration corridors (ILO, 2017).

## 6. Southern African Development Community (SADC)

**i. Legal instruments:** The 1992 SADC Treaty and the 2005 Protocol on the Facilitation of the Movement of Persons constitute the main legal basis for free movement of persons, although there are relevant provisions on, respectively, visa liberalisation and labour migration in the 1998 Protocol on the Development of Tourism and the 2014 Protocol on Employment and Labour.

**ii. Definition and scope of free movement:** The Treaty requires SADC to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services. The 2005 Protocol's objectives include the progressive elimination of obstacles to

movement of persons; and the facilitation of visa-free entry, permanent and temporary residence, and establishment, through a phased approach, which is to be determined by the Implementation Framework, that is yet to be developed.

**iii. Entry provisions:** The 2005 Protocol aims to achieve visa-free entry for “lawful purposes” for 90 days per year. This differs from other REC practices that dictate the length of stay, but are not as restrictive, since they theoretically permit nationals to leave and re-enter for further 90-day stays in the same year. As with other RECs, there is an allowance for a temporary suspension of provisions on security/order/health grounds. However, unlike other protocols, the 2005 Protocol states that MS shall establish population registers and machine readable passports and establish SADC desks at ports of entry. Article 14 conditions visa-free admission on the possession of valid travel documents and proof of sufficient resources, and not being a “prohibited person” according to the host MS. The second condition is more restrictive than conditions outlined in other protocols, while the third condition bears resemblance to the ECOWAS provision on inadmissible immigrants.

The 1998 Protocol on the Development of Tourism aims to facilitate travel by easing or removing visa restrictions and harmonising of immigration procedures; abolish visa requirements for SADC tourists; and implement a Univisa for foreign tourists. It states that MS shall endeavour to abolish visa requirements for regional tourists, and to harmonise visa registration documents.

**iv. Residence:** Facilitation of permanent and temporary residence is mentioned as part of the Protocol’s objectives, but provisions are undetailed. Article 16 defines residence (before establishment) as the permission to live in another MS according to MS legislative and administrative provisions, leaving the right of residence to be determined by MS.

**v. Establishment:** Facilitation of establishment is also mentioned as part of the Protocol’s objective, and Article 18 defines establishment (after residence) as the permission by the host MS to: exercise an economic activity and profession as an employee or self-employed person; and establish and manage a profession, trade, business or calling. Establishment is therefore granted by the host MS in accordance with their own national laws, which suggests that the grounds on which establishment is granted may vary among MS. Moreover, SADC is distinct in including employees in establishment provisions, in contrast to the other RECs’ protocols, that cover it under the right of residence.

The 2014 Protocol on Employment and Labour aims to harmonise standards and policies, and calls for labour, employment and social protection to be accorded to migrant workers and their families.

**vi. Implementation:** The Protocol was due to enter into force 30 days following ratification by two-thirds of MS and is not operational due to insufficient ratifications. The 1998 Tourism

Protocol, on the other hand, is in force and progress has been made through bilateral agreements for visa exemptions, with most exempting each other's nationals from visa requirements. Visas are, nonetheless, required to enter Angola, DR Congo and Madagascar (Munyuki, 2013: 65). The 2014 Protocol on Employment and Labour, signed by 9 MS, has also not been ratified by any MS (SATUCC, 2016). Obstacles to progress include the slow pace of ratifications, while the provisions of the 2005 Protocol leave wide scope for MS interpretation.

**vii. Next steps:** There have been talks on a proposed Univisa for foreign tourists, and single SADC passport initiative, but no recent steps appear to have been taken on either front. Ongoing initiatives include the Regional Labour Migration Policy Framework and Labour Migration Action Plan 2016-2019. These initiatives aim to harmonise MS' legislation to ensure conformity with international and continental labour standards, with all MS required to have labour migration policies in place by 2020, and the creation of a regional database on labour migration (ACMS, 2015).

## 7. Other free movement of persons initiatives

**i. Arab Maghreb Union (AMU):** Article 2 of the 1989 AMU Treaty commits MS towards working gradually towards achieving free movement of persons and transfer of services, goods and capital among them (Munyuki, 2013: 50). However, there have been no recent developments to promote AMU free movement. Three AMU MS have implemented freedom of movement provisions – Libya, Morocco and Tunisia, the latter being currently the only state that allows citizens from other MS to access its territory freely (UNECA, 2017a). At the recent AU Summit in February 2017, Moroccan King Mohammed VI gave a speech criticising the lack of progress on AMU free movement, calling on MS to act (North Africa Post, 2017).

**ii. Community of Sahel-Saharan States (CEN-SAD):** The Treaty Establishing the CEN-SAD, 1991 required the elimination of all obstacles impeding the unity of its MS through adopting measures that would, inter-alia, facilitate the free movement of individuals, and the freedom of residence, work, ownership and economic activity (Munyuki, 2013: 51). However, the Treaty is not in force and few concrete steps towards implementation appear to have been taken (UNECA, 2017c). CEN-SAD has adopted a visa exemption programme, but it only covers holders of diplomatic and service passports (Mo Ibrahim Foundation, 2010: 5).

**iii. Tripartite Free Trade Area (TFTA):** The overlapping membership of COMESA, EAC and SADC MS<sup>3</sup> and the conflicting impact which it has on achieving their regional integration objectives, gave rise to negotiations on the TFTA. The TFTA covers their 26 MS and should harmonise their regional integration objectives and create a larger integrated market. The first Tripartite Summit of October 2008 pinpointed the movement of business persons as important for engendering

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<sup>3</sup> Four states are members of both the EAC and COMESA; eight states belong to both COMESA and SADC, and one state has membership of SADC as well as the EAC.

trade, investment and overall business development in the region. A mechanism to facilitate the movement of business persons forms part of the TFTA negotiations, and the progress made in the movement of business persons in each of the RECs serves as the basis for these discussions (COMESA-EAC-SADC TTC-MBP, 2013: 1- 4).

In June 2013, a draft TFTA Agreement on the Movement of Business Persons was endorsed as the starting point for the negotiations. The aim of the draft Agreement is to reduce the cost of doing business through the adoption of objective criteria, and the establishment of greater legal certainty and minimisation of discretionary powers relating to temporary entry and exit of business persons. It will allow business travelers to enter and stay in another MS for up to 90 days, with the opportunity for extensions. MS also agreed to grant multiple-entry three-year business visas. However, MS may maintain prior application and approval requirements. With negotiations ongoing, concerns have been expressed over the lack of a Most-Favoured-Nations principle, thus not guaranteeing equal treatment to all regional business travelers, and lack of clear implementation timeframes (Cronjé, 2016).

#### **IV.ii Comparing the RECs:**

##### **1. Scope of the protocols and how entry, residence and establishment are defined**

The following analysis compares the provisions of the REC legal instruments relating to free movement of persons in COMESA, EAC, ECCAS, ECOWAS and SADC; the remaining AU RECs, IGAD, AMU and CEN-SAD, having not adopted any specific legal texts on free movement.

**i. Scope of the protocols:** Free movement of persons is not explicitly defined by any of the protocols but the legal instruments generally outline the scope, which commonly covers entry, residence, establishment and work. In COMESA, the “free movement of persons” provisions relate to entry requirements, with residence, establishment, and free movement of labour covered in separate sections. Meanwhile, in the ECCAS context, the “movement of persons” encompasses the free movement of tourists, business men and workers, and the Protocol title distinguishes between freedom of movement and the right of establishment. The main distinction in the EAC Protocol is between the free movement of persons for non-work purposes (including as a visitor or for medical treatment); and the free movement of workers. The ECOWAS protocols are, in some respects, clearer in distinguishing entry, residence, and establishment, with three implementation phases. Finally, SADC’s 2005 Protocol distinguishes between entry, permanent and temporary residence, and establishment.

**ii. Entry:** COMESA, EAC, ECOWAS and SADC protocols provide for different extents of visa liberalisation, while the ECCAS Protocol does not mention visa requirements. COMESA, in both protocols, requires visas to be issued on arrival, in view of transitioning to visa-free entry for 90 days at a time. While ECCAS does not make reference to visa requirements, it states that tourists may stay for three months at a time. EAC and ECOWAS hence go further by only providing for

visa-free entry, with EAC essentially replacing visas with six-month Visitor Passes at the border, while ECOWAS provides for visa-free entry for 90-day stays. SADC advocates for visa-free entry for 90 days, although this requirement is for 90 days per year, in contrast to COMESA, EAC and ECOWAS, which would allow multiple stays per year.

**iii. Residence:** For ECCAS, COMESA, EAC and SADC, there are limited residence provisions, as residence has seemingly been interpreted as a derived right, while ECOWAS outlines residence as a distinct right. For COMESA, residence provisions are brief and unspecified, (and come after the provisions for establishment) and simply state that the conditions for residence are to be adopted by the Council. The ECCAS Protocol contains no specific provisions related to residence, with residence seemingly considered a right derived from establishment and work provisions. The EAC outlines residence after establishment in the CMP, and residence is accorded to workers, the self-employed, spouses and dependents. The EAC therefore also considers residence a right that is derived from the rights to work and establish. ECOWAS, which outlines residence before establishment, differs from other RECs by integrating the right to seek and carry out employment into residence provisions, and providing a common framework for the residence permit (ECOWAS Residence Card), though this system is being abolished. Finally, SADC briefly outlines residence before establishment, which is granted at the discretion of MS.

**iv. Establishment:** Definitions vary between RECs. Establishing and managing enterprises is an aspect common to protocols, though provisions are inconsistent: some RECs also integrate self-employment (EAC and SADC), employment (SADC), non-salaried work (ECOWAS), and liberal professions (undefined) (ECCAS). For COMESA establishment is not defined in the dedicated article (which comes before residence), though the Protocol's Scope of Co-operation states that the Common Market shall establish mechanisms allowing the right to manage companies with gradual removal of all establishment restrictions. The Protocol leaves the definition and extent of establishment to future provisions that are to be determined by the Council. For ECCAS, the article on establishment includes access to liberal or craft work, and the establishment and management of enterprises. For EAC, the right of establishment is outlined before residence, and combines business establishment and self-employment. ECOWAS defines establishment as having access to economic activities, particularly setting up and managing enterprises. The 1990 Protocol extends this definition to non-salaried activities. For SADC, establishment is notably broad, involving host MS granting permission to citizens of other MS, in accordance with their national laws, to exercise employment or self-employment, or establish and manage a profession, trade, business or calling.

**v. Work:** Different RECs define work and labour in different ways, with varying distinctions between employment, self-employment, starting a business, and exercising liberal or craft professions. For COMESA, free movement of labour has a separate chapter, and labour is narrowly defined as skilled labour of skills unavailable in other MS, with the right to move to

another MS granted upon *acceptance* of employment. The ECCAS Protocol, meanwhile, also limits work provisions to the right to accept a job before moving, though this is considered under “movement of persons” provisions. For both ECCAS and COMESA, the distinction between employed and self-employed persons is not clear. The EAC distinguishes between free movement of workers, also limited to accepting employment offers, and establishment, which includes the right to self-employment. ECOWAS is unique in two main respects: 1) employment provisions are contained in the right of residence, while self-employment, like in the EAC, is treated under the right to establishment; and 2) citizens are permitted to travel to other MS to seek work – instead of having to find work before travelling.

**vi. Non-discrimination provisions and exemptions:** Two features of most protocols are that: 1) the REC’s citizens should be given equal treatment and non-discrimination vis-à-vis host MS citizens; and 2) MS may be exempt from certain provisions. Regarding non-discrimination, all RECs except SADC provide some form of non-discrimination clause. Regarding exemptions, all RECs exempt MS from certain provisions on the grounds of public security, order, and/or health. In addition, ECCAS allows MS to expel nationals without prescribing any limits, while ECOWAS MS can refuse admission to “inadmissible immigrants”.

## 2. Extent to which free movement has been achieved

Progress has varied among the continent’s RECs, with the most tangible progress being made in East and West Africa. North, Central and Southern Africa, meanwhile, are less advanced, though bilateral and sub-regional initiatives have enabled differing extents of visa liberalisation. On a continental level, freedom of movement is still lacking in many areas, but improving. According to the 2017 Africa Visa Openness Report<sup>4</sup>, in 2016 Africans did not need a visa to travel to 22% of other African countries, a two per cent improvement on 2015; and Africans need visas to travel to 54% of other African countries, which is a one per cent improvement on 2015. The following features of regional progress towards free movement can be observed.

**i. ECOWAS and EAC are the most advanced RECs:** According to the Africa Regional Integration Index, ECOWAS achieved the highest score in the free movement of persons category<sup>5</sup>, followed by the EAC (Africa Regional Integration Index, 2016). Both RECs are implementing their protocols and have introduced common passports, although gaps exist in both free movement regimes. ECOWAS was the first to adopt a legal framework and intended to implement its provisions in three distinct phases. Visa-free entry for all 15 MS is a significant ECOWAS achievement, while

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<sup>4</sup> This report was produced by the African Development Bank, the African Union Commission and the World Economic Forum Global Agenda Council on Africa.

<sup>5</sup> The free movement of persons index measures three aspects: the proportion of protocols ratified by MS, the proportion of MS not requiring a visa (to travel), and the proportion of MS whose nationals are issued with a visa on arrival.

the final stage – establishment – has yet to be fully implemented, and entry and residence provisions are not uniformly in force. EAC, meanwhile, is also implementing an ambitious agenda and leads in overall regional integration (Africa Regional Integration Index, 2016). However, implementation has been behind schedule, despite the framework in place to monitor implementation, and it has been argued that positive results in East Africa result from the high number of bilateral visa on arrival policies (AfDB et al, 2016a: 13).

**ii. North, Central and Southern Africa have had some success with visa liberalisation:** While the main North, Central and southern African RECs have had less success ratifying REC free movement protocols, bilateral agreements have spurred mobility. In Southern and Northern Africa, most states offer visa-free or travel or visa upon arrival, while in the ECCAS region, CEMAC MS lifted visa-based restrictions on free movement in May 2015 (UNECA, 2015b). The CEN-SAD region has achieved visa exemptions for diplomatic and service passports.

**iii. Regional momentum lacking in ECCAS, AMU, SADC and CEN-SAD, and possibly on the rise in IGAD:** While steps towards visa liberalisation have been taken at bilateral levels, ECCAS, AMU, SADC and CEN-SAD, despite all advocating varying levels of free movement in their founding treaties, appear to have lost momentum in promoting legal instruments. The ECCAS free movement process has been stalled for several years, due to the lack of political will and security concerns of MS (Munyuki, 2013: 59). Central African states appear to be making progress at CEMAC level only, the Moroccan King Mohammed recently deplored the lack of progress at AMU level (North Africa Post, 2017) and barely half the required states have ratified SADC's 2005 Protocol. IGAD, however, is in the process of drafting a free movement protocol, which it will hopefully be able to roll out, despite socio-economic disparities among MS and security concerns.

## **V. Measures to Enhance the Free Movement of Persons:**

**i. Harmonise Free Movement Regimes:** Although the AU only recognises eight RECs, the continent currently has 14 inter-governmental organisations working on regional integration issues (UNECA, 2006: xiii), with numerous instruments governing free movement. This proliferation of institutions and protocols means that most MS belong to two or three RECs. This can cause organisational duplication and resource misuse. Given that the process of merging RECs is likely to be long drawn, it is recommended that continental efforts promote harmonisation of the regional free movement processes.

**ii. Build the Evidence Base in Support of Free Movement:** To promote free movement, it is essential to address the issues that underlie restrictions. MS have disparate economies and needs, and are concerned about protecting their labour markets and public purse, as well as retaining their skilled labour. Evidence-based pro-free movement messages need to be communicated, indicating the material benefits for migrant origin and host countries, as well as

the policy measures and practices that can be put in place to address the associated socio-economic and security risks. Solid research which highlights the economic gains increased mobility will bring, including labour market analysis to identify imbalances in labour markets and opportunities for skills matching, need to be undertaken to develop feasible agreements and garner the necessary political support. Moreover, bilateral labour agreements between states should be studied in order identify best practices that can help to shape free movement agreements.

**iii. Promote Multi-Stakeholder Involvement:** Multi-stakeholder engagement in the development of free movement agreements should help to build the evidence base in support of free movement, and to shape technically sound and feasible agreements. Free movement agreements have been largely state-driven and state-shaped in Africa, with insufficient engagement of the various stakeholders that will be involved in implementing these agreements and utilising them. Private sector actors are well placed to highlight the limitations imposed on business persons by the red tape of cumbersome immigration procedures and the economic opportunities forgone as a result of restrictive immigration regimes. They could aid in the development of agreements that are based on market needs for the movement of persons and immigration procedures that facilitate mobility.

Moreover, different state ministries have diverging interests that may hamper the development or implementation of free movement agreements. Immigration officials tend to focus on securing borders against illegal migrants and criminal activity, and may oppose the abolition of entry fees, due to loss of revenue. Trade ministries may have an interest in promoting free movement of persons to facilitate trade liberalisation initiatives. In addition, government departments with a need to address certain skills shortages may wish to encourage labour mobility, such as departments of health who may want to attract African healthcare professionals. Criminal enforcement agencies may be opposed to free movement, on the grounds that it facilitates cross-border crime and reduces their ability to conduct checks at borders. Engaging these different actors in the development of free movement agreements should help to design feasible agreements that can be rolled out once political leaders have signed up to them. The technical implementation framework and administrative processes of free movement agreements need to be developed simultaneously, by engaging all the relevant actors, such as trade and immigration authorities, the private sector and professional boards, and should include coordination mechanisms and instruments between the relevant agencies and actors.

**iv. Develop Solid Implementation Frameworks for Free Movement Commitments:** Solid technical implementation frameworks that specify the implementation modalities of rights of entry, residence and establishment are needed to enable the implementation of free movement commitments. These frameworks should be built on specific categories of people, criteria and

procedures for movement, and be based on the lowest common denominator that states can agree to. Variable geometry which allows states to proceed and opt in at different speeds should make these agreements more attainable. Starting small and producing results should help to build trust among states for greater cooperation and incremental growth in the free movement of persons. Implementation frameworks that cover residence and establishment are technically complex, and would, inter alia, need to specify the rules and procedures for the harmonisation of immigration procedures and education systems, the mutual recognition of experience and qualifications gained, and common standards for working conditions.

Supra-national monitoring of free movement commitments, and sanctions to ensure enforcement, are further requirements for the effective employment of free movement regimes. Raising awareness on the rights and obligation of these agreements among citizens, immigration authorities and other parties concerned will also be important to ensure their effective implementation. Implementation frameworks also require political support and substantial technical capacity to be effectively implemented. It may therefore be important to plan for the necessary capacity building of the authorities that will be involved in applying these frameworks.

**v. Limit MS' Scope to Suspend Free Movement Provisions:** Most free movement regimes can be suspended on public health, order and security grounds. The limitations to these grounds, as well as other exemptions covered in protocols, should as far as possible be specified, to avoid their abuse by MS. Moreover, the lack of effective supra-national authority and sanctions remain one of the biggest challenges to the effective implementation of free movement regimes in Africa. Supra-national authority and sanctions, are, inter alia, needed to monitor and counter the unjustified suspension of free movement provisions by MS.

**vi. Ensure that Free Movement is Accessible to Citizens:** Common criticisms of REC free movement initiatives include inhibitive fees for common travel documents and a general lack of awareness of citizen's rights to free movement. To the extent possible, regional and continental efforts should focus on simplifying and harmonising free movement documents for community citizens, and ensure that application processes and fees do not inhibit implementation of the protocols' rights. Moreover, citizens and public officials should be informed of the rights, processes and procedures that the implementation of free movement regimes entail, and corruption and harassment at borders should be actively countered.

**Conclusion:**

This document has sketched the context which gave rise to the development of the AU Free Movement of Persons Protocol. Firstly by introducing the AU's free movement of persons agenda, secondly by purveying the key AU policies and programmes that are the impetus for the Protocol, and thirdly by capturing the socio-economic progress that greater mobility should bring. Next the state of play of free movement in the RECs was depicted, with a view to delineate the free movement commitments that currently exist in Africa, and critical challenges in meeting these commitments. The AU Free Movement Protocol is being developed on the basis of the free movement work of the RECs, and their free movement protocols provide the parameters within which the modalities of the AU Protocol are taking shape. Drawing on the experiences of the RECs, this document concludes with measures to enhance the free movement of persons across the continent and key considerations that should steer the development of the AU Free Movement Protocol.

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